

A critical look at Vidhi Centre's - 'From Addict to Convict': Working of the NDPS Act in Punjab' Report

Lawyers Collective

Recently, Vidhi Centre for Legal Policy issued a report entitled: '*From Addict to Convict': Working of the NDPS Act in Punjab*'. The Report, which is based on a review of 13,350 cases from Courts trying NDPS cases in Punjab from 2013 to 2015, concludes that the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") has not deterred drug use or drug trafficking and is in need of reform.

Having been involved in litigation and legislative advocacy on a range of issues in drug policy and human rights such as access to evidence-based treatment for drug dependence, proportionality in sentencing, death penalty for drug offences, scheduling of drugs under the NDPS Act, access to opioid medicines and removal of penalties for drug use, we couldn't agree more with the conclusion.

The painstaking research conducted by the authors on a subject that has largely been neglected by the human rights community in India is indeed commendable.

The Report throws up some very important findings on the operation of the NDPS Act in Punjab – namely, that a large number of convictions are on account of possession of drugs in 'intermediate' quantity, that cases involving illicit possession of pharmaceutical preparations attract more severe penalties owing to lower quantity-thresholds and the existence of disparate sentencing practices. The reasons behind these conclusions are however, not correct and need to be stated so that we can move forward on this important issue.

The Report suffers from serious flaws in its understanding of the legal framework for drug control and analysis of the NDPS Act. The object, scope and provisions of the law are either presented incorrectly or in a simplistic way,

that does not capture the complexity of drug control policies. Since the Report is published by a legal think-tank and will likely be read by lawyers, judges and policy makers, **there can hardly be any room for errors in examining the law.** If accepted in its current form, the Report may lead to provisions of the NDPS Act being misconstrued and wrongly applied - with consequences worse than what the authors have described.

We, therefore feel responsible to point out the errors and omissions in the Report, which otherwise has potential to inform drug policy changes. We hope that colleagues at Vidhi Legal and Policy Centre will review our comments carefully in this spirit and respond with 'errata' or correction - as appropriate.

i. Legal framework for drug control – twin objectives

The Report is based on an understanding that narcotic drugs and psychotropic substances are *per se* illegal. The emphasis on 'deterrence', 'punishment' and 'strict liability' gives the impression that the NDPS Act prohibits everything to do with narcotic drugs and psychotropic substances. This is not correct.

The NDPS Act is based on international Conventions – namely, the Single Convention on Narcotic Drugs, 1954 as amended by the 1972 protocol amending the Single Convention on Narcotic Drugs, 1954 ("1954 Convention"), the Convention on Psychotropic Substances, 1971 ("1971 Convention") and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ("1988 Convention"). International drug conventions have a **two-fold objective**, i.e. to **'ensure' the availability of narcotic drugs and psychotropic substances for medical and scientific use and to 'restrict' their availability and use for non-medical and non-scientific purposes.**

This dual purpose is also reflected in the NDPS Act, which creates a regime of **"prohibition, control and regulation"** over narcotic drugs and psychotropic substances. As a result, the NDPS Act does not criminalise drug-related

activities *per se*. According to section 8, *production, manufacture, possession, sale, purchase, transport, warehouse, use, consumption, import-inter State, export inter-State, import into India, export out of India or transshipment of narcotic drugs and psychotropic substances* are criminalized **except** if they are carried out for *medical or scientific purposes and in the manner and to the extent provided by the provisions of the Act or Rules or orders made thereunder and, in a case where any such provision imposes a requirement by way of license/ permit/ authorisation, in accordance with the terms and conditions of such license /permit/ authorization.*

The Report ignores the very important area of legally-regulated activities including licit cultivation of opium poppy, processing and manufacture of opium and opium derivatives in government factories, manufacture of opiates by the pharmaceutical industry and their distribution, supply and use by the medical sector.

ii. Policy and purpose of the NDPS Act – *medical use is permitted*

The Report gives the impression that possession of drugs is an offence and anyone caught with drugs is guilty under the NDPS Act. This observation is incorrect as the NDPS Act *allows* possession of narcotic drugs and psychotropic substances under certain conditions.

For example, Rule 66(2) of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (“NDPS Rules”) allows an individual to possess a psychotropic substance for his personal medical use in quantity of upto 100 dosage units at a time. Further, a person may possess upto 300 dosage units of a psychotropic substance at a time for his personal long term use if prescribed by a medical practitioner.

The question is not of possession of drugs simpliciter, but whether possession is authorized and within the limits prescribed by the law.

Enforcement of the NDPS Act is about ‘balancing’ legitimate and necessary activities in relation to drugs while preventing diversion and illicit use. The Report loses sight of this completely.

iii. Legitimacy of drug v legitimacy of purpose

The NDPS Act does not talk about licit or illicit drugs. Rather, it concerns itself with the legitimacy or illegitimacy of drug-related activities, as is evident from the expression ‘illicit traffic’ in section 2(viiiib) as well as section 8(c) of the NDPS Act. Legitimacy attaches to the ‘purpose’ for which the drug is used or sought to be used. The NDPS Act recognises ‘medical and scientific’ use as legitimate, and in the case of coca and cannabis, certain additional purposes.¹ However, merely having a legitimate purpose is not enough. The second condition is that the activity must be carried out in a manner that conforms to what is stipulated in the NDPS Act, Rules or licenses issued thereunder.²

The Report finds that:-“*Pharmaceutical drug cases are assigned harsh sentences within a penal framework that was originally designed to punish drug traffickers.*”

Unfortunately, this simplistic statement is not true. Illicit traffic in ‘pharmaceutical drugs’ is as much a concern for drug law enforcement as is trafficking in cannabis or heroin, which so far, have not been approved for medical or scientific use in the country. Illicit trade and supply of Fentanyl (a narcotic drug) is a serious concern in many countries, where its use is resulting in deaths.³ It would be naïve to call for ‘lesser penalties’ for illicit trafficking in Fentanyl because it is a ‘pharmaceutical drug’.

Harm may be a better metric

¹ Sections 13 and 14, NDPS Act.

² *Union of India v Sanjeev Deshpande* (2014) 13 SCC 1

³ <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>

A more appropriate test for examining the proportionality of sentences under the NDPS Act is to consider the ‘harms’ associated with the use of the drug. This is the central theme of drug policy debates all over. Recent legal reforms on cannabis in Uruguay, Jamaica, Canada and several U.S States have advanced on the understanding that cannabis is not as dangerous as other psychoactive drugs that warrant strict prohibition. In India too, a private Member’s Bill pending in Parliament proposes to legalise ‘natural’ substances like cannabis and opium as the ‘harm’ associated with their use is not comparable to that of synthetic drugs like heroin⁴. It is no coincidence that the Member of Parliament moving the Bill to amend the NDPS Act is from Punjab.⁵ The Report does not consider this aspect at all.

iv. ‘Narcotic drugs’ and ‘pharmaceutical drugs’ – no such distinction in the NDPS Act

The Report proceeds on the basis that ‘narcotic drugs’ and ‘pharmaceutical drugs’ are two distinct categories under the NDPS Act. The data in Volume II of the Report is presented on the same premise. This categorization suggests that there are illicit drugs [narcotics] and licit drugs [pharmaceutical] under the NDPS Act. This is simply not correct.

The NDPS Act distinguishes between ‘*narcotic drugs*’⁶, ‘*psychotropic substances*’⁷ and ‘*controlled substances*’⁸. Narcotic drugs are further divided into plant based drugs i.e cannabis, coca and opium, each of which are defined and punished separately⁹ and their synthetic variants or derivatives, which are called ‘*manufactured drugs*’.¹⁰ The classification of drugs under the NDPS Act follows the classification under international conventions, where narcotic drugs

⁴ <https://www.hindustantimes.com/punjab/aap-mp-gandhi-s-bill-seeking-opium-legalisation-cleared-for-tabling-in-parliament/story-itanKX3vRrhuXJPdgnJD6N.html>

⁵ <https://www.tribuneindia.com/news/punjab/mp-for-debate-on-legalising-soft-drugs/627213.html>

⁶ Section 2(xiv), NDPS Act

⁷ Section 2(xxiii) and section 3, NDPS Act.

⁸ Section 2 (viid), NDPS Act

⁹ Sections 2 (iii), (vi), (xv) and sections 20, 16 and 18, NDPS Act.

¹⁰ Section 2(xi), NDPS Act

are the subject matter of the 1961 Convention, psychotropic substances are scheduled under the 1971 Convention and controlled substances or precursors used to manufacture narcotic drugs are addressed under the 1988 Convention.

There is no separate class of 'pharmaceutical drugs' under the NDPS Act. Pharmaceutical drugs are 'preparations' and depending on their active pharmaceutical ingredient could be a 'narcotic drug' or a 'psychotropic substance' or a 'controlled substance'.

This categorization also obfuscates the fact that most of the narcotic drugs and psychotropic substances have medicinal properties.

Pharmaceutical preparations may be 'narcotic' or 'psychotropic' drugs

'Narcotic drugs' under the NDPS Act include a large number of drugs produced by the pharmaceutical industry such as morphine, codeine, fentanyl, pethidine etc. Conversely, psychotropic substances include substances that are not pharmaceutical drugs eg: LSD, Amphetamines, Methamphetamine.

With respect to the drugs profiled in the Report, Codeine, Dextropropoxyphene and Diphenoxylate are notified as 'manufactured drugs'¹¹ and therefore, 'narcotic drugs', whereas Alprazolam is a 'psychotropic substance'.¹² Contraventions in relation to Codeine, Dextropropoxyphene and Diphenoxylate are dealt with under section 21, whereas penalties for Alprazolam and other psychotropic substances are under section 22 of the NDPS Act.

All these are treated as 'pharmaceutical drugs' in the Report. Further, it is stated that: "*For the purpose of this Report, S. 22 offences are referred to as offences involving pharmaceutical drugs.*"

¹¹ Notification S.O.826(E), dated 14.11.1985, S.O. 40(E), dated 29.1.1993 and S.O. 1431(E), dated 21.6.2011 (hereinafter "notifications on manufactured drugs"). See entries at Sl. No. 35 (Codeine); Sl. No. 87 (Dextropropoxyphene) and Sl. No. 58 (Diphenoxylate)

¹² Entry at Sl. No. 30 in the Schedule to the NDPS Act, List of Psychotropic Substances

The Report's division of 'narcotic drugs' and 'pharmaceutical drugs' is wrong and misleading. The consideration of Court cases under section 22 of the NDPS Act as cases involving 'pharmaceutical drugs' is equally wrong and misleading. Consequently, the Report's findings and conclusions in relation to "pharmaceutical drugs" and cases under section 22 come under doubt.

v. Strict liability – not provided under the NDPS Act

The Report's claim that NDPS Act contains strict liability provisions is neither substantiated by the text of the law nor by judicial decisions.

Strict liability is understood to mean '*liability without fault*'. The principle was enunciated in the famous *Ryland v Fletcher*¹³ case in the following terms:-

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The very existence of an 'exception' under section 8(c) and of a host of activities regulated by Central or State NDPS Rules framed under sections 9 and 10 of the NDPS Act respectively, show that there is no strict liability.

Judicial decisions further confirm this. Take the case of *Alakh Ram v State of UP*¹⁴, where cannabis plants were allegedly seized from agricultural land belonging to the Appellant. If offences under the NDPS Act were of strict

¹³ *Rylands v Fletcher* L.R. 3H.L. 330

¹⁴ (2004)1 SCC 766

liability, it would be irrelevant whether the Appellant had control over the land and whether he had grown the plants himself or not. But that was not how the case was decided. The Supreme Court acquitted *Alakh Ram* as the prosecution could not show that he was the 'exclusive' owner of the land where the cannabis plants were found. Secondly, there was no evidence to prove that he had cultivated the plants himself. While acknowledging that *Alakh Ram* may have been negligent in not destroying the contraband growing on his land, the Court did not find him guilty under the NDPS Act. This could not have been the case had the offence been one of strict liability.

A similar position arises out of *Ram Singh v Central Bureau of Narcotics*,¹⁵ where the Supreme Court overturned the Appellant's conviction for possession and sale of opium under section 18 of the NDPS Act. In this case, the Appellant – *Ram Singh* was working in a hotel and had admittedly brought opium from the house of the hotel-owner to the hotel, where it was being sold. The Court held that in the absence of any evidence to show that *Ram Singh*, who was merely an employee, was in custody or control of the opium kept at the hotel, he could not be said to be 'possession' of the drug.

vi. Requirement of intent or *mens rea* under the NDPS Act

According to the Report,:- "*Stringent provisions are incorporated in the NDPS Act mainly through strict liability. Several offences have strict liability, i.e., they require no intention of committing a crime; the burden of proof is on the purported offenders and the provisions for bail are rigid.*"

International Conventions target 'intentional' acts

The NDPS Act follows international Conventions, which mandate States to discourage the production, manufacture, export, import, distribution, trade, use and possession etc. of narcotic drugs and psychotropic substances for non-

¹⁵ (2011)3 SCC(Cri) 181

medical and non-scientific purposes. Importantly, the Conventions require countries to adopt penal measures for acts committed “*intentionally*.”¹⁶

Under the 1988 Convention, domestic laws may be framed in a way that allows knowledge or intent required as an element of an offence to be “*inferred from objective factual circumstances*”.¹⁷

Intention under section 35, NDPS Act

It is this principle which is incorporated in section 35 of the NDPS Act where culpable mental state though required, is presumed by the Court trying the offence. While examining this provision, the Supreme Court observed: -

“*Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.*”¹⁸

Further, the presumption can be rebutted by the person accused. In other words, where a person is found to be in illicit possession of drugs, the NDPS Act presumes that s/he had the *mens rea* in relation to the contraband in her/his possession. But such person can show that s/he did not have knowledge of the presence of the drug or was authorized to possess it and therefore, lacks intention of committing a drug-offence.

Similarly, section 54 of the NDPS Act lays down presumption of guilt in relation to drugs and/or drug-paraphernalia, whose possession the person *cannot account for satisfactorily*. Apart from providing a satisfactory explanation for the possession of drugs and/or articles, the accused person can lead evidence to disprove the prosecution’s case of illicit possession.

Provisions related to presumption and reversal of burden of proof are not exclusive to the NDPS Act. In fact, elements of these can be seen in sections 105, 106 and 114 (a) of the Indian Evidence Act, 1872.

¹⁶ Article 36(1)(a), 1961 Convention; Article 22(1)(a), 1971 Convention; Article 3(1), 1988 Convention

¹⁷ Article 3 (3), 1988 Convention.

¹⁸ *Mohan Lal v State of Rajasthan* (2015) 6 SCC 222

Presumption of intent, which can be rebutted, is not the same thing as intent not being required or being irrelevant for fixing liability.

Burden doesn't shift entirely

The Supreme Court has held that the presumption under sections 35 and 54 of the NDPS Act kicks in *only* after the prosecution has established beyond reasonable doubt that the accused person was found in unlawful possession of drugs.¹⁹ Besides, the presumption of guilt can be rebutted through various modes including by pointing out lacunae in the prosecution's evidence [for eg: the search and seizure was conducted unlawfully] or leading evidence in defence [eg: the premises from which the drug was seized did not belong to the accused or was not under her/his control]. The Supreme Court has clarified that:-

“If the circumstances appearing in the prosecution case give reasonable assurance to the Court that the accused could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence.”²⁰

What the NDPS Act provides for is reversal of burden of proof, which though unfair, cannot be confused with strict liability. If the statement that offences under the NDPS Act carry strict liability and require no intention is accepted, then accused persons would be left defenseless in Court. The consequences of this would be disastrous to say the least.

vii. Dilution of safeguards under sections 42 and 50 of the NDPS Act

¹⁹ *Noor Aga v State of Punjab* (2008) 16 SCC 417 and more recently, a three-judge bench decision of the Supreme Court of India in *Mohan Lal v State of Punjab*, Criminal Appeal NO.1880 of 2011, decision dated 16.08.2018.

²⁰ *Baldev Singh v State of Haryana*(2015) 17 SCC 554

The Report mentions section 42 (procedure for conducting search without a warrant) and section 50 (procedure for searching a person suspected of carrying drugs) of the NDPS Act in passing. This is surprising as these provisions lay down important safeguards for persons accused of drug offences. During the first ten years of the NDPS Act coming into force, Courts zealously enforced these protections by observing that:-

“It must be borne in mind that the severer the punishment, the greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.”²¹

Compliance with these provisions was considered mandatory and a violation of the conditions contained therein was a ground for acquittal.²²

Over the following decades however, legislative changes²³ coupled with Court decisions led to a dilution of these safeguards. For example, the Supreme Court limited the scope of section 50 of the NDPS Act to bodily searches, which exclude personal belongings of the person being searched.²⁴ Similarly, the Court accepted the plea of ‘delayed compliance’ [post-search and seizure] with the requirement of recording information in writing by the Officer empowered to conduct a search under section 42.²⁵ Still other judgments declared that recording of prior information is unnecessary if the premises being searched are a public place under section 43 of the NDPS Act.

With the watering down of procedural requirements, it is easier for the prosecution to secure convictions under the NDPS Act. The Report loses sight of this completely.

²¹ *State of Punjab v Baldev Singh* (1999) 6 SCC 172

²² *Beckodan Abdul Rahiman v. State of Kerala* (2002) 4 SCC 229

²³ Amendments to section 42 and 50 under the NDPS (Amendment) Act, 2001

²⁴ *State of H.P v Pawan Kumar* (2005) 4 SCC 350

²⁵ *Karnail Singh v State of Haryana* (2009) 8 SCC 539

viii. Convictions based on ‘confessional statements’ – not discussed

According to the Report, strict liability provisions under the NDPS Act are responsible for the high rates of conviction in NDPS cases in Punjab. As discussed earlier, such provisions do not exist in the law.

Lawyers practicing in NDPS Courts, whether for the prosecution or the defence, will tell you that the basis of convictions in a vast majority of cases is the ‘so-called’ confessional statements recorded by officers under section 67 of the NDPS Act. A typical NDPS case proceeds like this:- a person is apprehended with drugs. After the seizure and recording of *panchnama*, the said person ‘voluntarily’ ‘confesses’ his ‘guilt’ to the Officer in a recorded statement. Thereafter, the person is formally arrested. If the maker of the statement names other persons, such persons are ‘summoned’ by the concerned officer. Their statements are recorded and in most cases, such persons are arrested as co-accused. Notwithstanding provisions of the Indian Evidence Act, the ‘so-called’ confessional statements are treated as admissible evidence and can be the sole basis for convicting the accused.²⁶ Until very recently, they could also be used for convicting a co-accused.²⁷ Letters retracting the statements by the accused are either disbelieved or not taken on board by the trial Court. All this, while there is no express provision under the NDPS Act to record statements, let alone confessional statements. Section 67 of the NDPS Act trumps the fundamental right against self-incrimination guaranteed in Article 20(3) of the Constitution.

Though the Report examines a large number of NDPS cases in Trial Courts, its data-set does not include analysis of so-called confessions recorded under section 67 in securing convictions. The omission is a serious one as especially since the Report purports to present the working of the NDPS Act comprehensively.

²⁶ *Kanhaiyalal v Union of India* (2008) 4 SCC 668

²⁷ *Surinder Kumar Khanna v Intelligence Officer Directorate of Revenue Intelligence* 2018 SCC Online SC 757

ix. Legislative history – some key insights

Possession for personal use v small quantity

The Report examines the law in relation to ‘small quantity’ and possession of drugs for personal use without appreciating the legislative history of section 27 of the NDPS Act.

The NDPS Act, as it stood in 1985, prescribed a minimum punishment of rigorous imprisonment for 10 years along with a fine of Rs 1 lakh for most offences with the exception of offences involving ganja and the cultivation of the cannabis plant, which attracted punishment upto 5 years imprisonment and fine of upto Rs 50,000.²⁸

The other exception was contained in section 27, which prescribed punishment of a maximum term of 6 months/1 year imprisonment (depending on the drug) or fine or both for consumption or illegal possession of any narcotic drug or psychotropic substance in ‘small quantity’, if the drug was proved to have been intended for personal consumption and not for sale or distribution. ‘Small quantity’ meant “*such quantity as may be specified by the Central Government by notification in the Official Gazette.*”²⁹ The onus of proving that the drug was intended for personal consumption and not for sale or distribution lay on the accused person.

After the amendment in 1989, the Central Government issued fresh Notifications specifying the ‘small quantity’ of 220 narcotic drugs and psychotropic substances³⁰ for the purposes of imposing lesser penalty under section 27 of the NDPS Act. The Report contains the recommendations of the

²⁸ Section 20 (i), NDPS Act, 1985 (Act 61 of 1985)

²⁹ Initially, ‘small quantity’ was indicated by the Central Government by Notification No. S.O. 825(E), dated 14th November 1985 which stated that, for the purposes of section 27 of the NDPS Act, ‘small quantity’ of narcotic drug and psychotropic substance would be the “quantity specified in each case by the concerned district chief medical authority.” This was partially modified by Notification No. S.O. 827(E), dated 14th November 1985 to specific the ‘small quantity’ of five narcotic drugs, namely: - Heroin – 250mg; Hashish or Charas -5gms; Opium – 5gms; Cocaine -125mgs; and Ganja – 500gms.

³⁰ Notification No. S.O. 527(E) dated 16th July, 1996 and S.O. 503(E) dated 18th July, 1996

Committee constituted by the Ministry of Health and Family Welfare for this purpose.

Though beneficent, section 27 was not used

Despite the possibility of imposing a lesser sentence under section 27 of the NDPS Act, persons caught with small quantity of drugs were still sentenced to 10 years imprisonment and hefty fines, as most of the times; the accused person was unable to prove that the drug was meant for personal consumption and not for sale.

In several such cases, it was the Supreme Court that ultimately provided relief to the accused appellant by invoking the provision on small quantity.³¹ For instance in *Raju v State of Kerala*,³² the Appellant was found with possession of 100 mg heroin worth Rs. 25. The Appellant's plea that the drug was for personal use was rejected by the lower Courts on the ground that he showed no symptoms of withdrawal while he was in custody and not using heroin. The Supreme Court expressed doubt whether such a small quantity of heroin could have been intended for sale to make profit. Ultimately, the Court invoked section 27 of the NDPS Act and modified the punishment from 10 years imprisonment to 1 year on the basis that the heroin was meant for personal use, even though the same was not 'proved'.

Another reason why drug users did not invoke the plea of personal use under section 27 of the NDPS Act was that it would amount to an admission of being in possession of drugs and risk certain conviction.

The requirement of 'admitting' to illicit drug-possession and 'proving' personal use made section 27 of the NDPS Act inaccessible. As a result, a large number of persons including those who use drugs languished in jail without the possibility of bail and/or lenient sentences.

³¹ *Gaunter Edwin Kircher v. State of Goa* 1993 Cri LJ 1485; *Hussain v State of Kerala* (2000) 8 SCC 139

³² *Raju @ Salam v State of Kerala* (1999) 4 SCC 725

It was in this backdrop that the NDPS (Amendment) Bill, 1998 was introduced and passed in 2001 to introduce graded quantities.

x. Object and import of the 2001 Amendments – *far reaching*

The NDPS (Amendment) Act of 2001 was a watershed moment, as Parliament, in a rare occasion, acknowledged the harmful consequences of harsh provisions of the NDPS Act and sought to correct course by introducing graded penalties, on the basis of whether the offence involved drugs in ‘small’, ‘intermediate’ or ‘commercial quantity’.

Though the proposed changes were criticized in Parliament for being ‘soft on drug offenders’, Shri Yashwant Sinha, the then Finance Minister who introduced the Amendment Bill, remained firm and saw through its adoption by the House.

The Report however, faults the 2001 Amendment by stating that that it resulted in treating “*anyone caught with drugs, whether for self-use or for sale, as a criminal.*” This criticism is misplaced.

The NDPS Act has always criminalized consumption and possession of drugs for personal use. Drug users did not become criminals as a result of the NDPS (Amendment) Act, 2001.

Doing away with ‘personal use’, extended protection of the law

The Legislature’s decision to do away with the requirement of proving possession for personal use for imposing lesser punishment and adopting the uniform criteria of ‘small quantity’ offences must be seen in the context of non-application of section 27, discussed above.

The 2001 Amendments were far-reaching in that they extended lenient sentencing (imprisonment upto 6 months and/or fine of Rs 10,000) and diversion (under sections 39 and 64A) to ‘anyone’ caught with a small amount

of drugs, irrespective of whether the drug was meant personal use or sale. This also helped drug users who may be involved in sale or supply of small quantities to peers.

Problem is that quantity alone determines penalty

The real drawback of the NDPS Amendment Act, 2001 is that quantity was made the sole determinant for the severity of penal measures imposed under the law including restrictions on bail, pre-trial detention and sentencing. Other factors such as the role and involvement of the accused in the crime - whether s/he is a mere carrier or controls the illicit trade are rendered irrelevant. The Report fails to examine this aspect completely.

xi. Quantity-based classification under the NDPS Act

All quantities are a range

According to the Report:-*“The category of intermediate quantity does not feature in the Schedule of the NDPS Act, but is negatively defined as the range between small quantity and commercial quantity. Intermediate quantity encompasses a wide range.”*

The Report overlooks the fact that under the law as well as the 2001 notification³³, ‘small’ and ‘commercial’ quantities are also not fixed numerical categories, but thresholds that create a range.

‘Small quantity’ is *any* quantity lesser than the threshold notified, whereas ‘commercial quantity’ is *any* quantity higher than the threshold notified for that particular substance. Thus, in the case of heroin, any amount less than 5 grams is considered ‘small quantity’ and any amount higher than 250 grams is considered ‘commercial quantity’. Unlike ‘intermediate quantity’, where the lower and upper-limits are definite, for commercial quantity, there is no upper-limit. Therefore, under the NDPS Act, 251 grams of heroin is ‘commercial

³³ Notification S.O. 1055(E) dated 19.10.2001 issued under section 2, sub-section (viiia) and (xxiiia) of the NDPS Act

quantity' as is 1 kilogram, 2 kilograms, 10 kilograms, 100 kilograms or 1,000 kilograms of heroin. The range in commercial quantity is not only wide but also indefinite.

The Report presents the wide range of drug-quantity and wide sentencing discretion for 'intermediate quantity' as a problem. It fails to notice that for offences involving drugs in 'intermediate quantities', Courts have attempted to calibrate the scale³⁴ by imposing lesser punishments for quantities closer to the lower-limit (small-quantity threshold) and higher sentences for quantities closer to the upper-limit (commercial-quantity threshold). This is evident from Tables 12a and 12b @ pg 49 of Vol I the Report. It is unclear why the authors find the exercise of judicial discretion in sentencing for intermediate quantity cases on sound, legal principles problematic.

xii. Impact of the 2009 notification – *everyone's affected*

Pharmaceutical preparations

The Report is correct in documenting the unfair and illogical consequences of the 2009 notification,³⁵ which has been interpreted to apply to the total weight, by adding the weight of inert material to the weight of the contraband. The impact on pharmaceutical drugs – whether they are categorized as 'narcotic drugs' or 'psychotropic substances' is direct and severe, not just because of the lower thresholds prescribed for them in the 2001 notification, which the Report rightly notes, but also because pharmaceutical preparations are always found mixed with neutral materials.

However, the tabular data (Tables 16a and 16b) is misleading as punitive provisions of the NDPS Act apply on the basis of the weight in grams and not on the number of tablets.

Determination of 'small' and 'intermediate' quantities also affected

³⁴ *Sonu@ Kane v State* 2007 (96) DRJ 509

³⁵ Notification No. S2941(E) dated 18.11.2009

The effect of the 2009 notification has been noticed only in relation to 'intermediate' and 'commercial' quantity cases.

According to the Report, most of the NDPS cases being tried in Punjab involve 'intermediate quantity' and in many instances, persons prosecuted for 'intermediate' amounts are drug dependent themselves. The Report goes to say that such persons are denied the 'benefit' of provisions for 'small quantity', even though they are drug users.

Surprisingly, the authors do not examine whether such persons, who are drug users, may, actually be in possession of drugs in 'small quantity' but are tried for 'intermediate quantity' because of the 2009 notification. If that is the case, then the fault lies not with the quantity-based classification introduced in the NDPS (Amendment) Act, 2001 but with the determination of drug-quantity under the 2009 notification, which has been the subject matter of extensive litigation before Courts.

xiii. NDPS (Amendment) Act 2014 – *wrongly described*

The Report confuses the NDPS (Amendment) Bill 2011, which was introduced in Parliament on 8.9.2011 with the NDPS (Amendment) Act 2014 which was adopted by Parliament and came into force on 1.5.2014. Many clauses contained in the NDPS (Amendment) Bill, 2011 were dropped from the NDPS (Amendment) Act 2014 and conversely, many provisions that find a place in the NDPS (Amendment) Act 2014, were not part of the NDPS (Amendment) Bill 2011. The Report misses these vital legal issues completely.

Proposed amendments on 'entire quantity' were dropped

The Report makes a very serious error when it states that:-*"The 2011 Amendment pointedly clarified that the entire quantity of drug seized should be considered while determining punishment, and not just the pure drug content"*.

While a proposal to amend the definitions of ‘commercial’ and ‘small’ quantity was introduced in 2011 which would have allowed imposition of punishment on the basis of the total quantity seized and not the actual quantity of the drug found in the seizure, the same was rejected by the Parliamentary Standing Committee on Finance (“Standing Committee”) as being vague and resulting in arbitrariness and undermining the rationalized penalty structure introduced by the 2001 Amendment to the NDPS Act.³⁶

The Central Government accepted the Standing Committee’s suggestion and dropped the proposed amendments in relation to determination of quantity from the NDPS (Amendment) Act 2014 – as passed by Parliament. Consequently, **there is no legislative change in the NDPS Act to allow drug quantity to be measured by the weight of the seizure.** That is why the 2009 notification continues to be invoked.

By suggesting that such an amendment has been incorporated in the NDPS Act, the Report makes a glaring mistake.

Punishment for ‘small quantity’ was enhanced

The Report overlooks another important amendment incorporated in 2014 in relation to sentencing. The NDPS (Amendment) Bill, 2011 had proposed to reduce the maximum sentence under section 27 for consumption of drugs to 6 months imprisonment, so that it is proportionate to the punishment for small quantity offences, which was, at the time, imprisonment upto 6 months and/or fine. The Standing Committee objected and suggested that instead of reducing penalty for consumption of drugs, the penalty for small quantity offences should be enhanced. Accordingly, under the NDPS (Amendment) Act, 2014 the

³⁶ Standing Committee on Finance (2011-12), Fifteenth Lok Sabha, Ministry of Finance, Department of Revenue, The Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011 Fiftieth Report, Lok Sabha Secretariat, New Delhi, March 2012.

<http://www.prsindia.org/uploads/media/Narcotic%20Drugs/SCR%20Narcotic%20Drugs%20and%20Psychotropic%20Substances%20Amendment%20Bill%202012.pdf>

maximum punishment for all small quantity offences has been increased from 6 months to 1 year rigorous imprisonment. This has a bearing on sentences for intermediate quantity too, which, after 1.5.2014, logically start from 1 year upwards.

It is surprising that while Parliamentary debates of 1985 have been recorded in extensive detail, the Report glosses over legislative developments leading up to the most recent amendments to the NDPS Act. More so, when the 2014 Amendments have a direct bearing on the issues highlighted in the Report – namely determination of drug quantities, sentencing and decriminalization of use and possession of drugs for personal use.

xiv. Sampling and forensics - *additional considerations*

The discrepancies in sampling and forensic examination are rightly noted. This problem is not exclusive to Punjab but can be seen in NDPS Courts throughout the country. The procedure for seizure, sampling and testing is prescribed by the Narcotics Control Bureau in 'Standing Instructions', whose enforcement varies. Further, Courts have not been consistent in demanding their full compliance.

Besides, the scope of section 52A(2) and (3) of the NDPS Act which lays down a special procedure for production of seized drugs and materials has not been fully appreciated by Courts. Whether this procedure accords with principles of fair trial is another issue that is still to be decided.

xv. Uncritical support for 'de-addiction' and 'rehabilitation' of 'addicts'

Rehabilitation – a rights-based measure?

According to the Report, one of the key objects of the NDPS Act is:- "*rehabilitation of drug 'addicts'*". The basis of this statement is unclear as the

Preamble, Long Title and Statement of Objects and Reasons of the NDPS Act do not say anything about rehabilitation.

The expression:—“*identification, treatment, education, after-care, rehabilitation and social integration of ‘addicts’*” under section 71 of the NDPS Act has been borrowed from international Conventions and is seen as measures to *reduce* the ‘demand’ for illicit drugs. They neither show any real or abiding concern for persons who use drugs nor accord rights, respect and dignity to them.

The uncritical acceptance of ‘de-addiction’ and ‘rehabilitation’ of ‘addicts’ as desirable policy goals is questionable. Public health³⁷ and human rights experts³⁸ and people who use drugs have condemned the practice of sending users to ‘rehabilitation’ centres for ‘de-addiction’. Such measures are neither rights-based nor provide effective treatment and care for drug dependent persons. Even in Punjab, there is growing acceptance of the failure of the ‘de-addiction’ and ‘rehabilitation’ model, which is outmoded. The Report fails to take note of this.

No cases under section 39 or section 64A

The study does not examine any NDPS case involving consumption (under section 27) or ‘small quantity’ offences before the Magistrate, let alone any case where a person was diverted to treatment by a Court either under section 64A or section 39. There is hardly any documentation of the use of these provisions in Court. On what basis do the authors conclude that these provisions are working well and must be applied to persons found with intermediate quantities? The Report’s recommendations on diversion are unsubstantiated.

xvi. Support for harm reduction – missing

³⁷ http://www.who.int/hiv/topics/idu/joint_statement_20120308.pdf

³⁸ Report of the Special Rapporteur on the right to the highest attainable standard of health, dated 10 August 2009, A/64/272. <https://www.ohchr.org/Documents/Issues/Water/Contributionsstigma/others/SPhealthI.pdf>

Across the world, the narrative around drug policies is being informed by the philosophy of ‘harm reduction’, which seeks to reduce the adverse health, social and economic consequences of the use of psychoactive drugs without necessarily reducing drug consumption.³⁹ India too, has adopted harm reduction as a public health strategy, albeit in the limited context of injecting drug use and prevention of HIV. Under the NDPS (Amendment) Act, 2014, Central and State Governments are encouraged to provide facilities for ‘management’ of drug dependence⁴⁰ and not just centres that make persons ‘drug free’.

The Government of Punjab implements harm reduction programmes through the Punjab State AIDS Control Society for an estimated 22, 500 injecting drug users in the State.⁴¹ Over the last one year, it has also established “Outpatient Opioid Assisted Treatment” (OOAT) centres in many districts with the aim of providing pharmacologically- assisted treatment in community health settings.⁴²

These services, which are in accordance with the amendments to section 71(1) of the NDPS Act, are consistent with health and human rights standards⁴³ Unfortunately, the Report neither acknowledges nor advances the cause of scaling-up harm reduction policies and practices in India or Punjab. This is a serious flaw.

Other policy implications

The Report’s revelation that most convictions under the NDPS Act in Punjab are not for ‘commercial quantity’ offences has other policy implications. It is clear that persons apprehended for drugs are small or mid-level actors and not those controlling the drug trade. Significantly, the Report does not document a

³⁹ <https://www.hri.global/what-is-harm-reduction>

⁴⁰ Section 71(1), NDPS Act

⁴¹ http://punjabsacs.punjab.gov.in/sites/default/files/OST_list_31-03-2017.pdf

⁴² <https://indianexpress.com/article/india/punjab-govt-kickstarts-new-opd-based-project-for-treatment-of-drug-addicts-4908285/>

⁴³ <https://www.dnaindia.com/analysis/column-a-template-to-fight-addiction-2574423>

single case where the accused was linked to other organized crimes like illicit arms or terror-financing. This belies the Central Government's claim of a "growing nexus" between drugs crimes and terrorist networks,⁴⁴ which has been used to resist efforts to debate and discuss the current state of drug control. We wished the Report had made observations on this issue.

Conclusion

Vidhi Legal Centre's Report is certainly a step forward in the inquiry into the working of the NDPS Act. But the reasoning and analysis of the law and consequently, the findings are substantially flawed. As a result, the recommendations which otherwise have been shown to be sound in other jurisdictions, eg Portugal, need to be further worked upon before concrete proposals to reform the NDPS Act can be made.

Authored by Tripti Tandon
with inputs from Samyak Gangwal and Anand Grover
Lawyers Collective

⁴⁴ Statement by Mr. Arun Jaitley, Minister of Finance, Government of India, 19 April 2016, 30th Session of the United Nations General Assembly on World Drug Problem, New York. Available at <https://palliumindia.org/cms/wp-content/uploads/2016/04/India-UNGASS-Statement.pdf>