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Liberty in the Shadow of Quantity: Bail, Reverse Burdens and Procedural Safeguards under the NDPS Act, 1985 and the United States Controlled Substances Act: A Comparative Appraisal

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Abstract
While India and the US utilize international law as the foundation for their respective drug control policies, the treatment of offenders in each country differs drastically. The Indian NDPS Act, 1985 restricts the issuance of bails in drug-related cases, presumes the guilt of those arrested, and makes the level of punishment commensurate with the quantity of drugs recovered. In turn, the US' system is equally strict; however, pre-trial detention in drug-related cases is predicated mostly on the risk factor. The aim of this paper is to compare and contrast the bail procedure, presumption of guilt, and procedure of each country on the basis of the important Supreme Court cases of both countries. Specifically, this paper shows that the Indian approach is particularly harsh at an early stage of criminal proceedings and that despite the attempts of courts to rectify the problem, the outcome was far from being even. Thus, the author recommends changing the bail procedure to the risk-based one, establishing the deadline for the trial to be held, regulating the burden of proof, making procedural protections more substantial, introducing some latitude into sentencing procedure, and gathering statistics about those detained under the NDPS Act.

Keywords: NDPS Act, 1985; section 37; bail; reverse burden of proof; Controlled Substances Act; Bail Reform Act; comparative criminal procedure; Article 21.

I. Introduction

The prosecution of narcotics cases is where the Indian guarantee of freedom becomes most severely tested. The legislation on narcotics, promulgated in 1985, was designed to bring Indian law into conformity with international agreements on drugs and to replace an unsatisfactory collection of colonial-era laws.[1] It is not the long period of imprisonment prescribed that renders this statute harsh, but rather the process from arrest through trial. This process is toughened by bail restrictions under section 37, presumptions of a guilty mind and guilt under sections 35 and 54, search and seizure rules, and restricted avenues of

[1] The Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter NDPS Act).

sentencing suspensions and remissions. Consequently, someone arrested for possessing a commercial quantity may spend several years behind bars without ever having the charge tested in a court of law.

As the country responsible for constructing much of the international prohibition regime,2 the United States of America is also not kind to the traffickers. Not only does its drug statute establish minimum sentences in accordance with the amount possessed, but also the statute on bail operates from the premise that someone accused of a serious drug offence ought to be held pending trial.[2] The difference is that American drug procedure has to fit inside a constitution that polices presumptions of guilt, keeps out unlawfully seized evidence and makes the prosecution carry the burden when it seeks to detain someone before trial.

This article asks one focused question of both systems: what protection does an accused person actually receive in the period between arrest and verdict? This question arises out of a larger doctrinal research project into the laws of drug control and their enforcement in India and the US; but for our purposes, the procedural aspects are alone in focus.

Our argument is that the Indian law has loaded up front the harshness that is not present in federal American law. In either case, a serious drug accusation tips the scales in favor of detention; but while America asks the judge to consider risk, in India release is based on the judge's ability to accept the accused's innocence. American law also requires every presumption to rest on a rational link and never lets the State escape its burden of proof. Indian judges have tried to soften the scheme, with mixed results. We close to concrete proposals for change.

Our method is doctrinal and comparative in the functional sense: each system is put to the same practical questions. When may an accused walk free pending trial? What has the State to prove, and what may it simply assume? What follows when investigators ignore the rules? Where older rulings refer to the 1973 Code, we map them onto the corresponding provisions of the new Sanhita of 2023 (BNSS).[3]

II. A Shared Treaty Base and Divergent Procedural Choices

Both countries are bound by the same three United Nations instruments: the Single Convention of 1961, the Psychotropic Substances Convention of 1971 and the Trafficking Convention of 1988.[4] The 1988 treaty requires parties to make trafficking a crime and to bear its gravity in mind when early release or parole is considered. Nowhere does it lay down a bail standard, a burden of proof or a rule of evidence. Its article 3 conditions the duty to criminalise on each country's constitutional principles and leaves offences, defences and procedure to be defined at home.[5]

Writers on treaty law have stressed this freedom for a long time. Boister reads the penal clauses of the conventions as setting a minimum level of criminalisation while leaving the handling of offenders, and especially of users in possession, largely to national choice.[6] It follows that the procedural rigour of the Indian statute is India's own decision; it cannot be excused as something international law demanded.

The constitutional foundations of the two systems point in different directions. India's Directive Principles, through Article 47, point the State towards banning injurious intoxicants save for medical use,

[2] 21 U.S.C. §§ 801–904; 18 U.S.C. § 3142(e)(3)(A).

[3] Act 46 of 2023 (hereinafter BNSS).

[4] 520 U.N.T.S. 151 (1961), as amended by 976 U.N.T.S. 3 (1972); 1019 U.N.T.S. 175 (1971); 1582 U.N.T.S. 95 (1988).

[5] 1988 Convention, *supra* note 5, art. 3(1), (2), (7) and (11).

[6] Neil Boister, *Penal Aspects of the UN Drug Conventions* (2001).

while Article 21 permits liberty to be taken away only through procedure laid down by law.[7] Since *Maneka Gandhi*, that procedure must be "right and just and fair",[8] yet Parliament keeps broad room to craft special rules for grave crimes, and the Supreme Court has more than once approved such rules in terrorism and organised crime statutes.[9] In America, by contrast, the Fourth, Fifth, Sixth and Eighth Amendments set concrete limits on searches, compelled statements, trials and bail, and those limits govern a drug case just as they govern a burglary; there is no separate procedural code for narcotics.

III. Pre-Trial Liberty: Section 37 and the Bail Reform Act

A. The Twin Conditions under Section 37

Section 37 opens by making all offences under the statute cognizable, and then reserves a much tighter bail rule for the most serious categories. The special rule covers section 19 (a licensed opium cultivator who embezzles his crop), section 24 (dealings outside India), section 27A (funding illicit trade or sheltering offenders) and every charge involving a commercial quantity. In those cases the prosecutor must first be heard, and if he objects, release is possible only where "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".[10]

Kishan Lal settled early on that this special clause overrides the ordinary bail jurisdiction of the superior criminal courts, which now sits in BNSS section 483.[11] Later, in *Shiv Shanker Kesari*, the judges read "reasonable grounds" as demanding more than a prima facie view; in its words, the phrase connotes "substantial probable causes" for believing in innocence.[12]

The weakness of this test is also obvious. At the stage of application for bail, investigation would normally not be completed; the evidence of the prosecution is yet to be tested, and there is no cross-examination done by defence counsel of any witness. Requesting the Court to determine existence of sufficient ground for believing the accused to be innocent is tantamount to requesting premature decisions prior to hearing of even one witness. In the light of bad conduct record of the police officer which shows that a commercial quantity was discovered on the person of the accused or in his vehicle, the Court will have nothing against such an observation in its file.

The validity of restrictions built on this double test was accepted for terrorism cases in *Kartar Singh*, where the seriousness of the offence was said to justify them.[13] What remains open is not whether section 37 is valid but how it ought to be applied.

B. Judicial Softening through Article 21

Indian bail law in general proceeds from the rule, put tersely by Krishna Iyer J., of "bail, not jail".[14] Ever since the Bihar undertrials litigation, Article 21 has also been understood to guarantee an expeditious

[7] The Constitution of India, arts. 21 and 47.

[8] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.

[9] *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569.

[10] NDPS Act, *supra* note 1, s. 37(1)(b).

[11] *Narcotics Control Bureau* v. *Kishan Lal*, (1991) 1 SCC 705.

[12] *Union of India* v. *Shiv Shanker Kesari*, (2007) 7 SCC 798.

[13] *Kartar Singh*, *supra* note 10.

[14] *State of Rajasthan* v. *Balchand*, (1977) 4 SCC 308.

hearing.[15] Those two commitments collided with section 37 in the mid-1990s, when a legal aid body petitioned on behalf of hundreds of NDPS prisoners who had waited years for trial. The judges answered by ordering conditional release for defined classes of these prisoners once they had already spent a large share of the minimum term inside.[16] The order was crisis management rather than statutory interpretation, but it made one thing clear: section 37 could not become an instrument of open-ended custody.

The idea matured in *Najeeb*, a case under the anti-terror statute. A statutory bar on bail, the judges said, cannot strip a constitutional court of its power to free a prisoner whose fundamental rights are being violated, and such bars weaken once a timely trial looks unrealistic.[17] The same logic reached narcotics cases in *Mohd. Muslim*, where the petitioner had spent upwards of seven years behind bars and the bench declined to construe section 37 so rigidly that bail would never be possible.[18] In 2025 a bench of Oka and Bhuyan JJ. carried the reasoning into appeals: in *Lakhwinder Singh* it held that a convict who has already spent a large part of his term in prison, with no early hearing of his appeal in sight, cannot be kept inside merely by invoking section 37 without offending Article 21.[19]

These rulings have not settled the law. *Sukhwinder Singh*, decided in the spring of 2026, pulled the other way. Bail given by the High Court to men said to have been carrying close to one and a half kilograms of heroin was set aside, even though only two of the two dozen prosecution witnesses had testified. A prompt trial, the judges reasoned, is a value that sits alongside section 37 and cannot be used to push it aside; the two statutory findings remain compulsory where the quantity is commercial.[20]

What emerges is a system in which escape from section 37 turns on who hears the case, the stage the evidence has reached and the months or years already lost. Freedom, when it comes, arrives through the lapse of time and not through a principled assessment at the start. Under the general ceiling on undertrial custody, a prisoner must ordinarily be let out once he has served half the longest possible term, or a third if he has no previous conviction.[21] Where the maximum is twenty years, even the lower figure tolerates well over six years of custody before verdict. When nearly three in every four Indian prisoners (72.6 per cent at the close of 2024, on official figures) are still awaiting trial,[22] the NDPS bail regime adds weight to a structure that is already overloaded.

C. The American Presumption of Detention

American federal law contains a drug-specific brake of its own. If a magistrate finds probable cause for a federal drug felony carrying ten years or more, the 1984 bail statute tells him to start from the assumption, which the defence may rebut, that nothing short of custody will keep the defendant in court and the public

[15] *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 81.

[16] (1994) 6 SCC 731.

[17] *Union of India* v. *K.A. Najeeb*, (2021) 3 SCC 713.

[18] 2023 SCC OnLine SC 352.

[19] *Narcotics Control Bureau* v. *Lakhwinder Singh*, 2025 LiveLaw (SC) 191.

[20] 2026 INSC 411.

[21] BNSS, *supra* note 4, s. 479(1).

[22] NCRB, *Prison Statistics India 2024* (2026).

safe.[23] The prosecutor can then demand a contested hearing,[24] where the court weighs what is alleged, how solid the government's proof looks, who the defendant is and what harm his release might cause.[25]

Salerno upheld this design. Holding someone because he is dangerous, the majority thought, regulates rather than punishes, and it is constitutional if the defendant gets a quick contested hearing, a lawyer and a requirement that danger be shown by "clear and convincing evidence".[26] The Court called liberty "the norm" and pre-trial detention "the carefully limited exception".

Two points stand out. The American presumption concerns risk and says nothing about guilt; the judge is not asked to believe in the defendant's innocence but to decide whether conditions can contain the danger of flight or harm. And the federal appellate courts agree that the presumption moves only the burden of producing evidence. Once the defendant offers some material on flight or danger, the presumption stays in the balance as one consideration, while the burden of persuading the court never leaves the government.[27] A separate 1974 statute adds a clock: trial is due within seventy days of indictment, leaving aside periods the law excludes, and defendants in custody are to be tried first.[28]

This does not make federal drug defendants likely to go home. Government statistics show that the share of them held until trial climbed from 76 per cent in 1995 to 88 per cent in 2008, falling back to 84 per cent in 2009 and 2010.[29] A study in the federal judiciary's own journal suggests the presumption keeps in custody many drug defendants whom risk tools would rate as low risk.[30] American bail, then, is no liberal model. Its comparative value lies in the question the judge must answer, the way burdens are allocated, and the clocks that law and constitution impose on detention.

D. Comparative Assessment

Seen together, the two systems start from a common assumption but reach their results differently. Each treats a grave drug charge as a reason to abandon the normal leaning towards release. India, though, conditions liberty on a tentative judgment about guilt, and in practice it is the accused who must supply reasons to believe him innocent. The United States conditions detention on a judgment about risk, gives the accused only a duty to produce evidence and leaves the job of persuasion with the prosecution. India sets no firm deadline for NDPS trials beyond the general ceiling in section 479 of the BNSS; American federal law counts the time to trial in days, however often that count is paused.

Indian judges have begun, much like their American counterparts, to ask how long the prisoner has waited and whether his case is actually moving. Because that shift rests on constitutional reasoning rather than on a written rule, results differ widely from one case to the next. Writing the rule into the statute would bring both fairness and consistency.

[23] Bail Reform Act of 1984, 18 U.S.C. § 3142 (hereinafter BRA), sub-s. (e)(3)(A).

[24] BRA, *supra* note 24, sub-s. (f).

[25] *Id.*, sub-s. (g).

[26] *United States* v. *Salerno*, 481 U.S. 739 (1987).

[27] *United States* v. *Jessup*, 757 F.2d 378 (1st Cir. 1985).

[28] 18 U.S.C. §§ 3161, 3164.

[29] T.H. Cohen, *Pretrial Detention and Misconduct in Federal District Courts* (BJS, 2013).

[30] A. Austin, 81(2) *Federal Probation* 52 (2017).

IV. Reverse Burdens and the Mental Element

A. Sections 35 and 54 of the NDPS Act

Whenever an offence under the statute depends on what the accused knew or intended, section 35 tells the judge to assume that guilty knowledge, and the accused must then show he did not have it. Sub-section (2) adds that a fact is 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". On a literal reading, the accused must disprove knowledge to the criminal standard.[31] Section 54 then lets the court infer guilt from any controlled article found with the accused for which he gives no satisfactory explanation.[32]

These presumptions survived challenge in *Noor Aga*, but on terms. They are triggered only after the State has firmly established the base facts, chiefly that the drug was recovered from the accused. And whatever section 35(2) may say, an accused meets his burden by making his version more probable than not.[33] Innocence until proven guilty was considered a human right by this decision that said that the seriousness of the charge determines the strictness of the evidence that supports the occurrence of these triggering facts.

Noor Aga therefore tames what could have been an oppressive rule: possession must be fully proved by the State, and the accused only has to make his account probable. The trouble is that the first step frequently depends on the word of the very officers whose search is being questioned. Once the court accepts the recovery, the accused is left to explain how the drug got into his bag, car or house, a task that may be hopeless for a courier, a driver or a relative of the real dealer.

B. Constitutional Limits on Presumptions in the United States

Federal American law contains no blanket presumption of a guilty mind in drug cases. The core trafficking offence reaches only those who act "knowingly or intentionally", and the justices have insisted on that element even at the margins. Thus in *McFadden* v. *United States* the prosecution, in a case about a controlled substance analogue, had to show the defendant knew the substance was controlled.[34] And in *Ruan* v. *United States* a physician accused of prescribing beyond his authority could be convicted only on proof that he knew, or intended, that his conduct was unauthorised.[35]

The American position on presumptions is anchored in the Constitution. *Winship* demands "proof beyond a reasonable doubt of every fact necessary to constitute the crime".[36] Decades earlier, *Tot* v. *United States* had struck down statutory presumptions that lack a rational link between what is proved and what is inferred.[37] That reasoning was turned directly on drug law in *Leary* v. *United States*. A federal statute let juries assume that anyone holding marijuana knew it had been smuggled in, and the Court invalidated the assumption because it could not say with confidence that such knowledge was more likely than not.[38]

In American courts possession is established through ordinary reasoning from evidence: where the drug was found, who controlled the space, how the accused behaved and what surrounded the seizure. A jury

[31] NDPS Act, *supra* note 1, s. 35.

[32] *Id.*, s. 54.

[33] *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417.

[34] 576 U.S. 186 (2015).

[35] 597 U.S. 450 (2022).

[36] *In re Winship*, 397 U.S. 358 (1970).

[37] 319 U.S. 463 (1943).

[38] 395 U.S. 6 (1969).

may infer knowledge from such facts but need not, and the burden of persuasion stays with the prosecution throughout.

C. Assessment

India has a presumption in statute that is diluted by the judiciary; the U.S.A. has a bar in its constitution from burden-shifting which is again diluted by inferences that the jury may like to draw. The difference becomes important in the marginal case where the state of mind remains in doubt, and it becomes important even before trial. As sections 35 and 37 go together, the presumed guilty mind makes the job even more difficult for the bail judge to form an opinion about innocence.

V. Safeguards at the Point of Search, Seizure and Sampling

A. Statutory Safeguards in India

Because NDPS cases rise or fall on recovery, the statute surrounds search and seizure with protective steps. Under section 42, an authorised officer who enters a building, vehicle or enclosed space without a warrant must write down why he believed it necessary and send that note to his superior within seventy-two hours. Section 50 entitles anyone facing a body search to ask that it happen in front of a senior official or a magistrate. Section 52A governs how the haul is catalogued, sampled and eventually destroyed, and section 57 requires a written account of every arrest and seizure to reach a superior within forty-eight hours.[39]

Up to a point, the courts have given these steps real bite. *Baldev Singh* made telling the suspect about his section 50 option mandatory and refused to let a conviction rest solely on drugs taken from a body search that skipped this step.[40] *Vijaysinh Jadeja* later rejected arguments of "substantial compliance" and demanded the real thing.[41] *Mohanlal* went on to treat correct sampling as the backbone of trustworthy evidence and required samples to be drawn under a magistrate's eye.[42]

Yet the protections run out quickly. Section 50 stops at the skin; luggage and cars fall outside it, as *Pawan Kumar* made clear.[43] A 2025 ruling, *Bharat Aambale*, measures a sampling lapse by the harm it actually does to the defence rather than treating it as fatal in itself.[44] Above all, Indian law has never adopted a rule that unlawfully gathered evidence must be shut out; *Pooran Mal* still stands for that.[45] Sections 42 and 50 therefore protect the accused only by raising doubts about whether the recovery really happened, not by shutting out its fruits.

B. Search Rules and Exclusion in American Courts

American courts tackle the same worry through constitutional search law. Officers usually need a judicial warrant grounded in probable cause, and what they seize unlawfully is, since *Mapp*, barred from the State's case.[46] That rule still shapes how drug police work. In *Kyllo*, aiming a heat-sensing camera at a house to

[39] NDPS Act, *supra* note 1, ss. 42, 50, 52A and 57.

[40] *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172.

[41] *Vijaysinh Chandubha Jadeja* v. *State of Gujarat*, (2011) 1 SCC 609.

[42] *Union of India* v. *Mohanlal*, (2016) 3 SCC 379.

[43] *State of Himachal Pradesh* v. *Pawan Kumar*, (2005) 4 SCC 350.

[44] *Bharat Aambale* v. *State of Chhattisgarh*, (2025) 8 SCC 452.

[45] *Pooran Mal* v. *Director of Inspection*, (1974) 1 SCC 345.

[46] 367 U.S. 643 (1961).

spot indoor cannabis lamps was a search;[47] in *Jardines*, so was walking a sniffer dog up to the front door;[48] and in *Rodriguez*, police were not allowed to drag out a completed roadside stop to bring in a dog without fresh grounds for suspicion.[49] All three cases were drug prosecutions, and in each the seized drugs were, or could have been, excluded.

The exclusionary rule has critics, and its exceptions have multiplied, including the good-faith exception recognised in *Leon*.[50] Still, the two countries part ways on a fundamental point. An unlawful search in America can end a prosecution however reliable the find. In India it matters chiefly as a reason to wonder whether the find took place as alleged; once the recovery is believed, the breach may do the accused little good.

C. Statements to Officers: Tofan Singh and Miranda

Statements made to investigators are one field in which Indian law has moved firmly towards the accused. Section 67 of the NDPS Act lets authorised officers summon people and question them. For decades, answers given under that power were admitted as confessions, on the theory, adopted in *Raj Kumar Karwal* and *Kanhaiyalal*, that officials of the national narcotics agency fell outside the 1872 bar on confessions made to police.[51] *Tofan Singh* ended that line of authority. By a majority, the Court treated officers vested with section 53 powers as police officers, barred the use of section 67 statements as confessions, and found that any other view would offend Articles 14, 20(3) and 21.[52]

Its American counterpart is *Miranda*: a person held for interrogation must first be warned that he may say nothing and may have counsel, or his answers cannot form part of the prosecution's main case.[53] *Tofan Singh* gets to a similar place by another road. It does not prescribe how questioning must be conducted; instead it strips the answers of evidentiary value when the questioners are, in substance, police.

VI. Quantity, Sentencing and the Cost of Process

A. How Quantity is Measured

Quantity shapes procedure as well as punishment in both countries. In India, the three weight bands introduced in 2001 decide whether section 37 bites at all. *E. Micheal Raj* had looked only at the pure drug inside a seized blend.[54] A 2009 notification tried to reverse that, and *Hira Singh* duly overruled the earlier case: filler or cutting agents now count towards the weight that fixes the band.[55]

The American Supreme Court had taken the same line some thirty years before. *Chapman* counted the blotter paper on which LSD had been applied as part of the "mixture or substance" for mandatory minimum purposes.[56] *Hira Singh* raises the same worry in India, with an extra twist: by pushing an

[47] 533 U.S. 27 (2001).

[48] 569 U.S. 1 (2013).

[49] 575 U.S. 348 (2015).

[50] 468 U.S. 897 (1984).

[51] (1990) 2 SCC 409; (2008) 4 SCC 668.

[52] *Tofan Singh* v. *State of Tamil Nadu*, (2021) 4 SCC 1.

[53] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[54] (2008) 5 SCC 161.

[55] (2020) 20 SCC 272.

[56] 500 U.S. 453 (1991).

intermediate seizure into the commercial band, the mixture rule also decides whether the accused faces the double test of section 37.

B. Mandatory Minimums and Release Valves

In the federal system, once the seized weight passes a statutory line, the judge cannot go below five or ten years, and the floor rises for repeat offenders or where someone dies or is badly hurt after using the drug. Since *Alleyne*, a jury rather than the judge must find any fact that raises that floor.[57] Congress has also opened a few exits. A 2010 reform shrank the gap between crack and powder cocaine from a hundred-to-one ratio to eighteen-to-one, and the 2018 reform package extended that change backwards, trimmed some repeat-offender add-ons and widened the "safety valve" for below-minimum sentences.[58]

Indian law sets comparable floors where the quantity is commercial: a decade at the least, up to two decades, with fines starting at ₹1,00,000.[59] As originally drafted, section 32A shut every door to suspension, remission or commutation except for consumption offences. *Dadu* struck down that clause to the extent that it stopped appellate courts from suspending sentences pending appeal, while leaving intact the ban on executive remission and commutation.[60]

Unlike America, India has no set of general sentencing guidelines or a statutory safety valve that would permit the judge to go below the floor for such a small role as a first-time courier. This creates a direct link to process. Given a ten-year mandatory minimum and section 37 governing bail, there is little incentive for either party to rush, since the defendant is sitting in prison regardless of progress in the matter.

VII. Suggestions for Reform

The comparison points to several changes for India. Each targets the procedural heart of the NDPS Act, and none would put India in breach of its treaty commitments.

First, section 37 should be rebuilt around risk instead of guilt. Instead of asking whether there are grounds to think the accused innocent, the law should ask whether the prosecution has shown, on the record, that no conditions of release could secure attendance at trial and protect the public. The prosecution should bear that burden, and the relevant considerations, such as the quantity involved, the accused's role, any criminal record and the strength of the case, should be listed in the Act, much as 18 U.S.C. § 3142(g) lists them.

Second, speedy trial in NDPS cases should become a statutory right. The Act should allow that if a person charged with a case of commercial quantity has been in custody for a certain period of time, say two years, with no progress at all in the trial proceedings, then conditional release must be considered notwithstanding section 37, unless the accused is responsible for the delay in trial. This will make sure that the conflict has arisen out of decisions subsequent to Mohd. Muslim and Sukhwinder Singh become predictable.

Thirdly, section 35(2) should be amended in line with Noor Aga to ensure that the accused discharges the presumed mental state beyond reasonable doubt. The amendment should also include that the

[57] 570 U.S. 99 (2013).

[58] Fair Sentencing Act of 2010 and First Step Act of 2018; 18 U.S.C. § 3553(f).

[59] NDPS Act, *supra* note 1, ss. 20–22.

[60] (2000) 8 SCC 437.

presumptions under section 35 and 54 occur after proof of the basic facts and cannot be used against any acceptable explanation of the accused at the bail stage.

Fourthly, the procedural guarantees in sections 42, 50 and 52A need to be supplemented by compulsory audio video recording of searches and seizures; which BNSS requires elsewhere,[61] The first is by a statutory rule that any failure to comply without explanation creates a presumption that the recovery was unreliable. This does not go as far as the American exclusionary rule but adds teeth to the safeguards.

Fifthly, a safety valve should be created in relation to quantity offenses where there is no prior record, minimal participation, and no violence in order to impose a sentence under the minimum.

Lastly, reform needs evidence. The Narcotics Control Bureau and the National Crime Records Bureau should publish separate data on NDPS undertrials: quantities involved, time spent in custody, bail outcomes and acquittal rates. The American studies of the detention presumption could be written only because pre-trial outcomes there are routinely recorded.

VIII. Conclusion

Both countries abandon ordinary criminal procedure when serious drug charges are involved, and both have paid for it. The American system carries well-known burdens of its own: heavy pre-trial detention, rigid minimum sentences, coercive plea bargaining and a long scholarly debate over the uneven racial impact of drug enforcement.[62] India should not borrow from it uncritically.

Still, setting the two side by side exposes real defects in the NDPS Act. It makes a bail judge pass a provisional verdict on guilt; on its face it makes the accused disprove his own state of mind; it treats breaches of procedure as matters of weight rather than admissibility; and it holds people in custody for long periods before trial. But even the Supreme Court of the United States of America has fought against this trend, and yet, as the recent decisions have proved, it is an easy trend to turn around.

The central point is that a tough anti-drug policy is quite compatible with procedural justice. Thus, a legislature is fully entitled to impose harsh punishments on convicted offenders and, at the same time, make sure that nobody is presumed guilty until the court says so, that every case of arrest should be well-founded, and that trials should not drag on for years. The Federal laws of the United States of America do it much better than the present Indian laws.

[61] BNSS, *supra* note 4, ss. 105 and 185.

[62] Michelle Alexander, *The New Jim Crow* (2010).