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# FROM PROHIBITION TO ENFORCEMENT: UNDERSTANDING LEGAL INTRICACIES IN THE NDPS ACT, 1985

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## I. ABSTRACT

The Narcotic Drugs and Psychotropic Substances (NDPS) Act of 1985 was enacted to address the growing challenges posed by illicit drug use in India. The NDPS Act categorizes various narcotic drugs and psychotropic substances, detailing the penalties associated with offenses, which can range from fines to capital punishment depending on the severity of the crime. The Act of 1985 also contains specific provisions pertaining to licensing and regulatory measures for the cultivation, production, and distribution of these substances for legitimate medical and scientific purposes. This research paper provides a descriptive and thorough analysis of the substantial provisions of the NDPS Act, and an endeavor has been made by the author to analytically review the enforcement mechanism provided under the Act with the help of evolving jurisprudence in the matters involving drug contraband.

The paper highlights the dual need for strict control to prevent abuse and misuse while ensuring the availability of these substances for legitimate medical and scientific purposes. This paper addresses significant challenges in drug law enforcement, including corruption and inadequate resources, and suggests potential reforms to create more effective and equitable drug policies that prioritize public health and social justice in India. Furthermore, the research also points out the existing gaps in the statutory provisions and enforcement strategies with suggestive measures to take them. The paper concludes by emphasizing the importance of revising the NDPS Act to better address the complexities of drug policy reform and its implications for these communities. This research aims to contribute to the ongoing discourse on drug policy

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in India, advocating for a balanced approach that considers both enforcement and policy shift in matters of NDPS Act.

## II. KEYWORDS:

NDPS Act, Narcotic drugs, Psychotropic substances, Enforcement mechanisms, Drug trafficking.

## III. INTRODUCTION

Indian laws prohibit possession, consumption, or distribution of “narcotic drugs or psychotropic substances”<sup>2</sup> and declares the same to be a serious offense having detrimental impact on the societal and economic framework of our country. Beyond its direct repercussions of introducing hazardous and addictive substances into the lives of young and impressionable individuals, it also jeopardizes the financial stability of the nation and significantly contributes to anti-national or terrorist activities by providing funding to unlawful organizations. The Narcotic Drugs and Psychotropic Substances Act of 1985 stands as a crucial instrument in India's efforts to combat the multifaceted challenges associated with use and abuse of narcotic drugs and psychotropic substances.

An essential aspect of the NDPS Act is its commitment to the protection of public health and welfare. By regulating the production, distribution, and use of narcotic drugs and psychotropic substances, the Act aims to shield the public from the detrimental effects of drug abuse and addiction. Enacted with a comprehensive scope, the Act of 1985 operates as a fundamental legislation, meticulously designed to prohibit, regulate and control different activities associated with “narcotic drugs and psychotropic substances”. With its primary objective being “*the control and regulation of operations related to narcotic drugs and psychotropic substances*”, the NDPS Act

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<sup>2</sup> The term “narcotic” carries distinct meanings in the legal and medical realms. While medically it denotes a drug inducing sleep, legally it encompasses various substances, including opiates (acknowledged as true narcotics), cannabis (classified as non-narcotic), and cocaine (notable for its stimulant effects rather than conventional narcotic properties). On the other hand, the term “psychotropic substance” refers to substances influencing the mind.

addresses the prevention of abuse and misuse, targeting both illegal trafficking and unauthorized consumption.

The main goal of the NDPS Act is to stop and discourage use and trafficking of illegal narcotics and psychoactive substances. This is accomplished by enacting stringent regulatory policies, imposing harsh punishments on offenders, and building a strong law enforcement apparatus.

The NDPS Act of 1985 also acknowledges the value of narcotics and psychoactive substances in the fields of science and medicine by promoting the medicinal and scientific use of these substances. While imposing strict regulations, the Act ensures availability of these drugs and substances for legitimate purposes through the issuance of licensing and permits to individuals, institutions, and organizations involved in these activities. The Act successfully strikes a compromise between the necessity to regulate and oversee these substances and their permissible use for medical and research purposes.

Additionally, the Act also places a strong emphasis on initiatives for prevention and rehabilitation by emphasizing upon the value of rehabilitation and treatment for those with substance misuse disorders while simultaneously requiring rigorous enforcement measures. The Act supports initiatives to inform the public about the risks posed by narcotic narcotics and psychoactive substances. This includes educating people about the dangers of drug usage for their health as well as the legal repercussions of engaging in unlawful drug-related activities. While rehabilitation programs work to assist people in overcoming addiction and reintegrating into society, awareness campaigns and educational activities try to raise public awareness of the risks associated with drug consumption.

**Section 4** of the Narcotics and Psychotropic Substances Act, 1985 requires the Central Government to take measures for preventing and combating abuse of and illicit traffic in narcotic drugs, etc. Under this provision, the *“Central Government has to take all such measures as it deems necessary or expedient for the purpose of preventing and combating abuse of narcotic drugs and psychotropic substances and the illicit traffic therein and for ensuring*

*their medical and scientific use.*"<sup>3</sup> The Central Government may take necessary measures for enforcement of the provisions of this Act. Further, the Central Government has also been empowered "to constitute an authority or a hierarchy of authorities by such name or names as may be specified in the order for the purpose of exercising such of the powers and functions of the Central Government under this Act and for taking necessary measures for the enforcement of the provisions of this Act".<sup>4</sup> The authority or authorities so constituted may exercise the powers and take the measures whichever is necessary for effective enforcement of the law relating to Narcotic Drugs and Psychotropic substances.

This research paper aims to provide a comprehensive examination of the Narcotic Drugs and Psychotropic Substances (NDPS) Act of 1985 with special emphasis upon the legal framework established for regulating narcotic drugs and psychotropic substances in India. Author also seeks to critically assess the enforcement mechanisms outlined in the NDPS Act, exploring how different provisions of the NDPS Act are implemented by law enforcement agencies and the challenges they face in combating abuse of prohibited drugs.

By doing so, author shall identify existing gaps in the statutory provisions and enforcement strategies of the NDPS Act, particularly in relation to the rise of synthetic drugs and the complexities of drug abuse in society. Lastly, the author shall also suggest potential reforms to the NDPS Act that can enhance its effectiveness in addressing drug abuse while ensuring legitimate access to narcotic substances for medical and scientific purposes.

#### **IV. LITERATURE REVIEW**

In the research paper titled "*The National Narcotic Drugs and Psychotropic Substances policy of India: A Critical Evaluation*"<sup>5</sup>, while analyzing a complex interplay between historical injustices, socio-economic factors, and the evolving legal landscape, author highlights the significant shift in the legal status of cannabis over recent decades,

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<sup>3</sup> Section 4(1)

<sup>4</sup> Section 4(3)

<sup>5</sup> Prashant Chakravarty, Dr. Azimkhan and B. Pathan, "*Revisiting The National Narcotic Drugs and Psychotropic Substances policy of India: A Critical Evaluation*", Journal of Pharmaceutical Research and Innovation (JPRI) Volume 2 Issue 2 (22-29).

questioning whether its legalization challenges racial capitalism or merely reinforces it. Furthermore, the examination of current regulations, such as import limits and social equity licenses, raises critical questions about their sufficiency in addressing the reparation demands of communities most affected by the 'War on Drugs' over the past century. Author suggests that while the legalization of previously illicit drugs may correct historical wrongs, it also risks creating a new market that could perpetuate existing inequalities. The author argues for a more comprehensive historical perspective to grasp the implications of drug control policies and their socio-economic impacts. Author aptly notes that a broader view is required to be taken for evaluating India's National Narcotic Drugs and Psychotropic Substances policy. Author has also relied on various studies that pave way for understanding the complexities of drug policy reform in India and its potential implications for marginalized communities.

In research paper titled "*Deciphering the narcotic drugs and psychotropic substances act of 1985 and its enforcement guidelines in India*"<sup>6</sup>, author discusses the NDPS Act of 1985 in India, which serves as a comprehensive legal framework aimed at regulating the production, distribution, and use of narcotic and psychotropic substances. The author notes that there exists a dual need for strict control to prevent abuse and misuse while ensuring the availability of these substances for legitimate medical and scientific purposes.

It emphasizes international cooperation in combating drug trafficking and includes provisions for severe penalties, property forfeiture, and preventative detention to dismantle the economic infrastructure of drug trafficking networks. The author notes that the NDPS Act of 1985 facilitates a balanced approach to regulation while recognizing the importance of rehabilitation and public education initiatives to address substance misuse, aiming to protect public health. Research paper concludes that the enforcement guidelines outlined in the Act provide a strategic framework for law enforcement agencies, encouraging collaboration with various stakeholders to effectively combat drug-related issues in India representing a critical effort to balance

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<sup>6</sup> Dhamotharan Jothieswari , Darmi Hima Bindu and Audinarayana Nelavala, "*Deciphering the narcotic drugs and psychotropic substances act of 1985 and its enforcement guidelines in India*", Pharm. Health. Sci. 2023; 3(4) (534-539).

public safety with the need for legitimate access to narcotic and psychotropic substances.

The research paper titled "*Understanding the Narcotic Drugs and Psychotropic Substances Act in India: A Comprehensive Analysis*"<sup>7</sup> provides an in-depth examination of the NDPS Act, which was enacted to combat the growing issues related to illicit drugs in India. The paper outlines the historical context leading to the Act's introduction, highlighting the inadequacies of previous regulations like the Opium Acts and the need for a comprehensive legal framework to address modern drug challenges.

Author has conducted a study of various categories of narcotic drugs and psychotropic substances and licensing and regulatory measures for the cultivation, production, and distribution of these substances for legitimate purposes. Enforcement mechanisms are discussed, emphasizing the roles of various agencies in investigating drug-related offenses and disrupting trafficking networks. The paper identifies significant challenges in drug law enforcement, including corruption, inadequate resources, and the need for a more integrated approach to drug policy that encompasses prevention, treatment, and harm reduction.

It suggests potential reforms, such as the decriminalization of drug use, expansion of treatment services, strengthening law enforcement capabilities, and promoting international cooperation.

In the research paper titled "*An Overview on Narcotic Drugs and Psychotropic Substances Act, 1985*"<sup>8</sup>, author notes that the Act of 1985 aims to control the abuse of narcotic drugs and psychotropic substances while allowing for their medicinal use under strict regulations. Author highlights the fact that despite its intentions, the act has faced criticism for several shortcomings like, presumption of guilt lack of adequate differentiation between casual users, petty peddlers, and serious traffickers etc. Author has also expressed his concern upon the rise of synthetic drugs and designer substances presenting ongoing challenges for enforcement, as these new drugs often

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<sup>7</sup> P Parmar and G Rathod "*Understanding the Narcotic Drugs and Psychotropic Substances Act in India: A Comprehensive Analysis*"<sup>7</sup> Mini Review Volume 9 Issue 1 (1-4).

<sup>8</sup> Shweta Sharma, Kapil Kumar and Gyanendra Singh, "*An Overview on Narcotic Drugs and Psychotropic Substances Act, 1985*" Journal of Forensic Science and Criminal Investigation Volume 4 Issue 3 (001-004).

fall outside the scope of existing regulations. Author concludes that while the NDPS Act represents a significant effort to regulate drug use in India, its implementation and impact reveal critical areas for reform and improvement in addressing the complexities of drug abuse in society.

The abovementioned review of literature highlights various complexities surrounding the regulatory and enforcement aspect of the National Narcotic Drugs and Psychotropic Substances (NDPS) Act of 1985. It allows us to understand the technical intricacies pertaining to the presumption of guilt and the lack of differentiation between drug addicts and traffickers, which is necessary to identify gaps in enforcement and requirement of reforms in the existing legal framework. Further, the literature emphasizes the dual need for strict control and legitimate access to narcotic substances in light of existing drug policy in India. Furthermore, the literature review also provides valuable insights for analyzing the potential consequences of drug legalization and its impact on existing complexities pertaining to enforcement of drug regulation norms.

## V. PROHIBITION REGARDING NDPS

Section 8 of the NDPS Act, 1985 imposes a complete prohibition on “*cultivation and further processing/transport or sale of any coca plant, opium poppy or any cannabis plant*”.

Section 8 of the NDPS Act, 1985 reads as:

“**Prohibition of certain operations.** – No person<sup>9</sup> shall –

- a) cultivate<sup>10</sup> any coca plant or gather any portion of coca plant; or
- b) cultivate the opium poppy or any cannabis plant<sup>11</sup>; or

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<sup>9</sup> Section 8 of the NDPS Act creates a prohibition not only for the citizens of India rather for every person residing in India, whether permanently or as a visitor (whether as a resident or a foreigner).

<sup>10</sup> To cultivate means to actually put efforts and physical labour on the growth of any plant. The cultivation of an kind of NDPS can only be done with the prior licenses to be issued by the government authorities under the Act.

<sup>11</sup> The cultivation of the opium poppy may be permitted by the Central Government under section 9 of the Act while the cultivation of cannabis plant may be permitted by the State Government under section 10 of the Act read with section 14 of the Act itself.



- c) produce<sup>12</sup>, manufacture<sup>13</sup>, possess<sup>14</sup>, sell, purchase, transport<sup>15</sup>, warehouse<sup>16</sup>, use<sup>17</sup>, consume<sup>18</sup>, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance<sup>19</sup>, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

*Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in*

<sup>12</sup> Section 2(xxii) of the Act defines “production” to mean “separation of opium, poppy straw, coca leaves or cannabis from the plants from which they are obtained;”

<sup>13</sup> Section 2 (x) of the Act defines “manufacture”, in relation to narcotic drugs or psychotropic substances, to include – “(1) all processes other than production by which such drugs or substances may be obtained;

(2) refining of such drugs or substances; (3) transformation of such drugs or substances; and

(4) making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances;”

<sup>14</sup> The term, ‘possession’ refers to control over an article or thing. It requires conscious possession (when possession is with knowledge). In the case of *Mohan Lal v. State of Rajasthan (2015) 6 SCC 222*, the Supreme Court of India held that “the term ‘possession’ consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the intent which has reference to exercise of the said control. Further, the term ‘possession’ for the purpose of section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession.”

<sup>15</sup> Section 2 (xxviii) of the Act describes “to transport” means “to take from one place to another within the same State or Union territory;”.

<sup>16</sup> Warehousing has not been defined under the Act. Literally speaking it involves any kind of storage of articles in different forms of existence (liquid, solid or powder). Where the prohibited goods have been placed in any place for safe custody, that shall amount to warehousing under the Act.

<sup>17</sup> Section 2 (xxviii) of the Act defines “use”, in relation to narcotic drugs and psychotropic substances, to mean “any kind of use except personal consumption;”

<sup>18</sup> It refers to the act of consumption. This consumption may be individual (self) or with other persons jointly.

<sup>19</sup> Like- Ganja. Section 2(iiib) of the NDPS, defines ganja as “ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated.”

this behalf: *Provided further* that nothing in this section shall apply to the export of poppy straw for decorative purposes.”

## VI. CULPABLE MENTAL STATE AND POSSESSION OF NDPS

Presumption of culpable mental state can be found under **Section 35<sup>20</sup> of the Narcotic Drugs and Psychotropic Substances Act, 1985** whereby the prosecution is not required to prove the same and the onus automatically shifts on the accused to rebut this presumption of culpable mental state. The onus of rebutting the presumption of culpable mental state under Section 35 of the NDPS Act significantly impacts the prosecution's burden of proof. This legal framework creates a unique dynamic where the prosecution must not only establish the elements of the offense but also counter the presumption of innocence regarding the accused's mental state.

The prosecution traditionally bears the burden to prove guilt beyond a reasonable doubt. However, under Section 35, the presumption shifts some responsibility to the accused to demonstrate a lack of culpable mental state, effectively creating a reverse onus situation. This shift can dilute the prosecution's burden, as they may rely on the presumption to establish culpability without fully addressing the mental state of the accused. However, at the same time, the presence of reverse onus clauses also raises concerns about fairness and the potential for wrongful convictions, as the accused may find it cumbersome to meet the rebuttal requirement.

Further, **Section 54<sup>21</sup>** of the NDPS Act also contain presumption regarding possession of illicit articles (Narcotic Drugs and Psychotropic Substances) and provide that any

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<sup>20</sup> **Section 35** of the Act reads: “**Presumption of culpable mental state.** – (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

*Explanation.* – In this section “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

<sup>21</sup> Section 54 of the Act reads: “**Presumption from possession of illicit articles.** – In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of – (a) any narcotic drug or psychotropic substance or controlled substance; (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

possession of such articles unless proved otherwise, shall be deemed to be in violation of the NDPS Act and shall be accordingly punishable.

- In the case of *Madan Lal and Ors. v. State of Himachal Pradesh*<sup>22</sup>, the Supreme Court held that *“the expression 'possession' is a polymorphous term which assumes different colors in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes. Further, the word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge.”*<sup>23</sup>
- In the case of *Noor Aga v. State of Punjab*<sup>24</sup>, the Supreme Court noted that *“An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigors of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”*
- In the case of *Gangadhar@Gangaram v. State of Madhya Pradesh*<sup>25</sup>, the Supreme Court of India noted that *“The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with*

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*(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.”*

<sup>22</sup> AIR 2003 SC 3642

<sup>23</sup> Also see the case of *Gian Chand and Ors. v. State of Haryana* 2013 (9) SCALE 544.

<sup>24</sup> (2008) 16 SCC 417

<sup>25</sup> (2020) 3 RLW(Raj.) 2013

*reverse burden of proof, does not sanction conviction on basis of preponderance of probability. ...The gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.”* Similarly, in the case of **Hanif Khan @Annu Khan v. Central Bureau of Narcotics**<sup>26</sup>, the Supreme Court also held that *“although the NDPS Act carries reverse burden of proof, but it does not absolve the prosecution from establishing a prima facie case against the accused.”*

- In the case of **Suresh Bawari v. State of Rajasthan**<sup>27</sup>, the accused was arrested pertaining to the theft of 210 kg of opium and got the opium recovered at his instance by giving an information under *section 27 of the Indian Evidence Act* and that too by digging a pit of more than two feet from a place, which happens to be the field of the father-in-law of the accused. The Court held that recovery from such a hidden place, even if that hidden place has been made in the field of the father-in-law of the accused, leads to the only conclusion that the accused had conscious knowledge and had dominion over it because it is he, and only he, who could have the knowledge about the contraband lying in the pit. The contention that the place was accessible to all and sundry, in the circumstances of the case, cannot be accepted.
- In the case of **Jagdish Rai v. State of Punjab**<sup>28</sup>, two persons were concededly seen coming on a motorcycle and having seen the police, they made their efforts to abscond but failed. The question posed by the Court was, why the Motorcycle rider shall make an effort to retreat in case if he was not aware of what was being carried by his so-called pillion rider who was found carrying bag full of NDPS on his shoulder. The Court held that it is very difficult to accept that the accused Jagdish Rai was not in conscious possession of the said contraband. The prosecution succeeded in showing that there was joint physical and conscious possession these accused, and it is to cover such situations, that provisions in the form of sections 35 and 54 of the Act are made,

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<sup>26</sup> (2020)16S CC709

<sup>27</sup> 2010 Cr LJ 4175 (4180)

<sup>28</sup> (2011) 4 SCC 571

where presumptions are available to be drawn from the possession of illicit articles as established.

## VII. POWERS OF EMPOWERED/AUTHORISED OFFICERS

Under Sections 41, 42, and 50 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, law enforcement officers are empowered with authority to conduct searches, execute seizures, and effectuate arrests of individuals suspected of involvement in narcotic-related activities. Nevertheless, these authorities are counterbalanced by a series of safeguards designed to mitigate potential misuse. However, these powers are balanced with several safeguards to prevent their misuse. The NDPS Act's provisions are interpreted in light of fundamental rights, including the right to life and personal liberty under Article 21 of the Constitution.

While Sections 41, 42, and 50 of the NDPS Act grant significant powers to law enforcement officers, these powers are carefully regulated through a combination of statutory safeguards, procedural requirements, and judicial oversight. Any instance of misuse or abuse of authority can render officers liable for unlawful conduct. The judiciary is vested with the authority to scrutinize the documented justifications to ascertain whether the actions of such officers were justified or not. These checks and balances are imperative for averting the misuse of authority and safeguarding individual rights while facilitating effective interventions against narcotic-related offenses.

### A. Power to issue warrant and authorisation [Section 41]

- A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person<sup>29</sup> [Section 41(1)].

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<sup>29</sup> "Whom he has reason to believe (a) to have committed any offence punishable under this Act, or (b) for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or (c) any document or other article which may furnish evidence of the commission of such offence or (d) any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed.

- Any empowered officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces<sup>30</sup> or any empowered officer of the revenue, drugs control, excise, police or any other department of a State Government<sup>31</sup> may also authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place [Section 41 (2)].

In the case of *State of Punjab v. Balbir Singh*<sup>32</sup>, the Supreme Court held that “under section 41(1) of the Act, only an empowered Magistrate can issue warrant for the arrest or for the search, and when such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out will be illegal..... only empowered officers or duly authorised officers as enumerated in section 41(2) and 42(1) can act under the provisions of the NDPS Act and if such arrest or search is made by anyone else, the same will be illegal.”

### **B. Power of entry, search, seizure and arrest without warrant or authorisation [Section 42]**

- Any empowered officer<sup>33</sup>, may between sunrise and sunset, – (a) enter into and search any such building, conveyance or place; (b) in case of resistance, break open any door and remove any obstacle to such entry; (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation

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<sup>30</sup> “If he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place.”

<sup>31</sup> *Ibid.*

<sup>32</sup> JT 1994 (2) SC 108

<sup>33</sup> *ibid.*

under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and (d) *detain and search*, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act. Further, if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief [**Section 42(1)**].

- Where an officer takes down any information in writing as mentioned above or records grounds for his belief, he shall within seventy-two hours send a copy thereof to his immediate official superior [**Section 42(2)**].

### **C. Conditions under which search of persons shall be conducted [Section 50]**

- When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer<sup>34</sup> of any of the departments mentioned in section 42 or to the nearest Magistrate [**Section 50(1)**].
- If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer, or the Magistrate referred to in sub-section (1) [**Section 50(2)**].
- The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge

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<sup>34</sup> In the case of *Union of India & another v. Sanjeev V Deshpande* 2014 AIR 3625, the Supreme Court held that where the raiding party consists of Gazetted Officer, the person to be searched shall not be taken before him and he shall be “taken” to the nearest other Gazetted Officer.

the person but otherwise shall direct that search be made. **[Section 50(3)]**

- No female shall be searched by anyone excepting a female **[Section 50(4)]**
- When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) **[Section 50(5)]**.
- After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior. **[Section 50(6)]**

**Note:** Section 50 of the Narcotic Drugs and Psychotropic Substances Act is applicable only when a personal search of the suspect is to be conducted and not in case of a search of any bag being carried by the suspect.

In the case of *Arif Khan @ Agha Khan v. State of Uttarakhand*<sup>35</sup>, the Supreme Court held that the provisions of section 50 of the NDPS Act are mandatory provisions. In this case, search and the recovery made from appellant by police officers and none of them a Gazetted officer. The accused was also not produced before either a Magistrate or a Gazetted Officer. The Court decided that non-compliance with the mandatory provisions of section 50 leads to lack of justified conviction.

### VIII. BAIL UNDER THE NDPS ACT

The availability of relief to accused in terms of bail in narcotics cases differs from ordinary criminal cases. Ordinarily, bail is considered to be the norm and jail as an exceptional action. However, in cases involving the criminal activities pertaining to “Narcotic Drugs and Psychotropic Substances” under the Act of 1985, imprisonment

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<sup>35</sup> AIR 2018 SC 2123



is the norm while bail is considered as exceptional relief. Under the provisions of Section 437 of Cr.P.C., the prosecution need to establish a prima facie case against any accused to counter the bail application whereas, Section 37 of the NDPS Act makes it incumbent for the accused to prove, prima facie, his innocence to take bail. Meaning, thereby, the onus is on the, accused to prove his innocence. In cases involving small and intermediate quantity, imprisonment is not ordinarily accepted as a rule to be followed and the courts without delving into merits of the case, decide the bail application on the basis of available evidences.

**Section 37** of the NDPS Act reads “**Offences to be cognizable and non-bailable.** – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), –

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless – (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (ii) where the Public Prosecutor opposes the application, 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

- In the case of **Union of India v. Ram Samujh and Ors.**<sup>36</sup>, the Supreme Court of India observed “...It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released

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<sup>36</sup> (1999) 9 SCC 429

*temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely.”*

- In the case of **Babua @ Tazmul Hossain v. State of Orissa**<sup>37</sup>, the Supreme Court held that *“unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail under section 37 (1) of NDPS Act*<sup>38</sup>. *The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court.”*
- In the case of **Customs, New Delhi v. Ahmadalieva Nodira**<sup>39</sup>, the Supreme Court held that *“twin conditions of S. 37 are cumulative and not alternative. Further, the satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence.*
- In the case of **Union of India v. Shri Shiv Shanker Kesari**<sup>40</sup>, the Supreme Court noted that *“while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”*
- At the same time, in the case of **Sarni Ullaha v. Superintendent, Narcotic Central Bureau**<sup>41</sup>, the Supreme Court has also held that *“Cancellation of bail*

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<sup>37</sup> AIR 2001 SC 1052

<sup>38</sup> Also see the case of **State of M.P. v. Kajad** (2001) 7 SCC 673

<sup>39</sup> (2004) 3 SCC 549

<sup>40</sup> 2007 (7) SCC 798

<sup>41</sup> AIR 2009 SC 1357

*necessarily involves the review of a decision already made and can, by and large, be permitted only if, because of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.”*

- In the case of ***State of Kerala etc. v. Rajesh etc.***<sup>42</sup>, the Supreme Court of India held that *“the expression ‘reasonable grounds’ means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates. It is a settled position of law that liberal approach in the matter related to the Narcotic Drugs and Psychotropic Substances is uncalled for.”*<sup>43</sup>
- Further, in the case of ***Narcotics Control Bureau v. Mohit Aggarwal***<sup>44</sup> the Supreme Court noted that *“the expression reasonable grounds used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence.”*

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<sup>42</sup> AIR 2020 SC 721

<sup>43</sup> In the similar lines, in the case of ***Union of India v. Md. Jamal (2022)***, the Supreme Court cancelled the bail of the accused on the ground that the High Court failed to apply the twin conditions of section 37 of NDPS Act.

<sup>44</sup> Criminal Appeal Nos. 1001-1002 of 2022

- In the case of *Sheru v. Narcotics Control Bureau*<sup>45</sup>, the Supreme Court held that “mere passage of time during the pendency of the appeal cannot be a ground to suspend the sentence and grant bail in NDPS Cases.”
- Repeating the settled principles of bail jurisprudence, in the case of *Rhea Chakraborty v. The Union of India and Ors.*<sup>46</sup>, the Supreme Court held that “Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail”.
- In the case of *State of Kerala etc. v. Rajesh*<sup>47</sup>, accused persons were found to be in joint possession of 10.202 kg of hashish oil and currency notes worth Rs 13,50,000/. The allegation against the accused persons were that they used to operate as a group for sale of prohibited drugs in the International market. The Supreme Court cancelled order of the high court granting bail to these accused persons.
- In the case of *Union of India v. Ram Samujh and Ors.*<sup>48</sup> the Supreme Court of India had very cautiously noted that “It should be borne in mind that in a murder case, the accused murders one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow on several innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely.”

## A. Default Bail

Recently, the Apex Court in the case of *Fakhrey Alam v. State of Uttar Pradesh*<sup>49</sup>, has held that default bail is a fundamental right and not merely a Statutory right. However, right of the accused to be released on bail for non-filing of the charge

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<sup>45</sup> Criminal Appeal Nos.585-586 of 2020

<sup>46</sup> Supreme Court Case -SLP (Crl) No.- 002127/2021 and Original case Citation - Criminal Bail Application No. 1871 of 2020 (Bom HC)

<sup>47</sup> AIR 2020 SC 721

<sup>48</sup> 1999 (9) SCC 429

<sup>49</sup> LL 2021 SC 165

sheet/complaint within the statutory period under Section 167(2) Cr.P.C., 1973 is a right which can be enforced by the accused only from the time when the default occurs and remains valid till the filing of the charge sheet/complaint and it does not survive or remains enforceable subsequent to the filing of charge sheet/complaint.

Further, the Supreme Court in the case of *Kamlesh Chaudhary v. State of Rajasthan* (2021) held that a person accused of an offence and who has been released on default bail cannot be re-arrested on filing of a charge sheet.

However, Proviso attached to the section 36A(4) provides that, *“if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.”*

The Apex Court in the case of *Sanjay Kumar Kedia v. NCB*<sup>50</sup> held that it is, mandatory on the part of Public Prosecutor to submit report 'specifying the progress of investigation and the compelling reasons for detention beyond 180 days prior to the expiry of the said period so as to confer jurisdiction on the Special Court to act on such report and extend the period of detention. In the event of the Public Prosecutor not filing any report before the expiry of 180 days and, any order extending period of detention beyond 180 days on the strength of a report which was filed after the said period had already expired would be clearly beyond the jurisdiction of the Special Court. In such cases, an accused becomes entitled to statutory bail upon expiry of 180 days and such availment of a statutory right cannot be faulted as an indefeasible right has accrued to an accused.

## **IX. PUNISHMENT UNDER THE NDPS ACT, 1985**

Drug addiction is a major curse on our civilization and it is a menace that threatens public health and leads to distortion of individual's personality which ultimately results into crime and lawlessness.<sup>51</sup> The NDPS Act of 1985 contains differential

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<sup>50</sup> (2009) 17 SCC 631

<sup>51</sup> Also see the case of *Budhiyarin Bai v. State of Chhattisgarh*, 2022 LiveLaw (SC) 667, wherein the Supreme Court held that *“the offences under the NDPS Act are very serious in nature and against society at*

provisions for criminal activities relating to the “narcotic drugs and psychotropic substances” as it classifies the contravention into three categories depending upon the quantity of the contraband involved: (a) small quantity; quantity lesser than commercial quantity but greater than small quantity; and (c) commercial quantity. Broadly we can say that the legislation contains strict and severe punishment for commercial drug dealers possessing commercial quantities whereas drug addicts (using contraband for personal use) are dealt with a liberal approach by providing lesser punishment.

In the case of *Mohd. Zahid v. State through NCB*<sup>52</sup>, the Supreme Court held that “no leniency should be shown to an accused who is found to be guilty for the offence under the NDPS Act. Those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to a number of innocent young victims who are vulnerable. Such accused causes deleterious effects and deadly impact on the society. They are hazard to the society. Such organized activities of clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have a deadly impact on the society as a whole. Therefore, while awarding the sentence or punishment in case of NDPS Act, the interest of the society as a whole is required to be taken into consideration. Therefore, considering the offences under the NDPS Act which are very serious in nature and against the society at large, no discretion shall be exercised in favour of such accused who is indulging into the offence under the NDPS Act.”

In the case of *Gurdev Singh v. State of Punjab*<sup>53</sup>, the Apex Court has aptly noted that “while awarding the sentence/punishment in case of the NDPS Act, the interest of the society as a whole is required to be taken into consideration and while striking a balance between the mitigating and aggravating circumstances, public interest, impact on the society as a whole will always tilt in favour of the suitable higher punishment. The Bench observed that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to a

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large and no discretion is to be exercised in favour of such accused who are indulged in such offences under the NDPS Act. It is a menace to society; no leniency should be shown to the accused persons who are found guilty under the NDPS Act, 1985.”

<sup>52</sup> Criminal Appeal No. 147 of 2021

<sup>53</sup> LiveLaw 2021 SC 196

*number of innocent young victims who are vulnerable, it causes deleterious effects and deadly impact on the society, they are a hazard to the society. The Bench further observed that organized activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances shall lay to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years."*

## **X. CONCLUSION**

We can aptly conclude that the India's drug control strategy pertaining to prevention of Drug abuse majorly relies upon the NDPS Act, 1985. Considering its implementation in the previous years, it may be noticed that this law has enabled the State to reduce illicit drug trafficking and abuse up to a major extent. However, challenges including ongoing illicit drug trafficking networks, corruption within law enforcement agencies, insufficient resources for drug control efforts, and the lack of a comprehensive approach to drug policy need to be addressed in a timely and effective manner by the authorities.

Enforcement authorities must improve their efforts to understand trading patterns of drug contrabands and trends of drug abuse in the country, especially in rural areas. The drug manufacturing hubs and trading routes need to be closely monitored with stricter surveillance to ensure enforcement of regulations pertaining to control of "narcotic drugs and psychotropic substances".

It is not only imperative rather has become incumbent upon the government to introduce comprehensive reforms to enhance the efficiency of the NDPS Act. Further, the NDPS Act is often criticized for catching small offenders while allowing big ones to escape due to their political influence and networking with enforcement officers. The current framework has also been criticized for its one-size-fits-all approach, which fails to differentiate between minor offenders and major traffickers, leading to disproportionate penalties and punishment. It needs to be stressed that the NDPS Act of 1985 lacks coherency to differentiate between drug addicts, small-time sellers, and major traffickers in terms of volume of transactions and quantity of contraband

involved. The NDPS Act should be amended to establish clear distinctions between minor drug offenses, such as possession for personal use, and serious trafficking activities. This would allow for more appropriate sentencing and reduce the burden on the judicial system, which is currently overwhelmed with pending cases.

To effectively combat drug trafficking in India, it's crucial to target the root causes and arrest those responsible for organizing and managing the trafficking network, rather than just focusing on the lower-level offenders. To tackle these challenges, there is a growing need to reform India's drug laws and policies. It is becoming increasingly crucial to address high-level drug traffickers rather than focusing solely on lower-level offenders. Consequently, there is a growing imperative to reform India's drug laws and policies. It is essential to bolster the capacity and integrity of law enforcement agencies responsible for enforcing the NDPS Act. This involves providing them with training, equipment, and supervision to ensure the effective enforcement of drug laws while upholding human rights and due process standards.

Given the cross-border nature of drug trafficking, there is a pressing need for enhanced international cooperation and coordination between countries to combat drug trafficking networks, share intelligence and best practices, and address the underlying causes of drug demand and supply. Ensuring the quality of drugs used for medical purposes is also important and should be taken into consideration. Improving coordination among states for drug-related investigations is essential. Understanding drug patterns is a requirement for eliminating the problem of illegal drugs in our country, and bringing awareness and education can help eradicate the problem of drug addiction.

It is also crucial to enhance the capacity and integrity of law enforcement agencies responsible for implementing the NDPS Act. This includes providing adequate training, resources, and supervision to ensure effective enforcement while upholding human rights and due process standards. In conclusion, revising the NDPS Act to incorporate these recommendations would not only enhance its effectiveness in combating drug-related issues but also promote social justice and public health in India. By addressing the systemic flaws within the current framework, the



government can create a more equitable and effective drug policy that serves the needs of all citizens of our nation.

The suggested reforms aim to strengthen the regulatory framework pertaining to narcotic drugs and psychotropic substances in India. Implementation of more extensive guidelines and continuous monitoring of the enforcement aspect shall ensure effective and significant reduction in the rising number of instances of adverse drug abuse. It shall also ensure that only safe and effective medications to reach the market, thereby protecting public health and enhancing trust in executive administration of such drugs. Enhancement in collaborative efforts can also lead to more comprehensive drug policies that consider the needs of all parties involved, fostering a more integrated public health strategy. This shall also allow our regulatory bodies to operate in an effective and empowered manner leading to better management of drug safety issues. Ultimately, the successful implementation of these reforms can lead to long-term health benefits for the Indian population.

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