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Decriminalization of Cannabis in India

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Abstract

This paper looks at the extent of cannabis regulation in India and situates the prohibition in its historical and regulatory context. The paper argues that cannabis consumption was historically permitted in India and the international pressure led by America's war on drugs pushed Indian legislators to criminalize cannabis consumption and cultivation. This paper then examines the extent of cannabis consumption in India and analyses the effect of its criminalization. It argues that India consumes vast quantities of cannabis and the State loses precious revenue by strictly regulating cultivation, production and prohibiting cannabis use. It then contends that criminalizing cannabis use puts an undue pressure on an already crumbling criminal justice system.

Cannabis Regulation in India

International obligations arising out of the UN Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances, 1971 influenced the enactment of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), which governs the cultivation, production, sale, transport, possession and use of narcotic drugs, psychotropic substances and other manufactured drugs. One of the many narcotic substances regulated by the NDPS Act is cannabis. Under section 2(iii) of the Act, Cannabis is classified in two forms – *charas* & *ganja*. *Charas* is defined as the resin from the cannabis plant, which includes *hashish oil* or *liquid hashish*. *Ganja* is the flowering or fruiting top of the plant. Any mixture of these forms or any drink so prepared also falls within the meaning of cannabis. Section 2(iv) further defines the cannabis plant as any plant of genus *cannabis*.

The NDPS Act regulates cannabis as a plant and as a narcotic and a manufactured drug. Although the definition of cannabis under the NDPS Act does not include *Bhang*¹, its production is still regulated. The cultivation of cannabis plant is prohibited except for medical and scientific purposes. The manner and extent of cultivation is further subject to control, through licenses and permits. Governments are also authorized to permit cultivation of cannabis plant for industrial or horticulture purposes². Production, manufacture, possession, sale, transport, import, export, use etc. of cannabis is prohibited. As in the case of cultivation, an exception is carved out for medical and scientific purposes³. Further, subject to the general prohibition on cultivation, production, use etc. of cannabis, state governments have been authorized to make rules for permitting and regulating cultivation of cannabis plant and production, manufacture, possession, transport or use of cannabis (excluding *charas*)⁴.

Criminalized Prohibition of Cannabis

Cultivation of the cannabis plant attracts a jail term which may extend to ten years along with a fine of up to one lakh rupees. Similarly, unlawful possession, production, sale, use etc. of cannabis is punishable with imprisonment, the duration of which depends upon the quantity of cannabis in possession. For possession of a small quantity of cannabis, the NDPS Act

¹ Leaves of the Cannabis Plant.

² NDPS Act 1985, s 14.

³ NDPS Act 1985, s 8.

⁴ NDPS Act 1985, s 10(a)(iii).

provides for imprisonment of up to six months,⁵ this goes up to ten years for an offence involving intermediate quantity and a minimum of ten years for a commercial quantity offence⁶. Further, Section 27 of the Act criminalizes consumption of cannabis and provides for a sentence which may extend to 6 months or with fine of Rs. 10,000 or both.⁷

Issues with India's Law on Cannabis

The criminalization of use, cultivation and strict controls over medical and industrial use of cannabis, raises multiple questions. Was there a need for the State to intervene with cannabis use and cultivation? Is the intervention well envisaged and proportionate to the need, if any? And, what are the consequences of this State intervention? In an attempt to answer these questions, the paper evaluates the consequences of criminalization, delve into the historical use of cannabis in India and analyse⁹ the reasoning behind the current regulation.

A. Premise of India's Cannabis Regulation

In India, the cultivation of cannabis started as early as 5000-4000 BC. Under the Ayurvedic form of medicine, cannabis was used as an analgesic, antispasmodic, anodyne, sedative etc. It was used to treat the nervous system, respiratory disturbances, gastrointestinal issues and for various infectious diseases. Cannabis was also used for making cloths and as construction material in the Ellora caves. The use of cannabis was entrenched in Indian cultural practices given its association with religious beliefs. Reference to it as a 'joy giver', a 'liberator' and its inclusion in the list of five sacred plants in the Atharveda, ensured its integration in mainstream culture. In 1893, the British appointed the Indian Hemp Drugs Commission to look into the cultivation of the hemp plant in Bengal, the preparation of drugs from it, the effect of their consumption on people, and the desirability of prohibiting the growth of the plant and the sale of ganja and allied drugs. In its report the Commission did not make any adverse observation and affirmed that moderate use of cannabis did not have any serious detrimental effect on physical, mental or moral health. Over the years, cannabis was regulated through multiple excise legislations, such as the Bengal Excise Act of 1909, the Dangerous Drugs Act, 1930 and the Drugs and Cosmetics Act, 1940. However, cannabis use was not criminalized.

i. India's Shift Towards Criminalizing Cannabis Use

A major force that drove the world towards a prohibitionist approach to drug use was the United States of America ('US'). The US had been 'fighting' opium use since the 1800s and its policy came to increasingly influence the world's perception of drug use. In 1905, the US drug policy was implemented in the Philippines where the US colonial government was allowed to restrict the use of opium. To develop consensus on the need to restrict opium trade, the US helped set up a Commission on Opium in Shanghai in 1909. This led to stopping of opium sales from Britain to China and elimination of China's own poppy

⁵ The Government has notified the quantities against all narcotic drugs and psychotropic substances. These quantities lay the basis for sentencing under the NDPS Act. Following quantities are specified for cannabis: Charas/Hashish: Small quantity (100 grams), Commercial quantity (1kg) Ganja: Small quantity (1 kg), commercial quantity (20 kg).

⁶ NDPS Act 1985, s 20.

⁷ NDPS Act 1985, s 27.

cultivation. The US continued to enforce strict prohibitionist measures at home by enacting the Opium Exclusion Act, 1909 and the Harrison Narcotics Act in 1914. In the following decades, the US internationalized its form of prohibition on drugs and worked through the United Nations to forge a prohibitionist drug regime across the globe. It has often been contended that the UN Convention on Narcotic Drugs, 1961 was a result of a US sponsored resolution and an American policy serving American interests.⁸ The 1961 Convention created international obligations to curb traffic, cultivation, use etc. of narcotic drugs, including cannabis. The NDPS Act was enacted to fulfil India's obligations under this Convention and the 1971 Convention on Psychotropic Substances. Thus, the use of cannabis, which was legally and socially sanctioned for thousands of years, was criminalized in one fell swoop in 1985. a marked failure in utilizing the exemption provided for industrial use of the cannabis.

A Cannabis plant with higher Cannabidiol ('CBD') content than Tetrahydrocannabinol ('THC') content, has a less psychoactive character and substantial industrial utility. In common parlance, this distinction lays the basis for categorizing such cannabis plants as 'industrial hemp'. Hemp products have a global market of around \$ 4.7 billion, spread across various sectors such as construction, paper making, personal care etc. However, India's contribution to the market is a mere 0.001%.⁹ Although hemp cultivation for industrial purposes may be permitted under the NDPS Act, only Uttarakhand and Uttar Pradesh seem to have explored the possibility, reflecting constraints of operating within a prohibitionist environment. Hemp's use as a fibre and in construction over thousands of years has largely been eliminated in less than four decades of cannabis prohibition. As the world cannabis market is estimated to go up to \$15.8 billion by 2027,¹⁰ restrictive policies in India continue to act as barriers to economic gains. Additionally, the government loses out on revenue from a widely consumed substance. As per the National Survey on Extent and Pattern of Substance Use in India by the Ministry of Social Justice, 2.8% of Indians between the age of 10-75 are current users of cannabis. This accounts to 3.1 crore individuals. Amongst psychoactive substances, cannabis is the second most consumed in India after alcohol. In 2018, New Delhi and Mumbai were amongst the highest consumers of cannabis in the world, consuming 38.26 metric tonnes and 32.38 metric tonnes of cannabis respectively. If cannabis was to be taxed like tobacco and alcohol, the government could raise a substantial revenue. A study estimated that around 725 crores could be raised in Delhi alone if cannabis is taxed. This number was pegged at 641 crore for Mumbai.¹¹

⁸ JS Rafaeli, 'The War on Drugs is Inseparable from US Imperialism' (*Vice*, 13 August 2018)

https://www.vice.com/en_uk/article/594j8b/the-war-on-drugs-is-inseparable-from-us-imperialism accessed 05 August 2020.

⁹ Neha Devan, 'Boheco: This Cannabis Startup is Weeding Out the High Notes for a Hemp Economy' (*Economic Times*, 16 April

¹⁰ 'Industrial Hemp Market Size, Share & Trends Analysis Report by Product (Seeds, Fiber, Shives), by Application (Animal Care, Textiles, Food & Beverages, Personal Care), and Segment Forecasts, 2020 – 2027' (Grand View Research 2020) <https://www.grandviewresearch.com/industry-analysis/industrial-hemp-market> accessed 05 August 2020

¹¹ Cannabis Price Index (ABCD 2018) <<http://weedindex.io/#biggestconsumers>> accessed 03 August 2020.

The Effects of Criminalization of Cannabis Use

Thousands of people are arrested every year for illicit consumption of narcotic drugs and psychotropic substances. In 2018, 81,778 persons were arrested under the NDPS Act. 59% of the those were found in possession of substances for personal use. Our forthcoming findings on Mumbai give an insight into how many people are arrested for illicit cannabis consumption, in comparison to other prohibited substances. Mumbai's NDPS arrests, which are the highest in the country¹², are primarily arrests of cannabis consumers. This suggests that criminalization of cannabis consumption is pushing a substantial number of people into the criminal justice system.

i. Strain on the Criminal Justice System

Criminalization of illicit cannabis use exacerbates the strain on the criminal justice system. The impact is particularly felt by an already overburdened and understaffed police force, where the police per lakh population ratio and vacancies have constantly remained a critical governance issues and the judicial system, already crumbling under high pendency¹³. In order to arrest, prosecute and sentence a cannabis consumer, the state machinery exhausts substantial human and economic resources. The police, judiciary and correctional institutions are systematically made party to a futile exercise, the cost of which is enormous. With over 3 crore cannabis users in the country, if the NDPS Act were to be implemented effectively, with every cannabis user arrested and prosecuted, the crumbling system would cave in entirely. Although there is no current research on the cost of enforcing cannabis prohibition in India, studies conducted abroad find that on an average, incarceration costs are 2-6 times higher than money spent on health and social services.¹⁴ A study of budgetary implications of cannabis prohibition in the US indicated that legalization of cannabis would save \$7.7 billion per year in government expenditure.

ii. Perils of a Criminal Record

Criminalization of illicit cannabis use ignores the many ills that a criminal record brings, the effect it has on social, economic, physical and mental wellbeing of the person. A history of any drug offence, even one as minor as consumption of cannabis, can have considerable bearing on sentencing in a subsequent offence, employment opportunities, securing custody of a child, getting visa etc. Human Rights Watch and American Civil Liberties Union have drawn attention to the effect that criminalization of drug use can have on families, job opportunities, welfare assistance, voting etc. More importantly, it underscores the discrimination and stigma that accompanies a criminal record. Criminalization of cannabis use subjects thousands of individuals every year to these hardships, while all they might really need is to be left alone or given access to appropriate health services.

¹² In 2018, 10006 NDPS cases were registered in Mumbai. Crime in India (National Crime Records Bureau, 2018)

¹³ 2.4 Crore criminal cases are pending before courts in India. National Judicial Data Grid <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 19 August 2020.

¹⁴ ³²European Harm Reduction Association, 'Criminalization Costs' <<https://harmreductioneurasia.org/criminalization-costs/>> accessed 05 August 2020.

iii. Promotion of Unsafe Practices

Criminalization of drug use is in direct conflict with the principles of harm reduction. The stigma associated with criminalization results in social exclusion and isolation, which then inhibit access to healthcare and harm reduction services. Criminalization also drives users to unsafe practices, making them prone to disease and overdose. Criminalization of drug use creates a parallel market of prohibited substances, taking them out of the regulatory apparatus. This leads to unrestricted access and unsupervised use of substances. In these illegal markets the quality of substances remains unchecked, leading to adulteration and sale of toxic substances. Studies across the world have identified adulteration in various substances, mainly intended to increase quantity or enhance potency. This aggravates the risk of an overdose or addiction to substances unknowingly consumed. In India, cannabis is adulterated with shoe polish and battery acid. Cannabis is also often adulterated with benzodiazepine, a prescription sedative, which can lead to addiction to sedatives without the person's knowledge or consent.

Decriminalization of Cannabis Use: Trends Across the World

In the past hundred years, the approach towards cannabis use has evolved substantially. After internationalizing its model of a criminalized form of drug prohibition, the US initiated crucial reform in the law. Decriminalization of cannabis use was the first step, which was followed by legalization of cannabis for medicinal purposes and then by legalization of personal consumption in some jurisdictions.¹⁵ The changing legislative framework reflected the failure of the much-touted war on drugs. Twenty-six states in the US have now decriminalized possession and consumption of cannabis. Eleven states and the District of Columbia have legalized small amounts of cannabis for adult use. It can be concluded that there are two models in the US that are different from traditional criminalized cannabis prohibition. One that considers cannabis consumption a civil violation or a low-level offence attracting no jail term and the other that has legalized possession of cannabis for personal consumption. Similarly, various other countries have decriminalized or legalized cannabis consumption. Belgium decriminalized possession of cannabis for personal consumption in 2003. Under Portuguese law consumption of cannabis is categorized as an administrative offence. Canada on the other hand allows adults to possess up to 30 grams of cannabis.¹⁶ The changing nature of laws, even in prohibitive legislative frameworks, which are now exploring a decriminalized model suggests an international shift towards an approach that recognizes the futility of criminalization of cannabis use.

¹⁵ R. Pacula & R. Smart, 'Medical Marijuana and Marijuana Legalization' (2017) 13 Annual Review of Clinical Psychology 397.

¹⁶ Cannabis Act, 2018, s 8.

Conclusion on How India Should Respond

Three and a half decades after cannabis prohibition was implemented in India, cannabis use has continued unabated. Crores of people still consume cannabis and thousands of vulnerable persons are arrested, prosecuted and convicted every year for such use. Far from deterring users, criminalization of cannabis consumption has only led to stigmatization and overburdening of an already crumbling criminal justice system. It has also created a strictly prohibitionist environment that has prevented effective utilization of cannabis for commercial purposes. Further, cannabis criminalization also disregards the racist origins of the US war on drugs. Association of opium use with Chinese culture, largescale immigration of Chinese into the US and increasing opium addiction led to the enactment of a patently racist Chinese Exclusion Act in 1882. As the countries across the world begin to now relax norms for personal consumption of cannabis, it is time India also shuns an archaic perception towards drug use in general and cannabis use specifically. Envisioning alternatives to criminalization is an important first step and countries across the world have paved a path in this direction. There is a promising indigenous de-criminalization model that India could consider following. The Sikkim Anti-Drugs Act, 2006 (SADA) does not utilize deterrence to curb drug use and relies on a public health approach to protect the best interests of a drug user.¹⁷

Cannabis should be de-criminalized as it has the proven potential to be a revenue boosting tool for the economy and also produce ample job opportunities. As there exists a huge mafia or black market they are earning a lot of money they are earning because there are people who are willing to buy at any price. If cannabis gets legalizes in India government would earn money instead of mafia and this money can use for some other important purposes like education or for the development of our country. It can also help in reducing the unemployment rate in our country if cannabis get legalizes there would cannabis industry and for industry workmen would be needed. There would be chain for marijuana industry and in every level of chain workmen would be needed like from farmers to transporters to sellers. Other major reason why cannabis should be legalized is that by legalizing cannabis there won't be black markets or smugglers and it would be decreasing the crime rates in our country. As when it will be legalized there would be rules and regulation regarding the use or possession and it would be controlled by government and not anymore by drug dealers and hence can reduce the crime rates. Regulation is not only beneficial for people who want to

¹⁷ Sikkim Anti-Drugs Act 2006 decriminalizes personal consumption of all drugs and mandates a psychiatric evaluation to determine the need for rehabilitation and de-addiction.

use cannabis safely; it also enhances security for all of society, as it helps undermine criminal markets.¹⁸

The most important factor for cannabis decriminalisation in India is because of its medicinal value. As cannabis can was proven to provide relief from many types of diseases such as cancer, AIDS etc and it sometimes provide relief from types of pain that drugs like morphine could not. Many countries all over the world have legalised cannabis and now it is high time that India should legalise cannabis too.

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¹⁸ Shashi Tharoor and Avinash Tharoor , Legalizing weed in India, June 2018