



LAWYERS
C O L L E C T I V E

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Adv/drugs/t/25/11

Shri Yashwant Sinha
Chairperson
Standing Committee on Finance
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Re: Comments on the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011

Dear Shri Sinha,

Please find attached comments of the Lawyers Collective on the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011, which raises issues of constitutional and public import.

The comments are divided in three sections, namely - (I) legislative overview, (II) comments on proposed amendments and, (III) suggestions for amending other provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985.

We also request for an opportunity to make oral submissions before the Committee so as to be able to express our concerns and make suggestions in greater detail.

Thanking you,

Yours truly,
Anand Grover

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

I. Legislative Overview

The Narcotic Drugs and Psychotropic Substances Act (hereinafter “NDPS Act”) was enacted by Parliament in 1985 with a view to introduce adequate penalties for drug trafficking, strengthen enforcement powers, implement international conventions to which India was a party and exercise statutory control over psychotropic substances. The NDPS Act replaced the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930.

A comprehensive code, the NDPS Act provides for prohibition, control and regulation of narcotic drugs and psychotropic substances. It prohibits the cultivation, production, manufacture, possession, sale, purchase, use, transport, import, export, sale and warehouse, transshipment of narcotic drugs and psychotropic substances except for medical and scientific purposes. At the same time, the Act permits/authorizes the above mentioned activities through license and in accordance with Rules. The NDPS Act has been amended twice; in 1989 and in 2001.

Under the 1989 Amendments, the Act was made more stringent by introducing mandatory minimum sentence of 10 years, restrictions on bail, bar on suspension, remission and commutation of sentences and imposition of mandatory capital punishment for repeat offenders. As a result, persons caught with small amounts of drugs faced long prison sentences, without the possibility of release on bail. Courts criticized the harsh and disproportionate sentencing structure, which led to a second set of Amendments in 2001 to rationalize punishment on the basis of the quantity of drugs involved in the offence. The Act now classifies narcotic drugs and psychotropic substances into ‘small’ and ‘commercial’ quantities. Commercial quantity means any quantity higher than the quantity specified by the Central Government vide notification S.O 1055(E), dated 19th October 2001¹ (hereinafter “2001 notification”). Small quantity means quantity lesser than the amount specified in the said notification. Quantity falling in between the threshold of small and commercial is treated as ‘intermediate’.

The quantum of punishment varies significantly between drug quantities. For instance, any offence involving a small quantity of drugs attracts a maximum of 6 months imprisonment and/or a fine of Rs 10,000. If the amount exceeds small quantity, then the penalty can go up to 10 years imprisonment with a fine of Rs 1 lakh (for intermediate quantity) or even 20 years imprisonment and a fine of Rs 2 lakhs (for commercial quantity). Thus, determination of the quantity of drug involved in the offence is of vital concern and much of the NDPS litigation revolves around this question. Courts have held that in determining the quantity of a narcotic drug or psychotropic substance, where such drug or substance is a preparation, containing a mixture or solution, only the actual amount of the offending drug or substance

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.

in such preparation is relevant.² 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.

II. Comments on the proposed amendments

The NDPS (Amendment) Bill, 2011 seeks to modify a number of provisions of the Act, which will affect penalties that people who use and are dependent on drugs will be subject to. In addition, the proposed changes have an important bearing on access to treatment and care for drug users. We are particularly concerned that the proposed amendments may undermine the rationalized penalty structure introduced by the 2001 Amendment to the NDPS Act.

Below are specific comments on amending clauses:

- **Amending clauses 2 (b) and 2 (c), changes in Section 2 (viiia) “Commercial quantity” and Section 2 (xxiiia) “Small quantity” respectively**

The proposed amendments seek to insert the word “*preparation*” in the definitions of commercial and small quantity, as well as provide for determination of quantity on the basis of the “*pure drug content or otherwise*”.

The proposed insertions are vague and confusing, as preparations are already included in the definition of narcotic drugs and psychotropic substances under the present Act.³

Furthermore, the 2001 notification specifying small and commercial quantities of narcotic drugs and psychotropic substances includes preparations of such drugs and substances.⁴

It is unclear what the addition of the expression “*preparation*” to the definitions of commercial and small quantities would achieve. On the contrary, it is apprehended that it will allow for arbitrariness in the application of the Act as well as in imposition of punishment under its penal provisions.

According to the Central government notification S.O.2941 (E), dated 18 November 2009, 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.⁵ The relation

² *E. Michael Raj v. Intelligence Officer, Narcotic Control Bureau* [(2008) 5 SCC 161

³ See Sections 2(iii) “cannabis (hemp); 2(v) “coca derivative”; 2(vi) “coca leaf”; 2(xi) “manufactured drug”; 2(xv) “opium”; 2(xvi) “opium derivative”; 2(xxiii) “psychotropic substance”.

⁴ Entry 239 of the 2001 notification

⁵ 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.”

between the 2009 notification and the proposed amendment to the definition of commercial and small quantity is uncertain and must be clarified on record.

It may be further pointed out that the scheme of the Act does not envisage determination of pure drug content. Indeed, the Act does not define or refer to purity or pure drug content in any provision. The phrase "*pure drug content or otherwise*" is ambiguous and may end up creating more confusion in application and judicial interpretation of the NDPS Act.

As pointed out earlier, the entire penalty structure under the Act depends on the quantity of narcotic drugs and psychotropic substance involved. It is feared that any ambiguity or confusion in legislative drafting, especially in the definitions of commercial and small quantity will result in arbitrary and unjust consequences under the NDPS Act.

- **Amending clause 5, modification in Section 27 "Punishment for consumption of any narcotic drug or psychotropic substance"**

The Bill seeks to standardise 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. Under the existing Act, punishment for consumption of certain drugs like cocaine, morphine and heroin is up to 1 year imprisonment and/or fine of Rs 20,000. While the proposed move is a welcome step, the Lawyers Collective believes that Section 27 should be deleted altogether, for the following reasons:

- Persons who use drugs, need support and assistance. Punishment is not an appropriate sanction to drug 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 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.
- The NDPS Act is modeled on International Drug Conventions, namely, the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol 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 offence.

- Section 27 of the NDPS Act, is unnecessary and outside International Drug Conventions, to which India is a signatory.

We therefore, recommend that Section 27 be deleted from the NDPS Act.

- **Amending clause 15, Section 71 (1) “Power of Government to establish centres for identification, treatment, etc. of addicts”**

We welcome the proposed insertion of the term “management”, after the words “treatment, identification” 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 shall, 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. The suggested language change will help address both concerns.

III. Suggestions for amending other provisions of the Act

Availability of opiates for medical use

Many narcotic drugs and psychotropic substances have legitimate medical use, including as analgesics and for the treatment of pain. 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.

Under Section 10 (1) (a) (v) of the NDPS Act, the possession, transport, purchase, sale, import inter-state, export inter-state, use and consumption of morphine⁶ (a cheap and effective opioid used for alleviation of pain) is vested with the State Governments. Different

⁶ Morphine is classified as an opium derivative, a manufactured drug and a narcotic drug under Sections 2(xvi), (xi) and (xiv) respectively of the NDPS Act, 1985.

States have different regulatory procedures and agencies. Moreover, in some States, multiple licenses are required to possess, transport, import, export, distribute, sell, purchase, use and consume morphine. By the time, the concerned agency or institution procures one license from one State, the other license expires. Morphine has therefore, remained virtually inaccessible for millions of terminal cancer, AIDS and other chronically ill patients. There is an urgent need to simplify the regulatory procedure and vest it within a single, preferably Central government agency such as the Narcotics Commissioner.

Towards this end, the Lawyers Collective suggests that just as the present Amendment seeks to transfer the power to regulate concentrated poppy straw from the States to the Central Government ostensibly for commercial purposes,⁷ the Government may do the same for morphine and other opiates for public health considerations.

In addition, 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 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”

Immunity for treatment seekers

Under Section 64A of the existing Act, drug dependent persons who opt for medical treatment are entitled to relief from prosecution, provided the charge is that of consumption or involves a minor quantity of drugs. 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.⁸

The application of this clause has been fraught with ambiguities. Immunity has not been granted to most drug dependent persons, on one or other technical grounds. These include insistence on proof of addiction, plea of guilt and waiting for framing of charge. This has resulted in undermining the legislative intent of the section, which is to discourage criminalization of drug dependent persons and encourage treatment seeking.

Another drawback is the restricted application to “addicts”; first time users are not exempted from punishment, unless they falsely testify as being drug dependent.

⁷ See Amending clauses 3 and 4 of the NDPS (Amendment) Bill, 2011 that seek to bring poppy straw concentrate under the purview of Section 9 from the existing Section 10 of the NDPS Act.

⁸ 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

Being a beneficent provision, Section 64A requires urgent legislative attention and reform.

Mandatory capital punishment

Section 31A of the NDPS Act prescribes a mandatory death sentence for certain drug offences upon subsequent conviction. The death sentence is mandatory in that there is no punishment laid down in Section 31A other than death and the alternative of sentencing the repeat offender under Section 31 is foreclosed by the non-obstante clause in Section 31A.

In *Mithu v. State of Punjab*, (1983) 2 SCC 277, the Supreme Court of India declared mandatory capital punishment as unconstitutional. In a recent decision,⁹ 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 as harsh, unjust and unfair*”. The said decision has not been appealed against till date.

The NDPS (Amendment) Bill, 2011 ignores the basis of invalidity of Section 31A as pointed out by the Constitutional Court. The Government has neither abolished nor amended Section 31A in the NDPS (Amendment) Bill, despite the findings of the Bombay High Court on its constitutional validity. This disregard of judicial orders merits attention of the Standing Committee.

⁹ 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].