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BALANCING REHABILITATION AND PUNISHMENT **UNDER THE NDPS ACT: AN ARTICLE 21** **PERSPECTIVE**

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1. Abstract

Narcotics Drugs and Psychotropic Substances “Act 1985 (NDPS Act) is the main legislation of India that has been implemented to address the use of narcotic drugs and psychotropic substances. The Act is a law that ban prohibits illegal trade in and use of narcotic drugs and psychotropic substances. The Act is essentially punitive in nature that is prescriptive of strong penalty, stringent bail conditions and robust procedural safeguards. They are meant to prevent organised drug related crimes and safeguard the health of the people but they have given Constitution difficulties in reference to personal liberty, proportionality and right to health under Article 21 of the Constitution of India. The Supreme Court has applied the Article 21 to include the right to life, dignity, health and fair process and have, therefore, forced the criminal justice legislation to strike a balance between the interest of the community and the right of a person. The NDPS Act also has the rehabilitative measures. After being voluntarily treated, the NDPS Act excepts the addicts by granting them immunity against prosecution (Sect. 64A). Nevertheless, such measures are not as applicable as its punitive aspect is. This is because the present article is a critical analysis of how the NDPS Act entails the constitutional interrelationship between punishment and rehabilitation in the context of the essay 21. It considers the legislative remedies, judiciary rulings and binding internationally claimant statutes which influence the Indian drug policy and evaluates the capability of the current legal framework to differentiate drug dealers and drug addicts. This paper suggests that a constitutional, and rights-based interpretation of the NDPS Act requires that greater emphasis should be given to rehabilitation, treatment and reintegration without diminishing the legitimate interest of the State in preventing organised drugs trafficking. This is more

appropriate to the objectives of criminal justice and constitutional values and with current thinking about public health.

2. Keywords:

NDPS Act, Article 21, Rehabilitation, Right to Health, Drug Policy

3. Introduction

Drug abuse and illegal drug trade in the world pose a threat to the health of the population, national security and criminal justice. States have been brutishly enacting laws controlling the narcotic substances as a response to the emergence of synthetic drugs, trans-national trafficking and organised criminal syndicates, as well as the social and medical consequences of addiction. With its closeness to the Golden Crescent and the Golden Triangle India is strategically weak in the world narcotics trade. Therefore, Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) came into effect to harmonize and revise the Act regarding the narcotic drugs and psychotropic substances and to enforce the international drug control conventions.¹

One of the unfortunate criminal laws in India is the NDPS Act. It stipulates serious penalties, mandatory minimum sentences on some crimes, reverse presumptions on the guilty mental state and possession and tough requirements over granting a bail under Section 37.² Principle 21: No human being shall be deprived of his life or personal liberty unless it is through due process laid down by law.³ Beginning with *Maneka Gandhi v. Union of India*, the Supreme Court turned Article 21 into a storehouse of substantial rights via a series of breakthrough decisions. The Court ruled that a process touching on personal liberty should be fair, just and reasonable and not arbitrary and oppressive.⁴ This broad interpretation has later recognised the right to health, dignity, legal aid, speedy trial and humane treatment as the integral part of the constitutional protection of life and personal liberty.⁵

Contemporary community health research is more and more recognising addiction as a chronic illness that must be treated, rather than criminalized.⁶ The involvement of the judiciary has

¹ Narcotic Drugs and Psychotropic Substances Act, No. 61 of 1985, Statement of Objects and Reasons (India).

² Narcotic Drugs and Psychotropic Substances Act, 1985, §§ 35, 37, 54 (India).

³ INDIA CONST. art. 21.

⁴ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

⁵ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 S.C.C. 608 (India); *Consumer Education & Research Centre v. Union of India*, (1995) 3 S.C.C. 42 (India).

⁶ World Health Organization & United Nations Office on Drugs and Crime, **International Standards for the**

played a crucial role in ensuring the constitutional protection of the NDPS Act. Procedural fairness is an integral part of Article 21 and the Supreme Court has always insisted upon strict compliance with the procedures relating to search, seizure, arrest, confession and investigation. The judiciary attempts to strike a balance between the effective law enforcement and constitutional safeguards against the unchecked exercise of State power can be seen in the cases such as *State of Punjab vs. Baldev Singh*, *Noor Aga vs. State of Punjab*, *Mohan Lal vs. State of Punjab* and *Tofan Singh vs. State of Tamil Nadu*.⁷

3.1. The Punitive Framework of the NDPS Act: A Constitutional Appraisal

The NDPS Act, 1985 was adopted to fight the increasing drug trafficking as well as to realize the Indian obligation towards the international drug control conventions. As opposed to the normal criminal legislation it possesses a rigid enforcement structure, with severe punishments, denying of bail and presumptions of the prosecution. In the amendment of 2001, there were established categories of small, company and commercial quantities and the punishment was proportional to the severity of the crime. This was in response to complaints that petty offenders and organised traffickers were punished meted out equally. Nevertheless, no lenient treatment is given to offences involving commercial quantity as it still carries heavy fines and imprisonment of up to 20 years as the legislature focuses on deterrence.⁸

Prosecution is also assisted by the presumptions formed by law in the Sections 35 and 54. Section 35 presupposes guilty mental state of the accused, unless proved guilty by the accused. Section 54 gives the courts a power to deduce that there was possession of prohibited drugs in this or that situation.⁹ The reverse onus per se is not illegal, yet, its application will be closely judged by a court. The reason is that it directly affects the assumption of innocent that is one of the essential characteristics of fair criminal proceedings provided in Article 21 of the Constitution of India.

Under Section 37 of the NDPS Act, stringent restrictions are imposed for bail. Although when it comes to cases of commercial offences, requiring the accused to live under bail in case, the Prosecutor of the Republic is heard and bail is not accepted until the court is quite prepared that the accused is not guilty and unlikely to repeat an offense on bail. These have been called

Treatment of Drug Use Disorders (2d ed. 2020).

⁷ *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172 (India); *Noor Aga v. State of Punjab*, (2008) 16 S.C.C. 417 (India); *Mohan Lal v. State of Punjab*, (2018) 17 S.C.C. 627 (India); *Tofan Singh v. State of Tamil Nadu*, (2021) 4 S.C.C. 1 (India).

⁸ Narcotic Drugs and Psychotropic Substances Act, 1985, §§ 21–23 (India).

⁹ Id. §§ 35, 54.

the twin conditions for bail and have made pre-trial release very hard.¹⁰

It is still argued if Section 37 is constitutional or not. Its strict bail terms tend to cause huge and protracted pre-trial detention because of the lag in investigation, forensic analysis and witness interrogation and due to the questioning of the entitlement to a prompt trial of Article 21 by Supreme Court.¹¹ The reason the courts have upheld section 37 is due to the severity of the cases dealing with drugs but have come to realise that prolonged pre-trial detention without substantial advancements being made might be infringing upon the very principle of human liberty. The concern on enforcement is reflected in the taking of the investigational measures in the Act. Section 42 and 43 permit authorised police to search, seize and arrest but Section 50, provides process protection on the search of an accused of a person character.¹²

State of Punjab v. Baldev Singh, the Supreme Court said that the personal search of an individual is necessary according to the Section 50 and the omission to inform an accused man about the right to search before a Gazetted Officer or Magistrate but this omission can lead to the dismissal of the conviction.¹³ *Noor Aga v. State of Punjab*, the Court insisted that NDPS Act which is harsh in nature means compliant application of the procedural safeguards.¹⁴

The constitutional importance of procedural fairness was reiterated in *Mohan Lal v. State of Punjab*, where the Supreme Court held that normally an informant cannot act as the investigating officer in the same case as such an arrangement violates the principle of impartial investigation.¹⁵ Equally in *Tofan Singh v. State of Tamil Nadu*, it was noted by a Constitution Bench that those authorized by the NDPS Act are subject to the definition of a police officer under Section 25 of the Indian Evidence Act and it follows that any confession that a person has provided to an official under the Act is not admissible as substantial evidence.¹⁶ The decision significantly improved procedural protection to accused persons and restated the argument that constitutional rights cannot be diminished based on the premise that acts committed under the NDPS Act are heinous.

3.2. Rehabilitation under the NDPS Act: A Constitutional Imperative

Undertaken based on a penal framework, but declaring addiction a health condition, the NDPS Act provides a means of limited medical treatment, counselling and rehabilitation, rather than

¹⁰ Id. § 37.

¹¹ *Hussainara Khatoon (I) v. Home Sec'y, State of Bihar*, (1980) 1 S.C.C. 81 (India).

¹² Narcotic Drugs and Psychotropic Substances Act, 1985, §§ 42, 43, 50 (India).

¹³ *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172 (India).

¹⁴ *Noor Aga v. State of Punjab*, (2008) 16 S.C.C. 417 (India).

¹⁵ *Mohan Lal v. State of Punjab*, (2018) 17 S.C.C. 627 (India).

¹⁶ *Tofan Singh v. State of Tamil Nadu*, (2021) 4 S.C.C. 1 (India).

criminal treatment. This rehabilitative notion takes the clearest display in Section 64A, that adds addicts found with small sums there is no prosecution provided they consent to undergo treatment in a licensed de-addiction centre.¹⁷ Section 71 of the Act further supports the rehabilitative aim of the Act by enabling governments to set up facilities for the identification, treatment, education, aftercare, rehabilitation and social reintegration of those suffering from drug use.¹⁸

In this paper, we present the argument that in as much as the hard punishment is a requirement in case of organised drug trafficking, under paper 21, NDPS Act ought to consider balancing between that and rehabilitation and human dignity and treat drug dependency primarily as a public health issue.

4. Section wise analysis of the NDPS Act, 1985 with reference to sections 27, 37, 42, 50 and 64A

4.1 Section 27: Penalty for use of narcotic drugs or psychotropic substances One of the few parts in NDPS Act which distinguishes between users and traffickers by providing for lesser penalties for drug usage is Section 27. It is an indication of the opinion of Parliament that addicts were not to receive similar criminal responsibility as organised traffickers. The sentence may last to 1 year and 6 months in jail, based on the material and the quantity of the materials involved.¹⁹

Section 27 has been denounced as an exercise in criminalizing addiction, as it is now medically agreed that substance dependency amounts to a health problem, deserving treatment rather than punishment. Voluntary treatment is hindered by fear of arrest and stigmatization, and it is hard to reconcile it with Article 21, which the Supreme Court has opined needs a fair and humane and proportionate criminal justice proportionate.²⁰

4.2. Section 37: Restrictive Bail Provisions and Constitutional Challenges

One of the most troubling areas of the NDPS Act is section 37 that substantially limits the discretion of the judge to lead to granting of bail on commercial bulk crimes. In contrast to traditional criminal law, by strict criteria it makes bail an exception so that it can only be

¹⁷ Narcotic Drugs and Psychotropic Substances Act, 1985, § 64A (India).

¹⁸ Id. § 71.

¹⁹ Narcotic Drugs and Psychotropic Substances Act, No. 61 of 1985, § 27 (India).

²⁰ *Consumer Educ. & Rsch. Ctr. v. Union of India*, (1995) 3 S.C.C. 42 (India); *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 S.C.C. 608 (India).

granted under severe conditions.²¹

Section 37 permits the bailing procedure after listening to the Public Prosecutor and considering that the court has enough reasonable grounds that the accused is innocent and unlikely to depict in offense again. This is due to these serious cases of twin conditions that tend to lead to lengthy pre-trial detention, which causes Article 21 issues. In *Union of India v. Shiv Shanker Kesari*, the Supreme Court has noted reasonable grounds require more than ordinary bail. It restated in *State of Kerala v. Rajesh* that general bail rules, may not overrule Section 37.²²

4.3-Section 42: Search, Seizure, and Recording of Prior Information

Section 42 gives the powers to be held by the authorised officers (e.g., search, seize and arrest without a warrants) under the guise of prior information. It provides that those information should be represented in writing and would be sent to a higher within the relevant time frame to protect against abuse.time.

In *Karnail Singh v. State of Haryana*, the Constitution Bench meant that a non-compliance with Section 42 generally nullifies the prosecution and only in the circumstances where immediate action was necessary and where the time-laxity is clearly illustrated, delayed compliance is allowed.²³

In *State of Punjab v. Balbir Singh*, Supreme Court noted that procedural safeguards of the NDPS Act are important because the Act offers extremely severe penalties. Failure to record or communicate the search and seizure may result in search and seizure being illegal in case this is not done.

4.4.- Section 50: Safeguards During Personal Search

Under the NDPS Act, one of the most crucial procedural safeguards accorded to an accused is section 50. It stipulates that an authorised officer, when he wants to carry out the personal search of a suspect, should advise the subject of the right to be searched before a Gazetted Officer or a Magistrate.²⁴ The Supreme Court has declared that personal searches are to be carried out under Section 50. The Constitution Bench in the *State of Punjab v. Baldev Singh* case had said that the omission of the information to the accused on this privilege generally

²¹ Narcotic Drugs and Psychotropic Substances Act, 1985, § 37 (India).

²² *State of Kerala v. Rajesh*, (2020) 12 S.C.C. 122 (India).

²³ *Karnail Singh v. State of Haryana*, (2009) 8 S.C.C. 539 (India).

²⁴ Narcotic Drugs and Psychotropic Substances Act, 1985, § 50 (India).

invalidated the conviction when the recovery is led by a personal search.²⁵ The Court noted that the procedural protections are more important in the case of legislation providing for heavy sanctions and reversal burden of evidence. Later rulings have made it clear that the application of Section 50 to search of a person only and not to search of vehicles, bags, suit cases or other items that are being carried by an accused.²⁶ This has been intellectually argued but continues to be the legal norm.

4.5. Section 64A: Immunity from Prosecution and the Rehabilitative Philosophy of the NDPS Act

Section 64A of the NDPS Act is reflective of the rehabilitative aspect of the Act as it provides immunity from prosecution to addicts for offences involving small quantity of narcotic drugs or psychotropic substances, if they voluntarily undergo medical treatment at a recognised de-addiction centre.²⁷ Article 21 is very much consistent with Section 64A in its constitution. Health as an intrinsic component of the right to life and personal autonomy has been recognised in the Supreme Court several restless times.²⁸ Evidence-based rehabilitation safeguards the human dignity, enhances the health of the population, and promotes humane criminal justice provided by Article 21. An intentioned interpretation of Section 64A requires a more active coordination between courts, de-addiction centres and medical institutions.

5. Conclusion

The NDPS Act, 1985 is evidence of the will power of India to combat drug trafficking and fulfill international duties. It attempts to stop organised drugs crime through the severe sentences, broad power of investigation, reverse presumptions as well as limited bails conditions. But its effectiveness, must be employed in the context of constitutional guarantees of fairness, proportionality and human dignity under Article 21. Cases such as, *Maneka Gandhi v. Union of India*, *State of Punjab v. Baldev Singh*, *Noor Aga v. State of Punjab*, *Mohan Lal v. State of Punjab* and *Tofan Singh v. State of Tamil Nadu* demonstrate that the Supreme Court tried to make the Act somewhat softer; that the court insisted on the careful following of the procedural safeguards, and that the individuals were not subjected to arbitrary exercise of State

²⁵ *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172 (India).

²⁶ *State of H.P. v. Pawan Kumar*, (2005) 4 S.C.C. 350 (India).

²⁷ Narcotic Drugs and Psychotropic Substances Act, 1985, § 64A (India).

²⁸ *Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 S.C.C. 37 (India); *Consumer Educ. & Rsch. Ctr. v. Union of India*, (1995) 3 S.C.C. 42 (India).

power.²⁹

The drug policy in India should be a punitive and rehabilitative policy according to the constitution, rather than an objective. Individuals who engage in organised trafficking must be stunned with harsh criminal repercussions whereas those whose criminal behaviour majorly relies on addiction must receive immediate treatment, counselling and social reintegration opportunities. This practice is reminiscent of the theory of proportionality, restorative justice and the very essence of human dignity in article 21.

Finally, NDPS Act continues to play a vital role in combating drug trafficking. To be constitutional and useful in the long term, a balance between the rights of individuals and society is required. Based on a rights-based interpretation of the Act, there should be a strict punishment of organised criminals, and addiction must be addressed through rehabilitation and public health. Such an approach will be seen as aligning the drug policy in India with the constitution, international standards in human rights and the current drug dependency theory to develop a more compassionate” effective and constitutionally-compliant legal structure.

²⁹ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India); *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172 (India); *Noor Aga v. State of Punjab*, (2008) 16 S.C.C. 417 (India); *Mohan Lal v. State of Punjab*, (2018) 17 S.C.C. 627 (India); *Tofan Singh v. State of Tamil Nadu*, (2021) 4 S.C.C. 1 (India).