

Sentencing policy under the NDPS Act

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NDPS Act, 1985

Statement of objects and reasons

(1)...many deficiencies in existing laws

(i) *scheme of penalties are not sufficiently deterrent* [3 to 4 yrs imprisonment]; No minimum sentence provided;

(ii)..

(iii) *vast body of international law* in the field of drug control, to which India must comply

(iv)....

(2) .. *considerably enhance the penalties particularly for trafficking offences,*

International Drug Conventions

- **Single Convention on Narcotic Drugs, 1961** (as amended by 1972 Protocol)
- **Convention on Psychotropic Substances, 1971**
- **Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances, 1988**
- Require Member States to **criminalise** production, manufacture, export, import, distribution, trade, use & possession of narcotic drugs & psychotropic substances, except for medical & scientific use
- Allow **alternatives to incarceration**, incl *treatment, education, rehabilitation and social reintegration* for minor offences
- Punishment, in the nature of ***“imprisonment or other forms of deprivation of liberty”***
- ***“...having due regard to the constitutional, legal and administrative systems”***

International Drug Conventions: object & purpose

“Recognising that :-

- that the medical use of narcotic drugs continues to be indispensable for the relief of pain & suffering & that adequate provision must be made to ensure the availability of narcotic drugs for such purposes”* [Preamble, 1961 Convention]

- that the use of psychotropic substances for medical & scientific purposes is indispensable & that their availability for such purposes should not be unduly restricted ”* [Preamble, 1971 Convention]

International Drug Conventions: object and purpose

- Recognising *also*:
 - “*..serious evil for the individual ...fraught with social and economic danger to mankind*” (1961 Convention)
 - “*...rigorous measures necessary to restrict use*” (1971 Convention)
 - “*...poses a serious threat to the health and welfare of human beings*” (1988 Convention)
- Allude to ‘offences’ that are:
 - *serious*
 - *not sufficiently serious*
 - *appropriate cases of a minor nature*
 - *factual circumstances which make commission of offence particularly serious*

NDPS Act: *Offences*

- Cultivation (coca; opium poppy & cannabis)
- Production
- Manufacture
- Possession
- Sale
- Purchase
- Transport
- Warehouse
- Use
- **Consumption**
- Import inter-State
- Export inter-state
- Import into India
- Export from India
- Transshipment
- Including attempt, abetment and conspiracy

Except for medical & scientific purposes , in accordance with the Act or Rules or conditions of license, if so prescribed

Sentencing Scheme under NDPS Act, 1985

- Min 10 yrs & Rs 1 lakh fine
- Max 20 yrs & Rs 2 lakh fine
 - Repeat offence: Min 15 yrs & Rs 1.5 lakh fine, may extend to 30 yrs & Rs 3 lakh fine
- Cannabis cultivation & ganja: max 5 yrs & Rs 50,000 fine
 - Repeat offence: max 10yrs & Rs 1 lakh fine
- For '**addicts**', consumption OR possession of ***small quantity*** [notified by Central govt] ***for personal consumption***:
 - cocaine, morphine, heroin: max of 1 yr or fine or both
 - other drugs: max 6 months

but ***only if accused could prove*** drug was for his own use

Also, Court could divert from prison to treatment

NDPS (Amendment) Bill, 1988

- Introduced in less than 4 yrs of 1985 Act
- Trigger:
 - International convention on illicit drug trafficking, 1988
 - SAARC & Bilateral agreements
 - Perceived vulnerability due to proximity to opium producing regions

NDPS (Amendment) Act, 1989

- **Act made harsher**
 - Restrictions on bail (u/s37)
 - Bar on suspension, commutation or remission of sentences (u/s32A)
 - Mandatory death penalty on subsequent conviction for specific crimes (u/s 31A)
 - Regulation & prohibition over ‘controlled substances’ (u/s 2(viid), 9A, 25A)
 - New offence of financing illicit traffic & harbouring of offenders (u/s 27A)
 - Forfeiture of property of offenders
 - Special Courts (u/s 36A)

Consequences:
Small quantity; long sentence

- *“seizure of 0.04 gm. brown sugar wrapped in a paper inside a match box. When accused was searched & contraband was recovered, he had no satisfactory explanation to offer for possession of the same.”*
- *“sentenced to undergo RI of 10 years & pay a fine of Rs. 1 lakh, & a further period of 2 years’ RI, in default.”*

Jt 2002 (8) SC 292

Courts - Quantity indicates use?

- In *Gaunter Edwin Kircher v. State of Goa* 1993 Cri LJ 1485, SC held that possession of <5 gm heroin with paraphernalia for smoking intended for personal use, not sale
- In *Raju v. State of Kerala* AIR 1999 SC 2139, where appellant was sentenced to 10 yrs & Rs. 1 lakh fine for possession of 100 mg heroin worth Rs. 25. Absence of withdrawal seen as evidence that accused not drug dependent. SC held such small qty could not have been meant for sale

Courts – Strict about safeguards

- *State of Punjab v Balbir Singh* (1994) 3 SCC 299
“The object of NDPS Act is to make stringent provisions for control & regulation of operations relating to drugs. At the same time, to avoid harm to the innocent persons & avoid abuse of the provisions by the officers, ***certain safeguards*** are provided which in the context have to be observed strictly.”
- *State of Punjab v Baldev Singh* (1999) 6 SCC 172
“This Court cannot overlook the context in which the NDPS Act operates & particularly the widespread illiteracy among persons subject to drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that ***all the safeguards*** provided in the statute are scrupulously followed.”

Long period of incarceration as under-trial

- *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India* (1994) 6 SCC 731 – continuous incarceration due to strict bail provisions & no Special Courts for trial
- **National Human Rights Commission** (1995-96) reported on undertrial prisoners & recommended '***better graded punishment under the NDPS Act***'

NDPS (Amendment) Bill, 1998

- Need to grade punishment on the basis of quantity of drugs involved in the offence
- Ref to Australian law for quantity categorisation
- Hon. Min of Finance [Shri Yashwant Sinha]:-
*“punishments prescribed are harsh, disproportionate at times to the gravity of the offence.... **reduce extraordinary harshness vis-a-vis small time offenders”***

Mood of the legislature

- Tenth Report, Standing Committee on Finance (1998-99), 12th Lok Sabha, NDPS (Amendment) Bill, 1998:

“Keeping in view that rural population of parts of UP, Bihar & Orissa consume cannabis on special occasions like Holi & other family functions, we suggest that punishment u/s 27(b) should be a maximum of 3 months imprisonment or fine of upto Rs 5,000.”

But overall, criticism of revising the sentencing scheme

NDPS (Amendment) Act, 2001

Statement of objects and reasons:-

“Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts ‘and’ those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences”

NDPS (Amendment) Act, 2001

- Punishment (& bail provisions) graded as per quantity: –
 - Small: “means any quantity lesser than the quantity specified *by the Central Government by notification in the Official Gazette*” (u/s 2(xxiiia))
 - Commercial: “means any quantity greater than the quantity specified *by the Central Government by notification in the Official Gazette*” (u/s 2(viia))
- And introduction of **section 32B** “**Factors to be taken into account for imposing higher than minimum punishment**”

Sentencing, post NDPS (Amendment) Act, 2014

- Small: 1yr (max) or Rs 10,000 fine or both
- Intermediate & controlled substances: 1 yr (min?) to 10yrs (max) & upto Rs1 lakh fine
- Commercial:
 - 10 yr (min) to 20 yr (max)
 - Fine Rs 1lakh (min) to Rs 2 lakh to more
 - Fine amount unlimited (?), if reasons recorded in the judgment
- Imprisonment in lieu of payment of fine

People who use drugs

- NDPS Act offers *alternative to criminalisation* to:
 - **Addict** (person dependent on drugs), who is
 - Charged with or convicted for:
 - Consumption or; (u/s 27)
 - Offences involving small quantity
- Section 64A: Immunity from prosecution if accused voluntarily seeks & 'completes' treatment
- Section 39: Person convicted may be diverted to treatment instead of jail

NDPS Act: Treatment

- Restrictive application of sec 64A ('strict' as opposed to 'liberal' construction)
- Insistence & rejection on 'technical grounds'
 - *Shaji v. State of Kerala* 2004 (3) KLT 270
 - *Fardeen Firoze Khan v Union of India* 2007 CriLJ 1758
 - *Anuradha Sanyal* (Bom HC, 2010)
- Defeats legislative intent to depenalise & encourage treatment seeking
- Whether 'long term pharmacological therapy' fulfils "completing treatment" ?

More than minimum punishment – relevance of section 32B

- At least 7 decisions of the Allahabad High Court (2014 – 2017), where sentence [higher than the minimum for commercial qty] was reduced, due to non-consideration of section 32B.
- Commercial quantity already factored in the minimum sentence prescribed by law
- Something more [*cogent reasons*] for imposing harsher sentence
- Section 32B alludes to:
 - ***Additional factors*** that the Court may deem fit; *and*
 - ***Enumerated factors*** [violence/use of arms; public office; children affected; vicinity of educational facility; organised gang; other illegal activities]

However...

- *“A bare reading of the above-said provision [S32B] makes it clear that there is no bar to impose a punishment higher than the prescribed minimum.”*
- In a decision dt 2.6.2016, the Punjab High Court upheld a sentence of 20 yrs, despite non-consideration of section 32B
- No pronouncement by the SC on this yet

NDPS Act: Repeat Offenders

- Dealt with strictly under Sections 31 & 31A
- Section 31: **Enhanced punishment** of imprisonment & fine (one & a half times) of max punishment for previous offence
- Section 31A: **Death penalty**, upon **subsequent** conviction, if:
 - First offence: Section 19 (embezzlement of lawfully cultivated opium), Section 24 (unauthorised external dealings), Section 27A (illicit financing of trade or harbouring drug traders) and offences of commercial quantity
 - Second offence: engaging in production, manufacture, possession, transportation, import, export or transshipment of a **large quantity of drugs** (eg: 20 kg cannabis; 1 kg heroin)
- Mandatory death penalty 'read down' in *Indian Harm Reduction Network v Union of India* 2012 Bom CR(Cri) 121 & made *discretionary* under NDPS Amendments, 2014

Repeat offenders, post 2014

- Offenders falling only u/s 31 [**15 yrs [min] to 30 yrs [max]**]
- Offenders falling u/s 31A, trial Court may:-
 - First, consider **death sentence** & reject, by recording reasons;
 - Thereafter, consider sentence u/s 31, which could be **30 yrs** (max) or **15 yrs** (min) or **anything in between**
- What guidance available to Courts for sentencing within such a wide range?
- Eg: *Gulam Mohammad Malik v State of Gujarat* 2017 SCC Online SC 413
 - Appellant's sentence reduced from death, to 30yrs, to 16yrs with order to run concurrently with sentence in first conviction

Benefit of order on concurrent sentence

- Court's power **u/s 427(1), CrPC** to direct first & subsequent sentence to run concurrently is not whittled down by section 32A, NDPS Act
[*Mohan Bhanudas Mohite v State of Maharashtra*, 2004, BomHC]
- Cases where benefit given:
 - *Pritam Singh v State of Punjab* (2007, PHHC)
(Total sentence: 10 + 15 = 25yrs)
 - *Jagdish v State of MP* (2009, MPHC)
(Total sentence: 10+ 10 =20 yrs)
- Denied:
 - *Paramjit Singh v State of Punjab* (2015, PHHC)
(3 Convictions; Total sentence: 10+12+15 yrs = 37 yrs)

Concluding thoughts...

- Absence of legislative and judicial policy on sentencing
- The only policy is that sentencing must be ‘individualised’, but not discriminatory or arbitrary
- Examination of:
 - Circumstances of ‘crime’ and ‘criminal’
 - Aggravating and mitigating factors
- Drug offences –
 - Quantity determining gravity of offence or other factors also?
 - Consequences of criminal action:
 - Actual or perceived
 - Intended or unintended
 - Harm: direct or remote

Discussed in *Soman v State of Kerala* (2013) 11 SCC 382