

# The NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT

## Ignoring Health; Infringing Rights

### BACKGROUND

India has a long history of opium and cannabis use, especially for medicinal, religious and recreational reasons. State regulation and community tolerance ceased after the enactment of the *Narcotic Drugs and Psychotropic Substances Act* (NDPS) in 1985, which created a restrictive regime around drugs. Clampdown on cannabis and opium in the late 1980's purportedly triggered more dangerous use - chasing and injecting heroin and other opioids.

### OVERVIEW OF THE NDPS ACT

The NDPS Act, 1985 is one of the harshest laws in the country. It prohibits cultivation, production, possession, sale, purchase, trade, use and consumption of narcotic drugs and psychotropic substances except for medical and scientific purposes under license.

#### Stringent Provisions of the NDPS Act

- Mandatory minimum sentence of 10 years' imprisonment for certain offences
- Presumption of guilt and reversal of burden of proof
- Severe restrictions on grant of bail
- Pre-trial detention of up to 1 year
- No suspension, remission and commutation of sentences
- No release on probation for offenders'
- Enhanced punishment (up to 30 years imprisonment) for repeat offenders
- Compulsory death sentence for subsequent conviction for specific offences

The Act has been amended twice; in 1989 and 2001. The first amendments in 1989 leaned towards greater stringency by introducing mandatory minimum sentences of 10 years, restrictions on bail

and mandatory capital punishment for repeat offenders. Following the amendments, persons caught with small amounts of drugs faced long prison sentences, without the possibility of release on bail. Courts criticized the harsh and disproportionate sentencing structure, which led to a fresh set of reforms in 2001 to rationalize punishment on the basis of whether the quantity of drugs involved is 'small', 'commercial' or 'intermediate' and provide some leniency towards drug offenders who also use drugs.

### CRIMINALISATION OF DRUG USE AND POSSESSION

Consumption of drugs is illegal and results in a jail term of up to 6 months or 1 year and/or a fine, depending on the substance consumed. Penalties for drug offences, including possession, are determined by the quantity of drugs involved (*see table below*). Intention, i.e., whether the drug is meant for sale, distribution or personal use is irrelevant for the purpose of punishment. Thus, selling 5 grams of cocaine attracts the same punishment as possessing the same amount for personal use.

Drug	Quantity and Punishment			
	Small Quantity	Punishment	Commercial Quantity	
Heroin	5gms	Maximum of 6 months' rigorous imprisonment or a fine up to Rs. 10,000 or both	250gms	Rigorous imprisonment from 10years' (min.) to 20 years (max.) & a fine from Rs 1 lakh to 2 lakhs
Opium	25gms		2.5kgs	
Morphine	5gms		250gms	
Ganja	1000gms		20kgs	
Charas	100gms		1kg	
Cocaine	2gms		100gms	
Methadone	2gms		50gms	
Amphetamine	2gms		50gms	
LSD	0.002gm		0.1gm	

Criminalisation of drug use and possession has disproportionately affected the health and lives of millions of people who use drugs. In particular, poor drug users are trapped in the revolving door between prison and the street, devoid of medical, social or legal assistance.

### Undue Restrictions on Civil Liberties

The NDPS Act denies safeguards on civil liberties that are ordinarily available within the criminal justice system. The Criminal Procedure Code allows pretrial detention for 60 or 90 days (for serious crimes), after which the accused can seek and be released on bail. Persons accused of certain NDPS offences are, however, liable to detention for 180 days, which may go up to 1 year, if the investigation is not complete.

Besides extending the duration of pre-trial detention, the NDPS Act imposes severe restraints on bail. Section 37 makes specific offences including those involving commercial quantity, non-bailable, unless the Court is satisfied that the accused is not guilty. These restrictions were also being applied to drug users upon arrest for consumption or possession of small amounts of drugs. The Courts have now clarified that persons charged with small quantity drug offences have a right to get bail.

A person arrested under the Act for minor offences like **consumption** and those involving **small quantity** of narcotic drugs and psychotropic substances is **entitled to bail**

[*Abdul Aziz v. State of U.P.* 2002 CriLJ 2913; *Shaji v. State of Kerala* 2004 (3) KLT 270; *Stefan Mueller v. State of Maharashtra* 2010 Vol. 112(7) Bom. I..R.]

### **MANDATORY DEATH PENALTY**

India joins 32 countries in the world that provide death penalty for drug crimes. Out of the 32, 13 countries (including India, hitherto) prescribed mandatory capital

punishment. Section 31A of the NDPS Act imposes mandatory death penalty for certain repeat crimes involving a large quantity of drugs. In June 2010, the Lawyers Collective argued a constitutional challenge to this provision in *Indian Harm Reduction Network v Union of India* [Criminal Writ Petition No. 1784 of 2010, High Court of Bombay] on grounds of infringing fundamental rights under Articles 21 (protection of life and liberty) and 14 (equal protection of law) of the Constitution of India. It also questioned the appropriateness of a death sentence for drug trafficking, which does not involve killing or taking of human life and is merely an economic offence.

In its decision dated 16<sup>th</sup> June 2011, the Bombay High Court found Section 31A to be in violative of Article 21 as it divested the Court of its beneficent discretion and scrutiny before pronouncing the death sentence. Accordingly, the sentencing Court will now have to hear the drug offender on the question of punishment and can decide to award a sentence other than death.

### **TREATMENT FOR DRUG DEPENDENCE**

The NDPS Act supports treatment both as an alternative to, and independent of penal measures. Several provisions stipulated under the Act depenalise personal use or offences involving small quantity and encourage treatment seeking.

#### Treatment Provisions under the NDPS Act

- **“Addict”** is defined as a person who has **dependence** on any narcotic drug or psychotropic substance (Section 2(1))
- If addicts are convicted for consumption or offences involving small quantity then they can be **diverted to treatment** by the Court, instead of prison, for undergoing treatment for detoxification (Section 39)
- **Immunity from prosecution** to addicts volunteering for treatment (Section 64A)

In practice, however, treatment is not accorded priority by the Government and is grossly inadequate, both in quantity and quality of services. The judiciary too, has narrowly interpreted these beneficent provisions, thereby denying their benefits to people who use drugs. Courts' insistence on technicalities like proof of addiction has restricted access to treatment for drug dependence.

### Unregulated Private Centres

Despite the statutory responsibility on the government to make rules for establishment and regulation of treatment centres, neither the Central nor State governments have framed such rules. As a result, a large number of unauthorized 'de-addiction' centres have proliferated to cash in on the desperation of drug users and their families. Instead of medical care, "punishments" are meted out to patients, inflicting severe torture and, in some cases, causing death. These incidents have come to light from all across India, most notably from Punjab, Chennai, Manipur and Delhi.

In April 2009, Sharan (an NGO working with people who use drugs) filed an intervention application through Lawyers Collective in *Talwinder Pal Singh v. State of Punjab* [Crl Misc No. M-26374 of 2008, High Court of Punjab and Haryana] asking the State to frame regulations for drug dependence treatment. Under the Court's directions, Governments of Punjab and Haryana have notified Rules directing drug treatment facilities to offer evidence based care, without coercion or compulsion. Unlicensed centres and those committing human rights violations are liable to closure, as also prosecution in some cases.

## **HEALTH CONCERNS**

### HIV/HCV Prevalence

In India, out of all the most at risk populations, HIV prevalence is highest amongst people who inject drugs. Drug dependence is widely prevalent in major

cities and States like Punjab and North - Eastern States, as are blood borne infections related to unsafe injecting like Hepatitis B and C.

### Blood borne diseases among persons who inject drugs in India

- Estimated number of persons who inject drugs - **0.2 million** (NACO data, 2009)
- HIV prevalence among people who inject drugs - **9.2%**
- HIV prevalence among people who inject drugs in Punjab- **26.1%**
- Hepatitis C prevalence in parts of Manipur- **above 90%**

### Harm Reduction Programmes

Though harm reduction services including supply of sterile needles and syringes for persons who inject drugs and oral substitution treatment (OST) have been introduced as part of HIV prevention, they operate in a restrictive legal and political environment. Concerns exist around the scale and quality of harm reduction services, especially OST, which is not seen as treatment for opiate dependence. Harm reduction continues to be viewed with suspicion and has not been fully embraced in India's response to narcotic drugs.

### Access to Medicines for Palliative Care

Morphine and other opiates are seldom available to patients in need of pain management. Although the NDPS Act allows medical use of narcotic drugs and psychotropic substances, strict rules and complex licensing procedures together with controls under the *Drugs and Cosmetics Act, 1940* have hindered access to opiates for millions of patients. Though the Central Government had proposed a simplified procedure for procuring morphine in 1998, till date,

only 15 States have adopted it. Morphine is included in the *National Essential List of Medicines*, 2011 prepared by Ministry of Health and Family Welfare, Government of India. Its unavailability to cancer, AIDS and other patients for analgesic purposes raises serious questions on the Government's commitment to protecting health.

## RIGHTS BASED DRUG POLICY REFORM

Criminalization of drug use has only exacerbated the harms related to drugs. Across the world, there is an increasing acknowledgement that drug use, at its core, is a health issue.

Countries like Portugal have successfully decriminalized consumption, possession and acquisition of narcotic and psychotropic drugs for personal use, with no resultant increase in drug use or dependence. On the contrary, people who use drugs have improved access to health and social services.



As against the U.N. Secretary General's call that - "*no one should be stigmatized or discriminated against because of their dependence on drugs*", India has a long way to go.

The government is again contemplating reforms in the NDPS Act. It is hoped that the amendment process will include wide-ranging consultations as well as discussion on alternatives to penalization. It is about time that Indian drug policy be guided by *health and human rights* and not *crime and punishment*.



Lawyers Collective is a non government organization in India that seeks to foster legal reforms in areas of women's rights, protection of civil liberties, equality and non-discrimination, access to medicines, health and drug policy through legal, research and advocacy interventions.

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