

Additional Submissions to the Parliamentary Standing Committee on Finance on the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011

The Lawyers Collective is pleased to submit detailed comments on the *Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011* and respond to the questions raised by the Hon'ble Members of the Parliamentary Standing Committee on Finance. The comments below are in addition to the written and oral submissions already made to the Standing Committee.

1. Comments on the Proposed Amendments

Below are the specific comments on the amending clauses in the Bill:

1.1 Proposed changes in the definitions of commercial quantity and small quantity

The NDPS (Amendment) Bill, 2011 seeks to modify the definitions of the 'commercial quantity' and 'small quantity', which will affect the penalties imposed under the NDPS Act. The Lawyers Collective is particularly concerned that the proposed amendments may weaken the rationalized penalty structure introduced by the 2001 Amendment to the NDPS Act, wherein persons involved in minor drug offences were subject to lesser punishment while traffickers attracted stringent sentences.

Clause 2:- Sub-clauses 2(b) and 2(c) seek to insert the word "*preparation*" in the definitions of commercial and small quantity, as well as add the phrase "*in terms of the pure drug content or otherwise*".

Proportionate Sentencing based on quantity

The 2001 Amendment was a watershed development in the history of the NDPS Act that sought to make a distinction between drug users/persons committing minor offences and drug traffickers, by rationalizing punishment on the basis of the quantity of drugs involved. The Act classified narcotic drugs and psychotropic substances into "small" and "commercial" quantities and brought in notification S.O 1055(E), dated 19th October 2001 (hereinafter "2001 notification") that specified quantity thresholds for 239 entries (238 drugs + 1 entry for mixture of one or more drugs).¹ Note 2 of the 2001 Notification made it clear that the stipulated quantities applied to the preparations of drugs and substances also.² Thus, quantity of drugs involved in the offence became the basis to distinguish drug traffickers from less serious offenders.

¹ Central Government notification S.O 1055(E), dated 19th October 2001 published in the Gazette of India, Extra., Pt II, Sec 3(ii), dated 19th October, 2001

² Note 2 to the 2001 Notification reads as: "*The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of Note 1 above.*"

Determination of Drug Quantity by Courts

Prior to 2001, in cases pertaining to drug users, the Supreme Court, took into account the actual drug content in calculating quantity and not the entire quantity seized³. After the 2001 notification, the penalties were determined by the quantity of drugs involved, but the NDPS Act did not provide any guidance of ascertaining the quantity of narcotic drugs or psychotropic substances. Consequently, some Courts relied on definitions of certain drugs that referred to a numerical percentage, like

- 'coca leaf' includes leaf of the coca plant, mixture of the same and all preparations containing more than 0.1% cocaine [Section 2(vi)]
- 'opium' consists of coagulated juice of opium poppy; mixture of opium poppy juice including preparations with 0.2% morphine [Section 2(xv)]
- 'opium derivatives' includes medicinal opium, prepared opium, heroin, morphine, codeine, thebaine and preparations containing more than 0.2% morphine or containing any diacetylmorphine [Section 2(vi)]

to calculate the quantity of drugs involved.

This resulted in several inconsistencies. In many cases, the Courts relied on the definitions of drugs to calculate the total quantity of drugs involved⁴, while in other cases including those relating to preparations of diacetylmorphine, the Courts ignored the definitions and looked at the percentage of diacetylmorphine, in contrast to the definition in S.2(vi) that includes preparations containing any diacetylmorphine.⁵ The inconsistency became more pronounced when the drug was a preparation or a mixture inclusive of neutral materials, wherein some Courts included neutral materials in calculating the total quantity of drugs involved while others excluded neutral materials.⁶

E. Michael Raj's Case

In 2008, the Supreme Court in *E. Michael Raj v. Intelligence Officer, Narcotic Control Bureau*⁷ held that "*in the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance/s, the quantity of the neutral substance/s is not to be taken into consideration while determining the small quantity or commercial quantity*

³ *Hussain v State of Kerala* (2000)8 SCC 139; *Ouseph v State of Kerala* [2001, Supreme Court; reported in (2004) 4 SCC 446]

⁴ *Kamlesh Patidar v. State of Rajasthan* [2009CriLJ4161]

⁵ *Ansar Ahmed v. State (Govt. of NCT of Delhi)* [123(2005) DLT 563]

⁶ *Ansar Ahmed v. State (Govt. of NCT of Delhi)* [123(2005) DLT 563], *Zakirhussain Shakurbhai Shaikh v. State of Gujarat* [Cri. Appeal No. 436 of 2007, decided on 23.12.2009, Gujarat High Court], *Ravindra Kumar v NCT of Delhi (State)* [55(2010) DLT 172]

⁷ [(2008) 5 SCC 161]

of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity.”

Despite the above decision, the confusion in determination of drug quantity did not cease. Some Courts sought to limit the application of Michael Raj decision only to cases of heroin or opium derivatives. Opium/Cannabis cases were distinguished from the rest and held to be inclusive of neutral materials.⁸

2009 Notification

In 2009, the Central Government brought in a new notification, through S.O.2941 (E), dated 18 November 2009 (“2009 Notification” hereinafter), wherein the quantities shown as small and commercial, apply to the entire mixture or solution of the narcotic drug or psychotropic substance and not just its pure drug content.⁹ It must be noted that the 2009 notification makes the entire quantity of narcotic drugs or psychotropic substances liable, irrespective of pure drug content. It is contended that the relation between the 2009 notification and the proposed amendment, which brings in the terms ‘*pure drug content or otherwise*’ to the definitions of commercial and small quantity, is unclear and will further compound the confusion and result in arbitrary interpretation of the Act.

Penal Statutes can’t be vague

It is a cardinal principle of penal law that what constitutes an offence must be clear and not vague. It is argued that preparations are already included in the definition of narcotic drugs and psychotropic substances under the present Act as well as in the 2001 notification. It is unclear what the addition of the expression “*preparation*” to the definitions of commercial and small quantities would achieve. Further, the term ‘*otherwise*’ in the proposed amendment is vague and imprecise and can result in arbitrary interpretation. The fact that the Act also prescribes the death penalty for repeat offences involving specified quantity of drugs, underscores the importance of due diligence in ascertaining the quantity of drug involved in the offence.

It is submitted that apart from capricious sentencing, arbitrariness in the determination of quantity would have other significant implications, since quantity is a determinant factor vis-a-vis i) jurisdiction of courts, that is, if the accused to be tried

⁸ *Ravindra Kumar v NCT of Delhi (State)* [55(2010) DLT 172, *Dilip v. State* 2011 CriLJ 334

⁹ The notification S.O. 2941(E) dated 18.11.2009 makes the following amendment in the Notification S.O. 1055(E), dated 19th October, 2001:

In the Table at the end after Note 3, the following Note shall be inserted, namely:- “(4) *The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.*”

before the Magistrate or the Special Court¹⁰, ii) grant of bail¹¹ and iii) the duration of pre-trial detention¹².

Lawyers Collective's Suggestions: In light of the above, following recommendations are made-

1) Only pure drug content to be considered for penalties

- In a mixture or preparation of narcotic drugs or psychotropic substances, only the actual content of narcotic drugs or psychotropic substances should be taken into account and the neutral materials ought to be excluded. Imposing penalty for non-offending substances is unfair and unjust, as observed by the Hon'ble Courts: "*while a recovery of 4 grams of heroin would amount to a small quantity, the same 4 grams mixed up with say 250 grams of powdered sugar would be quantified as a 'commercial quantity'! And, where would this absurdity stop?*"¹³
- The NDPS Act itself considers the quality of drugs important for the following purposes:
 - Under Section 52-A(2), the arresting officer has to make an inventory of seized drugs with details relating to their description, quality, quantity, mode of packing, marks, or such other identifying particulars of the narcotic drugs and psychotropic substances as the officer referred to in sub section(1) may consider relevant to the identity of such drugs or substances. Further, Section 52(4) treats such inventory as primary evidence in respect of such offence.
 - The Government has a policy of granting rewards to informers and government servants for giving information on seizures of illicit drugs, provided the drugs meet a prescribed purity criterion.¹⁴ For e.g., for morphine and its salts or heroin and its salts, purity has to be 90%.¹⁵ The reward will be reduced pro rata if the purity threshold is not met.
 - Purity of opium forms a significant aspect in government regulation of licit cultivation. Under Section 9(2), opium produced by licensed cultivators to be weighed and classified according to its 'quality and consistency' and price to be fixed accordingly¹⁶. Similarly, opium received at the government factory is checked for 'quality and consistence' and if found to be adulterated, then it is liable to be confiscated by the Government

¹⁰ Section 36-A (1) (a) of the NDPS Act

¹¹ Section 37 (1) (b) of the NDPS Act

¹² Section 36-A (4) of the NDPS Act

¹³ *Ansar Ahmed v. State (Govt. of NCT of Delhi)* [123(2005) DLT 563]

¹⁴ Government of India, Ministry of Finance, Department of Revenue guideline vide F. No. 13011/6/2001-Cus(AS) dated 28.08.2005

¹⁵ <http://cbn.nic.in/html/operationscbn.htm>

¹⁶ Section 9(2)(d) of the NDPS Act

officers¹⁷. If purity is an important consideration for licit opium cultivation and manufacturing, i.e., essentially for commercial purposes, then why should it be ignored while imposing criminal sanctions?

- Besides the determination of actual content of drugs, purity is an indicator of the role of the offender in the drug supply chain, as observed by the Delhi High Court in *Ansar Ahmed v State*.¹⁸ High purity implies proximity to the source of drugs; higher profit and presumably higher role in the drug supply chain while low purity indicates closer to street (many middlemen); less profit and probably lower in the drug supply chain.

2) Factors, other than quantity, to determine sentencing

- Quantity, being the only determinant of penal consequences, has resulted in several anomalies, wherein low level offenders have been given higher sentences, while the traffickers/high-level offenders have got away with lighter sentences.
- Studies show that organised traffickers, who are well-aware of the quantity threshold, are more likely to carry amounts below the commercial threshold and use drug mules or unsuspecting persons as couriers, in order to circumvent the law.¹⁹
- The NDPS Act itself recognizes the fact that seriousness of an offence is not always dependent on the quantity of drugs involved. For e.g. Section 19 (punishment for embezzlement of licitly cultivated opium), Section 24 (engaging in or controlling external dealings) and Section 27A (financing illicit traffic or harbouring offenders), are considered as most serious offences and attract stringent punishment of imprisonment (ranging from 10-20 years) and fine (ranging from 1–2 lakhs). In such cases, it is the nature of offence that indicates the culpability of the offender and not the quantity of drugs involved.
- In light of above, the Lawyers Collective suggests that the legislature, in order to advance the legislative intent of the 2001 Amendment, should consider introducing other elements in sentencing for intermediate and commercial quantity offences²⁰. Factors like **level of involvement, role and position in drug supply chain, harms intended to be caused** and **extent of profit made from illicit activity** ought to be considered for sentencing offenders convicted for intermediate and commercial quantity. To incorporate these elements, the legislature can contemplate amending **Section 32B**, to include

¹⁷ Section 9(2)(g) of the NDPS Act

¹⁸ [123 (2005) DLT 563]

¹⁹ Jennifer Fleetwood, 'Five Kilos: Penalties and Practice in International Cocaine Trade' *British Journal of Criminology* (2011) 51, 375-393 at p. 388

²⁰ In offences involving small quantity, maximum punishment is up to 6 months so there is no need to look into other factors.

factors to be taken into account which provides for factors to be taken into account for imposing higher than the minimum punishment. The Lawyers Collective recommends amending Section 32B to read as: “**Factors to be taken into account for imposing punishment in offences involving intermediate and commercial quantity,**” to incorporate the factors listed above, though not in an exhaustive manner.

3) Revised penalty structure for intermediate quantity

- In practice, there is no difference between punishment imposed for offences involving intermediate quantity and commercial quantity. It has been observed that in both, the accused is awarded 10years’ imprisonment (maximum for intermediate and minimum for commercial quantity offences).
- The Lawyers Collective suggests that punishment for offences involving intermediate quantity should be reduced from a maximum of ten years to **a maximum of five years imprisonment along with fine, which may extend up to fifty thousand rupees.**

4) Definitions of ‘commercial quantity’ and ‘small quantity’ not clear

Under the 2001 notification, commercial quantity is defined as any quantity ‘greater’ than the quantity specified in the notification²¹ while small quantity is referred to as any quantity ‘lesser’ than the specified threshold.²² But the question is whether the threshold quantity itself is commercial or small. The Rajasthan High Court in *Chanda Soni (Smt) @ Pushpa v State of Rajasthan* held that that ‘in order to be the “commercial quantity” as defined in Section 2(viia) of the Act, the quantity of the contraband so recovered should be ‘higher or greater’ than the quantity notified in the schedule.’ So opium of 2.5kgs (commercial quantity threshold) was held to be an intermediate quantity.²³

In order to have clarity, the following changes may be considered by the Standing Committee-

- Section 2(viia) ‘commercial quantity’: “any quantity **equal to, or greater than the quantity notified by the Central Government**”
- Section 2 (xxiiiia) ‘small quantity’: “any quantity **equal to, or lesser than the quantity notified by the Central Government**”

1.2 Punishment for consumption of drugs under Section 27

²¹ Section 2(viia) of the NDPS Act

²² Section 2(xxiiiia) of the NDPS Act

²³ RLW 2010 (2) Raj 1431

Clause 5: It seeks to amend Section 27 of the Act by standardizing the punishment for consumption of narcotic drugs and psychotropic substances to a maximum of 6 months imprisonment and/or fine, which may extend to Rs 10,000.

While the proposed move is a welcome step, the Lawyers Collective recommends that **Section 27 be deleted altogether**, for the following reasons:

- Persons who use drugs need support and assistance. Punishment is not an appropriate sanction for drug use and dependence. It has to be understood that once a person becomes dependent on drugs, s/he cannot give up without medical help. Punishing a patient is not only inappropriate but also unhelpful and unjust.
- Punishment is also not an appropriate sanction for experimental or occasional use of drugs. First time or occasional users will benefit more from education on the harms of continued use, rather than prosecution and jail. Counseling and social support is also more likely to dissuade future use.
- Imprisoning persons who consume drugs will not address the problem of consumption or addiction. On the contrary, incarceration will aid drug users' exposure to and contact with other criminal offenders, and likely to entrench them in a life of more and serious crime.
- The NDPS Act itself seeks to provide education, identification, treatment, rehabilitation and social reintegration for persons dependent on drugs. Criminal records diminish chances of reintegration including opportunities for education and employment. Section 27 thus contradicts the legislative intent, which is to treat and assimilate persons who use or are dependent on drugs in society.
- Section 27 is inconsistent with other provisions of the NDPS Act. The Act itself empowers the State Government to supply opium to registered addicts for his/her personal consumption [Section 10(1)(a)(vi)] while Section 71 authorizes the Government to establish treatment centres for addicts. Treatment in these de-addiction centres don't require prior criminal prosecution, thereby indicating that the Government itself acknowledges that drug dependence is a medical condition, requiring treatment and support and not incarceration.
- Also, the World Health Organisation (WHO) recognizes drug dependence as a "*multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease.*"²⁴ Imposing criminal penalties for a medical condition is illogical and unfair.
- The NDPS Act is modeled on International Drug Conventions, namely, the *Single Convention on Narcotic Drugs, 1961*, as amended by the *Protocol*

²⁴ Discussion Paper on Principles of Drug Dependence Treatment, published by UNODC and WHO (March, 2008) at p.1

Amending the Single Convention on Narcotic Drugs, 1972, the Convention on Psychotropic Substances, 1971 and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. None of these Conventions require State Parties to make consumption of drugs a punishable offence²⁵.

- Evidence from European Union (EU) countries, where consumption is decriminalized or depenalised, shows that it has not resulted in higher drug use or dependence. In fact, removing criminal sanctions for drug consumption has led to improved access to medical and social services and reduction in petty crimes.²⁶ Similarly, there is no proof that criminalisation of drug use or prohibitionist drug policies have deterred people from consuming illicit drugs.²⁷
- In 2001, Portugal decriminalized consumption, possession and acquisition of narcotic and psychotropic drugs for personal use. Addicts are supported through medical facilities while occasional users receive admonition. Ten years later, several studies show that there has been significant decline in petty crimes related to drug consumption like theft, because of availability of methadone treatment, decrease in HIV incidence amongst injecting drug users, along with reduction in recidivist crimes.²⁸

This answers the questions raised by Shri Manicka Tagore, Shri S.C. Udasi and Dr. K.S. Rao at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill.

1.3 Proposed changes in the provisions on property forfeiture

Clauses 10 and 11: These amendments seek to widen the provisions for forfeiture of illegally acquired property in S.68-B (g) to include any property of a person whose source cannot be proved. The need to establish that the said property is derived from, or used in the illicit traffic is done away with.

Lawyers Collective is of the view that proposed amendment in the definition of illegally acquired property is too broad in its scope and susceptible to misuse and therefore open to constitutional challenge. There has to be a nexus between the alleged illegally acquired property and drug offences under the NDPS Act. Instances of planting of drugs by police/rivals cannot be ruled out. Further, under the proposed amendments, even if the accused is acquitted of the NDPS charges, he/she will still

²⁵ Article 36 (1) (a), Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1972; Article 22 (1) (a) Convention on Psychotropic Substances, 1971; and Article 3, of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

²⁶ *Illicit Drug Use in the EU: Legislative Approaches*, European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) Thematic Papers, 2005 at p. 18

²⁷ Degenhardt L, Chiu W-T, Sampson N, Kessler RC, Anthony JC, et al. (2008) Toward a global view of alcohol, tobacco, cannabis, and cocaine use: Findings from the WHO World Mental Health Surveys. *PLoS Med* 5(7): e141. doi:10.1371/journal.pmed.0050141

²⁸ Artur Domosławski, "Drug Policy in Portugal: The Benefits of Decriminalizing Drug Use" (June, 2011) Global Drug Policy Program, Open Society Foundations at pp. 35-37

be subject to arbitrary investigations and excessive intrusion into his/her property whose source cannot be proved.

It may be pointed out that Section 8A of the Act already prohibits certain activities relating to conversion, transfer/possession/acquiring etc of property derived from an offence committed under this Act. This provision has rarely been used. The proposed amending clause 6 of the bill seeks to introduce Section 27B that would make Section 8A punishable with imprisonment ranging from 3 years up to a maximum of 10 years along with fine.²⁹ The government may invoke Section 8-A read with proposed Section 27B to curb profits and financial gains from illicit traffic.

1.4 Addition of the term ‘management’ to provisions on treatment for drug dependence

Clause 15: The Lawyers Collective welcomes the proposed insertion of the term “*management*”, after the words “treatment, identification” in Section 71 of the Act, as it is a more accurate description of clinical care for drug dependence. At the same time, we would like to suggest the following change to the said section:

The words “*The Government may, in its discretion, establish*” to be replaced by “*The Government **may establish, recognize or approve** as many centres as it thinks fit*”,

The above changes are being proposed because existing government facilities for treatment and rehabilitation are sparse. Consequently, many private centres have come up, which are not subject to rules under Section 71(2). In the absence of State oversight, many such centres are fleecing addicts and their families, subjecting them to coercion, abuse and torture. Some drug users have reportedly died because of physical torture and/or lack of timely medical attention. There is an urgent need to increase the number of government institutions providing drug dependence treatment as well as to regulate private facilities purporting to provide such services.

This answers the questions raised by Shri B. Mahtab, Shri S.S. Ahluwalia and Shri Rashid Alvi at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill.

2. Comments on other clauses

Clause 2:- Sub clause (a) proposes to introduce a new definition of ‘*Central Government factories*’ in Section 2(iva) of the NDPS Act as

“*Central Government factories*” means *factories owned by the Central Government or factories owned by any company in which the Central Government holds at least fifty-one per cent of the paid-up share capital;*”

²⁹ Clause 6 of the NDPS (Amendment) Bill, 2011 reads as: After section 27A of the principal Act, the following section shall be inserted, namely:—

"27B. *Whoever contravenes the provision of section 8A shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine.*"

The proposed amendments to the NDPS Act seek to allow the entry of private manufacturers (up to a maximum of 49% share) in opium production and manufacturing in the Government Opium Factories. Concerns were raised whether opening up the opium manufacturing process to private parties would result in dilution of government control and regulation. It must be noted that opium is licitly cultivated in India by farmers and subject to strict government control through licenses and rules/orders under the NDPS Act.³⁰ A similar framework of regulation can be formulated by the Government for allowing private manufacturers in the opium manufacturing factories

This answers the question raised by Shri B. Mahtab at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) bill.

3. Suggestions for amending other provisions of the Act

Apart from the proposed amendments, the Lawyers Collective makes the following recommendations on the issues that have not been addressed in the NDPS (Amendment) Bill, 2011.

3.1 Availability of opiates for medical use

Many narcotic drugs and psychotropic substances have legitimate medical use, including as analgesics, for the treatment of pain and for management of addiction. Opiates like Morphine and Codeine are included in the *National List of Essential Medicines of India*, 2011, which means that the Government is under an obligation to provide such drugs to patients, especially those suffering from terminal cancer, heart ailments and HIV/AIDS through hospitals and medical establishments. However, strict penal and complex regulatory provisions of the NDPS Act have made such medicines out of reach for millions of patients. This needs to be addressed urgently.

Lawyers Collective's Recommendations: The following amendments may be considered to strengthen the Central Government's power and responsibility to make available narcotic drugs and psychotropic substances for medical and scientific purposes:

- Amend **Section 4 (1)** to read “ *Subject to the provisions of the Act, the central Government shall take all such measures as it deems necessary or expedient for the purpose of preventing, **treating** and combating abuse of narcotic and psychotropic substances and the illicit traffic therein **and for promoting their medical and scientific use***”
- In **Section 4 (2)**: Insert provision (f) that reads: “**ensuring availability of narcotic drugs and psychotropic substances for medical and scientific use**”.

³⁰ Rule 5-30 of the *Narcotic Drugs and Psychotropic Substances Rules*, 1985

3.2 Mandatory Death Penalty

Section 31A of the NDPS Act imposes mandatory death penalty for certain repeat crimes involving a large quantity of drugs. The death sentence is mandatory in that there is no punishment laid down in Section 31A other than death. Under Section 31A, the first conviction must be for offences under Sections 19/24/27A and for offences involving commercial quantity. And the second conviction has to be for offences relating to production, manufacture, possession, transportation, export from India or transshipment, of the narcotic drugs or psychotropic substances specified in the table in Section 31A(1)(a), e.g., Opium (10kgs), Heroin (1kg), Cannabis (20kgs), etc.

Section 31A applies to repeat offenders who are subsequently convicted with specific quantities, which being greater than commercial quantities, are still commercial quantity within the meaning of Section 2(viia) of the Act, while Section 31 of the Act provides for enhanced punishment for offences after previous conviction. In order to attract Section 31, the subsequent offence must be an offence punishable under the NDPS Act with the same amount of punishment as the first offence. It is submitted that the classification between repeat offenders under Section 31 and under Section 31A is unreasonable and arbitrary. No substantial difference exists between the two, except the quantity of drugs, which too is notional, since s.31A quantities themselves fall in the category of commercial quantities.

Further, following the 2009 notification, quantity of drug is to be determined on the basis of the entire amount of the mixture or solution and not the pure drug content. As noted above, making pure drug content irrelevant and taking neutral materials in account will result in patently unjust consequences, especially in the context of S.31A. For e.g., *“if X was convicted for 1 kg substance (including 500 grams heroin and 500 grams powdered sugar) while Y was convicted for 900 grams substance (constituting 800 grams heroin and 100 grams powdered sugar) Still, X would get death for 1 kg heroin under s.31A while Y would be imprisoned under s.31 for 900 grams, even though the actual amount of heroin is higher in Y’s case.”* The legislature must avoid such unjust consequences, especially in matters of life and death.

The NDPS Act has been enacted pursuant to the International Drug Conventions, which do not mandate imposition of death penalty, much less mandatory death penalty for drug offences. On the contrary, penal measures referred to in the Conventions are in the nature of *‘imprisonment or other forms of deprivation of liberty’*³¹, and not deprivation of life.

³¹ Article 36 (1) (a), Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1972; Article 22 (1) (a) Convention on Psychotropic Substances, 1971; and Article 3, of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

More importantly, Section 31A contravenes settled principles of international human rights law and constitutional jurisprudence on death penalty. Article 6(2) of the *International Covenant on Civil and Political Rights* (ICCPR) restricts imposition of death penalty to ‘most serious crimes’³², which has been interpreted to mean crimes that involve intentional taking of life³³, and drug offences do not fall in the category of ‘most serious crimes’.³⁴ It is pertinent to point out that *United Nations Office on Drugs and Crime* (UNODC), the UN agency responsible for drug control, itself is of the opinion that drug offences do not meet the threshold of ‘most serious crimes’³⁵ and advocates “*the abolition of the death penalty for drug offences*.”³⁶ The Standing Committee may also note that the UN Human Rights Committee has asked India to limit the number of offences carrying the death penalty to the most serious crimes³⁷.

In India, death penalty is reserved for the ‘rarest of rare’ cases,³⁸ which has also been held to be “the internationally accepted standard in cases of death penalty”.³⁹ The Supreme Court has never imposed or upheld death penalty in any case that did not involve taking of life. It is submitted that imposing capital sentence for drug crimes that do not involve homicide is not consistent with the constitutional principles of India.

In addition, in *Mithu v. State of Punjab*⁴⁰, the Supreme Court had declared mandatory capital punishment as unconstitutional. In a recent decision, the Bombay High Court applied the same principle and held Section 31A of the NDPS Act to be violative of Article 21 of the Constitution. The High Court observed that “*the use of wise and beneficent discretion by the Court in a matter of life and death after reckoning the circumstances in which the offence was committed and that of the offender is indispensable; and divesting the Court of the use of such discretion and scrutiny before pronouncing the preordained death sentence cannot but be regarded*

³² Article 6 (2) of the ICCPR states:

“*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 judgment rendered by a competent court.*

³³ Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General, E/2000/3, Economic and Social Council, 31st March, 2000 at pg- 56, para 131

³⁴ United Nations Human Rights Committee (UNHRC) Concluding Observations: Thailand, CCPR/CO/84/THA (8 July 2005) at pg. 4, para 14

³⁵ Drug control, crime prevention and criminal justice: A Human Rights perspective” dated 3 March 2010, Vienna, Note by the Executive Director, UNDOC, pg 7, at para 25

³⁶ Drug control, crime prevention and criminal justice: A Human Rights perspective” dated 3 March 2010, Vienna, Note by the Executive Director, UNDOC, pg 7, at para 26

³⁷ United Nations Human Rights Committee (UNHRC) Concluding Observations: India, CCPR/C/79/Add.81 (8th April, 1997) at pg. 5, para 20

³⁸ *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684

³⁹ *Rajesh Kumar v. State through Govt of NCT, Delhi* [Criminal Appeal Nos. 1871-1872 of 2011 (Arising out of SLP (CRL) Nos. 9516-9517 of 2009)] dated 28th September, 2011

⁴⁰ (1983) 2 SCC 277

as harsh, unjust and unfair”.⁴¹ The said decision has not been appealed against by the Government till date.

The Government has neither repealed nor amended Section 31A in the NDPS (Amendment) Bill, despite the findings of the Bombay High Court on its constitutional validity.

Lawyers Collective’s Recommendation: Section 31A of the NDPS Act should be deleted and repeat offenders can be sentenced under Section 31 of the Act.

This answers the questions raised by Dr. K.S. Rao, Shri S.S. Ahluwalia, Shri B. Mahtab and Shri Rashid Alvi at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill.

3.3 Immunity for Treatment Seekers

Section 64A of the NDPS Act provides immunity from prosecution to *addicts*⁴² volunteering for treatment, if they are charged with consumption or offences involving small quantity. This provision is in keeping with International Drug Conventions that encourage alternatives to penal sanctions where the offence is of a minor nature or where the offender is dependent on drugs her/himself.⁴³ Accordingly, the Indian legislature enacted Section 64A, intending to depenalise personal use/offences involving small quantity and encourage treatment seeking which, in the long term, reduces the demand for illicit drugs.

However, the application of Section 64A has been fraught with ambiguities and subject to narrow and technical interpretation by the Courts, including strict insistence on proof of addiction. It must be noted that there is no clinical test of addiction, since dependence is a behavioural and psycho-social condition, evidenced over a period of time.⁴⁴ Other technicalities include waiting for framing of charge⁴⁵, implied admission of guilt, etc.

Another drawback is that Section 64A is applicable only to “*addicts*”; first time or occasional users are not exempted from punishment, unless they falsely testify as being drug dependent. Criminalizing users, who have occasionally consumed illicit substances, is contrary to the legislative intent, since section 64A is a beneficial

⁴¹ See Bombay High Court’s decision dated 16 June 2011 in *Indian Harm Reduction Network v Union of India* [Criminal Writ Petition No. 1784 of 2010]

⁴² Section 2 (i) defines ‘addict’ as ‘a person who has dependence on any narcotic drug or psychotropic substance’

⁴³ See Article 36 (1) (b), Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1972; Article 22 (1) (b) Convention on Psychotropic Substances, 1971; and Article 3, paragraphs 4 (c) and 4 (d) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

⁴⁴ Substance Use Disorder: Manual for Physicians, Editor Dr. Rakesh Lal, National Drug Dependence Treatment Centre, All India Institute of Medical Sciences (AIIMS), New Delhi (October, 2005) at pp. 12-14

⁴⁵ Courts have denied immunity in many cases on the ground that accused can ask for immunity only after the charges have been framed against him/her. As a result, accused has to spend months or even years incarcerated before the Court frames charges. In Fardeen Khan’s case, which arose in 2001, the trial court finally framed the charges in 2011, after 10years of the alleged offence.

provision meant to get people into treatment and not mar their future with criminal charges.

Further, evidence from other countries suggests that alternatives to penal sanctions have had noticeable impact on the lives and health of drug users. Non-penal sanctions include mediation, community work, administrative sanctions and monetary fines. Majority of EU member countries have mechanisms wherein dependent drug users are diverted to treatment facilities.⁴⁶

Lawyers Collective's Recommendations: In light of above, the following language change is suggested in Section 64A:

“Any person, who is accused of offences involving small quantity of narcotic drugs or psychotropic substances and who is found to have consumed such narcotic drugs or psychotropic substances, may voluntarily undergo counseling and medical treatment at any centre established, maintained, recognized or approved by the Government or a local authority, and upon completion of such counseling and medical treatment, shall not be liable to prosecution for offences involving small quantity of narcotic drugs or psychotropic substances.”

If the Standing Committee is not inclined to delete section 27 of the Act, as suggested by the Lawyers Collective, then the amended Section 64A should allow immunity for offence under Section 27, in addition to offences involving small quantity of narcotic drugs and psychotropic substances.

Questions were raised whether the Government can provide treatment for drug dependence in prisons. Section 39 of the Act provides that 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 detoxification.

This answers the question raised by Shri M.S. Reddy at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill on 9th January, 2012.

3.4 Broadening the provision on probation under Section 33

The Lawyers Collective recommends that Section 33 of the Act, which allows very few NDPS offenders to be released on probation, should be amended to include ‘*offences involving small quantity*’. Following language change is suggested in Section 33:

Section 33- Application of section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958.- *Nothing contained in section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act*

⁴⁶ ‘Alternatives to imprisonment- targeting offending problem drug users in the EU’, EMCDDA Selected Issues- 2 (2005) at pp. 25- 27

unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable under section 26 or section 27 or for offences involving small quantity of narcotic drugs or psychotropic substances.

4. Other concerns raised by the members of the Parliamentary Standing Committee on Finance

4.1 Poppy Cultivation

Parliamentarians had raised concerns regarding the illicit cultivation of poppy in various parts of India, especially in the Southern States, in collusion with officials from the State Revenue Departments or the Police. In order to prevent such practices, Section 42 and Section 59 of the NDPS Act can be used. Under Section 47 of the Act, it is the duty of every government officer, who gets information about any illegal cultivation of opium poppy, cannabis plant or coca plant, to give that information to the Police or any officer empowered under Section 42 and in case of neglect, he/she shall be liable to punishment.

Besides, Section 59 makes it a punishable offence, if an officer refuses to perform her duty or willfully aids in or connives at, the contravention of any provision of this Act/Rules/Orders made thereunder, with an imprisonment ranging from 10-20 years along with a fine ranging from 1-2 lakhs.

This answers the questions raised by Dr. M. Thambidurai and Shri M.S. Reddy at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill.

4.2 Need for Special Courts for speedy trials of small quantity offenders

Concerns about delayed trials of small quantity offenders by the Magistrate were raised and whether it would be better to ensure that NDPS Special Courts have the power to deal with all offences arising under the Act. It is submitted that the NDPS Act provides for summary trials of offences punishable with imprisonment up to 3 years, thereby having provision for speedier trials of under trials accused of small quantity offences.⁴⁷ Further, minor NDPS offences like consumption and those involving small quantity of narcotic drugs and psychotropic substances are bailable⁴⁸, so there is no reason for the accused to languish in prisons.

This answers the question raised by Shri B. Mahtab at the Parliamentary Standing Committee Oral Hearing on the NDPS (Amendment) Bill.

4.3 Concerns over the stringency of the NDPS Act

Several questions were raised about the stringency of the NDPS Act and the need to make it even stricter.

⁴⁷ Section 36-A (5) of the NDPS Act

⁴⁸ *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. L.R.)

It is submitted that the NDPS Act, 1985 is already one of the harshest laws in India. Among others, it provides for mandatory minimum sentence of 10 years' imprisonment for certain offences, including simple possession⁴⁹, while serious offences under the *Indian Penal Code, 1860* like kidnapping⁵⁰, voluntarily causing grievous hurt⁵¹ are punishable with a maximum imprisonment of 7 years.

Other strict provisions include presumption of guilt and reversal of burden of proof (Section 35), severe restrictions on grant of bail (Section 37), pre-trial detention of up to 1 year [Section 36-A(4)], no suspension, remission and commutation of sentences (Section 32-A), no release on probation for most offenders (Section 33), enhanced punishment (up to 30 years imprisonment) for repeat offenders (Section 31) and importantly, compulsory death sentence for subsequent conviction for specific offences (Section 31A). Besides, attempt to commit an offence as well as accessory crimes of aiding and abetting and criminal conspiracy attract the same punishment as the principal offence (Sections 28 and 29). Preparation to commit certain offences is punishable too (Section 30).

References of stringent drug laws from the Middle-East countries (Saudi Arabia, UAE, etc) were made. It is contended that though Iran has one of the harshest drug law regimes in the world, along with highest rates of executions of drug offenders, the problem of drug trafficking has not lessened. Harsh laws do not necessarily result in lesser crimes and better enforcement.

5. Conclusion

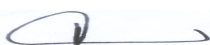
Without prejudice to the above-mentioned comments, the Lawyers Collective recommends a comprehensive review of the NDPS Act and not piecemeal amendments, as is been sought to be done in the NDPS (Amendment) Bill.

The Lawyers Collective is grateful to the Chair of the Parliamentary Standing Committee on Finance for the opportunity to comment, orally and in writing, on the proposed amendments and raise other concerns vis-a-vis the NDPS Act.

We will be happy to provide further assistance in this regard.

Yours Sincerely,

Anand Grover



Senior Advocate

Director, Lawyers Collective

⁴⁹ Section 15(c), Section 17(c), Section 18(c), Section 19, Section 20(b)(ii)(C), Section 21(c), Section 22(c), Section 23 (c), Section 24 and Section 27A of the NDPS Act

⁵⁰ Section 363, *Indian Penal Code*

⁵¹ Section 325, *Indian Penal Code*