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NDPS Act: a drafting error, its implications, and an amendment

The Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2021 was passed by Lok Sabha amid criticism by the Opposition. What is the amendment, and what has the Opposition said?

Written by **Apurva Vishwanath** | New Delhi |

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Lok Sabha Speaker Om Birla conducts proceedings in the House during the Winter Session of Parliament, in New Delhi. (LSTV/PTI)



Provision was passed amid the Opposition.

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What is the amendment?

The 2021 Bill amends the Narcotic Drugs and Psychotropic Substances Act, 1985 and seeks to rectify a drafting “anomaly” created by a 2014 amendment to the parent legislation.

The 2021 amendment contains a legislative declaration about what one section refers to. It says Section 2 clause (viia) corresponds to clause (viib) in Section 27, since 2014, when the provision was first brought in.

Section 27A of the NDPS Act, 1985, prescribes the punishment for financing illicit traffic and harbouring offenders.

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What is the 2014 amendment?

In 2014, a substantial amendment was made to the NDPS Act to allow for better medical access to narcotic drugs. In Section 2(viii)a, the amendment defined amendment defined “essential drugs”; under Section 9, it allowed the manufacture,



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But before the 2014 amendment, a Section 2(viii)a already existed and contained a catalogue of offences for which the punishment is prescribed in Section 27A.

Section 27A reads: “Whoever indulges in financing, directly or indirectly, any, of the activities specified in sub-clauses (i) to (v) of clause (viii)a of section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to 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.”

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What was the drafting “anomaly”?

While defining “essential drugs” in 2014, the legislation re-numbered Section 2.

The catalogue of offences, originally listed under Section 2(viii)a, was now under Section 2(viii)b. In the amendment, Section 2(viii)a defined essential narcotic drugs. However, the drafters missed amending the enabling provision in Section 27A to change Section 2(viii)a to Section 2(viii)b.

What was the result of the drafting error?

Section 27A punished offences mentioned under Section 2(viii)a sub-clauses i-v.

However, Section 2 (viii)a sub-clauses i-v, which were supposed to be the catalogue of offences, does not exist after the 2014 amendment. It is now Section 2(viii)b.

This error in the text meant since 2014, Section 27A was inoperable.



Tripura High Court, while hearing a reference made by the district court, the drafting error, urging the Centre to bring in an amendment and rectify it.

In 2016, an accused had sought bail before a special judge in West Tripura in Agartala, citing this omission in drafting. The accused's plea was that since Section 27A penalised a blank list, he could not be charged under the offence. The district judge then referred the legal question to the High Court.

The government had argued that the drafting error cannot be grounds to seek bail and must be overlooked. Although the HC agreed with the government and read the provision the way it was intended and not the way it was drafted, it said the reading could not be applied retrospectively.

Why can't it be applied retrospectively?

Article 20(1) of the Constitution says that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. This protection means that a person cannot be prosecuted for an offence that was not a "crime" under the law when it was committed.

Does the latest amendment make it retrospective?

In September, the government brought in an ordinance to rectify the drafting error, which Lok Sabha. "It shall be deemed to have come into force on the 1st day of May, 2014," the Bill reads.

During the discussion in Lok Sabha, Finance Minister [Nirmala Sitharaman](#) said retrospective application is permitted in "clarificatory amendments." "It is not substantive, that is why, retrospective is allowed," she said.

She said the government had sought the opinion of Solicitor General Tushar Mehta's opinion before introducing the amendment.



Can a substantive sentencing provision in criminal law be given retrospective effect by a legislative declaration? That's something the Bill does not address, Congress leader Manish Tewari said in his session on the Bill.

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BJD leader B Mahtab said that the retrospective nature of the amendment will be challenged in court. "When it was accepted it was a mistake, why commit another mistake by making it retrospective?... How can the penal provisions be passed retrospectively? It will lead to more constitutional questions?" he said.

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