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A Critical Analysis of the Punishment Clauses of the Narcotic Drugs and Psychotropic Substances Act, 1985

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ABSTRACT

Narcotic drugs and psychotropic substances severely impair the life and wellbeing of human beings. Recognising their detrimental effects, countries across the globe have enacted legislation to regulate and criminalise these substances. In India they are controlled under the Narcotic Drugs and Psychotropic Substances Act, 1985, which represents the commitment of the nation to anchor the Indian legal system in the international legal regime. The Act makes detailed provision for the prohibition, control and regulation of drugs, and is coherent and rational in its treatment of them. One of its important characteristics is the punishment clause, which prescribes different forms of punishment for first-time and repeated offences. Despite the profound merits of these punishment clauses, the Act has been criticised for disproportionate punishment, overcrowded prisons and prolonged incarceration. The purpose of this article is to analyse critically the efficacy of the punishment provisions of the Act. The researchers have adopted a doctrinal study and a thematic analysis of the penal provisions. The paper argues that the stringent penal provisions of the NDPS Act need to be balanced with constitutional values by integrating the doctrine of proportionality, rehabilitation, and the basic rights of offenders as well as of victims.

Keywords: *Narcotic Drugs, Psychotropic Substances, NDPS Act, Penal Clause, Critical Analysis*

I. INTRODUCTION

The global community is witnessing a massive and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances. The higher prevalence of drug use is evident from the findings of the World Drug Report (WDR) 2025, which estimates that the number of past-year cocaine users rose from 17 million in 2013 to 25 million in 2023, and that some 316 million people, or 6.0 per cent of the population aged between 15 and 64,

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used a drug in 2023.¹ Between 2019 and 2023 the quantity of cocaine seized worldwide increased by 68 per cent, reaching a record 2,275 tons. Seizures in the Americas, Europe and Oceania rose by 12 per cent in 2023 to reach 2,235 tons, which amounts to 98 per cent of the global total.² Synthetic drugs are increasing steadily and now dominate the markets of Eastern Europe, Central Asia and Transcaucasia, while Ukraine is particularly exposed to methadone.³ The expansion of the synthetic drug market continues on account of lower operational costs, ease of production and a reduced risk of detection, interdiction and prosecution.⁴ The Near and Middle East continues to be the region most affected by trafficking in, and the use of, "Captagon".⁵ More than thirty source countries of pregabalin have been identified across Asia, Europe and Africa,⁶ and methamphetamine trafficking continues to expand across the Near and Middle East and North Africa.⁷

The Indian situation is no exception to these global trends. It is evident from the World Drug Report that pregabalin, which is extensively prevalent in Asia, Europe and Africa, originates in India.⁸ Tramadol, which is present in the illicit markets of Africa, has made its way into India despite the improved national control mechanism adopted by the country.⁹ The Jammu and Kashmir route emerged as one of the principal trafficking routes for tramadol between 2022 and 2024.¹⁰ Within India, a Respondent Driven Sampling (RDS) survey conducted between December 2017 and October 2018 covered 135 districts and 72,642 people suffering from dependence on illicit drugs, while the companion household survey covered 186 districts and 4,73,569 individuals.¹¹ These trends and patterns pose a serious threat to the health and welfare of human beings and shake the economic, cultural and political foundations of society.¹² The stability, security and sovereignty of States are likewise placed in peril by illicit trafficking in drugs and by the crimes associated with it.¹³

¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *World Drug Report 2025* (Vienna: United Nations Publication, 2025), Key Findings and Conclusions.

² UNODC, *supra* note 1 (record global cocaine seizures of 2,275 tons in 2023, an increase of 68 per cent over the period 2019 to 2023).

³ UNODC, *supra* note 1 (synthetic drug markets in Eastern Europe, Central Asia and Transcaucasia).

⁴ UNODC, *supra* note 1 (drivers of the continuing expansion of the synthetic drug market).

⁵ UNODC, *supra* note 1 (Captagon trafficking and use in the Near and Middle East).

⁶ UNODC, *supra* note 1 (source countries of pregabalin across Asia, Europe and Africa).

⁷ UNODC, *supra* note 1 (methamphetamine trafficking in the Near and Middle East and North Africa).

⁸ UNODC, *supra* note 1 (pregabalin originating in India).

⁹ UNODC, *supra* note 1 (tramadol in Indian illicit markets).

¹⁰ UNODC, *supra* note 1 (tramadol trafficking routes through Jammu and Kashmir, 2022 to 2024).

¹¹ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *Magnitude of Substance Use in India, 2019* (New Delhi: Government of India and National Drug Dependence Treatment Centre, AIIMS, February 2019), 1. The Respondent Driven Sampling component covered 135 districts and 72,642 persons dependent on illicit drugs; the companion household survey covered 186 districts and 4,73,569 individuals.

¹² See the Preamble to the Single Convention on Narcotic Drugs, 1961.

¹³ *Id.*

To meet these consequences, the global community has responded by adopting a series of conventions, namely the Single Convention on Narcotic Drugs, 1961,¹⁴ the Convention on Psychotropic Substances, 1971,¹⁵ and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.¹⁶ Equal importance has been attached to institutions at the global level, such as the World Health Organisation (WHO),¹⁷ the United Nations Office on Drugs and Crime (UNODC)¹⁸ and the International Narcotics Control Board (INCB).¹⁹ India, in fulfilment of its commitment to these instruments, enacted the Narcotic Drugs and Psychotropic Substances Act, 1985.²⁰ In line with those instruments, punishment provisions have been made under the Act to inflict punishment for drug-related crime. The purpose of any punishment technique is to remove an unwanted response from an organism's behavioural repertoire.²¹ Punishment has the ability to weaken associative bonds, with the clear implication that it is capable of undoing the structure of learning. According to Gary C. Walters, punishment consists, first, in the presentation of an aversive stimulus when a specified behaviour occurs and, secondly, in the presentation of any event that serves to reduce the probability of responding.²² "Presentation" as an element of punishment denotes the addition of something after the particular behaviour, and "aversive stimulus" indicates an unpleasant or undesirable consequence; the purpose of both is to discourage repetition of the behaviour. The presentation of any event denotes the lowering of the likelihood of the behaviour in the future. Accordingly, the NDPS Act has adopted, as other criminal laws have done, exceptionally stringent penal provisions in order to achieve these purposes of punishment. This article critically evaluates those penal provisions in the light of the purposes that punishment is meant to serve.

¹⁴ Single Convention on Narcotic Drugs, 1961, 520 U.N.T.S. 151.

¹⁵ Convention on Psychotropic Substances, 1971, 1019 U.N.T.S. 175.

¹⁶ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 1582 U.N.T.S. 95, adopted at Vienna on 20 December 1988 and in force from 11 November 1990.

¹⁷ Constitution of the World Health Organisation, 1946, adopted on 22 July 1946 and in force from 7 April 1948.

¹⁸ See General Assembly Resolution 45/179 of 21 December 1990, establishing the United Nations International Drug Control Programme, and General Assembly Resolution 46/152 of 18 December 1991, establishing the Crime Prevention and Criminal Justice Programme. The two were merged in 1997 to form what is now the United Nations Office on Drugs and Crime.

¹⁹ See Article 5 of the Single Convention on Narcotic Drugs, 1961, which entrusts the international control functions to the Commission on Narcotic Drugs and to the International Narcotics Control Board; the constitution of the Board is dealt with in Articles 9 to 11.

²⁰ Act No. 61 of 1985.

²¹ GARY C. WALTERS & JOAN E. GRUSEC, *PUNISHMENT* (San Francisco: W.H. Freeman, 1977), 23.

²² *Id.* at 26.

II. OBJECTIVES OF THE STUDY

The present study seeks to: (a) understand the penal structure of the NDPS Act; (b) examine the rationale of the punishment clauses of the Act; (c) assess the compatibility of the Act with constitutional provisions and international standards; and (d) critically evaluate the penal provisions of the Act.

III. RESEARCH METHODOLOGY

The methodology adopted for the present study is purely doctrinal. Qualitative and quantitative methods have both been used to collect material. The quantitative method has been used to identify the trends in drug use and the spread of the problem, and the qualitative method has been used in examining the substantive provisions of the relevant legislative instruments. International instruments, Indian legislative instruments, decisions of the courts and reports of commissions and committees have been referred to in this study. In addition, scholarly books and articles have been consulted in order to assess the efficacy of the system and to understand the rationale of the punishment clauses. Thematic and content analysis of the penal provisions has been adopted, and the research is descriptive, analytical and comparative in nature.

IV. PUNISHMENT CLAUSES: AN OVERVIEW

The core principles of the United Nations Organization are sovereign equality,²³ respect for the territorial integrity and political independence of States,²⁴ and the peaceful settlement of international disputes.²⁵ International law attaches enormous importance to a fair trial, both under criminal law²⁶ and under human rights law.²⁷ Besides these general norms, there are specific instruments criminalising conduct relating to narcotic drugs and psychotropic substances. One of the major conventions at the global level is the Single Convention on Narcotic Drugs, 1961. The Convention recognises the indispensable role of narcotic drugs in relieving pain and suffering. It is equally acknowledged under the Convention that "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind".²⁸ The distinctive characteristic of the Convention is that it

²³ Article 2(1) of the Charter of the United Nations, 1945.

²⁴ Article 2(4) of the Charter of the United Nations, 1945, which prohibits the threat or use of force against the territorial integrity or political independence of any State.

²⁵ Article 2(3) of the Charter of the United Nations, 1945.

²⁶ See, for example, Article 55 of the Rome Statute of the International Criminal Court, 1998; Article 7(3) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Article 16(13) of the United Nations Convention against Transnational Organized Crime, 2000.

²⁷ Articles 10 and 11 of the Universal Declaration of Human Rights, 1948; Articles 14 and 15 of the International Covenant on Civil and Political Rights, 1966.

²⁸ Preamble to the Single Convention on Narcotic Drugs, 1961, *supra* note 12.

consolidates the earlier drug treaties into a single framework in order to address the complexities of control effectively.²⁹ It aims at limiting narcotic drugs exclusively to medical and scientific purposes and at preventing the illicit cultivation and trafficking of drugs. The Convention makes regulatory provision for the classification of narcotic drugs, the licensing and monitoring of the system, reporting by States and international supervision.

Another major instrument, which treats both narcotic drugs and psychotropic substances as a concern of the international community, is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNITNDPS), 1988. The rising trends in the production of, demand for and trafficking in such substances, recognised in a resolution of the Economic and Social Council³⁰ and in resolutions of the General Assembly,³¹ led to this Convention. The Convention postulates that narcotic drugs and psychotropic substances are a severe threat to the health and welfare of human beings and negatively affect the economic, cultural and political fabric of society.³² It further posits that the stability, security and sovereignty of nations are imperilled by illicit traffic in such substances.³³

Detailed provision has been made in the 1988 Convention as to criminalisation, confiscation, extradition, mutual legal assistance, transfer of proceedings, co-operation and training, and international co-operation and assistance for transit States. The Convention, as part of its commitment to international co-ordination, addresses the legislative as well as the administrative measures to be taken by the contracting parties within the framework of their

²⁹ Under Article 44 of the Single Convention on Narcotic Drugs, 1961, the following agreements and treaties are terminated by the Convention: (a) the International Opium Convention, signed at The Hague on 23 January 1912; (b) the Agreement concerning the Manufacture of, Internal Trade in and Use of Prepared Opium, signed at Geneva on 11 February 1925; (c) the International Opium Convention, signed at Geneva on 19 February 1925; (d) the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931; (e) the Agreement for the Control of Opium Smoking in the Far East, signed at Bangkok on 27 November 1931; (f) the Protocol signed at Lake Success on 11 December 1946, amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925, 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, except as it affects the last-named Convention; (g) the Conventions and Agreements referred to in sub-paragraphs (a) to (e) as amended by the Protocol of 1946 referred to in sub-paragraph (f); (h) the Protocol signed at Paris on 19 November 1948 Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success on 11 December 1946; and (i) the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, signed at New York on 23 June 1953, should that Protocol have come into force.

³⁰ Economic and Social Council Resolution 1988/8 of 25 May 1988, which convened the review group and the plenipotentiary conference for the 1988 Convention.

³¹ General Assembly Resolution 39/141 of 14 December 1984 and General Assembly Resolution 42/111 of 7 December 1987.

³² See the Preamble to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

³³ *Id.*

domestic legislative systems.³⁴ A non-derogation clause preserves intact the obligations undertaken by States under the 1961 Convention.³⁵

The Indian criminal justice system is rich in terms of both substantive³⁶ and procedural criminal law.³⁷ Several safeguards have been provided for the accused under the Constitution of India. Protection against ex post facto laws,³⁸ double jeopardy³⁹ and self-incrimination⁴⁰ are the prominent provisions meant for the protection of the accused. While the protection against ex post facto laws and against double jeopardy reflect substantive rights of the accused, the protection against self-incrimination is a procedural shield. In addition to these express provisions, other core rights of the accused have been read into Article 21 of the Constitution. These rights include the right to a fair trial,⁴¹ the right to a speedy trial,⁴² the right to free legal aid,⁴³ the right against custodial torture,⁴⁴ the right to dignity,⁴⁵ the right against illegal arrest and detention,⁴⁶ the right to a fair investigation,⁴⁷ the right to privacy,⁴⁸ the right to medical care,⁴⁹ the right to bail,⁵⁰ the right against solitary confinement and inhuman treatment,⁵¹ and the right to compensation.⁵²

The instrument containing the penal clauses on narcotic drugs and psychotropic substances in India is the Narcotic Drugs and Psychotropic Substances Act, 1985. Chapter IV of the Act, comprising sections 15 to 40, stipulates the penal provisions for punishing the various offences set out in that Part.⁵³ The scheme falls into two parts. The first grades punishment by the quantity

³⁴ Article 2(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

³⁵ Article 25 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

³⁶ The Bharatiya Nyaya Sanhita, 2023, replacing the Indian Penal Code, 1860, with effect from 1 July 2024.

³⁷ The Bharatiya Nagarik Suraksha Sanhita, 2023, replacing the Code of Criminal Procedure, 1973, and the Bharatiya Sakshya Adhinyam, 2023, replacing the Indian Evidence Act, 1872, both with effect from 1 July 2024.

³⁸ INDIA CONST. art. 20(1).

³⁹ INDIA CONST. art. 20(2).

⁴⁰ INDIA CONST. art. 20(3).

⁴¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597, holding that procedure under Article 21 must be fair, just and reasonable, from which the right to a fair trial follows.

⁴² *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81; AIR 1979 SC 1360.

⁴³ *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401.

⁴⁴ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

⁴⁵ *Sunil Batra v. Delhi Administration (II)*, (1980) 3 SCC 488.

⁴⁶ *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260.

⁴⁷ *Babubhai v. State of Gujarat*, (2010) 12 SCC 254.

⁴⁸ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴⁹ *Pt. Parmanand Katara v. Union of India*, (1989) 4 SCC 286; AIR 1989 SC 2039.

⁵⁰ *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 SCC 240.

⁵¹ *Charles Sobhraj v. Superintendent, Central Jail, Tihar*, (1978) 4 SCC 104.

⁵² *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

⁵³ The Narcotic Drugs and Psychotropic Substances Act, 1985, Chapter IV, ss. 15 to 40, the Chapter closing with s. 38 (offences by companies), s. 39 (release of certain offenders on probation) and s. 40 (publication of names, places and other particulars).

of the substance involved, distinguishing a small quantity, a quantity greater than a small quantity but less than a commercial quantity, and a commercial quantity. The Act itself supplies no numerical threshold; the small quantity and the commercial quantity for each controlled substance are fixed by notification issued under sections 2(xxiii a) and 2(viia).⁵⁴ Where the substance seized is a mixture, the whole weight of the mixture is reckoned in determining the tier into which the seizure falls, which makes the grading operate far more severely than the bare tiers suggest.⁵⁵ The quantity-graded offences are set out in Table 2 below.

Substance category	Section
Poppy straw	Section 15
Prepared opium	Section 17
Opium poppy and opium	Section 18
Cannabis plant and cannabis	Section 20
Manufactured drugs and preparations	Section 21
Psychotropic substances	Section 22
Illegal import into India, export from India or transshipment	Section 23
Quantity tier	Punishment
Small quantity	Rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both
Greater than a small quantity but less than a commercial quantity	Rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees
Commercial quantity	Rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and fine which shall not be less than one lakh rupees but which may extend to two lakh rupees; provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees

Table 2: Quantity-based analysis. The punishment turns on the quantity tier and is identical across all seven categories, which are therefore listed separately from the tiers. Only section 20(b)(ii) is quantity-graded: cultivation of the cannabis plant under section 20(a) carries rigorous imprisonment up to ten years and fine up to one lakh rupees irrespective of quantity.

⁵⁴ Notification S.O. 1055(E), MINISTRY OF FINANCE (Department of Revenue), dated 19 October 2001, issued under ss. 2(viia) and 2(xxiii a) of the Narcotic Drugs and Psychotropic Substances Act, 1985, specifying the small quantity and the commercial quantity for each of 239 substances, as amended, most materially, by S.O. 2941(E) dated 18 November 2009. By way of illustration, the small and commercial quantities are 5 g and 250 g for heroin (diacetyl-morphine), 2 g and 100 g for cocaine, 25 g and 2.5 kg for opium, 100 g and 1 kg for charas or hashish, 1,000 g and 20 kg for ganja, and 2 g and 50 g for amphetamine.

⁵⁵ *Hira Singh v. Union of India*, (2020) 20 SCC 272, holding that where the substance seized is a mixture the whole weight of the mixture is to be reckoned in determining the quantity, and overruling *E. Micheal Raj v. Narcotics Control Bureau*, (2008) 5 SCC 161.

The second part of the scheme fixes punishment without reference to quantity, either because the offence is not capable of being graded in that way or because the gravity of the conduct is treated as constant. These offences, together with the provisions governing repeat offenders, the suspension of sentence and the factors relevant to sentencing, are set out in Table 3 below.⁵⁶

SN	Section	Offence	Punishment
1	16	Contravention in relation to coca plant and coca leaves	Rigorous imprisonment for a term which may extend to ten years, or with fine which may extend to one lakh rupees
2	19	Embezzlement of opium by a cultivator	Rigorous imprisonment not less than ten years and up to twenty years, and fine not less than one lakh rupees and up to two lakh rupees; the court may, for reasons to be recorded, impose a fine exceeding two lakh rupees
3	24	External dealings in narcotic drugs and psychotropic substances in contravention of section 12	Rigorous imprisonment not less than ten years and up to twenty years, and fine not less than one lakh rupees and up to two lakh rupees
4	25	Knowingly allowing premises, conveyances etc. to be used for the commission of an offence	The punishment provided for that offence
5	25A	Contravention of orders made under section 9A	Rigorous imprisonment which may extend to ten years and fine which may extend to one lakh rupees; the court may, for reasons to be recorded, impose a higher fine
6	26	Certain acts by a licensee or his servants	Imprisonment for a term which may extend to three years, or with fine, or with both
7	27(a)	Consumption of a narcotic drug or psychotropic substance specified by the Central Government, cocaine, morphine and diacetyl-morphine being named in the section itself	Rigorous imprisonment for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both
8	27(b)	Consumption of any	Imprisonment for a term

⁵⁶ The Narcotic Drugs and Psychotropic Substances Act, 1985, ss. 16, 19, 24, 25, 25A, 26, 27, 27A, 27B, 28, 29, 30, 31, 31A, 32, 32A and 32B.

SN	Section	Offence	Punishment
		narcotic drug or psychotropic substance other than those specified	which may extend to six months, or with fine which may extend to ten thousand rupees, or with both
9	27A	Financing illicit traffic and harbouring offenders	Rigorous imprisonment not less than ten years and up to twenty years, and fine not less than one lakh rupees and up to two lakh rupees
10	27B	Contravention of section 8A	Rigorous imprisonment not less than three years and up to ten years, and shall also be liable to fine
11	28	Attempt to commit an offence	The punishment provided for that offence
12	29	Abetment and criminal conspiracy	The punishment provided for that offence, whether or not the offence is in fact committed
13	30	Preparation to commit an offence under section 19, section 24 or section 27A, or an offence involving a commercial quantity	One-half of the minimum and of the maximum punishment and fine provided for that offence
14	31	Offence committed after a previous conviction, save where section 31A applies	One and one-half times the minimum and the maximum punishment and fine provided for that offence
15	31A	A previous conviction under section 19, section 24 or section 27A, or for an offence involving a commercial quantity, followed by a conviction for production, manufacture, possession, transport, import into India, export from India or transshipment of a drug listed in the Table to section 31A in a quantity at or above the threshold there prescribed, or for financing such activity	Punishment which shall not be less than the punishment specified in section 31, or death; discretionary since the Amendment Act 16 of 2014
16	32	Offence for which no punishment is provided	Imprisonment for a term which may extend to six months, or with fine, or with both
17	32A	No suspension, remission or commutation of any sentence awarded under	Read down in <i>Dadu v. State of Maharashtra</i> , (2000) 8 SCC 437, in so

SN	Section	Offence	Punishment
		the Act other than a sentence under section 27	far as it barred suspension of sentence pending appeal
18	32B	Factors the court may take into account in imposing a punishment higher than the minimum	Permissive; the court may also take into account such other factors as it deems fit

Table 3: Non-quantity-based analysis. Rows 17 and 18 (sections 32A and 32B) are editorial additions.

V. CRITICAL ANALYSIS

Punishment is the heart of the criminal justice system. Its core objects include the prevention of all offences, the prevention of the worst offences, keeping down the mischief, and acting at the least expense.⁵⁷ There is also reasonable ground to doubt whether uniformity of punishment based on quantity retains its sanctity once the offender's role, intention, addiction and circumstances are taken into account. The doctrine of proportionality is the bedrock of the criminal justice system, and the dilution of that doctrine is visible in the imposition of equal punishment on the courier of a drug and on the financier of drug trafficking. It is irrational to treat these two punishments as comparable, since the culpability of the two offenders is very different. The Act does stipulate specific factors to be considered where a punishment higher than the minimum term of imprisonment or amount of fine prescribed for an offence is to be imposed. It provides that the court may, "in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine".⁵⁸ These are clear words directed at structuring judicial discretion and at guarding against the abuse of judicial power. The width of the enquiry that sentencing may require is captured in Jeremy Bentham's observation, made in the course of his discussion of the circumstances of an act, that "there is nothing in the nature of things that excludes any imaginable object from being a circumstance to it".⁵⁹

The clarity of the Act in stipulating the factors to be considered by the courts in imposing more than the minimum punishment, taken with the mandatory minimum sentences the Act prescribes, has circumscribed judicial discretion and, to that extent, sought to balance the interests of the State against the rights of the accused. The penal provisions of the Act have advanced the objectives of the deterrence theory and the consistency of sentencing decisions, at

⁵⁷ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford: The Clarendon Press, 1907), 178.

⁵⁸ Section 32B of the Narcotic Drugs and Psychotropic Substances Act, 1985. The provision is permissive rather than obligatory: the court *may* take the enumerated factors into account.

⁵⁹ Bentham, *supra* note 57, at 76-77. The observation is made in the course of the discussion of the circumstances of an act in Chapter VII, and is not itself a statement of punishment policy.

the cost of flexibility. Presumption of innocence is the foundational principle of criminal law and an integral part of human rights jurisprudence. A distinctive characteristic of the NDPS Act is the reverse burden of proof, which runs contrary to that traditional principle: the Act raises a presumption of a culpable mental state and a presumption arising from possession, and thereby imposes a significant evidentiary burden on the accused to establish his innocence.⁶⁰ The reverse burden radiates a deep commitment to the deterrent theory of punishment. Nevertheless, a serious issue remains as to the compatibility of this evidentiary principle with Article 21 of the Constitution.

Bail, and the liberal interpretation of bail, are long-established features of Indian criminal procedure.⁶¹ The general purposes of bail, such as preventing the accused from absconding, preventing the intimidation of witnesses and preventing the further commission of offences, are equally the expectations behind the bail provisions of the NDPS Act. Bail for the more serious offences under the Act is, however, not left to ordinary discretion. The Act mandates that bail shall not be granted unless the Public Prosecutor has been given an opportunity to oppose the application and, where he opposes it, "the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail".⁶² These twin conditions do not attach to every offence under the Act; they apply only to offences under sections 19, 24 and 27A and to offences involving a commercial quantity, and they operate in addition to, and not in substitution for, the limitations imposed by the general law of bail. That general law, including the well-established judicial guidelines on the grant of bail, therefore continues to apply.⁶³ A further concern for the courts is that prolonged delay at the pre-trial stage, and in the investigation and prosecution of the case, may undermine the legitimate rights of the accused, and this has to be borne in mind in dealing with such bail applications. The point is sharpened by the fact that the Act bars the suspension, remission and

⁶⁰ Sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Section 35 raises a presumption of a culpable mental state and s. 54 a presumption arising from possession; s. 35(2) requires that a fact be treated as proved only where the court believes it to exist beyond reasonable doubt.

⁶¹ *Dataram Singh v. State of Uttar Pradesh*, (2018) 3 SCC 22, describing the long-standing practice of a liberal approach to the grant of bail.

⁶² Section 37(1)(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The twin conditions attach only to offences under ss. 19, 24 and 27A and to offences involving a commercial quantity; s. 37(2) makes these limitations additional to those imposed under the general law relating to the grant of bail.

⁶³ *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21, para 18. Those factors are: (i) whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence; (ii) the nature and gravity of the charge; (iii) the severity of the punishment in the event of conviction; (iv) the danger of the accused absconding or fleeing if released on bail; (v) the character, behaviour, means, position and standing of the accused; (vi) the likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) the danger of justice being thwarted by the grant of bail.

commutation of sentences, a bar which had to be read down by the Supreme Court in so far as it deprived the court of the power to suspend a sentence pending appeal.⁶⁴

Habitual offenders present a serious challenge to the criminal justice system. There is a reasonable possibility that offenders under the NDPS Act will be of that description, and the law must deal with such offenders stringently. The Act has demonstrated its commitment by providing enhanced punishment for repeat offenders: on a subsequent conviction for an offence punishable under the Act, the offender is liable to one and one-half times the minimum and the maximum punishment and fine provided for that offence.⁶⁵ Where an offender is treated as habitual, however, the standard applied must be a reasonable belief founded on reasonable grounds, and not mere suspicion.⁶⁶ There is reasonable apprehension that the characterisation of an offender as habitual may be misused by the police authorities in invoking the provisions of the Act. While it is fair to provide enhanced punishment for repeat offenders, an equally important consideration is the relationship between the nature of the previous offence and that of the subsequent offence. A mismatch between a minor previous offence and a major subsequent offence, when enhanced punishment is being considered, may run counter to the wisdom of the criminal justice system.

The death penalty is one of the controversial components of punishment policy across the globe.⁶⁷ Across the Commonwealth nations it exhibits a declining trend.⁶⁸ Capital punishment forms part of a small number of Indian criminal statutes,⁶⁹ and the judiciary has moulded it by aligning its use with the sanctity of human life.⁷⁰ Under the NDPS Act the death penalty is reserved for a narrowly defined class of repeat offender. It requires both a previous conviction for embezzlement of opium by a cultivator,⁷¹ for external dealings in narcotic drugs and

⁶⁴ Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985, which bars the suspension, remission or commutation of any sentence awarded under the Act other than a sentence under s. 27. In *Dadu v. State of Maharashtra*, (2000) 8 SCC 437, the provision was held unconstitutional in so far as it took away the power of the court to suspend a sentence pending appeal.

⁶⁵ Section 31 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as amended by s. 14 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act 16 of 2014, which substituted one and one-half times for one-half in both s. 31(1) and s. 31(2). Section 31 applies to a subsequent conviction for any offence punishable under the Act, save where s. 31A displaces it.

⁶⁶ *Dhanji Ram Sharma v. Superintendent of Police, North District, Delhi*, AIR 1966 SC 1766, holding that surveillance may be maintained where the officer entertains a reasonable belief, resting on reasonable grounds, that the person is habitually addicted to crime.

⁶⁷ For global perspectives on the death penalty, see ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (5th edn, Oxford: Oxford University Press, 2015).

⁶⁸ Andrew Novak, *The Abolition of the Mandatory Death Penalty in India and Bangladesh: A Comparative Commonwealth Perspective*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 227 (2014), 227.

⁶⁹ The Bharatiya Nyaya Sanhita, 2023, the Army Act, 1950, the Navy Act, 1957, the Air Force Act, 1950, the Unlawful Activities (Prevention) Act, 1967, and the Narcotic Drugs and Psychotropic Substances Act, 1985, itself.

⁷⁰ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684; *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

⁷¹ Section 19 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (embezzlement of opium by a cultivator).

psychotropic substances,⁷² or for financing illicit traffic and harbouring offenders,⁷³ or for an offence involving a commercial quantity, and a subsequent conviction for the production, manufacture, possession, transport, import into India, export from India or transshipment of one of the drugs specified in the Table appended to the section, in a quantity at or above the threshold there prescribed, or for financing such an activity.⁷⁴ The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 made this capital punishment discretionary rather than mandatory by replacing the earlier words "shall be punishable with death" with "shall be punished with punishment which shall not be less than the punishment specified in section 31 or with death". That amendment gave legislative effect to the decision of the Bombay High Court which had held the mandatory death sentence violative of Article 21 and had read the provision down as directory.⁷⁵ The amendment demonstrates a progressive turn in punishment policy, bringing the capital punishment provision of the Act into line with constitutional principles and international standards. The major controversy that remains for scholars, in the context of the global movement against the imposition of death for non-violent crime, is whether the punishment has any proper place in the Act at all.

The consumption of any narcotic drug or psychotropic substance is punishable under the Act. For the purposes of consumption the Act classifies such substances into two categories: those specified by the Central Government, which include cocaine, morphine and diacetyl-morphine named on the face of the section, and those other than the substances so specified, for which a lower punishment is prescribed.⁷⁶ More importantly, in consumption cases it is reasonable to think that punishing the accused instead of treating and rehabilitating him reflects an immature approach on the part of the criminal justice system. Controversy also surrounds the coexistence of punishment for consumption with the immunity granted to addicts who voluntarily seek

⁷² Section 24 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (external dealings in narcotic drugs and psychotropic substances in contravention of s. 12).

⁷³ Section 27A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (financing illicit traffic and harbouring offenders).

⁷⁴ Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985. The Table appended to the section prescribes the following quantities: opium 10 kg; morphine 1 kg; heroin 1 kg; codeine 1 kg; thebaine 1 kg; cocaine 500 g; hashish 20 kg; LSD 500 g; tetrahydrocannabinol 500 g; and methamphetamine, methaqualone and amphetamine 1,500 g each.

⁷⁵ *Indian Harm Reduction Network v. Union of India*, decided on 16 June 2011, 2012 Bom CR (Cri) 121; 2012 Cri LJ 825 (Bombay High Court). Section 15 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act 16 of 2014 gave legislative effect to that decision.

⁷⁶ Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Section 27(a), which prescribes rigorous imprisonment which may extend to one year, or fine which may extend to twenty thousand rupees, or both, names cocaine, morphine and diacetyl-morphine on the face of the section, together with any other narcotic drug or psychotropic substance specified by the Central Government by notification; s. 27(b), which covers substances other than those so specified, prescribes imprisonment which may extend to six months, or fine which may extend to ten thousand rupees, or both.

treatment for consumption offences.⁷⁷ Distinguishing between these two cases may prove challenging for the legal system. It is another glaring omission of the Act that the term "consumption" is nowhere defined in it.

A perfect procedure is both unattainable and unaffordable.⁷⁸ No system can guarantee perfect procedural accuracy, and the highest possible degree of accuracy would be intolerably costly.⁷⁹ Courts have repeatedly emphasised that procedural safeguards relating to search, seizure, arrest and evidence must be meticulously followed by the actors in the criminal justice system. Detailed provision has been made under the NDPS Act to ensure procedural justice in respect of the offences committed under it. The procedural law to be followed for offences under the Act is crucial precisely because of its stringent punishments and bail provisions. A failure on the part of the legal system to observe those procedural provisions may result in careless prosecution and in acquittals that shake the very fabric of the criminal justice system. The Act has made fair provision with these considerations in view.

Persons arrested and prosecuted under the NDPS Act may continue to present a risk even after arrest and prosecution. That may be a primary risk posed to society or a secondary risk to the standing of the criminal justice system itself.⁸⁰ Bonds and security can act as mitigating factors in relation to such risk, and offences committed under the Act call for such control mechanisms because of the inherent nature of those offences. The Act therefore provides for the taking of security from convicted offenders, a power exercisable by the trial court and extended to the appellate court, the High Court and a Sessions Judge in revision, so that the risk posed by convicted offenders may be mitigated.⁸¹

VI. CONCLUSION

The NDPS Act, 1985 remains one of India's most stringent criminal statutes, reflecting the commitment of the State to combating illicit drug trafficking and to fulfilling its international obligations. Its rigorous penal provisions, including mandatory minimum sentences, reverse burdens of proof, stringent bail restrictions and enhanced penalties for repeat offenders, have

⁷⁷ Section 64A of the Narcotic Drugs and Psychotropic Substances Act, 1985, which grants immunity from prosecution to an addict charged with an offence under s. 27, or with an offence involving a small quantity, who voluntarily seeks de-addiction treatment at a recognised centre.

⁷⁸ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004), 185.

⁷⁹ *Id.*

⁸⁰ Nicole M. Myers, *Shifting Risk: Bail and the Use of Sureties*, (2009) 21(1) CURRENT ISSUES IN CRIMINAL JUSTICE 127, 128.

⁸¹ Section 34 of the Narcotic Drugs and Psychotropic Substances Act, 1985, which empowers the court, on conviction for an offence under Chapter IV, to require a bond for abstaining for a period not exceeding three years. Section 34(4) extends the power to an appellate court, the High Court and a Sessions Judge in revision, and s. 34(3) makes the bond void if the conviction is set aside.

undoubtedly strengthened enforcement against organised drug crime. Those same provisions have, however, generated concerns about proportionality, due process, prolonged pre-trial detention and the treatment of persons with substance dependence.

A modern drug policy must distinguish between profit-driven traffickers and individuals whose offending is rooted in addiction or socio-economic vulnerability. Constitutional values, judicial discretion, rehabilitation and evidence-based public health measures should complement deterrent criminal sanctions. Reforming the penal framework in this direction would enable the NDPS Act to remain an effective instrument against organised narcotics crime while aligning it more closely with the principles of justice, fairness and human dignity enshrined in the Constitution of India.
