

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS CRIMINAL JURISDICTION

[APPELLATE SIDE]

IN ITS JURISDICTION UNDER ARTICLE 226 OF THE CONSTITUTION OF

INDIA

CRIMINAL WRIT PETITION NO. 1784 OF 2010

In the matter of Articles 14 and 21 of the  
Constitution of India

And

In the matter of the constitutional validity of  
of Section 31A of the Narcotic Drugs and  
Psychotropic Substances Act, 1985,  
(hereinafter referred to as the “NDPS Act”)

**Indian Harm Reduction Network** ]

A society registered under Societies ]

Registration Act, 1860, Registration No. ]

S/58430/2007, having its office at ]

F 6/8A Vasant Vihar, New Delhi 110057 ]

Petitioner

Versus

1. **The Union of India**, through, ]

1A. Secretary, Department of Revenue ]

Ministry of Finance, North Block ]

New Delhi 110001 ]

1B Director General, Narcotics Control Bureau]

Ministry of Home Affairs ]

West Block No.1, Wing No.V, ]

R.K. Puram, New Delhi 110066 ]

1C. Zonal Director

Narcotics Control Bureau,

Mumbai Zonal Unit, Exchange Building, ]

3<sup>rd</sup> Floor, Sprott Road, Ballard Estate, ]

Mumbai 400001 ]

2. State of Maharashtra ] Respondents

**TO,**

**THE HON'BLE THE CHIEF JUSTICE AND HIS**

**COMPANION JUSTICES OF THIS HON'BLE COURT**

**THE HUMBLE PETITION OF THE  
ABOVENAMED PETITIONER MOST  
RESPECTFULLY SHOWETH THAT:**

1. This writ petition seeks to challenge the constitutionality of Section 31A of the NDPS Act, 1985, (hereinafter the impugned section), which imposes a mandatory death sentence upon persons convicted for certain offences after a previous conviction. The impugned section takes away judicial discretion in sentencing – which is both an important judicial function as well as a safeguard against arbitrariness in the criminal justice system. The impugned Section binds the trial Court to impose capital punishment, without looking into the background and circumstances of the offender as well as factors aggravating or mitigating the offence. Section 31A NDPS Act, 1985 also denies the accused the opportunity to be heard on sentencing. Across the

world, Courts have held that mandatory death sentences constitute cruel, inhuman and degrading punishment. Such punishment is in violation of Article 21 of the Constitution of India. The offence in question in a connected case is that of drug trafficking, which is an economic crime and does not entail the taking of life. The application of capital punishment is limited to exceptional cases involving the “most heinous crimes”. Drug offences, including those under section 31A NDPS Act, 1985 do not qualify as such. The imposition of mandatory death sentence upon persons convicted for drug crimes is excessive, disproportionate and arbitrary, and therefore also in violation of Article 14 of the Constitution of India. Presently, two persons are facing the death penalty under Section 31A NDPS Act. The appeal and confirmation of the death sentence of one such person is pending before this Honb’le Court. A similar provision – Section 303 of the Indian Penal Code, 1860 that imposed a mandatory death sentence upon persons convicted for murder while serving life imprisonment was declared unconstitutional by the Hon’ble Supreme Court of India. Section 31A of the NDPS Act, 1985 is contrary to Articles 21 and 14 of the Constitution of India, and must be struck down. Hence this petition.

### **Array of Parties**

2. The Petitioner is a society registered under Societies Registration Act, 1860, Registration No.S/58430/2007, having its office at F 6/8A Vasant Vihar, New Delhi 110057. The Petitioner has been working in the field of drug related programmes and policies since 2007. Its constituent members are non government organisations from different parts of the country that have been supporting efforts to reduce drug related harms for the last thirty years. The Petitioner seeks to secure a just, rational and humane response to drug use and dependence. The Petitioner society works closely with the Government of India, the United Nations and international agencies such as the Global

Fund to fight AIDS, Tuberculosis and Malaria to promote the health and human rights of persons who use drugs. The Petitioner has duly passed a resolution of its Governing Board to file this Petition through its Treasurer, Mr. Eldred Tellis, resident of Mumbai and citizen of India.

3. The Petitioner is vitally concerned with the issue of meting out of mandatory death penalty for drug offences, which is excessive, unscientific and inhumane. In the Petitioner's experience, it is poor people, whether they are drug users or carriers, who are subjected to harsh penalties and bear the brunt of criminalisation. Poor drug users are soft targets for law enforcement and are often falsely implicated for drug trafficking. They are unable to afford legal representation and plead guilty for crimes they have not committed. The imposition of a mandatory death sentence – a barbaric and irreversible punishment, disproportionately affects the poor and vulnerable. It contributes to the stigmatisation and demonisation of persons associated with drugs, including people who use and/or are dependent on drugs. The Petitioner therefore seeks to challenge mandatory death penalty as it interferes with the fundamental rights of persons and communities that it works with.
4. The Respondent is the Union of India, sued through its Secretary at the Department of Revenue, Ministry of Finance and the Director General and Zonal Director, Mumbai of the Narcotics Control Bureau, Ministry of Home, as the authorities responsible for administration and enforcement of the NDPS Act, 1985 respectively.
5. According to orders passed under the Government of India (Allocation of Business) Rules, 1961, Respondent 1A - the Department of Revenue, Ministry of Finance is responsible, *inter alia*, for the "*administration of the NDPS Act*".

6. Respondent 1B is the Narcotics Control Bureau (hereinafter referred to as “NCB”) is in charge of coordination and enforcement of the NDPS Act. The NCB was constituted by the Central Government in 1986 under Section 4(3) of the NDPS Act to *inter alia*, coordinate all measures for preventing and combating abuse of and illicit traffic in narcotic drugs and psychotropic substances, in connection with implementation of the provisions of the NDPS Act. The NCB is headquartered in Delhi and operates within the Department of Internal Security, Ministry of Home Affairs. The NCB also functions as an enforcement agency through its field units located at Mumbai, Delhi, Kolkata, Chennai, Varanasi, Jodhpur, Chandigarh, Jammu, Ahmedabad, Imphal and Tiruvananthapuram.
7. Respondent 1C is the Zonal Office of the NCB in Mumbai responsible for the coordination and enforcement of the NDPS Act in the State of Maharashtra and Goa.
8. The Respondent No. 2 is the State of Maharashtra.

#### **History of Drug Law(s) in India (pre independence)**

9. The use of psychoactive or mood altering substances has long existed in the country. Cannabis and opium were consumed for medical as well as recreational purposes. Cannabis was associated with religious occasions whereas opium was served at family/community ceremonies. Besides, these substances were administered to persons suffering from rheumatism, migraine, malaria, cholera or other minor ailments. Their use was regulated by social rather than legal norms. Excessive or problematic drug use was rarely reported. Opium poppy was one of the main commodities for export and generated considerable revenue during the sixteenth to nineteenth century period.

10. The first statutory law that regulated narcotic drugs in India was the **Opium Act, 1857**. The Act was introduced against the backdrop of the Opium wars (1839-1842 and 1856-1860) between Britain and China and consolidated the colonial state's control over the profitable poppy trade. The Opium Act of 1857 introduced licenses for growing poppy – a practice that continues till date. It appointed Opium Agents and Opium Officers to supervise licensing and collection of opium, on behalf of the government.
11. The **Opium Act of 1878** strengthened government control over cultivation, possession, transport, import, export, sale and warehousing of opium. It conferred enforcement powers on officers of Departments of Central Excise, Narcotics, Drugs Control, Customs and Revenue. The Opium Acts were motivated by commercial interests rather than punitive aims.
12. In **1930**, the **Dangerous Drugs Act** extended regulation to coca leaves and hemp, besides opium and its synthetic varieties. It incorporated punishment for unlicensed cultivation, possession, manufacture and import of dangerous drugs, upto a maximum of three years imprisonment.
13. None of these Acts penalised consumption of drugs and/or possession for personal consumption. On the contrary, they permitted opium users to register with the Government and procure opium from licensed shops. The Acts enforced state control over commercial activities but tolerated personal use of drugs.

#### **Historical Overview of International Drug Law(s)**

14. Efforts to create a multilateral framework for narcotic substances date back to the late nineteenth century and were led by China and the United States of America. In **1909**, the **Shanghai Opium Commission** was established to collect data and estimate the extent of international opium trade. Three

years later, thirteen States adopted the **Hague Convention, 1912** thereby agreeing to control the production, manufacture and distribution of opium. The Hague Convention came into force only after principles of ratification were clarified under the Treaty of Versailles, 1919. In 1920, the League of Nations passed a Resolution creating an **Opium Advisory Committee** to oversee the implementation of the Hague Convention.

15. By 1925, two international agreements led the international community to commit itself to a reduction, as opposed to control of opium production. The first agreement concerning the **Manufacture or Internal Trade in, and Use of Prepared Opium**, was concluded in Geneva on 11 February 1925 where signatory nations stated that they were - *“fully determined to bring about the gradual and effective suppression of the manufacture of, internal trade in and use of prepared opium.”* The second treaty, called the **International Opium Convention, 1925**, also referred to as the **Geneva Convention relating to Dangerous Drugs**, extended control to cannabis and institutionalized the international system of regulation by creating a **Permanent Central Opium Board** to maintain statistics on international trade in narcotics. The series of conventions laid down administrative measures, without criminalizing users and/or producers of opiates, cocaine and cannabis.
16. The **Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931** sought to limit supplies of potentially addicting but medicinally useful substances, such as morphine and codeine to amounts necessary for medical and scientific purposes. It introduced a system for countries to submit estimates of the quantity of drugs produced and consumed for medical reasons. This practice continues under the existing international framework for drug control.

17. The **1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs** was the first treaty to focus on illegal trade in drugs. Proposing a semi-punitive approach, the Convention mandated signatories to designate certain activities as offences while regulating other acts. Signed by thirteen States, the Convention came into force in 1939.
  
18. In 1946, the League of Nations' drug control functions passed on to the United Nations (hereinafter referred to as the "UN"). The League's Advisory Committee on Opium became the **UN Commission on Narcotic Drugs**, which presently leads drug policy making within the UN system. Thereafter, in **1953**, the **Opium Limitation Protocol** was adopted, which authorized seven countries including India to grow opium for export.
  
19. The **U.N Single Convention on Narcotic Drugs, 1961** was introduced to consolidate existing drug control measures into a "single" treaty. The 1961 Convention aims to balance the use of narcotic drugs by ensuring their availability for medical and scientific pursuits while simultaneously discouraging production, manufacture, export, import, distribution of, trade in, use and possession for non-medical purposes. The treaty laid down a 15 year period for States to eliminate non medical use of opium and 25 years for coca and cannabis. Drugs are classified according to their perceived liability to abuse and risk to public health under a fourfold system of Schedules. Schedule I contains drugs subject to the strictest controls including heroin, cocaine and cannabis, Schedule II lists out substances that require less stringent regulations, Schedule III covers drugs that are perceived to be at least risk of abuse and Schedule IV applies to drugs that are permitted for medical and scientific use.

20. The 1961 Convention also created the **International Narcotics Control Board** (hereinafter referred to as the “INCB”), a body comprising thirteen independent experts to oversee the implementation of international drug conventions.
21. The **1972 Protocol amending the 1961 Single Convention on Narcotic Drugs** called upon member States to take increased efforts to prevent the illicit production of, traffic in and use of narcotic drugs and to provide treatment and rehabilitation to persons addicted to drugs.
22. In **1971, the Convention on Psychotropic Substances** was adopted as a companion instrument to introduce controls over the manufacture, export and import of psychotropic substances such as amphetamines, barbiturates and hallucinogens like LSD. Its provisions are similar to those of the 1961 Convention.
23. Growing concern over transnational drug crimes and the difficulty in prosecuting persons involved in international drug trafficking led to the adoption of the **Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988**. The 1988 Convention seeks to harmonize national laws and enforcement actions against drug trafficking, including provisions on extradition, mutual legal assistance, cooperation and assistance for transit states, controlled delivery, money laundering, asset seizure, the diversion of precursor chemicals, and illicit traffic by sea and via the mail.
24. Together, the three drug conventions of 1961, 1971 and 1988 constitute the international legal framework for drug control. Like other international treaties, these drug conventions are not self-executing. Their provisions must be incorporated into domestic law by legislative acts, in accordance

with constitutional principles and the basic concepts of the legal system of that State.

### **Legislative History of the NDPS Act, 1985**

25. The NDPS Act was enacted by Parliament in 1985 in keeping with International Drug Conventions, namely the Single Convention on Narcotic Drugs, 1961; the Protocol amending the Single Convention on Narcotic Drugs, 1972 and the Convention on Psychotropic Substances, 1971. The NDPS Bill, 1985 was passed hastily over four days, without much legislative debate. It received the President's assent on 16 September 1985 and came into force on 14 November 1985. The NDPS Act, 1985 replaced the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930.
26. According to the Statement of Objects and Reasons of the NDPS Act, 1985, India was becoming a transit for drug trafficking and the then legislation was ineffective in countering the problem. The following deficiencies were noted in the law prevailing at the time – (i) absence of stringent penalties against drug trafficking, ii) weak enforcement powers, iii) development of a vast body of international law, which India was a signatory to, and, iv) lack of regulations over psychotropic substances.
27. The NDPS Act, 1985 was introduced as a comprehensive legislation to tighten control over abuse on narcotic drugs and psychotropic substances, enhance penalties, especially for trafficking in drugs, strengthen regulations over psychotropic substances and provide for the implementation of international conventions, to which India was a party.
28. The NDPS Act, 1985 combines elements of regulation with prohibition of narcotic drugs and psychotropic substances. The Act proscribes cultivation,

production, manufacture, possession, sale, purchase, transport, warehousing, use, consumption, inter-state import and export, import into and export outside India and transshipment of narcotic drugs and psychotropic substances except for medical and scientific reasons and in accordance with the statute and rules thereunder. At the same time, it empowers the Central and State Governments to frame rules and permit the above mentioned activities. For example, although consumption of morphine is illegal, the drug can be administered to patients suffering from severe pain as the latter constitutes legitimate medical use under the Act.

29. To deter drug crimes, the Act introduced a mandatory minimum penalty of rigorous imprisonment for ten years and a fine of Rs one lakh. For repeat offences, the minimum sentence was fifteen years imprisonment, which may extend to thirty years.
30. The NDPS Act, 1985 was supplemented by the ***Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988***, which provides for preventive detention of persons involved in illicit traffic in narcotic drugs and psychotropic substances.
31. In 1989, the NDPS Act underwent the first set of amendments, after a Cabinet Sub-Committee for combating drug traffic and abuse recommended that the law be made more stringent. At the time, among other provisions, the impugned Section 31A was also incorporated into the statute.
32. In 1998, the second Amendment to the NDPS Act was introduced in Parliament. Thereafter, the NDPS (Amendment) Bill, 1998 was examined by a Parliamentary Standing Committee on Finance.

33. In 2001, Parliament passed the NDPS (Amendment) Act. The NDPS (Amendment) Act, 2001 sought to rationalise the sentencing structure, which was considered harsh and disproportionate. Earlier, a person with a small amount of contraband could be sentenced to ten years imprisonment and a fine of Rupees one lakh if s/he failed to prove that the drug was meant for personal consumption. The NDPS (Amendment) Act, 2001 prescribes punishment according to the drug and quantity seized – according to whether the amount is “small” or “commercial”. Under the present Act, a person dealing in small quantity of illicit drugs is subject to imprisonment of upto six months and/or fine of Rs ten thousand while a person dealing in commercial quantity can be sentenced to jail for a period of ten to twenty years and a fine ranging from one to two lakh rupees. A person caught with an amount between small and commercial quantity is punishable with imprisonment upto ten years and with fine extending to one lakh rupees.
34. The impugned Section 31A was also amended in 2001.
35. As it stands, the NDPS Act provides the most stringent penal framework for activities relating to narcotic drugs and psychotropic substances, evidenced in the presumption of guilt and reversal of burden of proof (Section 35, NDPS Act), discouraging grant of bail (Section 37, NDPS Act), bar on suspension, remission and commutation of sentences awarded (Section 32A, NDPS Act), bar on release of offender on probation (Section 33, NDPS Act), enhanced punishment for more than one convictions (Section 31, NDPS Act) and a mandatory death sentence for subsequent conviction for specific offences (impugned Section 31A).
36. In providing such stringent measures, the NDPS Act overrides provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as “CrPC”) such as the power to suspend and remit sentences (Sections 432, 433, and

434 CrPC) and the power to release offender on probation or admonition (Section 360, CrPC).

**Legislative history and scope of Section 31A NDPS Act**

37. Section 31A was incorporated in 1989 after the Parliament passed the NDPS (Amendment) Bill, 1988. The original Section read:

*31A (1): "Notwithstanding anything contained in Section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under section 15 to section 25 (both inclusive) **or** section 27A, is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to, - "(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table : ....*

**TABLE**

<b>Particulars of Narcotic Drugs/ Psychotropic Substances</b>	<b>Quantity</b>
<b>1</b>	<b>2</b>
(i) Opium	10 Kgs.
(ii) Morphine	1Kg.
(iii) Heroin	1Kg.
(iv) Codeine	1Kg.
(v) Thebaine	1Kg.
(vi) Cocaine	500 grams
(vii) Hashish	20 Kg

(viii) Any mixture with or without any neutral material of any of the above drugs	1,500 grams
(ix) LSD, LDS-25 (+)-(N)-Diethyllysergamide (d-lysergic acid diethylamide)	500 grams
(x) THC (Tetrahydrocannabinols, the following in isomers: 6-a (10a), 6-a (7), 7, 8, 9, (11) and their stereochemical variants)	500 grams
(xi) Methamphetamine (+)-2- Methylamine-a-Phenylpropane	1,500 grams
(xii) Methaqualone (2-Methyl-3-O-toly-4-(3-H)-Quinanzolinone)	1,500 grams
(xiii) Amphetamine (+)-2-amino-1- Phenylpropan	1,500 grams
(xiv) Salts and preparations of the Psychotropic Substances mentioned in (ix) to (xiii)	1,500 grams

*(b) Financing, directly or indirectly, any of the activities specified in clause (a) shall be punishable with death.*

*(2) Where any person is convicted by a competent Court of criminal jurisdiction outside India under any law corresponding to the provisions of section 15 to section 25 (both inclusive), section 27A, section 28 or section 29, such person, in respect of such conviction, shall be dealt with for the purposes of subsection (1) as if he had been convicted by a court in India.”*

38. In introducing the NDPS (Amendment) Bill 1988 in Parliament, the Minister of State in the Department of Revenue in the Ministry of Finance, made the following statement:

*“Why this amendment has been brought in is to see that India being in the transit are between the golden triangle and golden crescent while it is in the passage there are spill overs and also when our action takes place they either throw away or sell it or try to take it in small shipments. That is why India was facing problems.*

*To tackle this problem, three major steps have been taken under this Bill. First, is death penalty. Death penalty has been provided for the*

*second offence. ....Section 31A provides how much quantity is to be obtained for enforcing death penalty. Considering the amount which is being transported between golden crescent and golden triangle and involvement of various people in India, it was thought that the punishment that was given for the second offence, was not deterrent enough. Therefore, the previous punishment of 10 years and 20 years in the first offence and 15 to 20-30 years in the second offence are remaining. But in case of serious offences after examining with the exports and other countries' laws, we found it necessary that in case of a serious offence – even though second offence – the hon. Judge will have power under the law to provide for death penalty. ....death penalty has been provided in the case of serious offences.” [emphasis added]*

39. The legislative intent in imposing a mandatory death sentence, as gleaned from the statement of the introducing Minister, is: - i) deterrence and, ii) comparison with laws in other countries’.
40. The *statement of object and reasons* for the impugned Section expresses that “*the hon. Judge will have power under the law to provide\_for death penalty...*” [emphasis added] The text of the provision however precludes judicial discretion, leaving the Judge with no alternative but to punish an accused convicted a second time for offences listed under Section 31A with death.
41. The original Section 31A covered a broader range of offences for which the death sentence was compulsory.

42. In 2001, the impugned Section was amended, to ostensibly limit the application of a mandatory death sentence. The Amendment of Section 31A in the NDPS (Amendment) Bill, 1998 read:

*In section 31A of the principal Act,-*

*(a) In sub-section (1), -*

- (i) For the words, figures brackets and letter “*section 15 to section 25(both inclusive) or section 27A*”, the words, figures and letter “*section 19, section 24, section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance*” shall be substituted;

The same change was incorporated in subsection (2).

43. The notes on clauses for this amending section reads: “*This clause seeks to abolish mandatory death sentence in respect of certain offences.*”

44. The Section at present reads as follows:

*'31-A. Death Penalty for certain offences after previous conviction –*  
*(1) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit , any of the offences punishable under section 19, section 24, section 27-A **and** for offences involving commercial quantity of any narcotic drug of psychotropic substance, is subsequently convicted of the commission of or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to, - (a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the*

quantity indicated against each such drug or substance, as specified in column (2) of the said Table : ....

**TABLE**

Particulars of Narcotic Drugs/ Psychotropic Substances	Quantity
1	2
(i) Opium	10 Kg.
(ii) Morphine	1Kg.
(iii) Heroin	1Kg.
(iv) Codeine	1Kg.
(v) Thebeine	1Kg.
(vi) Cocaine	500 grams
(vii) Hashish	20 Kg
(viii) Any mixture with or without any neutral material of any of the above drugs	1,500 grams
(ix) LSD, LDS-25 (+)-(N)-Diethyllysergamide (d-lysergic acid diethylamide)	500 grams
(x) THC (Tetrahydrocannabinols, the following in omers: 6-a (10a), 6-a (7), 7, 8, 9, (11) and their stereochemical variantas)	500 grams
(xi) Msethamphetamine (+)-2- Methylamine-a-Phenylpropane	1,500 grams
(xii) Methaqualone (2-Methyl-3-0-toly-4-(3-H)-Quinanzolinone)	1,500 grams
(xiii) Amphetamine (+)-2-amino-1- Phenylpropan	1,500 grams
(xiv) Salts and preparations of the Psychotropic Substances mentioned in (ix) to (xiii)	1,500 grams

*(b) Financing, directly or indirectly, any of the activities specified in clause (a) shall be punishable with death.*

*(2) Where any person is convicted by a competent Court of Criminal Jurisdiction outside India under any law corresponding to the provisions of section 19, section 24, or section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance*

*such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a Court in India.'*

45. The Amendment sought to restrict the number and nature of offences for “first convictions”, which result in a mandatory death sentence upon subsequent conviction. In accordance with the existing section, the first conviction must be for offences under Section 19 (embezzlement of licit opium) or Section 24 (external dealing), or Section 27A (financing illicit acts or harbouring offenders) **and** for offences involving commercial quantity. Accordingly, the first conviction must be on two charges – (i) embezzlement or external trade or financing/harbouring and, (ii) offences involving commercial quantity. Only if this criteria is met, can the Court look into whether the second offence involves the drug and quantity specified in the table in Section 31A (1) (a). If the first conviction is only on one charge, that is, Section 19 or Section 24 or Section 27A or for offences involving commercial quantity alone, Section 31A will not be attracted. The Court must then consider sentencing for a subsequent conviction under Section 31 and not 31A.
46. Section 31A stands apart from other provisions of the NDPS Act. Sections 15, 16, 17, 18, 20, 21, 22, 23, 25, 25A, 26, 27 allow discretion in sentencing. For offences involving commercial quantity, Sections 15 to 24 stipulate minimum and maximum penalty. Although judicial discretion is reduced, it is not eliminated for these provisions. Section 32B empowers the Court to consider additional factors in pronouncing punishment. Sections 64 and 64A authorise the executive and the judiciary respectively, to grant immunity to a specific category of offenders. Section 31A is the only Section in the Act that predetermines sentencing.

47. Section 31A is superfluous, even in terms of stringency. Section 31 of the NDPS Act authorises the Court to impose heavier punishment (upto one and a half times the sentence pronounced previously) for subsequent convictions. According to this provision, a person who is punished with 20 years imprisonment the first time can be sentenced to upto 35 years upon subsequent conviction. Persons convicted a second time under Section 31A can be subjected to very stringent penalties under other provisions of the NDPS Act.
48. Since the introduction of mandatory death penalty for drug trafficking, there has been no substantial difference in the scale and extent of drug crimes. Statistics on NDPS offences and drug seizures for the last twenty years do not show a reduction; rather indicate a rise in the quantity of drugs traded illicitly.

#### **Application of Section 31A NDPS Act**

49. In 1998, a petition was filed before the Goa bench of this Hon'ble Court vide Writ Petition No. 80 of 1998 challenging the constitutional validity of Section 31A NDPS Act, 1985. The Hon'ble High Court disposed off the petition on the ground that Petitioner was unable to disclose whether anybody was convicted and sentenced to death at the time of hearing of the case.
50. In recent years, there have been at least two cases where the accused has been sentenced to death under Section 31A NDPS Act. One case is that of *Shri Vipin Nair vs Ghulam Mohammed Malik*, whereby the accused was awarded a death sentence according to the judgement in NDPS Special Case No. 60 of 2002. His appeal in *Criminal Appeal No 582 of 2008* and confirmation of sentence vide *Criminal Confirmation Case No. 2 of 2008* is currently pending before this Hon'ble Court. In a second case, in February 2008, one *Omkar nath Kak alias Panditiji* was sentenced to death under

Section 31A by the Ahmedabad District and Sessions Court. His appeal and confirmation of death sentence is presently pending before the Gujarat High Court in *Criminal Appeal Case No. 1297 of 2008* and *Criminal Confirmation Case No. 2 of 2008* respectively.

## **International law and jurisprudence on mandatory death penalty**

### ***International Drug Conventions***

51. The NDPS Act was enacted to comply with International Drug Conventions. The Drug Conventions encourage, and in some cases, require signatories to impose criminal sanctions for drug related activities domestically, subject to *“constitutional principles and the basic concepts of its legal system prevalent in the polity of a member country.”* The drug conventions by themselves do not prescribe penalties. On the contrary, anti-narcotic measures must conform to Constitutional and criminal justice provisions of the member state. The mandatory death penalty under Section 31A NDPS Act is outside of India’s treaty obligations.

52. The INCB, a quasi judicial body that monitors compliance with international drug conventions, has, in its annual report of 2007, noted that:

*“The international drug control conventions do not specify what precise procedure or process each party should follow or what particular penalty, sanction or alternative to apply to a particular offender in a particular case. Providing the aims and requirements of the conventions are met, States can generally use their own processes and procedures and apply the different penalties, sanctions and alternatives they determine – according to their own laws, moral and cultural traditions, legal systems and the facts and circumstances of each case”* [emphasis added]. [Report of the INCB for 2007 (E/INCB/2007/1), para 31] According to the INCB, not only are Member States at liberty to determine penal measures for drug offences, they

must do so on a case by case basis. In prescribing capital punishment, Section 31A NDPS Act contradicts international drug laws in letter and spirit.

53. The INCB has further observed that “*due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions.*” [Report of the INCB for 2007 (E/INCB/2007/1), para 38]

54. The United Nations Office on Drugs and Crime [hereinafter referred to as “UNODC”], the U.N agency responsible for international drug control efforts, has denounced the death penalty for drug offences. In a note titled “*Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective*” dated 3 March 2010, Vienna, the Executive Director, UNDOC states in para 25:

*“At the extreme end of the scale of punishment, the use of the death penalty for those convicted solely of drug-related or economic offences raises grave human rights concerns. The International Covenant on Civil and Political Rights specifies that in countries which have not abolished the death penalty, the sentence of death may be imposed only for the “most serious crimes”. The concept of “most serious crimes” is limited to those where it can be shown that there was an intention to kill which resulted in the loss of life. The weight of opinion indicates that drug offences (such as possession and trafficking) and those of a purely economic nature do not meet this threshold.”* Denouncing the death penalty for drug offences, the UNODC advocates “*the abolition of the death penalty and calls upon Member States to follow international standards concerning prohibition of the death penalty for offences of a drug-related or purely economic nature.*” [emphasis added]

55. Drug Control agencies within the U.N are unanimous in the opinion that drug offences do not merit a death sentence.

### ***International human rights law***

56. There is a growing body of jurisprudence that mandatory death penalty *per se*, especially for drug crimes, falls foul of international human rights law.

57. Article 6 of the International Covenant on Civil and Political Rights [hereinafter referred to as “ICCPR”], states:

*“1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

*2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”* [emphasis added]

58. Although capital punishment *per se* is not prohibited under international human rights law, its application must satisfy the substantive criteria of the offence being the “most serious crime” and the procedural requirement of non-arbitrariness.

### ***Findings of the U.N Human Rights Committee***

59. In determining the scope of the “most serious crimes”, the U.N Human Rights Committee [hereinafter referred to as “UNHRC”], a body of experts that oversees the implementation and interpretation of the ICCPR, noted in 1993:-

*“In the light of the provision of article 6 of the Covenant, requiring States parties that have not abolished the death penalty to limit it to the most serious crimes, the Committee considers the imposition of that penalty for crimes of an economic nature, for corruption and for adultery, or for crimes that do not result in loss of life, as being contrary to the Covenant...” [emphasis added] [UNHRC (8 March 1993) Concluding Observations: Iran (Islamic Republic of). CCPR/C/79/Add.25, para 8]*

60. In 1997, the UNHRC advised India to *“...limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition.”* [UNHRC (30 July 1997) Concluding Observations: India. CCPR/C/79/Add.81, para 20]
61. In 2005, the UNHRC in its concluding observations on Thailand noted with concern that *“... the death penalty is not restricted to the “most serious crimes” within the meaning of article 6, paragraph 2, and is applicable to drug trafficking.”* [emphasis supplied] [UNHRC (8 July 2005) Concluding Observations: Thailand, CCPR/CO/84/THA, para 14]
62. In view of the above finding, awarding the death penalty for drug trafficking – a non violent, economic crime is inconsistent with the ICCPR.
63. A death sentence that is pronounced mandatorily without considering individual circumstances of the case tantamounts to arbitrary deprivation of the right to life. In *Pagdayawon Rolando v. Philippines* [Communication No. 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8<sup>th</sup> December, 2002], the UNHRC stated that *“the automatic mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, paragraph 1, of the ICCPR, in circumstances where the death penalty is*

*imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence."*

***Observations of UN Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions***

64. The UN appointed Special Rapporteurs are individual experts in specific areas of human rights law, who monitor States' compliance with international human rights law. Among other tasks, the Special Rapporteurs submit thematic reports that develop and expound legal concepts to add to the body of international human rights jurisprudence.

65. In 1999, Ms. *Asma Jahangir*, former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (August, 1998-July, 2004) made the following observation:

*"The death penalty should under no circumstances be mandatory by law, regardless of the charges involved. Furthermore, the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. These restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences."* [emphasis added]

[*Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, UN Doc. E/CN. 4/1999/39, 6<sup>th</sup> January, 1999, para 63*]

66. In 2004, the current UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Philip Alston (August, 2004 to Present) noted that:

*"the mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment".* [*Extrajudicial, Summary or Arbitrary*

*Executions: Report of the Special Rapporteur*, UN Doc. E/CN.4/2005/7, 22<sup>nd</sup> December, 2004, para 80]

67. In 2007, the current UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Philip Alston further stated:

*“ ..the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life...*

*Making the death penalty mandatory for certain crimes, in such a way that a judge is prohibited from taking the circumstances of an individual accused person into account in sentencing, is illegal under international human rights law.”* [emphasis added] [*Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, UN Doc. A/HRC/4/20, 29<sup>th</sup> January, 2007, paras 65-66]

68. The above authorities demonstrate the growing body of opinion that mandatory death penalty for drug offences is contrary to international human rights law.

### ***International Case Law***

69. Across the world, Courts have annulled laws that inflexibly impose a death sentence on constitutional and human rights grounds.

70. Distinguishing capital punishment from all other penalties, the U.S Supreme Court in *Woodson v North Carolina*, 428 U.S. 280 (1976), rejected automated death sentences enforced upon persons convicted of a specific offence. The Court observed:

*“[D]eath is a punishment different from all other sanctions in kind rather than degree....A process that accords no significance to relevant facets of the character and record of the individual offender*

*or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offence not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”*

71. The position in common law countries has changed from acceptance of mandatory death for specific crimes to rejection of statutes that exclude judicial discretion in sentencing. This is reflected in successive Privy Council decisions on the subject. In *Reyes v The Queen*, [2002] 2 AC 235, and in *Matthew v State of Trinidad and Tobago*, [2005] 1 AC 433, the Privy Council characterised mandatory death penalty as cruel, inhuman and degrading treatment and therefore, violative of the right to life. In *Watson v The Queen*, [2005] 1 AC 472, the Privy Council found mandatory death sentence to contravene Jamaican Constitutional prohibition on inhuman or degrading punishment. The Privy Council arrived at the same conclusion in *Bowes and another v The Queen*, [2006] 1 WLR 1623.
72. The Constitutional Courts in Malawi and Uganda have also quashed compulsory death sentences. The Malawian High Court in *Kafantayeni v Attorney General*, [Constitutional Case No 12 of 2005, (2007) MWHC 1], found mandatory death penalty for murder to be cruel and degrading, to arbitrarily infringe the right to life, to deny the right to a fair trial, and to contravene the Constitutional principle of separation of powers. More recently, the Supreme Court of Uganda in *Attorney General v Susan Kigulaand and 417 others*, [Constitutional Appeal No 03 of 2006, Uganda: Supreme Court 21 January 2009] declared all laws that prescribe a mandatory death sentence to be unconstitutional.

73. Similarly, the Inter-American Court of Human Rights in *Dacosta Cadogan v. Barbados*, [Series C No. 204, Inter-American Court of Human Rights (IACrHR), 24 September 2009] held that a law:

*“that mechanically and generically imposes the death penalty on all persons found guilty of murder is in contravention of the prohibition of the arbitrary deprivation of the right to life recognized in Article 4(1) of the [American] Convention [on Human Rights 1969], as it fails to individualize the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused.”*

Noting that sentencing is a judicial function, the Court further observed that:

*“Although the executive branch may well grant pardon or commutation of a sentence already imposed, the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime. In the present case, the judicial branch had no other option than to sentence the alleged victim to death when he was found guilty of murder, and no judicial review of the punishment of death was allowed because it is a punishment specifically fixed by law.”* [emphasis added]

74. Across the world, Courts have rejected the mandatory death sentence as being antithetical to constitutional norms of justice.

### ***Worldwide Status and Trends***

75. Latest statistics show that 138 nations have now abolished the death penalty in law or practice (no executions for 10 years). Currently, 32 countries punish drug trafficking with death. Of these, 13 countries make the death sentence obligatory for specific drug crimes. These are: Brunei-

Darussalam, Egypt, India, Iran, Kuwait, Laos, Malaysia, Oman, Singapore, Sudan, Syria, United Arab Emirates and Yemen. India's neighbouring States - Bangladesh, Pakistan and Sri Lanka impose death for drug trafficking but retain the alternative of life imprisonment. Nepal and Bhutan have eliminated the death penalty altogether.

### **Constitutionality of Capital Punishment in India**

76. At the time of independence, eight sections of the Indian Penal Code (hereinafter the "IPC") contained the death penalty - i) waging war against the government of India (Section 121), ii) abetting mutiny actually committed (Section 132), iii) giving or fabricating false evidence upon which an innocent person suffers death (Section 194), iv) murder (Section 302), v) murder by life convict (Section 303), vi) abetment of suicide of a minor or insane or intoxicated person (Section 305), vii) dacoity accompanied with murder (Section 396), viii) attempt to murder by a life convict (Section 307). In all, except Section 303, the death sentence is an alternative to imprisonment for life.
77. Until 1955, Section 367(5) of the CrPC mandated the Court to record reasons for not preferring death over life imprisonment. Therefore, death sentence was the norm and special reasons had to be furnished for not prescribing it. After the deletion of Section 367(5) CrPC, for offences punishable with death or life imprisonment, Courts were not required to give special reasons for their choice of penalty.
78. In *Jagmohan Singh v. State of UP*, (1973) 1 SCC 20, the constitutionality of death penalty under Section 302, IPC for the offence of murder was challenged on the grounds that it extinguished the right to freedom under Article 19(1) (a) to (g). It was also assailed under Articles 14 and 21 for investing wide and unguided discretion in Judges in choosing life

imprisonment or death for the crime of murder. A constitutional bench of the Supreme Court upheld the law affirming judicial discretion in sentencing. The Court observed - *“The structure of our criminal law which is principally contained in the Indian Penal Code and the CrPC underlines the policy that when the Legislature has defined an offence with sufficient clarity and prescribed the maximum punishment therefore, a wide discretion in the matter of fixing the degree of punishment should be allowed to the judge”* Further still, the Court declared that the exercise of judicial discretion on well recognised principles depending on the facts of each case is, *“in the final analysis, the safest possible safeguard for the accused”*

79. In 1973, the CrPC was amended to incorporate Section 354(3) that directed a Court convicting a person for an offence punishable with death, or, in the alternative, with imprisonment for life, to state the reasons for the sentence, and if awarding death, to record special reasons for prescribing that sentence. With this, the legislature evinced its preference of making life imprisonment the standard punishment and reserving death as the penalty in special cases.
80. While affirming reasoned sentencing, the Supreme Court in *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646, favoured capital punishment in *“grave cases where it is a crime against society and the brutality of the crime shocks the conscience of the Court.”*
81. The Supreme Court in a majority decision in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, upheld the constitutionality of capital punishment under Section 302, IPC as it was an alternative to the sentence of life imprisonment and could be invoked only after according special reasons under Section 354(3) CrPC and hearing the accused on the sentence under

Section 235(2) CrPC. The Court held that the legislative safeguards of “special reason” and “pre sentence hearing” prevented arbitrary exercise of judicial powers in awarding death to murder convicts. Upholding the death sentence but preferring restraint, the Court proclaimed that “*A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*”

82. In *Mithu v. State of Punjab*, (1983) 2 SCC 277, a five judge constitutional bench of the Supreme Court declared mandatory death penalty under Section 303 IPC for murder committed by life convicts to be unconstitutional. The Court found such a law to be unreasonable and arbitrary especially as it authorised deprivation of life by an unjust and unfair procedure, devoid of judicial discretion. Distinguishing the ratio of *Bachan Singh*, the Court held that “*judicial discretion was what prevented the outlawing of the sentence of death even as an alternative penalty for murder. Judged in the light of Maneka Gandhi and Bachan Singh, it is impossible to hold Section 303 as valid.*”

83. In the same year, a three Judge bench of the Supreme Court in *Machhi Singh and Ors v. State of Punjab*, (1983) 3 SCC 470 further developed the concept of rarest of rare expounded in *Bachan Singh*. In considering the application of capital punishment, the Court looked into the manner of commission of murder, the motive for killing, the abhorrent nature of killing, the enormity of the crime, such as multiple murders and, the personality of the victim. It further said “*A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to*

*be struck between the aggravating and the mitigating circumstances before the option [of capital punishment] is exercised.”*

84. Thereafter, although the apex Court rejected pleas for a reconsideration of *Bachan Singh* and upheld the validity of capital punishment for the offence of murder [See *Jumman Khan v. State of U.P.* (1991) 1 SCC 752, *Shashi Nayar v. Union of India*, (1992) 1 SCC 96], it reaffirmed the indispensability of pre sentencing hearing of the accused. [See *Allauddin Mian & ors v. State of Bihar*, (1989) 3 SCC 5].
85. Recently, in *Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, the Supreme Court reiterated Constitutional and legal safeguards that must underpin the invocation of a death sentence. It noted that “*post Bachan Singh, capital sentencing has come into the folds of constitutional adjudication.*” Further, it enjoined Courts to only comply with statutory requirements of pre-sentence hearing and special reasons under sections 235(2) and 354(3), but also the rarest of rare dictum, which “*takes its colour from constitutional guarantees*”. Emphasising individualised sentencing, the Supreme Court held that “*the rarest of rare case is to be determined in the facts and circumstances of a given case*” after reviewing circumstances of the crime and the criminal.
86. Subjecting capital sentencing to greater constitutional scrutiny, the Supreme Court in *Mohd. Farooq Abdul Gafur and Anr v. State of Maharashtra* (2009) 11 SCALE 327 held that “*capital sentencing must survive the special rigours of procedural justice, which not only includes the substantive compliance of Bachan Singh dicta in relation to selection of penalty, but also compliance of other due process requirements. It must be noted that administration of death penalty is carried out in the intensive gaze of Article 14 and Article 21 requirements.*”

87. Thus, the position that emerges is that while the death sentence for murder is not unconstitutional, it cannot be imposed mandatorily by the legislature. In all capital crimes, judicial discretion must be preserved and exercised in compliance with statutory safeguards of special reasons and pre sentence hearing. Importantly, the Supreme Court has restricted the application of death penalty to the rarest of rare cases – all of which pertain to the offence of murder. In light of this, the imposition of a mandatory death sentence for a non violent, economic crime like drug trafficking is seriously questionable.
88. In furtherance to the submission in para 50, the case of *Vipin Nair (NCB) and Anr v. Ghulam Mohammed Malik and Anr*, is pending before this Honb'le Court and the Court may come to the conclusion of confirming the death sentence of the accused. The petitioner therefore urges this Honb'le Court to hear this petition urgently, as it will affect the outcome of *Criminal Confirmation Case No. 2 of 2008*.
89. In light of the aforementioned facts, the Petitioner approaches this Hon'ble Court, for reliefs prayed for in the present petition on the following, amongst other grounds, which are without prejudice to each other: -

### **Grounds**

#### **I. Mandatory death penalty violates the Right to Life and Personal Liberty under Article 21**

- A. Article 21 of the Constitution forbids the State from interfering with a person's life and liberty, except in accordance with procedure established by law. It is a settled position that "procedure established by law" does not simply refer to a validly enacted legislation, but it requires that legislation be fair, just and reasonable, substantively as well as procedurally. [See *Maneka Gandhi v Union of India*, (1978) 1 SCC 248]

B. It is well established that the final arbiter on the question of justice and reasonableness is the Court and not the legislature. It is for the Courts to determine if the procedure established by law for depriving a person of his life or liberty is fair, just and reasonable. [See *Maneka Gandhi and Mithu v. State of Punjab*, (1983) 2 SCC 277]

C. Section 31A NDPS Act suffers from procedural arbitrariness because:

i. It prescribes the death sentence mandatorily and excludes judicial discretion.

a. In *Mithu*, a Constitutional bench of the Apex Court struck down Section 303, Indian Penal Code, 1860 (hereinafter “IPC”) which imposed a mandatory death sentence upon “*whoever, serving a sentence of imprisonment for life, commits murder*”. The Supreme Court declared.... *it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irresistible is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive.*” Like Section 303 of the IPC, Section 31A NDPS Act does not leave any discretion with the judiciary and binds the Court to direct execution of the offender. The impugned Section is therefore unfair, unjust, unreasonable and arbitrary.

- b. While upholding the constitutionality of the death penalty for murder as an alternative to life imprisonment, the Supreme Court in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, observed - *“a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity.”* By barring judicial consideration in sentencing, Section 31A NDPS Act lends itself to arbitrariness and falls foul of Article 21.
- c. In *Dadu @ Tulsidas v. State of Maharashtra*, (2000) 8 SCC 437, the Supreme Court declared Section 32A of the NDPS Act void to the extent that it took away the powers of the Appellate Court to suspend a sentence. The Apex Court affirmed that *“The exercise of judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislature cannot, therefore, make law to deprive the courts of their legitimate jurisdiction conferred under the procedure established by law.”* The impugned Section interferes with a paramount judicial function and fails the test of reasonableness under Article 21.
- ii. By mandating a death sentence upon all accused alike, Section 31A NDPS Act bars individualised sentencing based upon the facts and the circumstances of the offence as well as that of the offender.

- a. In *Machhi Singh and Ors v. State of Punjab*, (1983) 3 SCC 470, the Supreme Court held “..the guidelines indicated in *Bachan Singh’s* case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises.” [emphasis added] The Court further held that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability and that before awarding death penalty, the circumstances of the offender as also the offence must be considered.
- b. In *Mithu*, the Supreme Court declared that “A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.” [emphasis added]
- c. Sentencing must be individualised and not pronounced blindly. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498 the Supreme Court restated the Court’s duty to examine aggravating and mitigating factors in the crime such as the age, antecedents, socio-economic background as well as the possibility of reformation of the offender before passing the sentence of death. [See also *Mulla and Anr vs. State of Uttar Pradesh* (2010) 3 SCC 508] The Court held that “it is the spirit of Article 14 and 21 that forces us to adopt a principled approach to sentencing.” By foreclosing the

consideration of individual factors associated with the crime, Section 31A NDPS Act makes the sentencing procedure unfair and arbitrary.

iii. Section 31A NDPS Act falls foul of procedural requirements that render a death sentence reasonable and non-arbitrary.

a. According to *Mithu*, the Supreme Court in *Bachan Singh* upheld the constitutionality of the death penalty under Section 302 for three main reasons: “*Firstly, that the death sentence provided for ...is an alternative to the sentence of life imprisonment; secondly, that the special reasons have to be stated under section 354(3) CrPC, if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled under Section 235(2), CrPC to be heard on the question of sentence.” [emphasis added].*

b. Section 31A NDPS violates all three conditions laid down in *Bachan Singh*, as it - i) provides no penalty other than death, ii) does not require stating of special reasons and, iii) renders the right of the accused to be heard on the sentence meaningless. The mandatory nature of the provision eliminates the safeguards that ought to be followed in capital sentencing.

c. In *Bachan Singh*, the Supreme Court also laid down that the death sentence ought not to be given except in the “rarest of rare cases.” In *Mohd. Farooq Abdul Gafur and Anr v. State of Maharashtra* (2009) 11 SCALE 327, S.B Sinha J. opined that “*the assessment of “rarest of rare*

*case” is incomplete without coming to the conclusion that the “lesser alternative is unquestionably foreclosed”. And procedural fairness and justice concerns form part of the latter condition.”* By providing no alternative penalty other than death, Section 31A NDPS Act precludes any consideration of the particular facts and circumstance in the case as well as appropriateness of the sentence. The impugned section impairs procedural fairness and invites arbitrariness in penal justice.

iv. Imposition of a mandatory death sentence infringes the right of the accused to be heard on sentencing, and concomitantly, the right to a fair trial.

a. Under Section 235(2) CrPC, the accused is entitled to be heard on the question of sentence. In *Santa Singh v State of Punjab* (1976) 4 SCC 190, the Supreme Court held that the “accused *person should get a fair trial in accordance with the accepted principles of natural justice.*” Further, the Court stated that the “*provisions of Section 235(2) are very salutary and contain one of the cardinal features of natural justice, namely, that the accused must be given an opportunity to make a representation against the sentence proposed to be imposed on him.*” Further discussing the inviolability of Section 235(2), the Supreme Court in *Allauddin Mian & Ors v. State of Bihar*, (1989) 3 SCC 5 said that “*since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence, there can be no doubt that the provision is*

*salutary and must be strictly followed. The requirement of hearing the accused is intended to satisfy the rule of natural justice. In the case of life or death, the presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of the sentence. If the choice is made without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc. before the Court, the Court's decision on the sentence would be vulnerable.*

b. Where the sentence is predetermined, as in the case of the impugned Section, the right to be heard on sentencing ceases to be real or effective. For persons convicted under Section 31A NDPS Act, the right to pre sentence hearing is rendered infructuous. (See *Mithu*, para 12)

D. Section 31A NDPS Act fails the test of substantive reasonableness because:

i. Prescription of a mandatory death sentence constitutes cruel, inhuman and degrading punishment.

a. Though there is no express constitutional prohibition, Article 21 has been read to include a right against cruel, inhuman or degrading punishment. (See *Francis Coralie v. Administrator Union Territory of Delhi* (1981)1 SCC 248 and *Smt Selvi v. State of Karnataka*, Supreme Court judgment dated 5<sup>th</sup> May 2010).

b. The Supreme Court in *Francis Coralie* held that immunity against torture or cruel and unusual punishment or

- treatment is implicit in Article 21 and therefore, if any punishment is cruel and unusual, it would be violative of basic human dignity which is guaranteed under Article 21.
- c. According to *Bachan Singh*, a mechanised and automated death sentence runs the risk of “*degenerating into a bed of Procrustean cruelty.*”
  - d. Internationally, Courts are unanimous in their finding that a mandatory death sentence constitutes cruel, inhuman and degrading punishment. (See *Reyes v The Queen* [2002] 2 AC 235, *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, *Watson v The Queen* [2005] 1 AC 472, *Bowes and another v The Queen* [2006] 1 WLR 1623, *Kafantayeni v Attorney General* [Constitutional Case No 12 of 2005 (2007) MWHC 1] and *Attorney General v, Susan Kigulaand and 417 others* [Constitutional Appeal No 03 of 2006, *Uganda: Supreme Court 21 January 2009*])
  - e. According to Article 7, ICCPR, “*No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.*” The current UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Philip Alston has opined that death sentence imposed mandatorily is against the prohibition of cruel, inhuman or degrading punishment. (See para 66 above)
  - f. A conjoint reading of Section 2(1)(d) and Section 2(1)(f) of the Protection of Human Rights Act, 1993, makes human rights, that is, rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants, including the

ICCPR, enforceable by Courts in India. By enacting the Protection of Human Rights Act, 1993, India has incorporated the prohibition against cruel, inhuman and degrading treatment in domestic law. By this logic, mandatory death penalty under Section 31A NDPS Act stands in contravention of the Protection of Human Rights Act, 1993.

- ii. Section 31A NDPS Act is dehumanising and arbitrary in impact.
  - a. The test to adjudge whether a statute offends a particular fundamental right is to examine the effect of the law and of the state action upon the fundamental right in question. In *Maneka Gandhi*, the Supreme Court stated that “*in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.*”
  - b. A direct consequence of Section 31A NDPS Act is the arbitrary deprivation of the right to life and liberty. A person sentenced to death under Section 31A NDPS Act has no reprieve, even if the sentence is not administered. Section 32A NDPS Act forbids suspension, remission or commutation of sentences awarded under the Act. In such an event, the accused person will remain on a death row indefinitely. In the words of the Apex Court in *T.V. Vatheeswaran v State of Tamil Nadu*, (1983) 2 SCC 68, this

constitutes dehumanising treatment and offends the constitutional protection against arbitrariness.

- c. In the last six years, no death sentences have been administered in the country. In the likely event of non – execution and no amnesty, persons compulsorily committed to death under Section 31A NDPS Act will remain in prison for an indeterminate period, until they are put to death. Such a predicament is worse than being executed or imprisoned for life and will inflict untold misery and agonising mental trauma upon the convict. The impugned section read with Section 32A NDPS Act subjects convicts to cruel and inhuman treatment and encroaches upon the protection accorded by Article 21.

## **II. Mandatory death penalty violates the right to equality and equal protection of law under Article 14**

- A. Article 14 guarantees each person the right to be treated equally and without discrimination, when such persons are equally placed. Equality is antithetical to arbitrariness. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. [See *E.P Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3]
- B. In imposing a mandatory death sentence upon persons convicted under Section 31A (1) (a) and (b), the section violates the right to equality before law and equal protection because:
  - i. The death penalty is distinct from all other punishments because of its finality and irrevocable nature. It is a settled position that for

the offence of murder, life imprisonment is the norm and death the exception, to be awarded only in the “rarest of rare cases”. However, under Section 31A NDPS Act, death is the norm, without any exception. Such a position is arbitrary and unjust, against the ethos of Article 14.

ii. Section 31A NDPS Act prescribes a penalty disproportionate to the offence in question. Unlike murder, drug offences do not involve taking of human life. The principle of proportionality has been recognised as one of the criteria for judging the constitutional validity of a statute. [See *Om Kumar v. Union of India*, (2000) Supp 4 SCR 693]

a. According to Bhagwati J. in *Bachan Singh* - “..it is an essential element of the rule of law that the sentence imposed must be proportionate to the offence. If a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational, for it would not pass the test of reason and would be contrary to the rule of law and void under Article 14, 19 and 21. The principle of proportionality is implicit in these three Articles of the Constitution. If, for example, death penalty, was prescribed for the simple offence of theft as indeed it was at one time in the seventeenth century England-it would be clearly excessive and wholly disproportionate to the offence and hence arbitrary and irrational by any standards of human decency and it would be impossible to sustain it against the challenge of these three Articles of the Constitution. It must therefore be taken to be clear beyond doubt that the proportionality principle

*constitutes an important constitutional criterion for adjudging the validity of a sentence imposed by law.”*

b. In *Santosh Kumar Bariyar*, the Supreme Court noted that “*the constitution prohibits excessive punishment borne out of undue process.*” Underscoring the need for proportionality between the object of the legislation and the restriction imposed on fundamental rights, S.B Sinha J., referred to the Canadian Supreme Court in *R v. Oakes*, [(1986) 1 S.C.R. 103], where J. Dickson describes three components of proportionality.

*“First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right of freedom, and the objective which has been identified as of 'sufficient importance'.”*

Further, in *R v. Chaulk*, [(1990) 3 S.C.R. 1303], the Supreme Court of Canada held that “the means must impair the right as little as is reasonably possible.” A failure to comply with the minimal impairment test is a ground for invalidating the statute.

- c. Proportionality is also a factor in assessing whether the penalty prescribed is cruel, inhuman and degrading. (See *S. v. Makwanyane*, [Case no.CCT/3/94, Date of Judgment 06/06/1995]. The U.S Supreme Court in *Coker v. Georgia*, [433 U.S 584 (1977)] held that the Constitutional prohibition of cruel, inhuman and degrading punishment under the Eighth Amendment applies not only to punishments that are “barbaric”, but also those that are “excessive” in relation to the crime committed, and a punishment is excessive and unconstitutional “*if it is grossly out of proportion to the severity of the crime.*”
- d. Section 31A NDPS Act extinguishes the right to life of the accused, *ipso facto* for committing an economic crime of drug trafficking. The impugned section imposes maximum impairment and is grossly disproportionate to the offence in question.
- e. In the words of Bhagwati J. (in *Bachan Singh*), “*The proportionality between the offence and death penalty has to be judged by reference to objective factors such as international standards or norms or the climate of international opinion, modern penological theories and evolving standards of human decency.*” [emphasis added]
- f. International human rights law permits the invocation of the death penalty only for the “most serious crimes”. There is a growing body of evidence that drug offences do not fall in the category of “most serious crimes.” (See paras 56 - 68).

Mandatory death penalty for drug trafficking under Section 31A NDPS Act is out of step with human rights norms.

g. According to the Supreme Court, death penalty is reserved for the rarest of rare or most heinous crimes, which involve the taking of life (See *Bachan Singh; Machhi Singh*). Drug offences, including those covered under Section 31A, are economic in nature, which entail profiting from an illegal commodity. As such, they do not fit within the description of “rarest of rare” or “most heinous crimes”, as laid down by successive decisions of the Supreme Court of India.

h. In incorporating Section 31A NDPS Act, the legislature was guided by the penological goals of deterrence and retribution. Statistics under the NDPS Act indicate that the impugned section has failed in its objective of reducing drug crimes. Even if mandatory death penalty deters drug trafficking, its constitutional propriety would still be questionable. Bhagwati J. in *Bachan Singh* observed:

*“It is necessary to point out at this stage that death penalty cannot be said to be proportionate to the offence merely because it may be or is believed to be an effective deterrent against the commission of the offence.”* [emphasis added] Bhagwati J. further opined - *“The existence of a rational legislative purpose for imposing the sentence of death is a necessary condition of its constitutionality but not a sufficient one. The death penalty for theft would, for example, deter most potential thieves and may have a unique deterrent effect in preventing the commission of the offence; still it would be wholly disproportionate and*

*excessive, for the social effect of the penalty is not decisive of the proportionality to the offence.”*

Unlike murder, drug offences do not cause irreparable harm to victims. In fact, persons who become drug dependent, the so called “victims” of drug trafficking, can be successfully treated. The NDPS Act itself makes provision for the treatment and recovery of addicts. Thus, while the so called “victim” re-starts her/his life, the offender loses his, altogether. This scheme of things is out of bounds with the retributive aim of penal justice.

i. In light of the above, condemning a drug offender to death under Section 31A NDPS Act is wholly disproportionate and against established constitutional and human rights norms of criminal jurisprudence.

iii. Section 31A (2) NDPS Act violates rules of natural justice and legal defence.

Section 31A (2) reads: *“Where any person is convicted by a competent Court of Criminal jurisdiction outside India under any law corresponding to the provisions of [section 19, section 24 or section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance] such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a Court in India.”*

Across the world, legal systems and criminal justice are not uniform. Anti narcotic laws differ in classification of penalties according to the drug and quantity. Importantly, what may be classified as a large quantity in another country may not be considered commercial quantity under Indian law. For instance, in the Philippines, illegal possession of 10

grams or more of opium is subject to very stringent punishment ( life imprisonment or death and a fine ranging from 500,000 pesos to 10,00,000 pesos). But the same amount of opium in India constitutes less than small quantity and is punishable with maximum imprisonment of six months or a fine of Rs. 10,000 or both. Further, rules of search and arrest, procedure for trial and standards of proof vary from country to country. The person who has been convicted abroad for a similar offence may not have received similar protection of law and legal defence, as in India. The extra territorial scope of Section 31A NDPS Act lends itself to arbitrariness and contravenes the right to equal protection of law under Article 14 of the Constitution of India.

90. The Petitioner has no alternative efficacious remedy but to approach this Hon'ble Court under Article 226 of the Constitution of India for the reliefs prayed for herein.
91. The cause of action has arisen within the jurisdiction of this Hon'ble Court, and therefore this Hon'ble Court has the jurisdiction to entertain the present petition.
92. There is no other such petition pending in any other court in the in respect of the subject matter of this petition.
93. The Petitioner has paid the fixed court fees of Rs.....
94. The Petitioner craves leave to alter, amend or add to this petition.
95. The Petitioner seeks leave to rely on documents, a list of which, along with true copies has been annexed to this petition.
96. This petition is made *bona fide* and in the interest of justice.

**Prayer**

In light of the above mentioned reasons and circumstances, the Petitioner prays that:

- a) For a declaration that Section 31A Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the “NDPS Act”) violates Articles 14 and 21 of the Constitution of India and therefore void.
- b) Pending hearing and final disposal of this Petition, the hearing of Criminal Appeal *No 582 of 2008 and Confirmation Case No. 2 of 2008* may be stayed till the hearing and final disposal of this writ Petition.
- c) Pending hearing and final disposal of the petition, for an order staying the operation of Section 31A NDPS Act, 1985.
- d) For such further and other orders as the circumstances of the case may require.

For Indian Harm Reduction Network

Petition drawn by:

Ms. Tripti Tandon, Advocate and

Amritananda Chakravorty, Advocate

Settled by:

Anand Grover, Advocate

VERIFICATION

I, \_\_\_\_\_, the Petitioner abovenamed do solemnly declare that what is stated in para nos. 1 to 8 are true to my own knowledge and belief, and what is stated in the remaining paras is stated on information and belief and I believe the same to be true.

Solemnly declared at \_\_\_\_\_ )

This \_\_\_\_\_ day of June 2010 )

Petitioner

Identified by me:

Advocate for the Petitioner