॥न्यायस्तत्र प्रमाणं स्यात्॥

DELHI

NLUD

JOURNAL OF LEGAL STUDIES

2024 VOL. 6

NATIONAL LAW UNIVERSITY, DELHI

॥ न्यायस्तत्र प्रमाणं स्यात् ॥
nlu DELHI
NATIONAL LAW UNIVERSITY, DELHI PRESS

Mode of Citation

(2024) 6 NJLS <page no.>

Published by

National Law University, Delhi Press Sector-14, Dwarka, New Delhi-110078

www.nludelhi.ac.in

NLUD Journal of Legal Studies is published annually

Print subscription price: Rs 200

All enquiries regarding the journal should be addressed to:

University Librarian, National Law University Delhi, Sector-14 Dwarka, New Delhi-110078

Tel. No: +91 11 28035818

Email: nludjls@nludelhi.ac.in

FROM THE EDITORS' DESK

A few years ago, our journal changed its name from the NLUD Student Law Review to the NLUD Journal of Legal Studies. While the change was partly motivated by logistics, the general consensus was that the new name better reflected the aims and objectives of a journal like ours.

But what are the aims and objectives of a journal like this at an institution like ours? At the heart of all academic engagement with law, what legal academics are most interested in and engage with the most is doctrine. It is a preoccupation which constitutes most of our law school syllabi and something which legal research claims as its prime domain.

However, the existence of National Law Universities was made in recognition of the fact that an engagement with doctrine, while necessary, is not in itself, sufficient to the goals of legal education and the legal academy. Since the establishment of the first integrated programme in social sciences and law in 1988, enough ink has been spilt to emphasise the necessity of the interaction of law with social sciences. However, institutionally, we see a continuous silofication of these two components of contemporary legal education.

The point of a journal of 'legal studies' then is to recognise and tactfully integrate perspectives of law that go beyond mere textualist understanding of doctrine to a more wholistic examination of law. In this particular volume, we have tried to incorporate perspectives from anthropology, development studies, psychology, in our volume while trying to wade into the contemporary issues and developments in legal research.

With the events of the year leading up to the release of this edition, we, as editors of a legal studies journal, have been forced to interrogate the role that we play, not only in the academy, but in the broader socio-political context of the contemporary world. The chief among them being the systematic censorship of the work of Palestinian legal scholar Rabea Eghbariah by the boards of Harvard Law Review and the Columbia Law Review. In case of the former, the 2000 word essay titled 'The Ongoing Nakba: Towards a Legal Framework for Palestine' was revoked by the then President of Harvard Law Review Ms Apsara Iyer. A majority of the board voted to sustain the decision, while 25 editors publicly dissented, and two resigned. In the case of the latter, after the student editors solicited, edited, and published the piece 'Toward Nakba as a Legal Concept', the Board of Directors of the journal – a body which is rarely more than advisory in nature in a student led journal – unilaterally took down the journal website.

Events such as these bring out the overtly political nature of a role like ours. The choices that we make in soliciting, editing and publishing the pieces for our journal, whether concious or not, have consequences not only for the legal academy, but also legal education, policy, and the society broadly. While what happened with HLR and CLR are extreme examples where the choices by student editors had very immediate and material consequences, the cases where they don't do not deserve any less attention.

In that effort, the subject matters that we sought to address in this volume had a very conscious thought process behind them, and this is reflected in the pieces contained in this volume. In 'Ends and Means: Reflections on the Electoral Bonds Judgment' Hrishika Jain and Kaustubh Chaturvedi put into perspective the hard hitting judgment of the Supreme Court in *Association for Democratic Reforms v Union of India*. Lisa Hajjar presents some reflections on Mayur Suresh's new book *Terror Trials: Life and Law in Delhi's Courts*. Anwesha Choudhary and Sarthak Sharma draw a portrait of the civil consequences of the Prevention of Money Laundering Act in 'Civil Implications of PMLA: Envisaging the Financial Death of an Accused'. In 'The Unfulfilled Promise of Default Bail – on the Judicial Commitment to Pre-trial Punishment in India' Kartik Kalra critiques and explores the pitfalls of the default bail regime in India. In addition to legal theory and practice, we also turn our attention to legal education and its experience in the piece by Priyam Bhattacharya titled 'Neurodivergence in Legal Education'. Commenting on legal interpretation, we have Renuka Sane and Madhav Goel writing in 'Lost in Translation: Legislative Drafting and Judicial Discretion'. Shivani Vij writes on the recent decision of the Supreme Court in *Supriyo & Anr v Union of India* in a critical piece titled 'Marriage (In)equality: The State Discriminated, The Court Let it Slide'. Lastly, we have Shraddha Dubey discussing law and development in context of the recent G20 summit held in India in a piece titled 'Making of a Global City – Delhi and its Development Dilemmas'.

All pieces have been carefully chosen with due regard to their contemporary relevance and scholarly merit. We hope that they serve the purpose intended and forward a critical perspective *vis-à-vis* contemporary socio-legal issues in India.

Abhineet Maurya, *Managing Editor*

September 2024

NLU DELHI JOURNAL OF LEGAL STUDIES

Volume 6 2024

CONTENTS

Case Comment

Ends and Means: Reflections on the Electoral Bonds Judgment 1
Hrishika Jain and Kaustubh Chaturvedi

Book Review

Terror Trials: Life and Law in Delhi's Courts by Mayur Suresh 16
Lisa Hajjar

Legislative Comment

Civil Implications of PMLA: Envisaging the Financial Death of an Accused 21
Anwesha Choudhury and Sarthak Sharma

Articles

The Unfulfilled Promise of Default Bail – on the Judicial Commitment to Pre-trial Punishment in India 34
Kartik Kalra

Neurodivergence in Legal Education 65
Priyam Bhattacharya

Lost in Translation: Legislative Drafting and Judicial Discretion 91
Renuka Sane and Madhav Goel

Marriage (In)equality: The State Discriminated, The Court Let it Slide 106
Shivani Vij

Making of a Global City – Delhi and its Development Dilemmas 122
Shraddha Dubey

ENDS AND MEANS: REFLECTIONS ON THE ELECTORAL BONDS JUDGMENT

*Hrishika Jain and Kaustubh Chaturvedi**

Abstract

The Supreme Court's judgment in Association for Democratic Reforms v. Union of India, in invalidating the Electoral Bonds scheme and directing authorities to disclose details of bonds purchases and encashments, has firmly placed itself in the shelves of constitutional canon. Yet, that is precisely why a critical engagement with it, one that separates the ends from the means employed, is necessary. The authors critique the Court's uncritical acceptance of the conception of informational privacy advanced by the Union of India, and the unfounded use of 'essentiality' to dangerously narrow the voter's right to information. They also highlight the Court's (mis)adventures with the double proportionality framework and misapplication of the conventional proportionality assessment. At the same time, the Court made some salutary attempts to advance the law — notably, through its clarity on the presumption of constitutionality in fundamental rights cases and on the constitutionalisation of political parties — attempts which deserve mention due to the potentially canonical status of the judgment.

Keywords: *Electoral Bonds–Right to Privacy–Double Proportionality–Right to Information*

* Hrishika Jain is a lawyer and legal researcher currently pursuing her LL.M. at the Yale Law School. Kaustubh Chaturvedi is a practicing advocate before the Supreme Court of India and the Delhi High Court.

I. PREFATORY REMARKS

Great cases, just like hard ones, often make bad law.[1]

Indisputably, *Association for Democratic Reforms v. Union of India*[2] ('Electoral Bonds Judgement') is a 'great' case. The Electoral Bonds scheme ('the Scheme'), by permitting donors (including corporate donors) to channel unlimited funds to political parties without any public disclosure, had flooded the electoral field with big money,[3] allowed corporations undisclosed and unlimited political influence,[4] and grossly disadvantaged Opposition parties during a time of democratic backsliding. The Court's striking down the Scheme as unconstitutional and directing authorities to publicly disclose details of all bond purchases and encashments, months before the 2024 General Elections, has placed the Electoral Bonds Judgement firmly (and justly) in the shelves of constitutional history.

Yet, for that very reason, its missteps too carry the risk of distorting constitutional doctrine for years to come. We aim to highlight the Court's failure to consider threshold questions on the ambit of the right to privacy and the right to information, its misapplication of the conventional proportionality framework, and its doctrinal (mis)adventure with double proportionality, in the hope that these errors do not endure.

II. INTRODUCTION TO THE SCHEME

Electoral bonds were proposed in 2017 with the stated aim of curbing black money in electoral funding, and introduced through the Finance Act, 2017 by amending four key legislations. The Reserve Bank of India Act, 1934 was amended to allow the Central Government to authorise any scheduled bank to issue electoral bonds;[5] the Representation of People Act, 1951 was amended to exempt donations made via electoral bonds from the general requirement to disclose donations of amounts greater than twenty thousand rupees;[6] the Income Tax Act, 1961 was amended to exempt

1 *Northern Securities Co v United States* 193 US 197 (1904).

2 *Association for Democratic Reforms & Anr v Union of India & Ors* 2024 INSC 113.

3 'Electoral Bonds: Rs 1-cr bonds takes lion's share at 96%; Rs 1k bonds just 0.0001%' (Deccan Herald, 15 March 2024) <https://www.deccanherald.com/india/electoral-bonds-rs-1-cr-bonds-take-lions-share-at-96-rs-lk-bonds-just-00001-2938567> accessed 8 August 2024; Ayushi Arora, 'Infographic Unrestrained corporate funding as over 16K electoral bonds of Rs 1 Crore' (Deccan Herald, 16 February 2024) <https://www.deccanherald.com/india/infographic-unrestrained-corporate-funding-as-over-16k-electoral-bonds-of-rs-1-crore-sold-2897845> accessed 8 August 2024.

4 'Electoral Bonds: BJP took home lion's share of Rs. 16,000 crore political funding' (The Economic Times, 17 February 2024) <https://economictimes.indiatimes.com/news/politics-and-nation/electoral-bonds-bjp-took-home-lions-share-of-rs-16000-crore-political-funding/articleshow/> accessed 8 August 2024.

5 Finance Act 2017, s 135.

political parties from maintaining any records of contributions made via electoral bonds;[7] and finally, the Companies Act, 2013 was amended to remove the cap on corporate contributions to political parties as well as the requirement that companies disclose the amount and recipient of each contribution, leaving only a requirement of declaring aggregate amount of contributions.[8] These amendments were finally implemented by the notification of the Electoral Bonds Scheme, 2018, despite the objections raised by both the Reserve Bank of India[9] and the Election Commission of India.[10] Both the amendments and the 2018 Scheme were challenged before the Court.

The Court, striking these down, held that the amendments exempting donations from disclosure requirements violated the right to information under Art. 19(1)(a),[11] and the removal of the cap on corporate contributions was manifestly arbitrary in violation of Art. 14.[12] We agree with this outcome — there are, however, significant concerns with the path the Court took to get there.

III. DON'T ASK, DON'T TELL: INFORMATIONAL PRIVACY INTERESTS IN FUNDING 'PUBLIC AUTHORITIES'?[13]

The Union of India pressed into service donors' fundamental right to privacy, arguing that the Scheme's legitimate purpose was to realise this right for those donors who chose to donate through banking channels.[14] In its consideration of whether the right to privacy was engaged, the SC correctly recognised the privacy of one's political affiliation as salient even beyond the secret ballot.[15] In doing so, it implicitly affirmed that democratic participation begins, not ends, with the franchise, and consequently safeguards for civic engagement should similarly extend beyond voting day. This is seminal.

---

7 ibid, s 11.

8 ibid, s 154.

9 The Wire Staff, 'Modi Govt Ignored All of RBI's Warnings Against Electoral Bonds: Report' (TheWire, 19 November 2019) <https://thewire.in/government/electoral-bonds-rbi-finance-ministry> last accessed on 8 August 2024; Association for Democratic Reforms (n 2), [17]-[21] (Dr. DY Chandrachud, CJ).

10 See generally, the Counter Affidavit on behalf of the ECI filed in the Electoral Bonds Case, available at <https://www.livelaw.in/pdf_upload/pdf_upload-359432.pdf> accessed 8 August 2024; see also, the letter from the ECI to Ministry of Law & Justice (26 May 2017) <https://www.livelaw.in/pdf_upload/pdf_upload-359433.pdf> accessed 8 August 2024.

11 *Association for Democratic Reforms* (n 2) [169] (Dr DY Chandrachud, CJ)

12 ibid [215].

13 *Subhash Chandra Aggarwal & Anr v. Indian National Congress & Ors* [2013] CIC 8047 (Chief Information Commission).

14 *Association for Democratic Reforms* (n 2) [38] (Dr DY Chandrachud, CJ).

15 *Association for Democratic Reforms* (n 2) [134]-[142] (Dr DY Chandrachud, CJ).

However, there is a leap from recognising the right to privacy of political affiliation to first, recognising donations to political parties as expressions of political affiliation where there may be a reasonable expectation of privacy, and second, holding that the facet of privacy they engage is informational privacy, as opposed to only decisional autonomy from external pressures (both being aspects of the right recognised in Puttaswamy).

The SC made this leap, going on to conduct a 'competing rights' analysis between the rights to privacy and information without adequately considering threshold questions of the existence and nature of the conflict between the two rights. Is all information about a person's political affiliation or associations of such a nature that it may be kept anonymous at will, and if not, is information about financial contribution for political campaigns/party-

building of such a nature? Is there a reasonable expectation of informational privacy while donating to parties recognised as public authorities under the Right to Information Act 2005?[16] Specifically, is the nature of the right to privacy of political affiliation context-dependent, potentially taking on forms other than informational privacy (such as decisional autonomy) for political acts that reshape the political sphere outside one's own person, especially when using unequally available resources (such as money)?[17] In any case, are donations by corporations expressions of political affiliation at all, and if not, can the right to privacy be extended to those donations in any form?[18]

These threshold questions, if adequately considered at that stage, would have significantly altered the shape of, if not made redundant, the Court's 'competing rights' analysis under the double proportionality framework.[19] Instead, these questions were neglected or insufficiently answered.

The majority opinion makes a case for informational privacy of political affiliation using instances of purely private actions (like purchasing books or clothes and reading the news),[20] and then seems to, without much further ado, simply extend that logic to financial contributions to political parties (after flagging that extension as requiring

16 *Subhash Chandra Aggarwal* (n 13).

17 See for example, William Mcgeveran, 'Mrs. McIntyre's Persona: Brining Privacy Theory to Election Law' (2011) 19 William and Mary Bill of Rights Journal 859, 862, 869, 880 for a discussion on the relevance of the scale of political activity on privacy interests in it; see also, Elizabeth Garrett & Daniel A Smith, 'Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy' (2005) 4(4) Election Law Journal 295; see further, Lloyd Hitoshi Mayer, 'Disclosures about Disclosure' (2010) 44 Ind L Rev (2010) 255, 283.

18 See generally, Elizabeth Pollman, 'A Corporate Right to Privacy' (2014) 99 Minnesota Law Review 27.

19 *Campbell v MGN Limited* [2004] UKHL 22, [137], [147].

20 *Association for Democratic Reforms* (n 2) [136] (Dr DY Chandrachud, CJ).

distinct analysis).[21] The limited reasoning for this extension seems to broadly be thus: all expressions of political affiliation are based on thoughts and beliefs, and the right to privacy protects the privacy of all thoughts and beliefs (and, as explicitly stated, does not protect the resulting act of speech or expression).[22]

The Court's reasoning seems to indicate that while political actions are not generally protected by the right to privacy, being communicative in their nature, any actions (such as political donations) that reflect political beliefs are protected. The problem with this is fairly straightforward. Since most political actions would reflect political beliefs, and the Court gives no further hints about which of those kinds of actions it seeks to include within the ambit of informational privacy, the Court's reasoning threatens to collapse the difference between political action and political belief, and treats them both as confidential information disclosure of which is an 'intrusion of the mind'.[23]

In doing so, the Court flattens all expressions of political affiliation — ranging from purchasing certain kinds of newspapers, to voting, to handing out leaflets promoting a cause, to organising political protests, to making substantial donations to a political party — without regard to the inherent nature of the action and the expectations of privacy (and the facets of it) that may reasonably fit it. Of course, the right to decisional autonomy may be said to inhere in most matters of political affiliation, but surely whether the right to informational privacy is engaged cannot be a function merely of whether an action betrays a political belief (many things do, such as a pro-life group heckling women entering an abortion clinic). Rather, whether a reasonable expectation of informational privacy inheres in that action is a distinct inquiry involving, inter alia, considerations of the public/private space occupied by the action, its inherent nature, and its effect on the social/political field outside one's own person. Regrettably, the Court undertook no such inquiry when it came to financial contributions as a form of expressing political affiliation.

Nor did the majority opinion consider whether corporate entities, which were also permitted to purchase bonds under the Scheme, could be said to have a right to privacy of political affiliation (or, for that matter, even a political affiliation) at all, even if the right was otherwise engaged.[24] If not, the Scheme, insofar as it applies to corporations, should have been expressly invalidated after a conventional proportionality analysis had shown that it violated voters' right to information, without any further 'competing rights' analyses.

---

21 ibid [139].

22 ibid [141].

23 ibid [141].

24 In contrast, see ibid [73] (Sanjiv Khanna, J), which did consider the question and qualify the right to privacy that corporations may claim, albeit on account of different reasons.

Of course, the outcome would have remained the same — the Court declared, after assessing the competing rights, that the right to privacy would not prevail over the right to information and the Scheme would not be upheld. However, addressing these threshold questions would have brought doctrinal clarity to the future of informational privacy and avoided the distortions that arise from implicitly treating corporations as holders of political rights.

IV. THE RIGHT TO (ESSENTIAL) INFORMATION: THE (SOMEWHAT) INFORMED VOTER

The Court's threshold analysis on the right to information was as if a mirror image of its threshold analysis of the right to privacy: where, as we noted above, it failed to consider the case for circumscribing the latter, it seems to have over-circumscribed the former without sound basis in constitutional text or doctrine.

Interpreting (inaccurately, we argue) its prior decisions on mandatory disclosures of information by candidates before elections, the Court held that it is only that information which is 'essential' for the effective exercise of the freedom to vote that falls within the ambit of the fundamental right to information under Art. 19(1)(a).[25] This is a severe standard; while information on the funding of political parties may easily meet it (and indeed, the Court held it does),[26] it remains to be seen what information this newly innovated standard may deprive voters of. To make matters worse, a conjoint reading of ADR[27] and PUCL[28] does not support the Court's claim that it arrived at this litmus test of 'essentiality' on their basis.

Right off the bat, it may be noted that the issue framed by the Court in ADR[29] itself asked whether voters have the right to know all 'relevant' particulars of candidates, not essential particulars. In fact, the word essential was not used anywhere at all in the reasoning; instead, the Court observed that the electorate has the right to know "full particulars"[30] of a candidate and that every voter's decision will be based on his own relevant criteria.[31] Clearly, then, the Court in ADR was leaning towards a significantly more expansive conception of the voter's right to know than one limited to merely 'essential' information. The Court in PUCL, operating against the backdrop laid down by

25 ibid [77], [78], [95] (Dr DY Chandrachud, CJ).

26 ibid [104].

27 *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294.

28 *PUCL v Union of India* (2003) 4 SCC 399.

29 *PUCL* (n 28) [1], [18].

30 ibid [46.4].

31 ibid [22].

the prior decision in ADR, confirms this expansive construction. the majority opinion in PUCL was concerned with the right to information in its widest terms, speaking of "relevant antecedents" of a candidate,[32] emphasising the need to "attenuate the area of secrecy as much as possible,"[33] and holding voters' knowledge of the "biodata" of a candidate to be "the foundation of democracy."[34]

Thus, the Electoral Bonds Bench's misguided standard of 'essentiality' for determining whether a right to information exists finds no place in the precedents it cites. Nor should that be surprising. The 'essentiality' of a specific instance of a right is an inquiry better fitted to the subsequent stage of assessing whether a restriction on it is justified by competing interests/rights, not to the threshold inquiry of whether the right claimed exists at all in the first place.

After all, to recognise voters' right to all relevant information is not to perforce make it absolute — it only establishes that any secrecy when it comes to such information will have to be suitably justified as a proportionate restriction. The Electoral Bonds Judgement, unfortunately, takes that safeguard away for a large extent of the right to information.

V. MATTERS OF PROOF IN STRUCTURED PROPORTIONALITY: A LOST OPPORTUNITY

While applying the doctrine of proportionality to assess whether the Scheme's violation of the right to information is justified, the Court evaluated the constitutionality of the Scheme against two different proffered objectives — curbing black money and protecting donor privacy. In both cases, the Court's analysis in the 'suitability' prong, i.e. whether the Scheme is a suitable means for furthering its aim, was undercut by its deference to the State's evidentiary claims and consequent unwillingness to demand justifications based in the actual working of the law and not merely its stated intent.[35]

The more egregious omission was made by the majority opinion while considering the Scheme's suitability for the purpose of curbing black money in electoral finance. Having noted the Union Government's submission that the Scheme's guarantee of anonymity incentivises contributors to donate through the banking channel and thereby curbs the inflow of black money, the Court simply assumed it to be true, without further

32 *PUCL* (n 29) [16].

33 ibid [26].

34 ibid [70].

35 See generally Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3(2) Oxford Human Rights Hub Journal 55.

analysis of the Scheme's design or evidence of its workability.[36] This is not a quibble merely with the Court's refusal to show its work before arriving at a conclusion of suitability, but instead with its complete abdication of its responsibility to assess, and arrive at a conclusion as to, the Scheme's suitability at all. In doing this, the Court ignored serious evidence that indicated the Scheme's unsuitability for curbing black money. Indeed, as acknowledged by the majority opinion itself, two different regulators - the RBI and the ECI - had warned the Union Government that the Scheme might facilitate money laundering and the circulation of black money, not stem it.[37] Puzzlingly, however, this finds no mention in the Court's suitability analysis.[38]

The RBI, in particular, objected to the Scheme three different times. First, on 2nd January, 2017, the RBI wrote to the Ministry of Finance highlighting, inter alia, that the identities of any persons who buy the electoral bonds from the original purchaser will remain anonymous, effectively creating a secondary market that would militate against the objectives of the Prevention of Money Laundering Act.[39] Then for the second time, on 14th September, 2017, the RBI objected again, saying that the Scheme gave rise to the possibility of shell companies misusing electoral bonds for money laundering transactions.[40] When even this was not given heed to, the RBI finally wrote directly to the Finance Minister on 27th September, 2017, saying in clear terms that the Scheme may be perceived as enabling money laundering since the consideration for transfer of bonds from the original subscriber to a transferee will likely be paid in cash.[41] The ECI, echoing RBI's concerns, wrote to the Ministry of Law and Justice on 26th May, 2017 asking it to reconsider the Scheme since the removal of the cap on corporate funding would increase the use of black money in political funding through shell companies.[42] In addition, the counsel for one of the Petitioners had also collated data showing that the actual impact of the Scheme has also been to shift donors from conventional banking channels to anonymous bonds while leaving the cash channel (which the Union Government sought to attack as the avenue for black money) unaffected.[43]

---

36 Association for Democratic Reforms (n 2) [117]-[118] (Dr DY Chandrachud, CJ).

37 ibid [17]-[23].

38 ibid [117]-[118].

39 ibid [17].

40 ibid [20].

41 ibid [21].

42 ibid [23].

43 See pages 61-64 of the Supreme Court's Transcript <https://www.scobserver.in/wp-content/uploads/2021/10/Day-1-Transcript-Electoral-Bonds.pdf> accessed 8 August 2024.

The Electoral Bonds case was therefore a rare opportunity; seldom is there available such rich and cogent official material questioning the suitability of a measure for its own stated purpose. Much more frequently, the question of evidence in proportionality assessments involves either an absence of evidence-based thinking within the Government or a state of 'factual uncertainty'[44] from the production of conflicting evidence by the Government and private petitioners in support of their respective positions. The Court, unencumbered by these complications, had the opportunity to set a strong precedent for foregrounding evidentiary questions in the proportionality framework. Regrettably, however, the majority opinion paid all this evidence about as much heed as the Union Government had. Instead, it went on to consider (and strike the Scheme down on) the necessity prong, i.e. whether there were less restrictive options that fulfilled the Scheme's purpose to a 'real and substantial degree', without ever concluding that the Scheme itself had any rational connection to that purpose.

This is especially surprising because the minority opinion not only accepts the Petitioners' argument that the Scheme lacks a rational connection to the purpose of curtailing black money[45] but also lays down important law on the crucial role of evidence in proportionality assessments. It clarifies that the proportionality doctrine does not admit of 'preconceived notions'[46] and notes that the State would be typically required to produce empirical evidence justifying the impugned measure and establishing a causal relationship between the measure and its purposes, without which proportionality stricto sensu may fail for want of lack of standards.[47] The minority opinion further held that, if such evidence is inconclusive, or does not exist and cannot be developed — basically, as an exception — courts may instead rely on reason and logic to assess the State's justifications,[48] an inquiry where the State would still have to prove its case to a 'balance of probabilities'.[49] More notably still, the minority opinion specifically flagged that a lack of parliamentary deliberation and a failure to make relevant enquiries, i.e. a failure of the State to conduct an evidence-based inquiry, will itself be factors in the Court's decision,[50] thus proposing a form of indirect judicial review of legislative processes.[51] Regrettably, the Court's majority opinion failed to even engage with this rich exposition of the role of proof in the proportionality framework.

---

44 See generally, BS Barroso, 'Beyond the Principle of Proportionality: Controlling the Restriction of Rights under Factual Uncertainty' (2023) Oslo Law Review 74.

45 *Association for Democratic Reforms* (n 2) [44]-[46] (Sanjiv Khanna, J).

46 ibid [18].

47 ibid [33], [35].

48 ibid [33].

49 ibid [18].

50 ibid [33].

51 See generally, Vikram A Narayan, Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Processes in India?' (2021) VRU / World Comparative Law 358.

The Court commits a similar error in evaluating whether the Scheme is a suitable measure for protecting donor privacy as part of its double proportionality analysis. Again, the Court proceeds from the unquestioned premise that the Scheme enhances donor privacy by guaranteeing anonymity, and therefore all that remains for it to do is to consider less restrictive options and balance the Scheme's effect on the right to information.[52] This premise, on a deeper scrutiny of the actual design and working of the Scheme, breaks down.

Undoubtedly, the Scheme ensures donors' informational privacy vis-a-vis the electorate. However, it guarantees in no way donors' informational privacy vis-a-vis political parties.[53] Prima facie, this may seem like only an academic concern — one might assume that people donating to a political party will anyway want that political party to be aware of the donation. A more considered view, however, is that political parties knowing exactly who has (and, worse, who hasn't) contributed to them is likely to catalyse the exact kind of political vindictiveness the Scheme is supposedly trying to avoid.[54] If a party has perfect knowledge of all who are donating to it, it is able to strong-arm prospective donors into donating, a problem greatly exacerbated by the fact that this transaction is otherwise happening behind closed doors and away from public scrutiny.

In this way, the asymmetry of information that the Scheme facilitates does not only lack a nexus with informational privacy vis-a-vis the party, but also outright enables coercion in political funding and seriously compromises donors' decisional privacy. Of course, evidence supporting this proposition could only have come to light later (as it did)[55] when bond purchases were directed to be disclosed publicly. However, if the Court had critically engaged at all with the likely working of the Scheme, even using merely

---

52 *Association for Democratic Reforms* (n 2), [162] (Dr DY Chandrachud, CJ).

53 ibid, [103].

54 *Association for Democratic Reforms* (n 2) [39] (Sanjiv Khanna, J) adopts a somewhat similar stance.

55 Yashraj Sharma, 'India's electoral bonds laundry: 'Corrupt' firms paid parties, got cleansed' (Al Jazeera, 04 April 2024) <https://www.aljazeera.com/news/2024/4/4/indias-electoral-bonds-laundry-corrupt-firms-paid-parties-got-cleansed> accessed 8 August 2024; Vignesh Radhakrishnan and Srinivasan Ramani, 'Electoral bonds data | Many top donors were under ED and Income Tax Department scanner' (The Hindu, 15 March 2024) <https://www.thehindu.com/data/ed-and-it-had-conducted-searches-on-many-firms-which-purchased-electoral-bonds/article67954005.ece> accessed 8 August 2024; Himanshi Dahiya and Naman Shah, 'Electoral Bonds: Of Donations From Top Firms Raided by Agencies, BJP Got 30%' (The Quint, 15 March 2024) <https://www.thequint.com/news/politics/electoral- bonds-bjp-donations-ed-cbi-income-tax-departments-election-commission> accessed 8 August 2024; see also Reporters' Collective, 'Electoral Bonds Tracker' <https://www.reporters-collective.in/electoral-bonds-tracker#tracker> accessed 8 August 2024.

reason or logic as the minority opinion suggests,[56] its so-called double proportionality analysis need not have gone further than holding that the Scheme is an unsuitable means for realising either the right to information or the right to privacy.

This, unfortunately, is only the tip of the iceberg as far as the Court's competing rights analysis was concerned.

VI. DOCTRINAL (MIS)ADVENTURES WITH DOUBLE PROPORTIONALITY

To resolve the conflict between the right to information and the right to privacy that was held to arise from the Electoral Bonds Scheme, the Court offered a framework of analysis it called the 'double proportionality' approach. Offering a roadmap for navigating hard constitutional cases — those involving competing fundamental rights — the Court's holding had the potential to achieve a significant shift in the very decision-making matrix that informs constitutional litigation. Regrettably, however, the Court's particular version of 'double proportionality' seems to lack logical coherence or a sound understanding of the origins of the test it relies on, leaving it all but unworkable.

Proportionality simpliciter evolved in the context of contests between an individual and the State where the individual seeks to challenge a State-imposed restriction on their fundamental right.[57] However, there may be situations when the fundamental rights of other non-litigants are implicated in the litigation between an individual and the State, particularly where the measure infringing the litigant's right was intended to protect another competing fundamental right. In such cases, the simple application of the proportionality test in protection of the fundamental right asserted by the individual suing may be unfair, in that such an exercise is designed to maximise the right allegedly infringed by the measure (say, Right A) and minimise all restriction on it. Consequently, in situations such as the one described above, the right that the restriction seeks to maximise (say, Right B) gets decentred, or even minimised, in favour of the infringed right claimed by the petitioner.[58] This has been called 'preferential framing',[59] where the entirely circumstantial questions of who the petitioner is and what right they assert ends up materially affecting the manner in which the conflict between two fundamental rights is resolved.[60]

---

56 *Association for Democratic Reforms* (n 2), [33] (Sanjiv Khanna, J).

57 HMJ Andrew Cheung PJ, 'Conflict of fundamental rights and the double proportionality test' (University of Hong Kong Common Law Lecture Series, 17 September 2019) <https://www.hkcfa.hk/filemanager/speech/en/upload/2236/Common%20Law%20Lecture%20(Final%20Version).pdf> accessed 8 August 2024.

58 See generally, ibid; John T Cheung, 'Balancing Fundamental Rights in Private Law Through the Double Proportionality Test' (2020) 28 Nottingham LJ 52.

59 See Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge 2017) 35.

60 John T Cheung (n 58) 58.

The double proportionality test was innovated to solve this problem, to provide a framework for resolving a conflict of rights where the proportionality of interfering with one had to be assessed against the proportionality of restricting the other. As such, its use in Indian jurisprudence is undoubtedly a net positive — it provides a structured way of ensuring that "no considerations that are relevant are omitted… and no questions that should be asked are not asked"[61] while weighing competing rights, and represents a significant improvement over the kind of ad hoc analysis that has been pervasive till this point.[62]

A correct application of the double proportionality framework would thus entail conducting a conventional proportionality analysis for each possible infraction of rights, and if each measure passes muster in the first three stages, then balancing them against each other in an attempt to restrict each to the extent necessary to protect the others. If one of the alleged infractions fails at one of the first three stages — if it does not have a legitimate goal, is not a suitable means of furthering that goal, or is not the least restrictive method of furthering that goal — then that alleged infraction gets invalidated without ever having to resort to balancing. In case the alleged infractions pass the first three stages of their respective proportionality assessments, the Court would then be required to assess the strength and clarity of the two assessments and ultimately balance them against each other.[63]

Crucially, in a constitutional case, the incidence of infraction for the competing rights would each be distinct. As for the right claimed by the petitioner, the infraction is in the Impugned Measure itself; but for the competing right, the infraction is a hypothetical one, that is it will arise in the event that the Court strikes down the Impugned Measure and reverts the law to status quo ante. Thus, to clarify, the correct 'double proportionality' inquiry in a constitutional challenge is as follows: first, whether Measure No. 1 is a proportionate infringement of Right A, and second, whether striking down Measure No. 1 will be a proportionate infringement of Right B.

In the Electoral Bonds case too, there were two possible infractions of fundamental rights in play — the infraction of the electorate's right to information on account of the Scheme, and the hypothetical infraction of the donor's right to privacy in the event of the Court striking down the Scheme. The Court's task, then, was to first assess whether the Scheme was a proportionate restriction of the electorate's right to information and

61 HMJ Andrew Cheung (n 57) 20.

62 See for example the Supreme Court's analysis of the right of privacy as a competing right to the right to information in *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294, [41]; Andrew Cheung (n 57), 20.

63 John T Cheung (n 58) 55.

second whether striking down the Scheme and reverting to status quo ante would be a proportionate interference with the donors' right to privacy.

Instead, the majority opinion inexplicably scrutinises the Scheme itself against the touchstone of both rights, and assesses whether the Scheme (i.e. the Impugned Measure) itself is a suitable means for furthering both the right to privacy and the right to information, whether the Scheme itself is the least restrictive measure for realising both the right to privacy and the right to information, and whether the Scheme has a disproportionate impact on the right to privacy and the right to information.[64]

This version of 'double proportionality' creates a logical impossibility — if a 'conflict' between the two rights is assumed, how can a test that requires the Impugned Measure to be a suitable means for furthering both the rights ever succeed and validate a law? If this is what 'double proportionality' is, any and every action actually involving a conflict between two fundamental rights should be struck down as invalid. Imagine if, in the facts of In Re: S, when faced with the conflict between a 5 year-old boy's right to privacy and a newspaper's freedom of expression to publish details about that boy's mother's trial for murder,[65] the House of Lords had framed the question as whether a gag order furthered both the boy's and the newspaper's right; a gag order can never further the freedom of expression, just as a scheme designed to facilitate informational privacy for donors can never further the freedom of information. To test it against that benchmark reveals an entirely misguided understanding of the double proportionality framework, one that we are optimistic will be rectified in the Court's future doctrine.

VII. CONCLUDING REMARKS

Each one of these errors takes on outsize importance because SC judgements, unlike those of apex courts through most of the world, are binding in toto, even parts not strictly in issue before the court.[66] Every error, thus, affects future jurisprudence; equally, so does every salutary piece of analysis. Consequently, before concluding this case comment, it is only apt to flag three positive strands in the Court's reasoning in the hope that the Court will pick up and expand on them moving forward.

First, the Court has endorsed a progressive, rights-friendly approach towards the burden of proof in constitutional litigation, requiring the Petitioner to establish a prima facie infringement of a fundamental right, i.e. show that a fundamental right is engaged by the impugned measure, and then shifting the onus to the State to justify the

64 *Association for Democratic Reforms* (n 2), [157] (Dr DY Chandrachud, CJ).

65 *In Re S (FC) (A Child)* (Appellant) [2004] UKHL 47.

66 *Municipal Committee v Hazara Singh* AIR 1975 SC 1087, [4]; *Sarwan Singh Lamba v Union of India* (1995) 4 SCC 546, [17]; *Palitana Sugar Mills v State of Gujarat* (2004) 12 SCC 645, [62].

infringement.[67] The presumption of constitutionality, in effect, ceases to apply once the Petitioner is able to show that a right has been prima facie restricted. Importantly, this puts the "burden of factual uncertainty"[68] on the State, in line with the culture of justification proportionality is meant to represent. However, while this development is critical, the Court leaves it on shaky territory by failing to engage with the conflicting 7-Judge Bench decision in Pathumma v. State of Kerala.[69] Instead, the Court could have differentiated itself from Pathumma by accepting the Petitioners' contention that laws setting the ground rules of the electoral process merit a distinct, higher level of scrutiny; after all, any degree of deference to the legislature since it represents the will of the people is harder to justify when the impugned laws affect whether the legislature as constituted represents an accurate translation of the will of the people.[70] Now, as things stand, a larger Bench will likely need to settle the question of burden of proof in Article 14 challenges — hopefully, it will do so in favour of the position advanced in this case.

Second, the judgement expressly acknowledges that political parties are an important unit of democracy, and accordingly subject to constitutionalisation. The Court has arguably been moving gradually in this direction since Kihoto Hollohon upheld the Xth Schedule of the Constitution,[71] and cases such as Rameshwar Prasad,[72] Kuldip Nayar,[73] and Subhash Desai[74] can be read as having taken incremental steps to enmesh political parties more deeply in our constitutional framework; the Electoral Bonds judgement completes that process. This will likely have significant positive implications for democratic accountability moving forward.[75]

Third, crucially, the Court's framing of the Scheme and the constitutional questions that arise from it centred, not merely the free flow of information as an end in itself, but the spectre of political inequality that money brings to the electoral field and the need for open and informed public discourse to keep it in check. In this manner, the judgement recognises money in elections as, at best, a necessary evil and, at worst, as a

67 *Association for Democratic Reforms* (n 1), [45] (Dr DY Chandrachud, CJ); *Association for Democratic Reforms* (n 2), [17] (Sanjiv Khanna, J).

68 Aparna Chandra (n 35) 85.

69 (1978) 2 SCC 1, [6], [8], [20].

70 *Association for Democratic Reforms* (n 1), [31] (Dr DY Chandrachud, CJ).

71 (1992) Supp (2) SCC 651.

72 (2006) 2 SCC 1, [72]-[73].

73 (2006) 7 SCC 1, [451]-[452].

74 (2024) 2 SCC 719, [118].

75 See generally, Udit Bhatia, 'What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40(3) Law & Philosophy 30(5); see also, Aradhya Sethia, 'Where's the Party?: Towards a Constitutional Biography of Political Parties' (2019) 3(1) Indian Law Review 1, for scholarship on the importance of constitutionalising the political party in India.

constitutional distortion of the ideas of political equality and democracy which needs heightened public scrutiny, even as it clarified that it was not tasked with deciding the constitutionality of corporate funding. The Court's focus on political equality poses a stark and commendable contrast to the jurisprudence in the US which, while emphasising disclosures as essential for informed voting, has still held that donations are political speech and considers the existence of financial influence, an obviously unequally available resource, to be a key sign of responsiveness in government. In proposing a framework that centres equality over 'responsiveness', the Court has unlocked doors for new, different conversations about the role of money in electoral politics.

76 *Association for Democratic Reforms* (n 2) [140] (Dr DY Chandrachud, CJ).

77 *McCutcheon v FEC* 572 US 1, 39.

TERROR TRIALS: LIFE AND LAW IN DELHI'S COURTS BY MAYUR SURESH

*Lisa Hajjar**

Mayur Suresh has distilled the dissonance in Delhi's courts, where terrorism cases are prosecuted, into a crystal-clear study of the workings of law and its effect on the lives of terror-accused people. Terror Trials is a theoretically sophisticated ethnography in which insights about the life of law and the making of legal meanings and judicial truths are gleaned from a vantage point that rarely is centred in socio-legal studies. Suresh foregrounds legal procedures and technicalities, which he uses as an analytical lens to structure the book. Each chapter covers a distinct procedural aspect of terror trials, narrated through the stories of individuals whose experiences illuminate that specific technicality. The originality of this approach gives readers a fresh perspective on well-established understandings of the law as simultaneously an extension of politics and society and a semi-autonomous domain.

Suresh spent years in the Tis Hizari court complex following fourteen cases. His ethnographic research experience, with largely unfettered access, and his arguments about how these courts do their work undermine prevailing views that terrorism constitutes an "exceptional" crime. In the Indian context, terror trials take place in regular criminal courts set in dense urban settings where the accused can actively participate in their own cases.

While India's anti-terrorism statute may appear on paper to be a fearsome tool of state repression, when its efficacy is examined through the legal processes in terror trials, as Suresh does, its power is revealed to be slippery, vulnerable, and negotiable. On paper, the statute reflects the state's political aims to cast a wide net over "suspicious types" of people—religious and ethnic minorities (mainly Muslims and Dalits) as well as political dissidents (especially communists and Kashmiris who advocate for independence) and critics (journalists and human rights advocates who expose and condemn official wrongdoing and repressive policies). This statutory power is enabled through provisions to prosecute conspiracy and material support as terrorism crimes.

These types of charges, in India as elsewhere, are notoriously malleable because they lend themselves so easily to the discriminatory targeting of members of disfavored communities by branding them "terrorists." The statute also enshrines the state's authoritarian ambitions by vesting prosecutors—the arms of the state in courts—with special powers intended to intensify the helplessness of the accused; these powers are

---

* Lisa Hajjar is a professor of Sociology at the University of California – Santa Barbara. Her publications include Courting Conflict: The Israeli Military Court System in the West Bank and Gaza (2005), Torture: A Sociology of Violence and Human Rights (2013), and The War in Court: Inside the Long Fight against Torture (2022).

Mayur Suresh, Terror Trials: Life and Law in Delhi's Courts (Fordham University Press, 2023).

the special procedures and evidentiary rules that defy rule-of-law norms, thus enhancing the state's power to repress through the legitimation of legal exception. Another advantage, which is procedural rather than strictly statutory, is the state's prerogative—this one exercised by police and prison authorities—to hold the accused in pre-trial detention, sometimes for years, as their cases wend through the system. And yet, if the strength of the statute were evaluated by its capacity to achieve convictions at trial, it is weak because such convictions are rare. Terror Trials illustrates how legal technicalities can make the force and enforcement of the law so vulnerable and negotiable. However, the legal process itself serves the state's punitive goals by justifying the extended imprisonment of people who are charged with terrorism crimes but have not been convicted. One big takeaway from the book is that the process is the punishment.

The custodial dimension begins with arrest and is an adjacent component of the legal process. But it is integral to the experiences of terror-accused because of the difficulties—and for the poor, impossibilities—of being released on bail while awaiting trial. It also shapes their experiences because conditions of pre-trial detention are rife with torture and dehumanization.

Suresh addresses the custodial dimension in Chapter 1 by analyzing what he terms "custodial intimacy." In India as elsewhere, people subject to long-term detention and interrogational violence experience intimate—meaning interpersonal—contact with their custodians. Indeed, the two defining aspects of torture that distinguish it from all other forms of violence are the custodial context in which it occurs and the interpersonal nature of applied violence by individual interrogators to cause physical pain and/or psychological suffering to those individuals against whom those techniques are applied. Protracted detention means that custodians and incarcerated people become part of a common environment, albeit with highly different statuses and rights. They get to know one another through prolonged proximity, two-way exposure, and routinized interactions. The legal technicalities that shape the nature of this "togetherness" include the rules and rulings that govern the (in)availability of bail and the institutionalized discretion and monopoly police have over the investigation of terrorism allegations.

One feature of custodial intimacy that Suresh explores is the power of rumors. His interlocutors' custodians were a constant presence in their minds, made manifest through the stories—fact-based and fictitious—that circulated in jail. He analyzes rumors as a mode through which the power of the police is incarnated. These rumors easily leach into conspiracy theories, inciting terror-accused to experience anxieties about their individual custodians' fantastical powers or monstrous motives.

In Chapter 2, Suresh focuses on legal language to probe how terror-accused come to acquire knowledge about the law through their exposure to it in courts and jails. The chapter begins with observations that would ring true to any scholar who focuses on people's first encounters with a criminal legal system. They will hear lawyers and judges saying things that are incomprehensible because they are speaking the rarified language of law. The key point of the chapter, however, is to illuminate the agency of the accused as they come to "know" the law through prolonged exposure, and how they instrumentalize this knowledge by using the law to their own advantage, which Suresh terms "recycled legality." This process of learning law is an active and often collective enterprise; in jails, people borrow legal books from libraries, transcribe and translate documents relating to their cases, file applications, and consult with one another for advice about legal strategies.

Suresh tells the story of a man he calls Qayoom to illustrate the broader theme of "doing things with legal language." Qayoom was accused of being part of a conspiracy to perpetrate bombings in Delhi. He and his accused co-conspirators studied the law relevant to the case against them, including the granular details of legal procedure. They discovered that the police had fabricated evidence during the investigation. The accused used this knowledge to file applications and even to question prosecution witnesses in court. Their goal was to persuade the judge that the law had been violated in order to undermine the prosecution's case against them. They succeeded because the charges were dismissed. They had put the state on trial and won.

The relationship between the law and the state is the focus of Chapter 3. The main objective is to show how the law can be—or be made—a trap for the state. The potential vulnerability of the state to its own laws exemplifies the law's functional semi-autonomy. From the vantage point of his interlocutors, Suresh explains that they see and understand the law-state relationship in several ways: law is something the state says; it signifies state power to arrest, prosecute, and imprison; and it is a source of potential vulnerability if the state fails to adhere to its own laws. Extending the theme of "doing things with legal language" in the previous chapter, Suresh uses the story of people he names Baruch and Kumar who are accused of being members of the Communist Party. They discovered and then argued that the state had failed to follow its own laws in charging them with terror crimes. In essence, by identifying a procedural defect, they were creating legal meaning that the case against them was illegitimate by emphasizing the legitimacy of the law and the significance of its violation. The result was that the terrorism charges were dismissed. Yet when two other terror-accused, whom Suresh calls Keshav and Sonia Shukla, tried to exploit the defect that Baruch and Kumar had exposed, they failed because the state—in the form of the prosecution—leveraged its

power against the judge and the accused by threatening to refile charges, thereby making all the years and money already spent on the trial a waste.

In Chapters 4 and 5, Suresh delves into the world of "the file." In the Indian legal system, files play a central role because everything about a case must be documented, including charges, arrest procedures, source of evidence, statements by witnesses, judicial rulings, and utterances in court that become transcripts. Documents must support and be supported by other documents, and their validity is subject to technical practices of certification. The circularity of authentication is a form of "referential truth-telling." For example, in a case file, the memos that police produce about their investigative process must be validated by testimony in court which is documented in the transcript, and each item must be certified. Suresh uses the term "hypertext" to describe the capacity of the file to fabricate—a word that can mean both "make" and "fake"—judicial "realities." "Hypertextual" can also be used to describe the state's capacity to fabricate different versions of reality through the file and the certification process.

To illustrate the power of paper truths, one of the stories Suresh tells is of a woman from Kashmir, Masooda Parveen, whose "terrorist" husband accidentally killed himself when a bomb in his possession exploded, or so the official account claims. Parveen challenged this official account as false and sued the army and the police for compensation and damages for murdering her husband. In response to her petition, the army and the police both submitted documents validating the general account that the husband was the victim of his own booby trap. But there were contradictions in the documents of the two state agencies, notably the police memo ascribed the time that the husband was arrested to be after the time the army memo said he had died. Yet Parveen lost because, as an ordinary citizen, she was unable to fabricate files containing the truth of what actually happened: her husband was arrested, tortured to death, and then bombs were strapped to his body to deflect accountability for his death in custody.

Throughout the book, but especially in Chapter 6, Suresh makes good on his goal to bring the human voice back into the law. His discourse analysis of petitions written by terror-accused discerns pleadings and demands that reveal human vulnerabilities, passions, pains, and grievances. He has the perfect subject to illustrate this range: a man he calls Mohsin who spent fourteen years in prison before being acquitted. Despite Mohsin's ultimate release, he lives a ruined life. Mohsin was a prolific petition-writer even after his release, and he saved copies of all of them in a trunk. The collection of petitions that Mohsin shares with Suresh contain some that reflect his hopes and desires for justice, some that rail against those who have wronged him through false accusations, and some that lament his ruination.

Suresh gleans three ways to understand the purposes of petition writing from the perspectives of their terror-accused authors. One purpose is to make demands on the law in that the writers expect or at least hope for replies. Another is to regard petitions as a mode of self-writing to present an account of oneself for oneself, despite that petitions are intended for another (the recipient individual or agency). The third, so well demonstrated in the case of Mohsin, is to see petition-writing as an act of mourning.

The book concludes with a reflection on what it means that the vast majority of terrorism cases end in acquittals. So much time, money, energy, and paper is expended in a system that, on the surface, fails miserably in its raison d'etre which is to obtain convictions. The people accused by the state are caught up in this system whose real purpose is to immiserate and repress them. Yet, as Suresh amply demonstrates, through the consequences of accusations and resultant legal procedures, they live, learn, use, speak, and fight the law.

Although Terror Trials is deeply grounded in this specific Indian context, it contains many invaluable insights and theoretical framings that deserve a wide readership. It holds empirical lessons about the workings of security law that can be adopted to understand terror trials elsewhere. It also is a model of refined scholarly writing, and as legal ethnography, it is a methodological masterpiece.

CIVIL IMPLICATIONS OF PMLA: ENVISAGING THE FINANCIAL DEATH OF AN ACCUSED

*Anwesha Choudhury & Sarthak Sharma**

Abstract

The Prevention of Money Laundering Act, 2002, serves as a critical legal framework in India's efforts to combat money laundering. The Act empowers the Enforcement Directorate to attach, retain, and confiscate 'proceeds of crime'. The scope of the PMLA extends beyond mere criminal prosecution, incorporating civil measures that include freezing of bank accounts and retention of properties. Therefore, civil implications of the statute could lead to prolonged financial deprivation of people long before their guilt is established in a court of law. Sections 5, 17, and 18 of the PMLA have been subject to constitutional scrutiny, particularly regarding the attachment of untainted properties and concerns over potential misuse of the ED's powers. Furthermore, systemic deficiencies plague the adjudication process under the PMLA. Judicial interpretations of these provisions continue to shape the application of the PMLA, balancing the need for effective law enforcement with the protection of individual rights.

Keywords: *Money Laundering - Proceeds of Crime - Attachment of Property - Enforcement Directorate*

* Anwesha Choudhury is a lawyer and legal researcher, currently pursuing an LLM at Columbia Law School. Sarthak Sharma is a practicing advocate at the Delhi High Court. The authors can be contacted at anweshachoudhurydhc@gmail.com.

INTRODUCTION

The Prevention of Money Laundering Act, 2002 (PMLA) was brought into force on 1st July 2005[1] to prevent money laundering and facilitate confiscation of property derived from or involved in money laundering. It was enacted to meet India's international obligations under the Vienna[2] and Palermo[3] Conventions, the Political Declaration and Global Programme of Action (1990) adopted by the UN General Assembly,[4] and to give effect to the recommendations made by the Financial Action Task Force (FATF) for combating money laundering.[5]

The PMLA encompasses regulatory, preventive, and penal measures, employing a dual-focused strategy targeting both assets and offenders to achieve its objectives. Firstly, it institutes civil proceedings to identify, provisionally attach, confirm, and eventually confiscate properties upon conviction for money laundering.[6] Secondly, it prosecutes the accused before a special court for money laundering offences.[7] The Act deems a person guilty of money laundering if they engage directly or indirectly in any process or activity related to proceeds of crime—such as concealing, possessing, acquiring, or using the proceeds—and try to present it as legitimate property.[8] The Directorate of Enforcement (ED) is empowered to carry out investigations and also to attach the property involved in money laundering.[9]

This article aims to examine the civil dimensions of the legislation by analysing the provisions relating to the attachment and retention of properties, termed as 'proceeds of crime' under the PMLA. The authors contend that the cumulative impact of these

---

1 Department of Economic Affairs, 'Notifications & Rules under PMLA' available at <https://dea.gov.in/sites/default/files/moneylaunderingrule.pdf> accessed 4 August 20244 August 2024.

2 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (Vienna Convention).

3 United Nations Convention against Transnational Organized Crime and the Protocols Thereto (adopted November 15, 2000) 2225 UNTS 209 (Palermo Convention).

4 The Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its 17th special session on February 23, 1990.

5 The FATF Recommendations, 'International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation' (November 2023) <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf> accessed 4 August 2024.

6 Prevention of Money Laundering Act 2002, ss 5, 8, 17 and 26.

7 Prevention Of Money Laundering Act 2002, ss 3, 4, 44, 45 and 47.

8 Prevention Of Money Laundering Act 2002, s 3.

9 Prevention Of Money Laundering Act 2002, ss 48-54; Department of Economic Affairs (n 1).

provisions—enabling provisional attachment, retention, confirmation, and eventual confiscation of properties—results in the financial demise of the accused long before their guilt is established in a court of law.

I. UNDERSTANDING PROCEEDS OF CRIME

The offence of money laundering under Section 3 of the PMLA centres around laundering the 'proceeds of crime'. The term 'proceeds of crime,' defined under Section 2(1)(u) of the Act, has undergone significant changes since its inception, particularly in the years 2015, 2018, and 2019. As per the original definition, 'proceeds of crime' meant any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. The definition was amended in 2015 to also include the property equivalent in value held within the country for any property taken or held outside the country.[10] The ambit of the definition was further expanded in 2018 to include property equivalent in value held both within the country and abroad if the original property is taken or held outside the country.[11] Finally, an explanation was also added to it through the 2019 amendment, which clarified that 'proceeds of crime' include property not only derived or obtained from the scheduled offence but also any property that may be directly or indirectly derived or obtained as a result of any criminal activity relatable to the scheduled offence.[12] The explanation inserted in 2013 clarifies that the term 'property' includes any property used in the commission of an offence under the PMLA or any scheduled offence.[13] It is common for proceeds of crime to be converted, or siphoned off into different assets, frustrating attempts to locate and attach original proceeds of crime. To account for this, the lawmakers adopted a broad definition of "proceeds of crime" that enabled the ED to also attach properties of the accused equal in value to the actual proceeds of crime, which may have become untraceable. Thus, the ED has powers to order a debit freeze on bank accounts of accused persons.

Additionally, the Act specifies that the proceeds of crime must arise from a scheduled offence listed under Section 2(1)(y) or from criminal activity relating to such an offence. These are also referred to as predicate offences, as they constitute the basis for the commission of money laundering offences. Consequently, proceeds of crime attributable to scheduled offences listed under the Act which are subject to seizure, freezing, attachment, confirmation, and confiscation.

---

10 Finance Act, 2015.

11 Finance Act, 2018.

12 Finance Act, 2019.

13 The Prevention of Money Laundering (Amendment) Act 2012, s 2.

While the initial list of Scheduled Offences included only 6 legislations,[14] subsequent amendments have now increased the Scheduled Offences list to cover offences under 29 different legislation – thereby ensuring that the PMLA net is cast much wider when compared to what was originally envisaged in 2002. Interestingly, in addition to serious infractions under the NDPS Act 1985, UAPA 1967, Arms Act 1959, Prevention of Corruption Act 1988, Section 447 of the Companies Act, 2013, and others, even relatively minor contraventions under the Copyright Act, 1957, Trade Marks Act, 1999, Biological Diversity Act, 2002, Wild Life (Protection) Act, 1972, etc., have also been brought under the Act's ambit.

In essence, the following categories of properties are categorized as proceeds of crime - (a) property directly or indirectly derived or obtained by any person as a consequence of criminal activity related to a scheduled offence, (b) the value associated with such property and (c) property of equivalent value held within the country, in instances where the property is situated or held outside the country. Property has been defined to include corporeal or incorporeal, movable or immovable, tangible or intangible property or assets.[15] Therefore, the "proceeds of crime" that ED can attach under PMLA could either be:

- tainted property, i.e., the actual "proceeds of crime"; and
- untainted property, i.e., property not derived from the proceeds of crime but having a value equal to the tainted property of the concerned accused.

II. QUANTIFICATION OF PROCEEDS OF CRIME

The term 'value' holds pivotal importance under the PMLA regime, as it defines the scope of asset attachment by the ED. The PMLA defines 'value' as the fair market value of any property at the time of acquisition or if such date cannot be determined, the date on which such property is possessed by such person.[16] A plain reading of the definitions of "value" and "proceeds of crime" leads to the understanding that "value" as used in the definition of "proceeds of crime" refers to the value of the tainted property, and does not apply to valuing untainted properties sought to be attached.[17] Therefore, if the period of offence is 2020-2024 and the ED alleges laundering of Rs. 50 crores of money, it could attach a property acquired by the accused in 2022 valued at Rs. 50 crores.

---

14 The original 6 legislations were the following – (i) Indian Penal Code, 1860; (ii) Narcotic Drugs and Psychotropic Substances Act, 1985; (iii) Arms Act, 1959; (iv) Wild Life (Protection) Act, 1972: (v) Immoral Traffic (Prevention) Act, 1956; (vi) Prevention of Corruption Act, 1988.

15 Prevention of Money Laundering Act 2002, s 2(v).

16 Prevention of Money Laundering Act 2002, s 2(zb).

17 Aditya Mukherjee and Krishna Tangirala,' Asset attachment under Prevention of Money Laundering Act – What is the right approach? (MoneyControl, 12 February 2024) <https://www.moneycontrol.com/news/opinion/asset-attachment-under-Prevention of Money Laundering Act-what-is-the-right-approach-12245101.html> accessed 4 August 2024.

However, as per the ED's interpretation, the phrase "fair market value of the property as on date of acquisition" extends even to untainted property completely unconnected to the 'proceeds of crime.' Interpreting the PMLA in such a manner allows the ED to attach property based on its historical acquisition value rather than its contemporary market value.

For instance, if the alleged period of offence is 2020-2024 and an individual inherited land in 1990 (untainted property), ED may be entitled to attach the property at its 1990 value rather than its current market worth. This interpretation could lead to significant anomalies, where properties with substantially higher current values are attached at comparatively negligible historical values. A more critical implication is that, under this interpretation, multiple properties of the accused, if not all, may sought to be attached to match the total alleged proceeds of crime, considering their value at the time of acquisition. For example, the ED alleges Rs 50 crore as proceeds of crime accrued between 2020 and 2024, and the individual possesses 10 inherited properties in Delhi, each valued at Rs 5 crore in 1970 but currently worth Rs 50 crore each. If tainted properties are untraceable, the ED could attach all these inherited properties at their 1970 value. This would result in the attachment of properties worth over Rs 500 crore today to cover alleged crime proceeds of Rs 50 crore, thereby illustrating a significant disparity due to the depreciated historical valuation.

This raises concerns about fairness and proportionality of the scope of powers of the ED to attach properties, potentially resulting in the attachment of properties at depressed values, especially when acquired many years before the alleged criminal activity.[18] This could lead to the virtual denudation of individuals' assets, irrespective of their connection to any criminal activity, leading to irrevocable ramifications for the accused.

III. ATTACHMENT, ADJUDICATION AND CONFISCATION

Section 5 of the Act provides for provisional attachment of property by the ED during investigation by issuance of a Provisional Attachment Order (PAO).[19] Once a PAO is passed, the property shall remain attached for 180 days from the date of passing of such order and pending the confirmation of the attachment order by the Adjudicating Authority constituted under Section 6(1) of PMLA.[20] Within 30 days of issuing such PAO, the ED is mandatorily required to file a Complaint and give its 'reasons to believe' that such provisional attachment is necessary in the given facts and circumstances, before the adjudication. Upon receiving the complaint, if the adjudicating authority is of

18 *Vijay Madanlal Choudhary v Union of India* (2022) SCC Online SC 929 [4]; ibid.

19 Prevention of Money Laundering Act 2002, s 5(1).

20 Prevention of Money Laundering Act 2002, s 6.

the opinion that a person has committed an offence under the PMLA, or is in possession of the POC, it has to issue a 'Show Cause Notice' upon such a person in terms of Section 8(1) of PMLA, calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached by ED, giving them an opportunity to file a reply before hearing both parties. If the Adjudicating Authority finds that the property is involved in money laundering, it confirms the PAO.[21] Once an order confirming attachment has been passed the property remains attached for 365 days or till the pendency of proceedings related to offence under the Act.[22] The Appellate Tribunal hears appeals against the order of the Adjudicating Authority.[23]

However, Section 5 is not the only provision that facilitates legal deprivation of an accused of their property. Section 17 of the Act empowers the ED to carry out a search and to seize any record or property found as a result of such search. Where the seizure of such record or property is not practicable, for example, a bank account, an order of freezing such property/account can be passed.[24] Section 18 provides for the search of a person and seizure of any record or property. The retention or freezing of property under Sections 17 and 18 continues for 180 days[25] and within 30 days from such seizure or freezing, an application has to be filed in writing before the adjudicating authority, requesting for the continuation of the order beyond the 180 days.[26] A show cause notice is thereafter issued by the adjudicating authority to any person deprived of such property, after recording "reasons to believe" that they have committed an offence under Section 3 or have proceeds of crime.[27] This highlights a two-tier process mandated by the Act, where the ED first satisfies itself of the need for retention, followed by independent verification and satisfaction by the Adjudicating Authority before issuing a show cause notice.

Once a property has been attached/seized by the ED, such attachment can continue for a period of 180 days or until a date when such attachment is confirmed under Section 8(3) by the adjudicating authority, whichever is earlier.[28] At such stage, the only right available to the accused and the claimant is to continue enjoyment of property if it is

21 See, Prevention of Money Laundering Act 2002, s 8(2).
22 See, Prevention of Money Laundering Act 2002, s 8(3).
23 Prevention of Money Laundering Act 2002, s 26.
24 Prevention of Money Laundering Act 2002, s 17(1A).
25 Prevention of Money Laundering Act 2002, ss 20 and 21.
26 Prevention of Money Laundering Act 2002, s 17(4).
27 Prevention of Money Laundering Act 2002, s 8(1).
28 Prevention of Money Laundering Act 2002, s 5(1).

immovable.[29] However, Section 8(4) states that once attachment or freezing is confirmed, the ED is empowered to take possession of the property.[30] So, the opportunity to continue enjoyment of right in an immovable property is effectively discretionary in the hands of the ED. Such an order becomes final after an order of confiscation is passed by the Special Court.[31]

The Supreme Court has clarified that the attachment under Section 5(1) is merely notional, emphasising that even if an order confirming the attachment under Section 8(3) is passed,[32] the property does not stand confiscated until an order of confiscation is passed, therefore, the right to enjoy the property under Section 5(4) continues. The Court advised against taking possession prior to confiscation, as a matter of rule, because of the possibility that the accused may eventually be acquitted — in which case the property would stand released. There is however, lack of sufficient safeguards in the statute itself.

In case of moveable properties and bank accounts, however, the accused/claimant are immediately deprived of their use/possession or debarred from making debit transactions, respectively, till such attachment/retention/freezing is set aside by the concerned court/tribunal or upon acquittal, whichever is earlier. Such swift freezing of accounts of individuals and companies can have a cascading impact on their financial capabilities and could potentially jeopardize their financial continuity. In July 2022, the ED had frozen bank accounts of Vivo India bringing a standstill to its business activities, while also making it impossible for the company to meet immediate payments to be made towards statutory dues, salaries, rent and even refunds due to consumers. As an urgent conditional relief, the Delhi High Court had allowed Vivo to operate its bank accounts.[33] In most cases however, the accused/claimant has no choice but to go through the stipulated process of opposing the confirmation of attachment/retention before the Adjudicating Authority, appealing before the PMLA Appellate Tribunal both of routinely pass order confirming the attachment or retention of properties by the ED. This makes the appropriate High Court the first effective recourse to reversing any dispossession or freeze.

While the power of attachment u/s 5 PMLA extends to 'proceeds of crime' as defined u/s 2(1)(u) PMLA to include untainted properties, the power to seize properties Section 17 PMLA is limited to property being 'proceeds of crime' involved in the money

29 Prevention of Money Laundering Act 2002, s 5(4).

30 Prevention of Money-laundering (Taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority) Rules, 2013.

31 Prevention of Money Laundering Act 2002, ss 8(5), 8(7), 58B, 60(2A).

32 *Vijay Madanlal Chaudhary* (n 18) [304-305].

33 *Vivo Mobile India Pvt Ltd v Directorate of Enforcement* (2023) SCC OnLine Del 1901.

laundering or property related to crime. For the scope of power of attachment, the purpose of which is to secure the identified value of proceeds of crime till the conclusion of trial, is wider that the scope of power Section 17 PMLA which is limited to power of search and seizure.

IV. RESTORATION OF PROPERTY

Upon the conclusion of a trial of the offence of money laundering, if the Special Court finds that the offence of money laundering has been committed, it shall order for confiscation of the property by the Central Government.[34] However, if the Special Court finds that the offence of money laundering has not taken place or the property is not involved in the offence of money laundering, the Special Court shall pass an order for releasing the property to the person who is entitled to receive it.[35] If the trial of the offence of money laundering cannot be conducted due to the death of the accused person or the person being declared a proclaimed offender or for any other valid reason, the Special Court has the authority to consider an application by the Director or any other person claiming entitlement to the possession of the property can pass an order for confiscation or release of the property based on the material before it.[36]

In a significant amendment, Section 8(8) was added stating that if a property has been confiscated by the Central Government u/s 8(5) of the PMLA, the Special Court may direct the Central Government to restore the confiscated property to a claimant who has a legitimate interest in the property and has suffered a quantifiable loss as a result of an offence of money laundering.[37] The Central Government notified the Prevention of Money-Laundering (Restoration of Property) Rules, 2016 which contains the procedure to be followed by the Special Court for restoration of the property to give effect to the amended provision. Thereafter, vide an amendment introduced in 2018, the second proviso was added to Section 8(8) which has additionally facilitated the restoration of property to a claimant during the trial of the case if the Special Court thinks it fit.[38]

---

34 Prevention of Money Laundering Act 2002, s 8(5).

35 Prevention of Money Laundering Act 2002, s 8(6).

36 Prevention of Money Laundering Act 2002, s 8(7).

37 Act 20 of 2015, s. 147

38 Finance Act, 2018, S. 208.

V. KEY ISSUES AND INTERPRETATIONS

The constitutionality of Sections 5, 8, 17 and 18 of the PMLA was inter alia challenged before the Supreme Court for being violative of Article 14, 19, 21 and 300A of the Constitution.[39] The intention of the legislature in progressively widening the scope of these provisions was particularly suspect since the amendments of 2015, 2018 and 2019, expanding the scope and powers of the ED, were introduced by way of Finance Acts.[40] This becomes significant since Finance Bills are certified as Money Bills in the Parliament, meaning the Upper House (Rajya Sabha) has no power to amend or reject these Bills.[41] While the Upper House has the power to recommend amendments to the Finance Bill, it is for the Lower House (Lok Sabha) to accept or reject the recommendations. It has been argued that the government exploits this loophole in the legislative process, choosing the Money Bill route when anticipating setbacks like rejection, amendments, or serious discussions on bills in the Upper House.[42] Though the constitutionality of the provisions was eventually upheld in Vijay Madanlal Choudhary v. Union of India,[43] the persistent issues remain unresolved. The issue of judicial review of certification of money bills by speaker has been referred to a 7-judge Constitution Bench of Supreme Court in Roger Mathew v. South Indian Bank, which will have the final say the validity if the amendments. It needs to be borne in mind that the rampant exercise of the sweeping powers by the ED can have irrevocable consequences, which would be impossible to undo if the court holds the amendments invalid.

Section 5 has undergone amendments in 2005, 2009, 2013 and 2015. Before the amendments, attachment could take place only if the person was in possession of any proceeds of crime, was charge sheeted as an accused in the predicate offence and such proceeds were likely to be concealed or transferred. Currently, under the terms of the first proviso, no provisional attachment could be affected before the filing of a chargesheet in the predicate offence. However, the second proviso to Section 5, substituted by the 2015 amendment, allows the attachment of property without the filing of a chargesheet in a predicate offence or even to attach the property standing under the name of any person other than those accused under the scheduled offence.[44] This

39 *Vijay Madanlal Choudhary* (n 18).

40 ibid.

41 The Constitution of India 1950, art 109.

42 *K.S. Puttuswamy v Union of India* (2019) 1 SCC 1; *Vijay Madanlal Choudhary* (n 18). The issue of judicial review of certification of money bills by speaker has been referred to Constitution Bench of Supreme Court in *Roger Mathew v South Indian Bank* (2020) 3 SCC 63.

43 *Vijay Madanlal Choudhary* (n 18).

44 *B Rama Raju v Union of India* (2011) 108 SCL 491 (AP).

proviso, envisaged as an emergency procedure, allows for immediate attachment to prevent frustration of proceedings relating to confiscation under the PMLA. It therefore enables attachment of any property without any link to the scheduled offence or the proceeds of crime, facilitating arbitrary and unjust attachment of even untainted property that could be temporally unconnected with the predicate offence.

The inclusion of "value thereof" properties has raised several contentious issues, particularly regarding whether properties acquired from legitimate income can be attached if they are considered equivalent in value to proceeds of crime. The High Court of Delhi in The Deputy Director, Directorate of Enforcement, Delhi v. Axis Bank and Others,[45] held that untainted property would also fall within the ambit of the Act in a situation where the tainted assets held by them are nor traceable or cannot be reached since the person holding such property was found involved in criminal activity. The Punjab and Haryana High Court in Seema Garg v. Deputy Director, Directorate of Enforcement,[46] however, categorically held that property derived from a legitimate source cannot be attached on the ground that property derived from a scheduled offence is not available. It principally holds that the phrase ―value of any such property and ―property equivalent in value held within the country or abroad cannot be ascribed the same meaning and effect. The court took into account the fact that there could be scheduled offences where property may or may not be involved because every scheduled offence is not committed for the sake of property, e.g. murder or offences under the Arms Act.[47] The court explained that to understand the true meaning of the second limb of the definition of 'proceeds of crime,' it must be read in conjunction with Sections 3 and 8 of the PMLA.[48] Such a reading makes it abundantly clear that "value of such property" merely means property that has been converted into another property or has been obtained based on property derived from the commission of the scheduled offence.[49] For instance, if an accused buys gold after selling immovable property that was originally obtained by committing cheating, the gold would amount to "proceeds of crime." However, such an amount of gold that was purchased by an accused before the alleged period of offence through legitimate sources of income would not constitute "proceeds of crime." The Delhi High Court, in Prakash Industries v. Directorate of Enforcement.[50] discarded the line of reasoning adopted in Seema Garg and reiterated the principles laid down in Axis Bank. Most recently, the Kerala High Court[51], followed the

45 (2019) SCC OnLine Del 7854.

46 (2020) SCC OnLine P&H 738.

47 *Seema Garg v Deputy Director, Directorate of Enforcement* (2020) SCC OnLine P&H 738 [37].

48 ibid [35].

49 ibid.

50 (2022) SCC OnLine Del 2087.

51 *Satish Motilal Bidri v Union of India* WP(Crl) No 406 of 2024 (Order dated 28 June 2024, Kerala HC).

Seema Garg line of reasoning holding that the term proceeds of crime would not include the value of property which had been acquired even earlier.

The same position was reiterated by the Supreme Court in Vijay Madanlal Choudhary v. Union of India.[52] The court held that the definition of "proceeds of crime" in section 2(1)(u) of the PMLA is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. It also clarified that the explanation added in 2019 which includes any property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence is only a clarificatory amendment that does not transcend beyond the original provision. Property derived from proceeds of crime, even if subsequently acquired, is considered tainted and actionable under the Act. In other words, property in whatever form mentioned in section 2(1)(v), that is or can be linked to criminal activity relating to or relatable to scheduled offence, must be regarded as proceeds of crime for the Act. However, the Court did not address the specific issues regarding the valuation and attachment of assets, leaving room for continued debate and scrutiny. In Pavana Dibbur v. Directorate of Enforcement[53] it was observed that properties acquired prior to commission of scheduled office cannot constitutes proceeds of crime. The law however largely remains unsettled with different High Courts giving differing interpretations to the second limb of the definition of 'proceeds of crime'. It is pertinent that appeals had been preferred against the Axis Bank and Seema Garg judgments before the Supreme Court. While the Seema Garg appeal was dismissed,[54] the Axis Bank appeal is pending with the court directing the parties to maintain status quo vide an interim order,[55] The larger question of whether ED can attach ancestral assets as proceeds of crime is pending adjudication before the Supreme Court of India.

The concerns regarding expansive powers of the ED extend to matters of seizure of property as well. The PMLA as it was originally enacted only allowed for the search and seizure under sections 17 & 18 to be conducted after the filing of a chargesheet or a complaint in the predicate offence. This requirement was gradually diluted by amendments, culminating in the 2019 Finance Act, which removed these safeguards entirely. Sections 17 and 18 as they now stand, allow officers of the ED to conduct searches and seizures without the necessary preliminary steps such as registering an FIR for cognizable offences or filing a complaint before a competent court. This absence of

52 *Vijay Madanlal Choudhary* (n 18).

53 (2023) SCC OnLine SC 1586.

54 *Deputy Director, Directorate of Enforcement v Seema Garg* Nos 14713-14715/2020.]

55 *SBI v Dr Kewal Krishan Sood* SLP No 6554/209.

56 *Directorate of Enforcement v KS Nandhini* SPL(Crl) No 6236-6237/2021.

procedural safeguards contrasts with the Code of Criminal Procedure, which mandates certain safeguards for similar actions.[57] Sections 17 and 18 lack magisterial oversight, instead relying on limited oversight by the Adjudicating Authority. The Adjudicating Authority exercises no control over the ED, – it is only an ex post facto safeguard. Therefore, right of the accused to their property, is solely hinged on the expectation that the Adjudicating Authority may subsequently correct any egregious exercise of power, severely hampering the financial liberties of an accused.

Lastly, Section 8(4) allows the ED to take possession of attached property with simply one stage of confirmation by the Adjudicating Authority. Initially, the PMLA mandated that attachment would continue during the proceedings related to the scheduled offence.[58] Subsequent amendments extended this period and decoupled it from the scheduled offence. The current scheme allows the ED to take possession without even filing a chargesheet in the predicate offence,[59] for 365 days during an investigation of the offence during the pendency of proceedings under the PMLA. Furthermore, the statute does not clarify the consequences if the ED fails to file a complaint within 365 days of confirmation of the PAO.

CONCLUSIONS AND OBSERVATIONS

The unbridled powers of the ED are not the only cause of worry for persons accused under the PMLA. The functioning of the Adjudicating Authority too has been mired in controversies. The Delhi High Court has repeatedly cautioned the Adjudicating Authority against the use of template paragraphs in its orders reflecting a non-application of mind and reducing natural justice principles to "a mere rhetoric."[60] In another matter, the Court has asserted that the Adjudicating Authority, while issuing a Show Cause Notice under section 8, PMLA must establish separate and independent grounds to believe that an offence has occurred, and must not undermine the two-step verification provided by the act before provisional attachment or retention of property by merely relying on the reasons provided by the ED.[61]

---

57 See Code of Criminal Procedure, 1973, ss 93, 94, 99, 165.

58 Finance Act, 2012; Finance Act, 2018.

59 Prevention of Money Laundering Act 2002, s 5(1).

60 *State Bank of India v Deputy Director, Enforcement Directorate* (2023) SCC OnLine Del 1800[5]; *Kankipati Rajesh v AA, Prevention of Money Laundering Act* (2023) SCC OnLine Del 2526 [10].

61 *JK Tyre and Industries Ltd v Directorate of Enforcement* 2021 SCC OnLine Del 4836.

Strategic vacancies at the Appellate Tribunal, PMLA, lasting over two years,[62] had rendered it non-functional, undermining the statutory right to appeal of individuals aggrieved by orders of the Adjudicating Authority.[63] This led to the filing of numerous writ petitions in High Courts assailing orders passed under the PMLA, on account of statutory appeals being not taken up for consideration.[64] Recognizing the urgency of the situation, the High Court intervened, directing the Central Government to promptly appoint the Chairperson and members of the Appellate Tribunal.[65] Additionally, the Delhi High Court had also directed the Union Government to take expeditious steps for the constitution of multiple benches of the Adjudicating Authority, taking judicial notice of the fact that there is a "large volume of cases" pending under PMLA.[66] Therefore, after the time-bound confirmation of a PAO or retention by the Adjudicating Authority, it takes an indefinite time for appeals against such confirmation to be heard and decided by the Appellate Tribunal. On the occasion of such an appeal being dismissed,

Hence, in addition to granting the ED unbridled powers of attachment without sufficient judicial oversight, the PMLA provisions are riddled with systemic shortcomings. Trial has only been concluded in 25 cases instituted under the PMLA so far. To quantify the financial impact, the ED has provisionally attached properties valued at ₹1,15,350 crores[67] since the Act came into force. However, the Adjudicating Authority has confirmed only ₹71,290 crores of these attachments, leaving ₹40,904 crores pending confirmation.[68] Confirmed confiscations stand at ₹12,623 crores, but there is no data on the restoration of property to those discharged, acquitted, or for whom the period for filing a prosecution complaint has lapsed. This lack of transparency and accountability raises serious concerns about the fairness and proportionality of the ED's actions. Unfortunately, these shortcomings in the legislation and the systemic deficiencies in the functioning of adjudicating authorities/tribals enable significant financial deprivation for the accused, leading to irrevocable impacts long before their guilt is established.

---

62 Abraham Thomas, 'SC issues notice on plea to fill vacancies at Prevention of Money Laundering Act Tribunal' (The Hindustan Times, 29 January 2021) <https://www.hindustantimes.com/india-news/sc-issues-notice-on-plea-to-fill-vacancies-at-Prevention%20of%20Money%20Laundering%20Act-tribunal-101611934634478.html> accessed 4 August 2024; 'Govt appoints new chairperson to Prevention Of Money Laundering Act Adjudicating Authority' (The Print, 13 January 2022) <https://theprint.in/india/govt-appoints-new-chairperson-to-Prevention of Money Laundering Act-adjudicating-authority/810909/> accessed 4 August 2024.

63 Prevention of Money Laundering Act, s 26.

64 Fullerton India Credit Company Limited v Union of India W.P.(C) 7815/2021 [6].

65 ibid [5].

66 M/S Gold Croft Properties Pvt. Ltd v Directorate of Enforcement (2023) SCC OnLine Del 1154 WP(C) 2191/2023.

67 Directorate of Enforcement, 'Statistics' <https://enforcementdirectorate.gov.in/statistics-0> accessed 4 August 2024.

68 ibid.

THE UNFULFILLED PROMISE OF DEFAULT BAIL – ON THE JUDICIAL COMMITMENT TO PRE-TRIAL PUNISHMENT IN INDIA

*Kartik Kalra**

ABSTRACT

Indian criminal procedure contemplates a system of "default bail", requiring a pre-trial detainee's unconditional release following the completion of a specified duration in prison, provided the state's inability to file a "charge-sheet" – a document containing its investigative work – within this duration. While the legislative provisions regulating default bail are seemingly absolute, a five-decade long doctrinal evolution of the law on default bail has weakened it in many aspects, making the regime largely toothless. This weakening, I propose, has occurred in three dimensions – first, the authorization of re-arrests after an accused's release; second, the prohibition on enquiring into a charge-sheet's substance to assess an investigation's completeness; and third, the concentration of institutional efforts to hinge the accused's release on the time of document-filings in court, which serves to whitewash how the regime has become rigged in the state's favour. The law on default bail has evolved with a minimal conceptualization of its necessary normative underpinnings, which concern the imposition of a duration-definite investigative duty on the state and its pursuit of "systemic effectiveness" as a principle of procedure. The systemic attachment of guilt with pre-trial detainees that entrenches a notion of guilt to its recipient class is one important explanation behind the Court's negative institutional outlook towards default bail, offering insights into why the regime has been substantially weakened.

Keywords: *default bail – criminal procedure – charge-sheet – remand – guilt – pre-trial detention*

* The author is a fourth-year law student at National Law School of India University, Bangalore (NLSIU).

INTRODUCTION

Unconditional rules in criminal procedure – especially those enabling criminal defendants' release based on the state's non-adherence with procedural guarantees – often cause discomfort to courts, causing the introduction of various riders and exceptions.[1] One rule that has arguably caused the greatest discomfort to the criminal justice machinery has been that of "default bail", contained in the Code of Criminal Procedure, 1973 ("CrPC"). Section 167(2) requires that a pre-trial detainee must necessarily be released on the completion of sixty (or ninety) days from the "date of remand",[2] if the police fail to complete their investigation, the completion of which is evidenced through the filing of a "charge-sheet" within the stipulated period.[3] This rule, as has been envisioned in the CrPC, is unconditional in terms of its disconnection with the merits of the case. The nature of the allegations, their gravity, and the accused's antecedents are all irrelevant in determining the accused's eligibility to obtain default bail.[4]

The Supreme Court's ("Court") formal views on default bail have undergone a sea transformation since the regime's formal introduction five decades ago – from referring

---

1 Along with the Code of Criminal Procedure 1973, s 167(2), Courts have generally shown discomfort with CrPC requirements positing time limits within which certain acts must be performed. Section 437(6), which states that a person may be released on bail if their trial has not been completed within 60 days of its commencement, has been interpreted to signify only an encouragement of a speedy trial, and not confer a right on the accused. Similarly, the Court has interpreted Section 468, which states that no court can take cognizance of an offence beyond the "period of limitation" to mean only that a complaint must be registered within such period, and not that a court would be disempowered to take cognizance of such an offence. For cases on Section 437(6) that state its generally non-binding character, see *Robert Lendi v Collector of Customs* (1986) SCC OnLine Del 167 [16]; *Anwar Hussain v State of Rajasthan* (2006) SCC OnLine Raj 534 [6]. For the interpretation of "cognizance" as "complaint" u/s 468, see *Sarah Mathew v Institute of Cardio Vascular Diseases* (2014) 2 SCC 62.

2 The "date of remand" under s 167(2) refers to the date on which an accused has been sent to judicial or police custody after their production before a Judicial Magistrate, which must occur within twenty-four hours of arrest, as provided u/s 57. The calculation of the sixty/ninety days must be from the date of remand, not the date of arrest, pursuant to *Chaganti Satyanarayana v State of AP* (1986) 3 SCC 141 [16]. The "remand" hearing concerns the issue of whether the accused should be detained in the first place, or whether they should be released. For case-law on the enquiry during remand, see *Satender Kumar Antil v Central Bureau of Investigation and another* (2022) 10 SCC 51 [47]; *Gautam Navlakha v National Investigation Agency* (2021) SCC OnLine SC 382 [73]; *Prabir Purkayastha v State (NCT of Delhi)* (2024) SCC OnLine SC 934 [16]-[20].

3 Code of Criminal Procedure 1973, s 167(2) states that a failure of the police to complete an investigation within the stipulated period –which is expressed through a "final report" u/s 173, which is called the "charge-sheet" – causes the accrual of a right of "default bail" on the accused.

4 See *State v T Gangi Reddy* (2023) 4 SCC 253 [15], stating that "it cannot be said that the order of release on bail under the proviso to Section 167(2) CrPC is an order on merits".

to Section 167(2) as a "paradise for criminals" in 1975,[5] to recognizing it as a "fundamental right directly flowing from Article 21" in early 2023.[6] This evolution in its stance towards Section 167(2), however, is wrongly reflective of the Court's substantive treatment of the law on default bail, which has evolved with substantial consistency to the accused's disadvantage, with its conceptualization as a "paradise for criminals" serving as the constant overarching interpretive principle behind its judicial treatment.

A trajectory of criminal law that causes an expansion of state power is not a development unique to Section 167(2), for the Court's general interpretive lens towards criminal procedure has been characterized as employing a "public order" lens, instead of a "due process" lens.[7]

The Court's treatment of default bail, however, garners much greater contemporary significance than its treatment of trial-related rules of criminal procedure, for the heart of the criminal justice system no longer lies in the adjudication of guilt or innocence through detailed evidence and arguments. It lies, instead, in being free or imprisoned during investigation and trial.[8] The Prison Statistics India Report, released in 2021, states that four-fifths of India's prison population now consists of pre-trial detainees,[9] with other reports stating that the time taken for criminal trials has substantially increased, ranging from 3 to 9 years.[10] Such developments have led to conclusions that

---

5 *Natabar Parida Bisnu Charan Parida v State of Orissa* (1975) 2 SCC 220 [8], with the Court observing that while the rule of default bail may offer a "paradise for criminals", the blame thereof lies with the legislature, not with the courts.

6 *Ritu Chhabaria v Union of India* (2023) SCC OnLine SC 502 [15], noting that "It is also pertinent to note that the relief of statutory bail under Section 167(2) of the CrPC, in our opinion, is a fundamental right directly flowing from Article 21…"

7 See Aparna Chandra and Mrinal Satish, 'Criminal Law and the Constitution' in Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook to the Indian Constitution* (OUP 2016) 1055, arguing that "the development of constitutional criminal procedure in India has demonstrated a shift from a liberty perspective to a public order perspective"; See also S N Sharma, 'Towards Crime Control Model' (2007) 49(4) Journal of the Indian Law Institute 543.

8 For the state of the criminal justice system that is disinterested in eventual adjudications of guilt, and functions, instead, on "punishments without condemnation", see Abhinav Sekhri, 'The disintegration of the criminal justice system' *The Hindu* (New Delhi, 7 October 2020) <https://www.thehindu.com/opinion/lead/the-disintegration-of-the-criminal-justice-system/article32785928.ece> accessed 10 September 2023; Abhinav Sekhri, 'Separating Crime from Punishment: What India's Prisons Might Tell us About its Criminal Process' (2021) 33(2) National Law School of India Review 280, arguing that there are "systemic factors at play which contribute" to "steadily high numbers of undertrial prisoner populations in India".

9 See National Crime Records Bureau, Prison Statistics India 2021 (Ministry of Home Affairs 2022) xi, stating that "[u]ndertrial inmates…were reported as…4,27,165…accounting for…77.1%…at the end of 2021".

10 Arunav Kaul, Ahmed Pathan & Harish Narasappa, 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts' in Shruti Vidyasagar, Harish Narasappa, Ramya Tirumalai (eds), *Approaches to Justice in India* (Eastern Book Company 2018) 91.

the stage of conviction is no longer the pivotal one in a criminal case, with that title having been arrogated by one's arrest or decisions on bail.[11]

This centrality acquired by arrest, bail and remand in contemporary criminal justice, I propose, has substantial implications on the doctrinal development of default bail. The Court, over the past five decades, has weakened the default bail regime substantially, prohibiting an enquiry into a charge-sheet's contents to assess whether it was a product of a genuine investigation, and enabling "re-arrests" after the accrual of default bail if the state develops a belief into the accused's guilt.[12] This development of the law on default bail, which is vulnerable to criticism on grounds of its unprincipled, normatively hollow nature, is capable of being explained through the institutionalized allocation of guilt to pre-trial detainees that remand and bail enquiries facilitate. This is because bail adjudication, and consequently decisions authorizing remand become largely factual, merits-based enquiries into the likelihood with which an accused can be considered to have committed an offence, and the legitimation of one's imprisonment – done through a rejection of bail and authorization of remand – causes the emergence of an institutionalized notion of pre-trial detainees' guilt. Since the individuals availing default bail are those whose remand has been authorized, and whose bail on merits has likely been rejected, an entrenched notion of the guilt of default bail's recipient class acquires prominence, permeates into the adjudication of individual default bail cases, and consequently into the law on default bail. The largely toothless nature of the law on default bail, therefore, can be explained in reference to a systemic perception of the guilt of its recipient class, whose avenues to release are minimized under this overarching framework of pre-trial guilt. This state of affairs must be remedied through adjudicating default bail with a recognition of the normative considerations at stake, which concern the imposition of a duration-definite duty on the state to undertake investigation, and its procedural character to pursue "systemic effectiveness" that requires its law to be exceptionless and absolute.

I make this argument in the following manner – first, I argue that bail adjudication in India has evolved into a largely factual enquiry into an accused's guilt, and the rejection of bail (or authorization of remand) becomes a sufficient indicator of guilt that justifies pre-trial detention (I); second, I propose two principles that must constitute the normative foundation for interpreting Section 167(2) and developing the law on default bail, which concern the imposition of a duration-definite investigative duty on the state,

11 Abhinav Sekhri (n 8) 296.

12 For the prohibition on enquiring into charge-sheets' contents, see *Enforcement Directorate v Kapil Wadhawan* (2023) SCC OnLine SC 972 [23], and for the general approval granted to re-arrests, see *Gangi Reddy* (n 4) [29]. These two cases are discussed in-depth in Section IV.

and default bail's pursuit of "systemic effectiveness" (II); third, I discuss three avenues in which default bail has been substantially undermined by the Court – the authorization of post-release re-arrests; the prohibition on enquiring into charge-sheets' contents to assess investigative completeness;[13] and the "extinguishing regime" (III); and fourth, through a detailed analysis of two cases – Gangi Reddy and Wadhawan – I aim to show the implications that the Court's conceptualization of default bail's recipients as "likely guilty" has towards shaping its doctrine (IV).

I. BASICS OF INDIAN BAIL ADJUDICATION – THE FOUNDATION OF PRE-TRIAL GUILT

The scheme of the CrPC is such that while default bail can be obtained only after the completion of sixty (or ninety) days from one's remand, bail ordinarily can be obtained at all stages of investigation, and all stages of trial.[14] A decision as to whether a person must be released on bail must also be taken on the date of remand, which is the date on which the accused is presented before the Magistrate for the very first time.[15] Due to the centrality of bail to contemporary criminal justice, as well as its ripple effects on default bail, I discuss bail adjudication in India from three perspectives – its vision in the CrPC, which is highly restrictive, carrying a default position of the rejection of bail (A); Supreme Court-sponsored changes to rules on arrest and bail in the past decade (B); and the practical operationalization of arrest and bail, which – data suggests – demonstrates substantial continuity with CrPC-envisioned police and judicial discretion (C).

A. Arrest and Bail in the CrPC – Outdated, Restrictive Conditions

The CrPC contains a layered, classificatory regime to determine the circumstances of arrest and bail – offences are "cognizable" or "non-cognizable", and "bailable" or "non-bailable".[16] A "cognizable offence" is one for which the police can arrest without

13 A "charge-sheet" is the colloquial term for a "police report" under s 173 of the CrPC, which is the police's assessment of the commission of an offence by the accused. The timely presentation of the charge-sheet, as discussed below, is determinative of whether the accused is entitled to be released on default bail. For the nature of a charge-sheet, see *Saurav Das v Union of India* (2023) SCC OnLine SC 58.

14 While offences are classified as "bailable" and "non-bailable" as discussed in sub-section A, bail can be granted for all offences. The only difference is that for non-bailable offences, the accused must offer reasons, and demonstrate conditions warranting their release. See CrPC 1973, ss 437, 439.

15 The accused must be produced before the Judicial Magistrate before the completion of 24 hours of arrest. The Magistrate then decides whether the accused is sent to police custody (which can be for a maximum of 15 days in the manner enunciated in *V Senthil Balaji v State* (2023) SCC OnLine SC 934), or judicial custody. Pursuant to *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273 [8.2], the Magistrate must also decide the issue of bail on the date of remand itself.

16 This classification is provided separately for each individual offence in the Indian Penal Code, 1860 under the First Schedule to the CrPC. See First Schedule, CrPC 1973.

obtaining a Magisterial warrant, meaning that the decision to arrest is solely their own.[17] A "non-cognizable offence" is one for which the police cannot arrest without a Magisterial warrant, and can investigate only after obtaining the Magistrate's directions.[18] A "bailable offence", on the other hand, is one for which bail can be availed as a matter of right, meaning that there is no pre-trial detention; and a non-bailable offence is one for which the grant of bail lies at the Court's discretion, and the burden of showing circumstances warranting release lies on the accused.[19]

The CrPC, as it was originally enacted, contained no guidance as to the circumstances necessitating arrest, requiring only that there be some grounds to believe the accused's connection with the commission of a cognizable offence.[20] This, it was noted by the 177th Report of the Law Commission of India, was an unsatisfactory state of affairs: the deferential standard to arrest u/s 41 meant, in effect, that it became an ordinary tool to be employed with high casualness, without regard to a substantive assessment of its rights-implications.[21] Subsequently, a principle of "necessity to arrest" was installed, meaning that a mere connection with the offence could not be the sole criteria to arrest, and the police must additionally show the necessity of arrest for five specific purposes, which were listed u/s 41.[22] Further, pursuant to the Supreme Court's observations in Joginder Kumar v. State of U.P.,[23] Parliament added s 41A to the CrPC, which concerned the substitution of arrest with a procedure called an "appearance before the police.[24] Using this method, the police would interrogate an accused without arresting them, for the conditions necessitating arrest u/s 41(1) – which concern the possibility of committing an offence during one's release, requirements of pre-trial interrogation etc. – had not arisen.[25]

17 CrPC 1973, s 2(c) states that a "cognizable offence means an offence for which… a police officer may… arrest without warrant".

18 CrPC 1973, s 2(l) states that a "non-cognizable offence means an offence for which…a police officer has no authority to arrest without warrant".

19 CrPC 1973, s 2(a) states that a "bailable offence" means an offence…shown as bailable in the First Schedule… and "non-bailable offence" means any other offence".

20 CrPC 1973, s 41 (unamended) states that a "police officer may…arrest any person…who has been concerned in any cognizable offence…".

21 Law Commission of India, Report No. 177 — Law Relating to Arrest (Ministry of Law and Justice 2001) 68-9.

22 CrPC 1973, s 41 (as amended) states that an arrest may be made for offences punishable with a maximum of seven years "(a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured".

23 *Joginder Kumar v State of UP* (1994) 4 SCC 260.

24 CrPC 1973, s 41A.

25 CrPC 1973, s 41A states that "The police officer shall, in all cases where the arrest of a person is not required… issue a notice".

Lastly, the CrPC contains a default "no-bail" scenario for an accused alleged to have committed a non-bailable offence. While each offence is distinctly characterized as a "bailable" or "non-bailable" offence in the First Schedule, the general rule of thumb is that any offence punishable with a minimum of three years is "non-bailable".[26] It has been estimated that out of roughly 300 offences in the Indian Penal Code, 1860 ("IPC"), 190 are non-bailable, on whom the statutory presumption against bail applies.[27] While this presumption operates against all non-bailable offences, it is further strengthened against offences punishable with death or life imprisonment, for which bail must be availed directly from a Sessions Court.[28] While this does not make bail impossible for non-bailable offences, it cannot be availed as a matter of right – the accused must make a case for bail, arguing primarily two things: first, their factual disconnection with the offence (to the extent permissible, given the prohibition on adducing substantive evidence in assessing their possible commission of the offence);[29] and second, the absence of risks associated with their release. This assessment is also done at the remand hearing, which is the accused's very first presentation before the court to determine whether they must be taken into custody, or be released.[30] This adjudication of bail based on the accused's submissions, I argue below, has evolved into a largely factual enquiry into the accused's role in the offence's commission, with a bail rejection constituting a "semi-adjudication" of guilt.

Given the highly pro-state classificatory regime under the CrPC that discourages bail, the Supreme Court has attempted to intervene on multiple occasions, both in terms of "one-time" release orders when prison overpopulation reaches disastrous levels,[31] and through changing the law on arrest and bail.[32] While doctrinal interventions on arrest have marked a substantial shift from their CrPC-based conceptualization, such interventions on bail – through progressive in comparison to judgments of the 1970s – are still, fundamentally, the same.

---

26 CrPC 1973, First Schedule.

27 Abhinav Sekhri, 'The Bailable v Non-Bailable Classification in Indian Criminal Procedure' (2021) 3 GNLU Law and Society Review 56.

28 CrPC 1973, s 437(1)(i) read with s 439. While bail for ordinary offences – including those triable by a Sessions Court – can be availed from a Judicial Magistrate, one must necessarily obtain bail from the Sessions Court for an offence punishable with life imprisonment or death. The Magistrate's assessment of the nature of the allegations to determine their jurisdiction to grant bail has been described in *Prahlad Singh Bhati v NCT, Delhi* (2001) 4 SCC 280 [11].

29 *Amrit Pal Singh v Union Territory of J&K*, Bail App No 223/2020 [High Court of Jammu & Kashmir] [7]-[10]; *Anees v State of Uttar Pradesh,* Crl Misc Bail Application 23624 of 2020 [High Court of Allahabad] [8], [25]-[26] refusing to address the accused's arguments of a dying declaration's inadmissibility and unreliability at the bail stage.

30 For a general description of the remand hearing, see (n 2). See also, *Satender Kumar Antil* (n 1) [47]; *Gautam Navlakha* (n 1) [73]; *Prabir Purkayastha* (n 1) [16]-[20].

32 Aparna Chandra and Keerthana Medarametla, 'Bail and Incarceration: The State of Undertrial Prisoners in India' in Shruti Vidyasagar, Harish Narasappa, Ramya Tirumalai (eds), *Approaches to Justice in India* (Eastern Book Company 2018) 67.

Arnesh Kumar v. State of Bihar is regarded as the most significant case concerning the police's power to arrest in recent times, where the Court stated that the incorporation of the principle of necessity u/s 41(1) and the notice regime u/s 41A meant that things were not business as usual.[33] In that case, the Court laid down a few propositions of law: first, that the requirement of recording reasons when choosing to arrest is mandatory;[34] second, that the Magistrate – at the stage of remand – must review the compatibility of the arrest u/s 41, and refuse to grant custody if the arrest was illegal;[35] third, that if the police effect an arrest without complying with the notice regime u/s 41A, the arrest would be vitiated[36] and fourth, the police's non-compliance with these rules constitutes contempt of court, making delinquent officers liable to imprisonment and fines.[37] There has been substantial case-law building on Arnesh Kumar, with multiple High Courts hauling the police for contempt in light of illegal arrests.[38]

The law on bail, however, has stagnated in terms of substance, for one unfortunate point of commonality subsists: bail adjudication remains a factual enquiry into the likelihood of one's commission of the alleged offence, instead of a risk-based enquiry into the dangers associated with release.[39] This means that a court enquires into the accused's factual connection with the alleged offence in terms of the possibility or likelihood of the accused having committed the offence. On the other hand, the risk-based enquiry considers the risks associated with release, such as one's susceptibility to commit an offence during bail, threaten witnesses, tamper with evidence, or simply flee, in determining whether the detainee must be released.[40] This is not, however, to claim that a risk-based enquiry – the statutory mandate in the United Kingdom (a bail regime Satender Kumar Antil invited Parliament to adopt)[41] – is perfect: the act of authorizing one's detention based solely on "dangerousness" has invited the critique of over-inclusiveness,[42] risk-based factors contain racial undertones of groups deemed risky,

32 ibid.

33 Arnesh Kumar (n 15).

34 ibid [7.2].

35 ibid [8.2].

36 ibid [11.6].

37 ibid [11.7].

38 See *Rakesh Kumar v Vijayanta Arya* (2021) SCC OnLine Del 5574; *In Re v Chandan Kumar* (2022) SCC OnLine All 705.

39 While the terms "factual enquiry" and "risk-based enquiry" have not been explicitly employed as distinct categories of considerations in bail adjudication, I use the terms to describe different standards used across case-law.

40 For a list of such factors, see, for example, the Bail Act 1976, Schedule I of the United Kingdom.

41 *Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51 [100.1].

42 Richard L Lippke, 'Preventive Pre-Trial Detention Without Punishment' (2014) 20 Res Publica 112, proposing the slippery slope that detention on grounds of "dangerousness" enables; Paul H Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114(5) Harvard Law Review 1437-1441, discussing a set of moral problems that detention based on dangerousness prompts.

whose members' release is made difficult due to racial bias,[43] and the ex-ante assessment of one's "future-crime-indicating characteristics" is, at the very least, morally problematic.[44] These are, however, problems encountered by a bail regime aspiring to achieve its objectives distinctly from those of conviction and sentencing – in other words, these are problems arising from a bail regime's inability to properly fulfil its own objectives of arriving at principled, risk-based determinations of whether an individual must be released.

In India, however, the bail regime's distinct objectives in determining persons to be released are captured by, and rendered subordinate to those of conviction and sentencing, with the bail enquiry according centrality to a merits-based assessment of the likelihood with which an accused can be deemed to have committed an offence. The Court's early jurisprudence makes the factor of the "gravity and nature of the accusation" a significant one in the decision to release, making the factual enquiry prominent in bail adjudication: State v. Captain Jagjit Singh regarded (solely) the allegation of the revelation of official secrets sufficiently serious to deny bail, irrespective of the risks involved in the accused's release;[45] State of U.P. v. Poosu authorized post-acquittal undertrial imprisonment (awaiting the state's appeal) for a person accused of an offence punishable with death, premised solely on the quantum of punishment that the offence carried;[46] and Gurcharan Singh v. State entrenched the standard of "nature and gravity of…the offence…" in bail adjudication.[47]

The constancy of these principles laid down in the Court's early jurisprudence is discernible in case-law across the last two decades: Jayendra Saraswathi Swamigal v. State of T.N. affirmed Jagjit Singh's standards for bail adjudication;[48] Kalyan Chandra Sarkar v. Rajesh Ranjan considered the "nature of accusation and the severity of

43 Anonymous, 'Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing' (2018) 131(4) Harvard Law Review 1126-8, noting the disproportionate effects of the law on bail, alongside its requirements of furnishing bail, on persons from racial minorities.

44 Frederick Schauer, 'The Ubiquity of Prevention' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal Law* (OUP 2013) 11, proposing the impermissibility of detaining "a social group whose aggregate characteristics probabilistically indicate a proclivity to commit crimes" merely on that ground.

45 The *State v Captain Jagjit Singh* (1962) 3 SCR 622 [5)], stating that "[a]mong other considerations,…a court has to take into account…the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail".

46 *State of Uttar Pradesh v Poosu and another* (1976) 3 SCC 1 [14], holding that there is no "merit in the contention that an order directing the rearrest and detention of an accused respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right…".

47 *Gurucharan Singh v State (Delhi Administration)* (1978) 1 SCC 118 [24], [29].

48 *Jayendra Saraswathi Swamigal v State of Tamil Nadu* (2005) 2 SCC 13 (16).

punishment" as the first and primary consideration in the grant of bail;[49] Rajesh Ranjan v. CBI remarked that if bail were to be granted in light of the presumption of innocence, "then logically in every case bail has to be granted";[50] Prahlad Singh Bhati v. NCT of Delhi noted that the Court must consider the "nature of accusations", along with "the nature of evidence in support thereof" in deciding bail;[51] Rohit Bishnoi v. State of Rajasthan noted that a "prima facie conclusion" of the "serious nature of the accusations" is sufficient ground to deny bail;[52] and Dimple Tyagi v. State of U.P. affirmed that the "settled legal position" includes a factual assessment of the nature of allegations.[53] The phenomena of ordinary criminal law's functional replacement by special laws, which contain a modified version of criminal procedure, can be considered an additional cause – at least in recent times – to the phenomena of a merits-based enquiry in bail adjudication. Legislation such as the Unlawful Activities (Prevention) Act, 1967 ("UAPA") and the Prevention of Money Laundering Act, 2002 ("PMLA") contain explicit provisions requiring a factual enquiry into the accused's involvement in bail adjudication, officially abridging the gap between pre-trial detention and punishment.[54] Thus, once a person has been deemed "likely guilty" by a court under these special laws, their lengthy detention is authorized based on the court's assessment of their likely guilt, and little discomfort seen in this state of things.[55]

Some cases, however, may be read as indicating that the factual enquiry may have taken a backseat, increasing the role of the merits-based enquiry: in P. Chidambaram v. Directorate of Enforcement, the Court employed a "triple test" to decide bail, which enquires into the accused's susceptibility to flee, tamper with evidence, and influence

49 *Kalyan Chandra Sarkar v Rajesh Ranjan* (2004) 7 SCC 528 [11], noting that "…at the stage of granting bail…, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence".

50 *Rajesh Ranjan v CBI* (2007) 1 SCC 70 [23]. For a critique of this judgement, see Vrinda Bhandari, 'Inconsistent and Unclear: The Supreme Court of India on Bail' (2013) 6(3) NUJS Law Review 549.

51 *Prahlad Singh Bhati v NCT Delhi* (2001) 4 SCC 280 [8], noting that "[w]hile granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused."

52 *Rohit Bishnoi v State of Rajasthan* (2023) SCC OnLine SC 870 [39]. Due to the "seriousness of the allegations" of the commission of offences under ss 25 and 27 of the Arms Act, 1959 and Section 302 of the IPC, the Court proceeded to cancel the accused's bail.

53 *Dimple Tyagi v State of UP* (2023) Crl Appeal No(s) 3610/2023 [4].

54 UAPA 1967, s 43D(5); PMLA 2002, s 45.

55 For an unequivocal approval of a merits-based enquiry requiring prima facie proof of the accused's innocence, see *Vijay Madanlal Choudhary v Union of India* (2022) SCC OnLine SC 929 [400]-[412], approving this regime under the PMLA; *NIA v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1 [23]-[27], noting with approval the scope of the enquiry under s 43D(5) of the UAPA.

witnesses.[56] On facts, the Court found that the accused did not carry such propensities, and was eligible to be released on bail in a case concerning allegations of corruption and fraud, which are otherwise considered serious.[57] The Court, however, nowhere discouraged an additional enquiry into the factual component, explicitly recognizing that the "gravity of offence is a factor…in addition to the triple test" in bail adjudication.[58] The application of the triple test has been similarly unsatisfactory, indicating that things are, indeed, business as usual, with a factual enquiry similarly prominence.[59] Rohit Bishnoi and Dimple Tyagi are both post-Chidambaram cases and have chosen to prize a factual assessment of the commission of the offence, instead of adopting a risk-based enquiry in adjudicating bail. Further, among the cases arising from arrests under special laws containing bail-restrictive provisions, two judgments must be noted. In Manish Sisodia v. CBI, a case arising from the arrest of a sitting Minister of the Government of Delhi, the Court merely captured a set of information suggesting the accused's possible involvement in money laundering and corruption, rejecting bail accordingly.[60] In Satyendar Kumar Jain v. Enforcement Directorate, another case arising from a sitting Minister's arrest on money laundering allegations, the Court more or less convicts the accused in adjudicating bail, noting that there was "no shadow of doubt" that the accused laundered funds.[61]

---

56 *P Chidambaram v Directorate of Enforcement* (2020) 13 SCC 791 [18]-[19]. For proposals of how the "triple test" or "tripod test" may depart from previous doctrinal considerations in bail adjudication, see Editorial, 'Bail basics: On Chidambaram case' *The Hindu* (New Delhi, 6 December 2019) <https://www.thehindu.com/opinion/editorial/bail-basics/article30195231.ece> accessed 17 June 2024, noting that a "triple test" must be invoked to "find out if a person is likely to hinder the trial by fleeing from justice, tampering with evidence, or influencing witnesses", and that factual allegations "cannot be used to deny bail based on allegations yet to be tested in a trial". For a contrary view, see Abhinav Sekhri, 'Supreme Court Grants Bail in the P. Chidambaram Cases — Some Thoughts' (*The Proof of Guilt,* 4 December 2019) <https://theproofofguilt.blogspot.com/2019/12/supreme-court-grants-bail-in-p.html> accessed 17 June 2024, proposing that Chidambaram enabled an enquiry into an offence's seriousness alongside the "triple test".

57 Chidambaram (n 56) [30], noting that the accused was "not a "flight risk" and there is no possibility of tampering with the evidence or influencing/intimidating the witnesses".

58 ibid [23].

59 For cases applying the "triple test" in bail adjudication, see *Vivekanand Mishra v State of UP* (2022) SCC OnLine SC 1903 [25] (denying bail in a case of grievous hurt after a factual enquiry into the likelihood of the accused's commission of the offence); *State of Kerala v Mahesh* (2021) 14 SCC 86 [37] (denying bail using the triple test, citing the seriousness of the allegation of murder as a ground); *Amandeep Singh Dhall v CBI* (2024) SCC OnLine Del 4285 [43]-[52], [63], invoking the triple test but assessing the state's factual allegations against the accused. For a contrary take on the strength of the triple test, see *Deepak Goyal v CBI* (2024) SCC OnLine Del 4108 [23]-[25], noting that detention is not supposed to be punitive and that the "seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail".

60 *Manish Sisodia v CBI* (2023) SCC OnLine SC 1393 [26].

61 *Satyendar Kumar Jain v Enforcement Directorate* (2024) SCC OnLine SC 317 [28].

Such reasoning in bail adjudication – implicit in ordinary cases, and as explicit as it can get in special laws – constitutes a "semi-adjudication" of the accused's guilt, for the Court premises the grant of bail primarily on its factual assessment of the accused's commission of the alleged offence. Such reasoning departs substantially from the burden levied on the state to deprive one's liberty through a conviction, which requires proof "beyond reasonable doubt".[62] There exists, therefore, a large normative hole in this state of affairs: while conviction-related liberty-deprivation occurs only through proof of the commission of an offence "beyond reasonable doubt", pre-trial liberty-deprivation is acceptable so long as a court deems the commission of the alleged offence "likely". This normative hole's practical implications are striking: while 1.1 lakh persons presently suffer a deprivation of liberty due to a conviction, 4.2 lakh pre-trial detainees have been imprisoned for time periods ranging from three months to five years, with such detention being authorized primarily on the likelihood of their involvement in the alleged offence.[63] Detention for periods akin to those of conviction, therefore, is being authorized through courts' assessment of a possibility of guilt – a situation, I propose below, that conflicts with bail adjudication's fundamental aims and purposes, and one that has permeating implications for doctrinal developments of default bail.

There has, however, been one development that marks a shift both from the CrPC's text and from early case-law – in Satender Kumar Antil, the Court has acknowledged the mass deprivation of liberty resulting from CrPC's presumption against bail for offences punishable with a minimum of three years, holding that the presumption shall now apply only to offences punishable with a minimum of seven years.[64] Despite this change, the doctrine on bail adjudication remains remarkably similar, with courts ordinarily enquiring into the factual commission of the alleged offence in all its dimensions – its seriousness, the likelihood of commission, and the accused's overall involvement in the offence. I discuss the implications of such a mode of bail adjudication below, where a sense of guilt becomes institutionally attached to pre-trial detainees.

C. Pre-Trial Detention and the "Semi-Adjudication of Guilt"

Duff conceptualizes pre-trial restrictions on liberty as a social recognition of an accused's unique normative position, for they must behave in accordance with reasonable social fears emerging in light of the allegations levelled against them.[65]

62 Indian Evidence Act 1872, s 4.

63 National Crime Records Bureau (n 9) xvii.

64 *Satender Kumar Antil* (n 2) [2]. The Court also recommended legislative change through the enactment of a "Bail Act", akin to what exists in the United Kingdom, which streamlines the grounds of bail adjudication.

65 RA Duff, 'Pre-Trial Detention and the Presumption of Innocence' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal Law* (OUP 2013) 123.

Simultaneously, however, he proposes that such accommodation of social fears must not cause an upheaval in an accused's life. The disruption to their life must be minimal, for they are, overall, presumed innocent.[66] On this basis, he proposes that even if pre-trial detention is to be justified on the logic of one's obligation to accommodate social fears, the public distinction between pre-trial detention and conviction-related imprisonment must be institutionally ensured, for the pre-trial detainee does not stand in the moral position of guilt.[67] Raifeartaigh proposes that we must actively pursue lesser rights-restrictive alternatives to pre-trial detention.[68] This is because the distinction between a conviction, which results in a procedurally-sound finding of guilt, and detention, which occurs in pursuit of placating social fears till the trial's completion, is highly susceptible to collapsing.[69] Similarly, Ashworth and Zedner argue that even if pre-trial detention is justified in light of the state's pursuit of preventing harm, such detention must be made as "non-punitive and as normal as possible".[70]

Given the hefty normative considerations involved in pre-trial detention but its simultaneous inevitability on grounds of general social interest, the issue of the correct questions to ask during this enquiry has been heavily debated. A basic, original purpose of the presumption of innocence, Baradaran notes, concerned the imposition of a prohibition on judges from predicting an accused's guilt in advance, requiring comprehensive proof at the stage of trial.[71] Since guilt was to be adjudged only at trial, the sole purpose that pre-trial detention, alongside the law on bail, served was to ensure the accused's presence at trial, nothing else.[72] Page and Scott-Hayward note the steady departure that American courts made from this singular justification for pre-trial detention by detaining individuals that were "believed dangerous or likely to flee", to punish individuals they found "disrespectful or troublesome", as well as to "elicit information or confession[s]".[73] This evolution, over time, gave rise to a general consensus that the purpose of bail had broadened, and that bail law aimed to "contain

66 ibid 125-6.

67 ibid 121. Duff proposes that there must be the "drawing a sharper and more public distinction between those who are remanded pending trial and convicted offenders by, for one obvious instance, detaining them in separate facilities."

68 Una Ni Raifeartaigh, 'Reconciling Bail Law with the Presumption of Innocence' (1997) 17 Oxford Journal of Legal Studies 1.

69 ibid.

70 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 71.

71 Shima Baradaran, 'Restoring the Presumption of Innocence' (2011) 72 Ohio State Law Journal 723, noting that a prohibition on "deciding defendants' guilt pretrial ensure[s] that defendants would remain at liberty before trial."

72 ibid 726.

73 Joshua Page and Christine S Scott-Hayward, 'Bail and Pretrial Justice in the United States: A Field of Possibility' (2022) 5 Annual Review of Criminology 93.

and control people…accused of crimes".[74] The allegation's seriousness, they note, became a primary consideration in bail adjudication because courts – premised on a risk-averse understanding of human behaviour – considered their control over criminal defendants to become the weakest when individuals were accused of the most serious offences.[75] The legitimate purposes for pre-trial detention, however, remained the same: securing the accused's presence for trial, and subserving public interest by temporarily incapacitating persons appearing dangerous, i.e., those that risked harming the trial process.[76] Lastly, Baradaran notes that a merits-based enquiry deleteriously impacted the bail's availability in the United States, for courts could now "weigh evidence" against the accused to deny bail.[77]

Lippke, based on the work of Ashworth and Redmayne, proposes the creation of strict, conjunctive conditions to be satisfied by the state to obtain pre-trial custody of accused persons, which should involve risk-based factors, a burden on the state to show "substantial evidence" of the accused's guilt, as well as its demonstration of the unavailability of lesser-restrictive alternatives to pre-trial detention that fulfil its objectives.[78] Baradaran, however, in discussing factors relevant to assessing the grant of bail, strictly advises against a merits-based enquiry into guilt, for predictive guilt – apart from being possibly inaccurate – diverges from bail's foundational purpose of securing the individual's presence at trial, and incapacitating them even when they pose no risks to the trial process.[79] While a merits-based, factual enquiry may have the advantage of enabling the release of persons appearing disconnected from the offence's commission, it diverges from pre-trial detention's purpose of securing a proper trial and may have the effect of validating a perfunctory and deferential standard for authorizing detention.

Such an enquiry – in the manner seen in Indian cases above – does not resemble Lippke's standard of the presence of "substantial evidence" against the accused and authorizes detention based on a highly preliminary assessment of facts that suggest a possible involvement of the accused in the offence's commission.[80] Instead of operating

74 ibid 94.

75 ibid.

76 ibid 96.

77 Baradaran (n 71) 741.

78 Lippke (n 42) 117-9.

79 Baradaran (n 71) 762-3.

80 See, for instance, the judgment in *Rohit Bishnoi* (n 52), finding allegations of murder sufficient to reject bail on grounds of seriousness; *Nitu Kumar v Gulveer* (2022) 9 SCC 222, holding an offence's seriousness to be a relevant factor in the grant of bail, cancelling bail; *Guria Swayam Sevi Sansthan v Satyabhama* (2018) 13 SCC 387, finding allegations under the Immoral Traffic (Prevention) Act 1956 sufficiently serious, justifying a refusal of grant of bail; *Naveen Singh v State of UP* (2021) 6 SCC 191, finding allegations of fabricating court records serious and factually possible, rejecting bail. There exist a plethora of cases that undertake a highly preliminary analysis of the factual case against the accused, rejecting bail on the offence's seriousness and their possible involvement.

with the intent to accord overwhelming priority to the presumption of innocence and consequently demand immense evidence from the state for authorizing detention, the Indian variant of the enquiry asks the state to produce mere allegations – irrespective of the quality of evidence backing them – in authorizing detention. Lastly,[81] in case the enquiry does become modelled on a factual assessment of "predicting guilt", it would be expected that the accused be able to offer material showing their innocence at the bail hearing too. Unless this is done, the mere production of allegations, without regard to the accused's defence, becomes ripe for courts' utilization to impose conviction-like sentences at the bail stage itself. Indian case-law, especially across High Courts, has taken this route: while enabling detention based on the state's production of allegations, the accused is simultaneously disabled from producing contrary evidence showing their innocence, with observations being made on the permissibility of producing such evidence only at trial.[82]

Thus, even if a factual enquiry must be taken into an accused's guilt, it must be done with the cognizance of the enquiry's possible divergence from pre-trial detention's foundational purposes and must be done with the purpose of increasing the burden on the state to obtain an accused's custody. In case it does become the norm, a minimal expectation would be to secure parity in producing material for undertaking this factual enquiry between the state and the accused – an expectation courts have not fulfilled.[83] Overall, therefore, imprisonment can be authorized based on a factual enquiry into the accused's guilt, the state's production of barebone allegations is highly consequential in this enquiry, and the accused is simultaneously disabled from producing contrary evidence to show their innocence.

A normative unease with pre-trial detention, owing to its character as a distinct and independent punishment, therefore, is highly lacking in Indian bail adjudication, and the above scope of adjudication appears to diverge immensely from pre-trial detention's purposes and principles. Sekhri notes one cause: while the police, overall, have only 15% of investigations pending, courts have pendency rates of nearly 90% for ordinary criminal cases.[84] This institutional incapacity to reach normatively acceptable determinations on guilt and innocence within a reasonable timeframe – alongside CrPC

81 ibid.

82 For cases disabling an accused's production of evidence to show their innocence or non-involvement with the case at hand, see *Amrit Pal Singh v Union Territory of J&K* [High Court of Jammu and Kashmir], Bail App No 223/2020, holding that the accused's production of evidence demonstrating their disconnection with a murder case cannot be considered at the stage of bail; *Anees v State of Uttar Pradesh* [High Court of Allahabad], Crl Misc Bail Application 23624 of 2020, refusing to address the accused's arguments of a dying declaration's inadmissibility and unreliability at the bail stage.

83 ibid.

84 Abhinav Sekhri (n 8).

and its case-law envisioning a default denial of bail – creates a situation where courts engage in a form of punishment without condemnation. An accused, after having their bail denied, is presumed sufficiently guilty to warrant their detention till the trial's completion. This is because bail adjudication – done in line with case-law encouraging a merits-based review of the accused's likelihood of guilt – deems one sufficiently guilty to undergo imprisonment. The rejection of bail becomes a sufficiently institutionally acceptable measure of guilt, and prolonged pre-trial detention – based primarily on a court's assessment of the likelihood of the commission of an offence – becomes the norm. This highly tangible absence of a presumption of innocence also manifests statutorily: Section 436A of CrPC states that one can, if circumstances warrant, be detained for up to one-half of the total sentence carried by the alleged offence, and even beyond if the court deems fit – all without a judicial determination of guilt![85] This section comes into the limelight primarily when prison conditions become highly unmanageable, and the volume of detainees having undergone lengthy pre-trial detention overwhelms prison authorities. In[86] In re - Inhuman Conditions in 1382 Prisons, for example, the Court "requested" governments to "implement" Section 436A to "reduce overcrowding in prisons". Forgotten detainees enter judicial discourse only when they become too many, and it is not the loss of their dignity and a continual violation of their fundamental rights that necessitates their release. It is, instead, the objective of alleviating prison congestion. This is because they are, for all practical purposes, sufficiently guilty to warrant prolonged detention, for the "formal verdict of the court" is nowhere in sight[87]

II. CONCEPTUALIZING DEFAULT BAIL NORMATIVELY: A DURATION-DEFINITE LEGAL LIMBO, SECURING SYSTEMIC EFFECTIVENESS

Pre-trial detention, therefore, often serves the function of meting out punishment for wrongs likely to have been committed, with the bail enquiry evolving to ask this question consistently. In such a scenario, the role of default bail – the procedure enabling one's release based on their imprisonment for sixty/ninety days without the state's demonstration of interest in their case – becomes crucial. Since the persons availing default bail have, at minimum, been imprisoned for sixty/ninety days, and their bail on merits has also likely been rejected, should the law on default bail evolve with a conceptualisation of its recipients as persons that are likely guilty, and therefore minimize the possibilities of their release?

85 CrPC 1973, s 436A.

86 *In re - Inhuman Conditions in 1382 Prisons* (2016) 3 SCC 700 [16].

87 Duff (n 65) 120.

I propose this approach – discussed in the following section as having been adopted by the Supreme Court – to be incorrect, requiring a morally justifiable theoretical foundation for default bail, grounded in the presumption of innocence, capable of offering guidance for principled doctrinal developments. Such a theoretical foundation must contain, at the very least, two elements: first, a recognition that default bail signifies the normative impermissibility of detaining an individual in the state's breach of its duration-definite duty to actively pursue elimination of the "accused" label on the individual; and second, a recognition of its primarily procedural nature pursuing systemic effectiveness, which can be secured only through judicial interpretations emphasizing the absolute nature of the state's duty, and the unconditional nature of the right derived in its breach.

First, a conception of default bail as a windfall gain – an ill-gotten receipt of liberty, as discussed below – must cease. Default bail must not be considered merely an "order on default", i.e., the receipt of liberty based on the state's negligence in filing a document timely.[88] It should, instead, be considered reflective of the normative impermissibility of detaining an individual beyond a particular duration in the absence of a genuine enquiry into their guilt. An individual's unique normative position arising by virtue of being accused – an individual that is not legally guilty, yet must accommodate social fears by virtue of allegations – originates conditionally, with a corresponding duration-definite duty on the state to cease this legal limbo between guilt and innocence.[89] One's acquisition of the legal-normative status of the "accused", therefore, comes with a condition of this status not being indefinite, with the state committing to pursue this legal limbo's elimination.[90] Accordingly, one's accommodation of social fears based on the

88 This interpretation, as discussed in the following section, is a view adopted by the Court in laying down the law on re-arrests, and fails to adhere to the two normative underpinnings of default bail discussed in this section. For cases on this standard, see *Rajnikant Jivanlal v Intelligence Officer, Narcotic Control Bureau* (1989) 3 SCC 532 [11]-[13]; *T Gangi Reddy* (n 4) [26]–[27]. See also, *Raghubir Singh v State of Bihar* (1986) 4 SCC 481, whose observations constitute the basis for Rajnikant Jivanlal's holding on default bail.

89 See, for example, Ashworth and Zedner (n 44) 65-71, discussing the unique characteristics of pre-trial detention that prevent its normative characterization as a punishment, prompting an enquiry into legitimate justifications therefore that do not undermine persons' status as responsible agents. For the duration-definite nature of undergoing pre-trial detention under s 167(2), see Ramesh Vaghela, 'Default Bail: A Study of Case Law' (2003) 45(1) Journal of the Indian Law Institute 81, noting that the provisions on default bail, while not concerning the duration of the investigation itself, send a clear indication that the accused would be released but for the completion of a timely investigation.

90 CrPC provisions require the state to undertake an investigation into offences in the police's knowledge, with this process including all proceedings for the collection of evidence. The police, based on evidence collected that suggests an accused's commission of an offence, prepare a "police report", called a charge-sheet, under s 173. Based on the facts disclosed in the chargesheet, the Magistrate may, u/s 190 of the CrPC, choose to take cognizance of the offence and move towards the initiation of trial. The Magistrate may, however, find that the charge-sheet does not disclose an offence's commission, and refuse to take cognizance. For the steps available for the Magistrate in assessing a charge-sheet, see *Zunaid v State of UP* (2023) SCC OnLine SC 1082 [11].

factum of allegations is coextensive with the state's duration-definite pursuit of eliminating one's "accused" status through a genuine investigation. It is this prohibition on the state's conferral of an indefinite "accused" status on an individual, all while simultaneously making no genuine pursuit in eventually eliminating this status, that must be considered to conceptually underlie default bail. Since the judicial enquiry in assessing the availability of default bail is premised on an examination of the charge-sheet – the document containing the state's investigative work – it must necessarily evince material demonstrating a genuine investigative endeavour, ensuring that attempts to confer an indefinite "accused" status on an individual are not being made.

Second, a conception of default bail must be premised on a recognition of its principally procedural character that aims to secure justice systemically.[91] The nature of Section 167(2) is such that it regulates the conduct of state officials, mandating them to make genuine enquiries into an accused's guilt. The process of a duration-definite investigation, as discussed above, constitutes an obligation on the state's part, and the actors whose adherence therewith is expected are state officials.[92] This procedural rule mandating investigation, however, also confers a substantive right on the accused based on the procedural obligation's non-fulfilment, since the non-filing of the charge-sheet u/s 167(2), resulting from a lack of investigation, entitles the accused to be released. This procedural rule, like procedural rules generally, serves a systemic function, for it aims to secure compliance with legal norms at a structural level.[93] It requires the state machinery overall to fulfil the investigative task and enables every accused to be released based on its non-fulfilment. Legal norms aimed at securing the state machinery's overall compliance with a set of principles are considered as pursuing "systemic effectiveness", which is all state actors' well-accepted, imbibed adherence to certain legal requirements.[94] Sweet, in discussing the utility of the four-pronged proportionality

91 See, for example, Paul B Lewis, 'Systemic Due Process: Concepts and the Problem of Recusal' (1990) 38 University of Kansas Law Review 400, proposing the value of process and procedural law in creating a system that offers "long-term societal benefits", for it "establishes a stable mechanism by means of which the collective can effectively operate…"; Norman W Spaulding, 'The Ideal and the Actual in Procedural Due Process' (2021) 48 Hastings Constitutional Law Quarterly 261, proposing that due process norms in the United States are unable to secure justice in disputes that actually arise in American society, for these norms – instead of possessing a systemic nature – are confined to certain "ideal" forms of procedure.

92 As discussed in n , an offence's investigation is the state's prerogative, and a failure thereof entitles an individual to be released under s 167(2). Courts have also sought to create software that captures timelines for investigation and the availability of default bail, tracking both the state's fulfilment of investigative duties and the accrual of the right. For cases suggesting the creation of digital means to track investigations and bail, see *Arvind Kumar Saxena v State* (2018) SCC OnLine Del 7769 [21]; *Sher Singh v State* (NCT of Delhi) (2022) SCC OnLine Del 3745 [22].

93 See Lawrence Solum, 'Procedural Justice' (2004) 78 Southern California Law Review 188-9, noting the "action-guiding role of procedure" is such that it imposes obligations to comply both on state officials and citizens; Lewis (n 91) 399-400; Spaulding (n 91) 290.

94 Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (OUP 2019) 4.

standard in assessing the validity of state action, proposes that this enquiry's consistent and structured utilization in adjudication systemically alters state actors' behaviour, making adherence with proportionality the norm in their own governance and decision-making processes.[95] In case the procedural mandate of a genuine investigation, as well as the accused's corresponding right to be released, are to be offered an interpretation that enables their achievement of systemic effectiveness spanning across the state machinery, such an interpretation must necessarily emphasize default bail's absolute and unconditional nature.

Attempts at creating exceptions and riders to default bail, or undermining its theoretical foundation that requires the state's engagement in a genuine investigative endeavour, would necessarily conflict with a pursuit of systemic effectiveness, stymieing its ability to alter state actors' behaviour. It is only through the creation of an absolute requirement to complete an investigation within a specified duration, alongside an unconditional right to be released in this requirement's non-fulfilment, that can prompt state actors to move towards fulfilling it. In case exceptions and riders are created to either the state's duty or the individual's right, a defection from fulfilling the genuine investigative endeavour becomes acceptable, and the default bail regime loses its ability to secure state-wide acquiescence to its principles. Consider an example of the latter variety, which concerns the individual right being weakened, done through permitting "re-arrests" after release:[96] in this case, an accused who was released under default bail can simply be re-arrested any time thereafter, with the only condition being the state's filing of a charge-sheet before arresting.[97] This weakening of the individual right has the effect of detracting from the duration-definite nature of one's "accused" status, for it entitles the state to investigate for howsoever long as it desires, with the individual perpetually possessing the "accused" status, being ever-ready to surrender to prison when the state feels they might be guilty. Since the introduction of a "re-arrest" norm causes a failure of default bail's foundational underpinning to prompt a genuine investigative endeavour, it no longer encourages state officials to enquire into the individual's guilt in a duration-definite manner, failing in its pursuit of systemic effectiveness. Enabling re-arrests after release, therefore, would wholly conflict with default bail's principles and underpinnings, and would be an outcome that a judiciary cognizant of default bail's purpose and underpinnings will avoid. The Supreme Court, however, has chosen otherwise, enabling re-arrests, as well as weakening the default bail regime in two other crucial ways too. I discuss these in the next section.

---

95 ibid 4-5.

96 For cases permitting "re-arrests" after release (discussed in Section III), see *Gangi Reddy* (n 4); *Aslam Babalal Desai v State of Maharashtra* (1992) 4 SCC 272.

97 The standard of a subsequent filing of a charge-sheet enabling re-arrests has been laid down, inter alia, in *Gangi Reddy* (n 4).

III. THE DEFAULT BAIL REGIME – ASSESSING THE RIPPLE EFFECTS OF THE ADJUDICATION OF GUILT IN THREE AVENUES

The Court's approach towards default bail, as seen from the re-arrest example above, is generally ignorant towards the normative considerations with default bail, and can, instead, be described as minimizing the avenues through which it can be availed. An underlying reason for its consistent weakening of the default bail regime – which I explore further in Section IV – is arguably the Court's cognizance of the institutional constraints necessitating the above-discussed semi-adjudication of guilt, creating an entrenched notion of default bail's recipients being likely guilty. The institutional attachment of guilt with pre-trial detention, therefore, may carry substantial ripple effects to the doctrinal development of default bail, offering an explanation for why the Court has consistently weakened it. I am, of course, not claiming this to constitute the sole explanation behind the Court's creation of exceptions to Section 167(2)'s legislatively-stipulated absoluteness, but one that traces the implications of the judicial characterization of its recipients on the interpretations offered to default bail. This explanation is derivable from the commonality of reasoning offered in case-law that weakens default bail, which affirms its character as a windfall gain for persons that otherwise deserved to be imprisoned, and case-law refusing bail based on their assessment of an individual's likely guilt. A sense of guilt attached to default bail's recipients, therefore, may explain why the Court has minimized the avenues through which it can be availed. In this section, I discuss three ways in which the Court has proceeded to weaken the default bail regime, bringing it close to toothlessness – first, its creation of the "extinguishing regime" (A); second, the possibility of "re-arrests" after release on default bail (B); and third, the Court's rejection of an enquiry into a "charge-sheet's" quality to assess its sufficiency to deny default bail (C).

A. The Extinguishing Regime: On the Rat Race of Filings

The first attack on Section 167's ostensibly unconditional character is done through the judicial creation of rules that define circumstances where the right to avail default bail is deemed forfeited, referred to as the "extinguishing" of default bail. The issue of extinguishing, whose problematized character was made most evident in State of M.P. v. Rustam, has been a highly contentious theme since the default bail regime's inception.[98] Since the filing of a charge-sheet is pivotal in determining one's eligibility to avail default bail, the issue of the charge-sheet being filed subsequent to the date on which default bail became available has always been contentious.

The factual basis of such cases lies in pre-trial detainees filing applications for default bail on the date that the sixty (or ninety) days – within which the police are bound to complete their investigation and file a charge-sheet – had elapsed, with such applications being listed in court subsequently. The police would file its charge-sheet in

98 *State of MP v Rustam* (1995) Supp (3) SCC 221.

the interim, and on the date of hearing, claim that the investigation had been completed and that the accused would no longer be entitled to their release. In Rustam, the Court approved of this scheme, holding that the charge-sheet's filing subsequent to the bail application (which, however, was filed timely, on the sixty-first or ninety-first day) prevented the accused from obtaining default bail.[99] The duration for which the accused underwent imprisonment – which exceeded the sixty/ninety days – would not be an obstacle in barring the accused's release, for the "default" on the part of the police, which concerned the lapse in the timely filing of the charge-sheet, had been remedied by the date of the hearing.[100] The underlying logic of Rustam's reasoning may lie in the same attachment of pre-trial notions of guilt: detainees are sufficiently guilty to warrant prolonged imprisonment, and deviations from this outcome must be doctrinally discouraged. Mistakes – in terms of "defaults" – of investigative agencies are insufficient to warrant one's release, for the moral position in which the accused stands – instead of being distinct from the convicted prisoner – as conceptually akin. The accused acts with no virtuosity in "accommodating social fears" in light of the allegations against them, and is, instead, the rightful recipient of pre-trial punishment.

The judgment in Rustam was overruled in Uday Mohanlal Acharya v. State of Maharashtra, where the Court noted that an interpretation of Section 167(2) "capable of being abused by the prosecution" should be disfavoured, and the filing of a default bail application on the date that it accrued would be sufficient for the accused to be released.[101] This position of law has been affirmed in Union of India v. Nirala Yadav, where the Court accepted that the relevant date to determine the availability of default bail is the date on which the application was filed and not the date when the case came up for hearing subsequently.[102] In M. Ravindran v. Directorate of Revenue Intelligence, the Court has also imposed an obligation on the Magistrate to inform the accused of the availability of default bail, so that underprivileged persons, who have insufficient legal aid, do not have to spend time in prison beyond the stage where default bail accrued.[103] Ultimately, however, default bail is still determined by a filing rat race on the sixty-first (or ninety-first) day: if the accused files their application first, bail can be availed; and if the police file their charge-sheet first, default bail extinguishes.

99 ibid [4], holding that "[t]he court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail."

100 ibid.

101 *Uday Mohanlal Acharya v State of Maharashtra* (2001) 5 SCC 453 [13], noting that "[s]ince the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution".

102 *Union of India v Nirala Yadav* (2014) 9 SCC 457 [28].

103 *M Ravindran v Directorate of Revenue Intelligence* (2021) 2 SCC 485 [18.10], noting that "the counsel for the accused as well as the Magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights."

Another factor that has stayed uniform in the law's evolution from Rustam to Raivndran is the continually conditional nature of one's release. This is because the accused is ineligible to be released until they furnish the bail amount, and also file an application for release prior to the police filing their charge-sheet.[104] It hinges the question of one's release, therefore, on the time differential of a few minutes or hours in a filing rat-race, as well as the accused's readiness to furnish the bail amount. This interpretation conflicts with the interpretive requirement of the investigative duty's absoluteness, as well as the accrual of an unconditional right on the accused. Most pre-trial detainees are disadvantaged and financially weak and are unable to furnish bail for their release.[105] By imposing a necessary requirement of the accused's furnishing of a sum for availing default bail, the state's defection from the bargain underlying default bail is again permitted, for a duration-definite investigation is obviated by the expectation that the accused cannot, in any case, afford to obtain default bail. The right, instead of being unconditional, hinges on the production of a sum for a release, which is also a statutory mandate106 Vaghela, however, proposes that this is not a hindrance to the grant of default bail, for the legal status of one's imprisonment must be deemed to cease from that of pre-trial detention and acquire the form of detention due to one's inability to furnish bail from the sixty-first or ninety-first day.[107] A legislative reconsideration of the requirement to furnish bail, and judicial recognition of its iniquitous implications would, therefore, be useful. Further, the concentration of the bail enquiry on the time of filing documents in court confers a veneer of equal opportunity on availing default bail, enabling an accused to precede the state in the filing battle. This does not, however, consider that the police could simply abstain from a duration-definite genuine investigation and file a document containing anything, just formally titled "charge-sheet", and still defeat default bail as discussed in sub-section C, or merely enable the accused's release for a moment, and effect their re-arrest whenever they feel the accused's possible involvement in the offence's commission. I discuss this below.

B. Re-Arrest after Default Bail – No Pre-Trial Presumption of Innocence

One way of rendering default bail ineffective is to apprehend the accused immediately after their release, subjecting them to pre-trial detention once again. Although this practice appears unfair as it renders the practical significance of default bail negligible, it has been consistently endorsed in case-law. In Rajnikant Jivanlal v.

104 *Ravindran* (n 103) [25.4], holding that "[i]f the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid."

105 Murali Karnam and Trijeeb Nanda, 'Condition of Undertrials in India: Problems and Solutions' (2016) 51(13) Economic and Political Weekly 14; Rahul Tripathi, 'Majority undertrials from poorer sections, shows NCRB data' (Economic Times, 3 September 2022) <https://economictimes.indiatimes.com/news/india/majority-undertrials-from-poorer-sections-shows-ncrb-data/articleshow/93958200.cms?from=mdr> accessed 18 June 2024.

106 CrPC 1973, explanation to s 167(2), stating that "the accused shall be detained in custody so long he does not furnish bail."

107 Vaghela (n 89) 93-4.

Intelligence Officer, the accused, who had been released u/s 167(2) due to the police's omission in filing the charge-sheet within ninety days, was "re-arrested" after the police's subsequent filing of the charge-sheet.[108] The only reason cited for the re-arrest was that the charge-sheet disclosed the commission of a non-bailable offence.[109] The Court held such a re-arrest permissible, because an order to release on default bail was merely an "order on default", and the accused had no guaranteed liberty by virtue of being released on default bail:

> "The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled."[110]

This observation may be premised on the same institutionalized notion of pre-trial detainees' likely guilt, deeming them beneficiaries of special privileges that accrued to them due to the police's mistakes. Default bail was ill-gotten and unearned, for the accused was sufficiently morally culpable to deserve pre-trial punishment. In terms of the position of law, the Court approved post-charge-sheet re-arrests, and the only relevant factor was whether the charge-sheet demonstrated the commission of a non-bailable offence.[111] This was too easy a threshold to meet, for the police only had to choose from any non-bailable offence in the IPC (of which there are 190) and describe its commission. A factor contributing further to how this threshold is highly skewed towards the state is the fact that the court – when deciding default bail based on the filing of the charge-sheet – does not enquire into the contents of the charge-sheet, enquiring only into its barebone, physical existence as discussed in sub-section C. Since the charge-sheet could contain any allegations, whose veracity would not be tested while deciding default bail, the police may virtually write anything about the commission of a non-bailable offence in the charge-sheet in order to effect a re-arrest, and the court would not enquire therein. This easy standard for effecting a re-arrest, which enabled the police to defeat default bail by merely writing about the commission of a non-cognizable offence in its charge-sheet – became a concern in Aslam Babalal Desai v. State of Maharashtra.[112] In that case, the Court overruled Rajnikant Jivanlal, holding that the standard for a re-arrest must not be the mere filing of a charge-sheet that identifies the commission of a non-cognizable offence, and must necessarily be something more:

> "We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime."[113]

108 *Rajnikant Jivanlal v Intelligence Officer* (1989) 3 SCC 532.

109 ibid [6].

110 ibid [14].

111 ibid.

112 *Aslam Babalal Desai v State of Maharashtra* (1992) 4 SCC 272.

113 ibid (emphasis mine).

The Court, per majority, changed the standard from one that only requires the filing of a charge-sheet, to one that requires the production of "special reasons" for cancellation. This was because Section 167(2) states that a person released thereunder shall be "deemed to be so released under the provisions of Chapter XXXIII", which is the chapter on ordinary bail for non-bailable offences.[114] The Chapter, u/ss 437(5) and 439(2), empowers the court to cancel bail, which is, in turn, done through an enquiry akin to the risk-based enquiry on bail – the court assesses whether the accused tampered with evidence, influenced witnesses, or acted contrary to their bail conditions.[115] It is only when their release, which may have been decided through either factual or objective enquiries, turns risky to society that one's re-arrest is authorized through the cancellation of bail. On this basis, the majority in Aslam Babalal incorporated the objective standard to determine the circumstances for cancellation of bail.[116] Puncchi, J., however, authored a dissent: he affirmed Rajnikant Jivanlal, holding that the charge-sheet's subsequent filing would be sufficient to re-arrest, and the "special reasons" requirement offered by the majority was incorrect.[117] In State v. T. Gangi Reddy, the Court – after discussing both the majority and minority judgments in Aslam Babalal – has created an ambiguity as to the standards for re-arrest after the availing of default bail, effectively turning Punchhi, J.'s dissent into the majority holding.[118] This is because the Court noted that while the standard for re-arrest is the existence of "special reasons", such reasons can include an assessment of whether the "accused has committed a non-bailable crime" based on the contents of the charge-sheet.[119] This phraseology affirms the minority in Aslam Babalal – as well as Rajnikant Jivanlal – for effectively, the only relevant enquiry is whether the charge-sheet discloses the commission of a non-bailable offence.[120]

---

114 CrPC 1973, s 167(2) states that a person released on default bail shall be deemed to be released under the CrPC's chapter on bail for non-bailable offences.

115 *Aslam Babalal* (n 96) [11], noting that "bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vii) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc." These factors resemble the objective enquiry into the grant of bail, for they examine the risks associated with the accused's release.

116 ibid [11]-[14].

117 ibid [28].

118 Abhinav Sekhri, 'Section 167, 'Default Bail', and its Cancellation' (The Proof of Guilt, 16 February 2023) <https://theproofofguilt.blogspot.com/2023/02/section-167-default-bail-and-its.html> accessed 18 September 2023. The essay, referring to the Court's sleight-of-hand in T Gangi Reddy, argues that "[t]his is clearly not what was held by the majority in Aslam Babalal Desai, but speaks to the minority."

119 *Gangi Reddy* (n 4) [31].

120 Abhinav Sekhri (n 118).

The law on re-arrests, therefore, substantially undermines the default bail regime, rendering it virtually toothless – one can be arrested right after being released, for the subsequent filing of a charge-sheet is the sole factor controlling one's liberty. The charge-sheet's contents, as discussed below, are beyond judicial review when assessing default bail, centering the decision on one's release wholly on the police's undisputed actions. Akin to the extinguishing regime, the law on re-arrest insufficiently conceptualizes the role of the presumption of innocence, for it indicates that the sixty/ninety-day detention – during which the police attempted to investigate the accused's guilt – was too minimal a pre-trial punishment. Once the police develop any belief in the accused's guilt, which they express through the filing of a charge-sheet, even greater pre-trial punishment is warranted. The state's defection from its end of the bargain, which requires it to undertake a duration-definite investigation into the accused's wrongdoing, is authorized by the Court, enabling the imposition of an indefinite "accused" status on the individual. The state can develop a suspicion into one's guilt at any moment, enabling a re-arrest and continued pre-trial detention. More importantly, however, an interpretation of Section 167(2) that enables re-arrests departs from the foundational requirement of interpreting the investigative duty absolutely, and the right unconditionally. Re-arrests enable a defection from the duty and render the right largely meaningless since a re-arrest can be undertaken at any moment of the state's choice.

C. Sufficiency of the Charge-Sheet to Deny Default Bail

The charge-sheet, therefore, is the most significant document for the accused's liberty, for the time of its filing governs their release. The question, therefore, is what is a charge-sheet – what must it necessarily comprise to defeat the accused's right to be released? Can it be a mere replica of the "First Information Report",[121] or consist of the police's conjectures without the investigation's completion?

This issue was discussed in Ritu Chhabaria v. Union of India, whose facts involved the filing of a charge-sheet that explicitly admitted to the investigation's pendency.[122] The Trial Court, relying on this charge-sheet, refused to grant default bail, holding that the requirement of a charge-sheet being filed – irrespective of the nature of its contents – had been fulfilled.[123] The Supreme Court, reversing this order of the Trial Court, held that no charge-sheet can be filed without the investigation's completion, and if done, would not defeat the accused's right to be released on default bail:

> . "…a chargesheet, if filed by an investigating authority without first completing the investigation, would not extinguish the right to default bail under Section 167(2) CrPC…"[124]

121 The "First Information Report" is a document containing the allegations about the commission of an offence, which are given by an informant. See s 154, CrPC 1973.

122 Ritu Chhabaria (n 6).

123 ibid.

124 ibid [33].

The Court, therefore, encouraged an enquiry into the qualitative sufficiency of the charge-sheet to determine whether it resulted from the investigation's completion, or whether it was filed "only to scuttle the right of statutory bail".[125] The Court also examined the legislative history of Section 167(2), noting the past practice of indefinite adjournments sought by the state to enable the investigation's completion, for the Code of Criminal Procedure, 1898 stipulated an investigative time-period of only 15 days.[126] On this basis, the Court noted that the sixty/ninety-day limit was meant for investigations to be completed within the stipulated time, and no charge-sheet could be filed without the investigation's completion.[127] This meant that the product of an incomplete investigation could not defeat default bail, for that would be antithetical to Section 167(2)'s purpose. This judgement was, however, "recalled" in a procedurally dubious manner in Directorate of Enforcement v. Manpreet Singh Talwar,[128] with the Court later clarifying that this recall would not affect independent considerations of Section 167(2) applications. Reliance on Ritu Chhabaria, however, has been forbidden by the Court, meaning that courts are discouraged from enquiring into the contents of charge-sheets when deciding default bail applications.[129] Recently, in CBI v. Kapil Wadhawan, the Court has affirmed the prohibition on qualitative assessments of the contents of charge-sheets, holding that even if charge-sheets' content may appear subpar, indicative of an investigation's incompleteness, it is only the bare, formal filing of a document titled "charge-sheet" that is relevant in assessing default bail's availability u/s 167(2).[130]

The Court, therefore, appears unconcerned with default bail's theoretical underpinning lying in the imposition of an obligation on the state to undertake a genuine investigative endeavour, finding that the filing of any document by the police formally titled the charge-sheet would be sufficient to defeat the accused's right to be released. The state's defection from the bargain symbolized by default bail is being authorized, for the Court accepts the outcome of pre-trial detention without the state undertaking a genuine investigation process.

In other cases, however, courts have held that the charge-sheet must be "proper", meaning that they must not suffer from procedural infirmities. In Achpal v. State of Rajasthan, for example, – a peculiar case where the High Court mandated the charge-sheet to be filed only by a particular officer – the Court noted that the charge-sheet's filing by a different officer meant that no charge-sheet had been filed, and default bail would

125 ibid [29].

126 s167, Code of Criminal Procedure, 1898.

127 Ritu Chhabaria (n 6) [21].

128 *Directorate of Enforcement v Manpreet Singh Talwar* (2023) SCC OnLine SC 545.

129 *Directorate of Enforcement v Manpreet Singh Talwar* (2023) SCC OnLine SC 751.

130 *CBI v Kapil Wadhawan* (2024) 3 SCC 734 [23]. For a critique of this judgment, see Kartik Kalra, 'The Supreme Court, Default Bail, and the Question of 'Incomplete' Chargesheets' (The Proof of Guilt, 4 February 2024) <https://theproofofguilt.blogspot.com/2024/02/guest-post-supreme-court-default-bail.html> accessed 17 June 2024.

accrue.[131] The Court, however, remarked that once the appropriate officer filed the charge-sheet anew, nothing precluded a re-arrest on "cogent grounds".[132] The underlying reasoning of such remarks lies in the same conceptualization of default bail as an undeserved and ill-gotten receipt of liberty, as an exception to the prolonged pre-trial punishment that is due to each accused.

IV. MELANCHOLY TAKEAWAYS ON DEFAULT BAIL – CRIMINAL JUSTICE AND THE ASSUMPTION OF CRIMINALITY

The Court, therefore, has weakened default bail substantially in these three facets, rendering the regime largely toothless. At a conceptual level, case-law has consistently positioned default bail as a lower-tier concept than regular bail, repeatedly affirming its status as an "order-on-default", accruing only because of an error on the police's part.[133] Case-law on these three facets shows little concern with the underlying normative considerations with default bail discussed in Section II, being wholly ignorant towards the normative impermissibility of detailing an individual in the absence of a genuine investigative endeavour being undertaken by the state. It appears accepting towards the imposition of an indefinite "accused" status on an individual without the state's pursuit of its elimination, refusing to assess the content of charge-sheets to determine whether the state has, in fact, completed its end of the bargain to undertake a genuine investigation. Case-law does not recognize default bail to be a principle of procedure that pursues systemic efficiency, not having regard to a system-wide breakdown that the creation of riders and exceptions to Section 167(2) risks.

This interpretive look towards weakening default bail – apart from being vulnerable to critique based on its unprincipled and normatively unjustifiable nature – also prompts a question into why a negative institutional outlook towards default bail has emerged and solidified. One possible response in explaining such institutional behaviour, I propose, concerns the predominance of a factual, merits-based enquiry in assessing the availability of regular bail. An individual who stands accused of a non-bailable offence, and has been arrested by the police, would first file an application for regular bail, arguing that the allegations against them are factually untrue and that their release poses minimal risks to society. It is a rejection of this application – which, I have discussed above, results from a court's assessment of the allegations being likely – that causes their imprisonment for a duration that entitles them to be released on default bail, provided, of course, that a charge-sheet within this duration was not filed. The persons availing default bail are, therefore, persons who have suffered a rejection of regular bail, which is likely to have occurred on their case's merits.

---

131 *Achpal v State of Rajasthan* (2019) 14 SCC 599.

132 ibid [24] "…it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds…".

133 See *Gangi Reddy* (n 4); *Rustam* (n 98); *Aslam Babalal* (n 96).

A notion that the recipients of default bail have been deemed sufficiently guilty to warrant pre-trial detention, therefore, may possibly develop in adjudicating default bail cases, and consequently in shaping its doctrine. In an economy of criminal justice where the bail hearing screens persons to impose a sentence akin to pre-trial punishment, all those screened by it become sufficiently guilty for the criminal justice machinery to regard them as such, and the doctrine on default bail develops accordingly. Herbert Packer, in explaining the "crime control model" of criminal procedure, notes that such a system operates on the overarching assumption that the persons it governs are guilty since they have been screened by the state with this belief.[134] While an overall characterization of the Indian criminal justice machinery across Packer's (or other) theories is beyond the scope of this article, a tendency to treat persons screened once by the system as likely guilty might carry explanatory value for why default bail has received the judicial treatment that it has.

The permeation of the likely guilty logic in adjudicating default bail can be seen in action in a few cases discussed above. First, Gangi Reddy – the case primarily responsible for permitting re-arrests after obtaining default bail – arose from high-profile murder allegations levelled against a politician-accused, with an order of remand – a stage where the accused makes their case to be released on grounds akin to those of bail –[135] being passed by a court.[136] The police, however, were unable to file a charge-sheet within ninety days of remand, and the trial court released the accused on default bail.[137] Investigative agencies, after undertaking greater investigation and developing evidence suggesting the accused's involvement, filed an application to cancel the accused's default bail to re-arrest them, which the trial court, and correspondingly the High Court, rejected.[138] The High Court's reasoning was premised on the unconditional

134 Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 11, noting that in an ideal-type "crime control" model, a "presumption of guilt" operates on the understanding that the "screening processes operated by police and prosecutors are reliable indicators of probable guilt".

135 The "remand" hearing enables a court to assess whether an accused's detention is required, or whether they can be released pending trial. Apart from arguing for bail during the remand hearing, an accused may also argue that their arrest was procedurally unsound, necessitating release. For case-law on the enquiry during remand, and the grounds for bail to be considered therein, see *Satender Kumar Antil* (n 2) [47], noting that a person may argue for bail, and may be released accordingly by the Magistrate during a remand hearing, even without the filing of a formal application; *Gautam Navlakha v NIA* (2022) 13 SCC 542 [73], relying on *CBI v Anupam J Kulkarni* (1992) 3 SCC 141 for the proposition that bail's availability must be assessed, and bail accordingly granted at the remand stage itself. For making the argument of an arrest's vitiation due to its procedural conditions being unfulfilled, see *Prabir Purkayastha v State (NCT of Delhi)* (2024) SCC OnLine SC 934 [16]-[20], holding that the police's failure from furnishing the written grounds of arrest, at least for offences under the UAPA, vitiates it, and should be assessed during remand.

136 Gangi Reddy (n 4) [3].

137 ibid.

138 *CBI v Thummalapalli Ganga Reddy* (2021) Crl MP 791 of 2021 [District and Sessions Judge Kadapa, Andhra Pradesh]; *State of AP v T Gangi Reddy,* (2022) 1 HCC (AP) 293 [29]-[31].

nature of one's release under default bail that prevented a re-arrest, and risk-based grounds concerning the accused's release – the risk of them fleeing, influencing witnesses, and tampering with evidence – being minimal.[139] The Supreme Court, however, took a view that a serious offence's commission should be a factor sufficient to cancel bail, for justice would be frustrated by a view that disables courts from analyzing the case's merits – assessing factual allegations and evidence – in determining whether an accused should remain at liberty.[140] The High Court undertook this analysis subsequently, finding that the accused was likely guilty, cancelling his bail on this basis. The Court's view towards enabling a merits-based enquiry into cancelling bail,[141] it appears, may be traceable to its view of individuals already involved in the criminal justice machinery – through approval of remand, refusal of bail, or otherwise – being probably guilty, since the ends of justice require such persons to be continually imprisoned.[142] This may also be verifiable from the Court's subsequent treatment of the same case: the High Court, in its same order finding the accused likely guilty of having committed the offence, also remarked that the accused may still remain at liberty on furnishing bonds of Rs. 1 lakh.[143] In appeal, the Court stayed the operation of this segment of the judgment, directing the accused to be re-arrested after having been released on default bail.[144] Its postulation of a standard to re-arrest on merits, the High Court's merits-based finding of the accused's guilt, and the Court's ultimate direction to re-arrest the accused – all go to show the creation of doctrine influenced by notions of guilt attached to default bail's recipients, the Court directing particular outcomes to be achieved using this doctrine, and stepping-in to ensure that these outcomes are, in fact, achieved.

Second, consider the judgment in CBI v. Kapil Wadhawan, a similarly high-profile case, which arose from allegations of grave financial fraud. The accused's remand had been authorized, with ninety days in custody complete.[145] Though a charge-sheet had been filed by the investigating agency within ninety days, the trial court found the charge-sheet incomplete, for it did not show the investigation's completion.[146] The High Court concurred, finding that a substantial chunk of the investigation required was

139 *Gangi Reddy – HC I* (n 4) [29]-[31].

140 *Gangi Reddy* (n 4) [29]-[30].

141 State through CBI v T. Gangi Reddy @ Yerra Gangi Reddy (2023) Criminal Petition No 2995 of 2023 [High Court of Telangana] [45]-[46], noting that the "prima facie participation of [the] accused…in the commission of crime" can be seen, cancelling their release under default bail.

142 *Gangi Reddy* (n 4) [29].

143 *Gangi Reddy – HC II* (n 4) [59].

144 *Suneetha Nareddy v T Gangi Reddy @ Yerra Gangi Reddy* (2023) Special Leave to Appeal (Crl) No 6294/2023.

145 *Wadhawan* (n 130) [2]-[3].

146 *CBI v Kapil Wadhawan* (2023) SCC Online Del 3283 [High Court of Delhi], extracting in [8] segments of the trial court's judgment releasing the accused on default bail, citing the charge-sheet's incompleteness as against the accused.

incomplete and that a charge-sheet premised on an incomplete investigation could not defeat default bail.[147] The Supreme Court's judgment – in echoing the likelihood of the accused's guilt – proceeds to deny default bail, laying down as a matter of principle that no enquiry can be undertaken into a charge-sheet's contents to assess an investigation's completeness.[148] The implications of a systemic imposition of a "likely guilty" label are decipherable in two ways in Wadhawan. First, the Court finds that a Magistrate had already taken cognizance of the offence based on the charge-sheet, and the fact that the criminal justice machinery had been set in motion meant that the court was "satisfied about the commission of an offence".[149] The possible commission of an offence, evident from a Magistrate's cognizance of the offence against the accused, meant that default bail should anyways be unavailable. Such reasoning is clearly premised on default bail being unavailable[150] for those likely guilty, and this status being derivable from various stages of the criminal justice process – remand or cognizance. Second, and more importantly, the Court substantially twists the factual matrix of the instant case to deny the accused default bail, trivializing the extent of the investigation's incompleteness to shape the law in prohibiting an enquiry into charge-sheets' contents. While the trial court and High Court found the investigation incomplete as against the accused in the instant case, and the charge-sheet "piece-meal", intended to "ruse" their right to be released, the Supreme Court wholly ignores this finding, holding that the only possible infirmity with the charge-sheet was its alleged incompleteness against other accused.[151] Since the alleged financial fraud had multiple parties accused, the Supreme Court transformed the accused's allegation into one easily susceptible to rejection, which it then utilizes to comment on the legal prohibition of enquiring into the charge-sheet's contents to assess the investigation's completeness.[152] In other words, the Court builds a strawman of the accused's case to wholly forbid a charge-sheet's qualitative assessment, achieved through ignoring the argument that urges the investigation's incompleteness against the accused in this case, which it then invokes to comment on the legal unavailability of assailing a charge-sheet on grounds of its insufficiencies.[153] A likely reason for this

147 ibid [34]-[35], finding that "a major part of the fraud is yet to be investigated", that "the charge sheet so filed on the face of it was incomplete", and that it was filed "merely to ruse the statutory and fundamental right of default bail…"

148 ibid [25]-[26], holding that the accused has no "right to get default bail on the ground that the charge-sheet was an incomplete charge-sheet".

149 ibid [23].

150 ibid [25], noting that since "cognizance [had] been taken by the Special Court of the offences allegedly committed by [the accused], [they] could not have claimed the statutory right of default bail…"

151 The Supreme Court frames the issue to be the availability of default bail because of the "investigation qua some of the accused named in the FIR [being] pending", contrary to the judgment in Wadhawan – HC (n 145), assessing the investigation's incompleteness as against the accused in the instant case.

152 ibid [23].

153 For an expanded version of this argument, see Kalra (n 130), noting that "the Court's trivialisation of the instant chargesheet's flaws transform[ed] into a general legal prohibition on enquiring into its contents…"

sleight of hand, I consider, was the Court's specific unwillingness to release the accused on bail, based on its assessment of the likelihood of their guilt – which, in turn, could be derived from a failure of their arguments at remand, as well as a court's acts of having taken cognizance against them.

An analysis of the Court's reasoning, observations and underlying premises in Gangi Reddy and Wadhawan, therefore, offers insights of the role that a systemic allocation of pre-trial guilt has on doctrinal developments on default bail. A sense of guilt attaches to the accused through the rejection of their bail, continued remand, and, as seen in Wadhawan, a court's cognizance over the allegations against them. This sense of guilt becomes influential in the outcomes of cases before the Supreme Court, and consequently plays a substantial role in shaping doctrine, having the effect of weakening the default bail regime to minimize avenues for the release of those deemed likely guilty.

CONCLUSION

The judicial treatment of default bail, therefore, has rendered the regime very weak, and the Supreme Court's case-law has persevered to undermine its dimensions that are touted to claim its "indefeasibility". While cases such as Ravindran retain the accused's eligibility to obtain default bail as long as they outpace the police in submitting a timely application, the fact that the charge-sheet could be anything and the court is forbidden from enquiring into it makes the state's job quite easy, authorizing the state's defection from the bargain that default bail symbolizes. An individual faced with allegations of an offence becomes an "accused" indefinitely, for the state may develop a suspicion of their guilt at any moment, and take them into custody again. Even if an accused succeeds in the filing rat race, their release is futile if a re-arrest could occur any moment, the only procedural requirement for which is a charge-sheet's filing whose contents are to be unquestionably accepted. This legal landscape – apart from being influenced by a notion of the likely guilt of its recipient class – is based on minimal normative reasoning of the purposes, compromises, and larger interpretive principles relevant in deciding the law on default bail. Case-law enabling re-arrests and prohibiting an enquiry into charge-sheets' contents authorizes the state's defection from a duration-definite duty to eliminate the legal limbo between guilt and innocence, and the extinguishing regime concentrates institutional attention towards the otherwise irrelevant variable of the moment of filing a document in court. The game, therefore, becomes rigged in the state's favour, with a veneer of opportunity to the accused in filing a document a minute early than the police being invoked to tout the regime's fictional "indefeasibility".[154] The Court's initial observations of Section 167(2) serving as a "paradise for criminals", I submit, appear to be the overarching interpretive framework with which the law on default bail has developed.

---

154 See *Kapil Wadhawan* (n 130) [15] and *Gangi Reddy* (n 4) [28], referring to default bail as an "indefeasible" right of the accused, yet arriving at conclusions discussed in Section IV.

NEURODIVERGENCE IN LEGAL EDUCATION

*Priyam Bhattacharya**

ABSTRACT

The experience of neurodivergent students in legal education differs from that of neurotypical students. Mapping the causes of this incongruence cannot be solely attributed to their differing cognitive patterns. What becomes the larger cause of this distinction is the widespread and deep-rooted bias against non-normative ways of cognition and disability.

The present inquiry aims to highlight the experiences and struggles of neurodivergent law students. It outlines how the experience of neurodivergence is negotiated with the identity of being a law student, specifically in the context of the prominent, limiting, and abled-bodied idea of an ideal law student. This negotiation often entails a tough bargain between expressing one's authentic self while also seeking acceptance. This internal scuffle often pushes the student to mask their neurodivergence in the face of social stigma, which further creates a severe deficiency in social and academic citizenship and a sense of belonging.

Keywords: *Neurodivergence, Legal Education, Masking, Belongingness and Accommodations*

* Priyam Bhattacharya works as a counseling psychologist. She completed her Undergraduate and Master's in Psychology from the University of Delhi.

I. INTRODUCTION

At the inception of the present inquiry, the preliminary thoughts about this paper were being discussed with a former law student, Y. She studied law in New Delhi and worked in the discipline for a while. When the focal point of the paper, that is to understand the experience of law students with neurodivergence, was brought up, she suggested with caution, "I am sure there are many law students and practitioners who are neurodivergent, but I am doubtful if many would like to come out and talk about it." The conversation flowed into the details about how the privacy of the participants would be a crucial and non-negotiable prerequisite in the present endeavour. She concluded by saying "I would ask around, but I will be happy if even one person responds." On the surface level, this seemed like an empirically mundane issue of the 'sample', but it was immediately realised that Y's suggestion and apprehension spoke of the larger structural issue at hand. It posed two exceedingly pointed questions: Are there truly no neurodivergent students in legal education? And if the prevalence is not nil, why would they not talk about it?

Ruminating with these two initial questions effortlessly chain-reacts into probes about what causes and reinforces this apprehension and, further, how it affects the academic and interpersonal journey of the student, their psychological well-being, and self-concept. These probes became the guiding force in outlining the scope of the present paper. The focus of this inquiry was to understand and highlight the experience of neurodivergent individuals in legal education in the context of contemporary discourse around neurodivergence in higher education. To ensure that the inquiry was rooted in the lived experiences of the students, an open-ended interview was shared via a Google Form with the participants. Three former law students with neurodivergence agreed to share their experiences. To subsequently gather an in-depth understanding of the neurodivergent experience and its relationship with psychological well-being, two mental health practitioners who extensively work with the population were contacted and requested to share insights from their practice in a similar open-ended questionnaire.

The themes elicited from the responses and their echoes in the coeval issues around neurodivergence are discussed in the next sections. The present paper underlines the contemporary understanding and statistical trends of neurodivergence. It further addresses how the sense of self of a neurodivergent student is affected in the context of a culturally potent schema of an 'ideal law student'. It subsequently dives into the issue of weakened recognition and self-perception of one's strengths in the face of this ideality. It focuses on masking used in classrooms, and interpersonal interactions to get through

this gap experienced from the neurotypical ideality. The paper also discusses the effects of masking on seeking institutional accommodations and its enduring consequences on the sense of belongingness and psychological well-being.

II. DEFINING NEURODIVERGENCE

Understanding neurodivergence poses a special consideration. One could easily fall into the constraints of the dominant biomedical model and visualise neurodiversity just as brain disparities. As much as the neural disparity is a valid consideration in understanding the discourse of neurodivergence, it is also significantly vital to trace its birth to the paradigms of diversity and disability rights.[1] Judy Singer, the sociologist who coined the term neurodiversity, expresses that it is not only a stagnant neurological reality but also extends to a political movement.[2] Stanford School of Medicine describes neurodiversity as "a concept that regards individuals with differences in brain function and behavioural traits as part of normal variation in the population."[3] This approach is based on the understanding that individuals are different and that diversity is the reality of human existence.

The extension of this diversity is not limited just to observable physical features, cultural idiosyncrasies, or differing nature of social learnings. Diversity also lives in the structural makeup of the brain, as well as psychological and cognitive processes.[4] Thus, just like other facets of biodiversity, humans also have neural diversity, and our meaning-making of the world and the interactions within it are non-identical.[5] This diversity is present in the structure, functionality, and processing abilities of the brain. The commonalities found in these are often seen as socially desirable and become the markers of the average processing speed, memory, and abilities. These are termed as neurotypical compared to the deviancies seen from these norms.[6] These fragmentations suffer from similar social inequalities: the typical becomes the preferred, desirable, and thus superior in hierarchies.

---

1 Nick Walker, 'Neurodiversity: Some Basic Terms and Definitions' (Neuroqueer: The Writings of Dr. Nick Walker, 2023) <https://ndclibrary.sjc1.vultrobjects.com/> accessed 8 August 2024.

2 John Harris, 'The mother of neurodiversity: how Judy Singer changed the world' (The Guardian, 5 July 2023) <https://www.theguardian.com/world/2023/jul/05/the-mother-of-neurodiversity-how-judy-singer-changed-the-world> accessed 8 August 2024.

3 'Stanford Neurodiversity Project' (Department of Psychiatry & Behavioral Sciences, Stanford Medicine) <https://med.stanford.edu/neurodiversity.html> accessed 8 August 2024.

4 Mylène Legault and others, 'From neurodiversity to neurodivergence: the role of epistemic and cognitive marginalization' (2021) 199 Synthese 12843.

5 Thomas Armstrong, 'The Myth of the Normal Brain: Embracing Neurodiversity' (2015) 17(4) AMA Journal of Ethics 348.

6 Nicole Baumer and Julia Frueh, 'What is neurodiversity?' (Harvard Health Publishing, 23 November 2021) <https://www.health.harvard.edu/blog/what-is-neurodiversity-202111232645> accessed 8 August 2024.

Within the clinical paradigm, neurodivergence is synonymous with neurological and developmental conditions such as Autism spectrum disorder, Attention-deficient hyperactivity disorder, and learning disabilities.[7] The clinical approach is criticised as it purely relies on medical underpinnings and often views the disability existing within the individual. It falls back on solutions and cures that can alter the individual with the disability/divergence, as close as possible to an 'able'-neurotypical individual.[8]

Alternatively, a strong social model suggests that the difference only becomes a disability because of the barriers created by a society that makes the world inaccessible for the disabled person.[9] The neurodiversity approach and movement find their home in this social model of disability and the bio-psycho-social model of diseases, which refuses to visualise the solution in terms of altering the person with neurodivergence or bringing their cognition and behaviour closer to neurotypical individuals. The approach addresses the issues by reforming and reshaping the environment.[10]

It is crucial to note that the perspectives within the discourse of neurodivergence are far from unipolar. The historically commanding clinical and medical model is often criticised for pathologising atypical ways of cognition and prescribing a rigid 'normality'. This criticism comes from the social model of disability that roots the inequality within the social structures and not the individual. However, in recent times, the neurodiversity approach has also come under serious criticism, as it is seen to be only imagined as a 'normal biological variation'. This fails to accommodate individuals who face serious neurodevelopmental challenges and can significantly benefit from medical interventions.[11]

Gwendolyn Kansen, a woman with autism, writes in her article, “I think it's great that people want to normalise autism. But sometimes they gloss over how disabling it can actually be.” She adds, “We can't have a truly productive discussion about autism

7 Helen Bewley and Anitha George, ‘Neurodiversity at Work’ (2016) National Institute of Economic and Social Research, available at: <https://www.tourettes-action.org.uk/storage/downloads/1482243777_Neurodiversity_at_work_0916-(1).pdf> last accessed on 8 August 2024.

8 Jessica MF Hughes, 'Increasing Neurodiversity in Disability and Social Justice Advocacy Groups (White Paper, Autistic Self Advocacy Network 2016) <https://autisticadvocacy.org/wp-content/uploads/2016/06/whitepaper-Increasing Neurodiversity-in-Disability-and-Social-Justice-Advocacy-Groups.pdf> accessed 8 August 2024.

9 Rhoda Olkin, ‘Could you hold the door for me? Including disability in diversity’ (2002) 8(2) Cultural Diversity and Ethnic Minority Psychology 130.

10 Patrick Dwyer, ‘The Neurodiversity Approach(es): What Are They and What Do They Mean for Researchers?’ (2022) 66 Human Development 73.

11 Moheb Costandi, “Against Neurodiversity” (Aeon, 12 September 2019) <https://aeon.co/essays/why-the-neurodiversity-movement-has-become-harmful> accessed 8 August 2024.

acceptance by sugarcoating the condition. Not until we accept every part of autism will we start finding solutions."[12] Proponents of the neurodiversity approach respond to this criticism by highlighting that the lens of the approach isn't opposed to interventions that can improve the quality of life by addressing speech issues, self-harm issues, mental health issues, or issues of mobility. It rather distances itself from clinical and medical interventions that aim to alter traits simply because they are atypical.[13] Geraldine Dawson, a professor at Duke Center for Autism, questions this normality forced upon the people on the autism spectrum. She states, "If someone rocks back and forth because it makes them feel calmer" I feel that our society should be accepting of different ways of being in the world.[14]

In this broader context of varying approaches, the present inquiry falls back on the bio-psycho-social model.[15] To understand the experiences of the participants, that is, it takes note of their clinical diagnosis while relying extensively on their idiosyncratic challenges and strengths in the context of their legal educational journeys.

III. PREVALENCE

Even a swift look at global and national epidemiological findings puts rest to the question of whether or not there are neurodivergent students in legal education. The statistical trends make it clear that neurological diversity is not an alien or non-relevant issue to be cured; it is a biological reality suffering from social inequality and marginalisation that needs to be addressed and rightfully accommodated.[16] The present section discusses the national and global trends of neurodivergence and subsequently sheds light on the growing number of neurodivergent students in legal education. The section also introduces the clinical pictures of the Diagnostic and Statistical Manual of Mental Disorders 5 as, despite the growing criticism of its pathologising approach, it is extensively used for research and diagnostical purposes, which in turn decides the possibility and nature of institutional accommodations.

---

12 Gwendolyn Kansen, 'What the Neurodiversity Movement Gets Wrong About Autism' (Pacific Standard, 25 May 2016) <https://psmag.com/news/what-the-neurodiversity-movement-gets-wrong-about-autism> accessed 8 August 2024.

13 Ari Ne'eman, 'When Disability Is Defined by Behavior, Outcome Measures Should Not Promote "Passing"' (2021) 23(7) AMA Journal of Ethics E569.

14 Devrupa Rakshit, 'How Autism Interventions Are Starting to Move Away From 'Fixing' Autistic People' (The Swaddle, 21 November 2022) <https://www.theswaddle.com/how-autism-interventions-are-starting-to-move-away-from-fixing-autistic-people> accessed 8 August 2024.

15 Robert J Gatchel and others, 'The biopsychosocial approach to chronic pain: Scientific advances and future directions' (2007) 133(4) Psychological Bulletin 581.

16 Autumn K Wilke and others, 'Access and Integration: Perspectives of Disabled Students Living on Campus' (2019) 46(1) University Author Recognition Bibliography 46.

The prevalence of neurodivergence in legal education can be comprehended from a 2023 survey by Bloomberg Law, where 2700 law students, legal educators, and professionals were interviewed. A total of 25% of law students identified themselves as neurodivergent compared to only 7% of the total professionals. The difference in this self-report can possibly be attributed to the growing awareness about neurodiversity and higher mental health literacy at large.[17] Also, 7.6 % of students, 5.0% of attorneys, and 7.7% of law teachers said they would rather not respond to it, pointing to the possible apprehension of self-disclosure.[18] Further, the U.S. Department of Education estimates that 20% of undergraduate students and 12% of graduate students have a diagnosis that falls under the category of neurodivergent.

In terms of diagnostic purposes and classification of mental health disorders, the Diagnostic and Statistical Manual of Mental Disorders 5 understands neurodevelopmental disorders as a set of conditions that typically manifest in the early periods and lead to impairments of personal, social, academic, or occupational functioning.[19] They can affect specific functions or lead to global impairments. The DSM-5 arranges neurodevelopmental disorders into six subcategories: Intellectual disability, Communication disorders, Autism Spectrum Disorder *(ASD)*, Attention-Deficit Hyperactivity Disorder *(ADHD)*, Neurodevelopmental motor disorders, and Specific learning disorders.[20] It is crucial to note that these diagnostic stratifications are heavily criticised by the social model, which sees neurodivergence as a reality and not as 'a wrong way of being'.[21] However, given the heavy reliance on clinical models for most statistical data, the diagnostical categories are mentioned here.[22]

The diagnostic manual outlines the clinical picture of ASD as deficits in social communication and interaction, restricted-repetitive patterns of behaviour, interests, or activities, repetitive motor movements, use of objects or speech, insistence on sameness, inflexible adherence to routines, or ritualised patterns of verbal or nonverbal

17 AF Jorm, 'Mental health literacy: Public knowledge and beliefs about mental disorders' (2000) 177 British Journal of Psychiatry 396.

18 'Law School Preparedness: Fall 2023' (Bloomberg Law) <https://aboutblaw.com/bcyE> accessed 8 August 2024.

19 Deborah J Morris-Rosendahl and Marc-Antoine Crocq, 'Neurodevelopmental disorders the history and future of a diagnostic concept' (2020) 22(1) Dialogues in Clinical Neuroscience 65.

20 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (5th ed., American Psychiatric Publishing, 2013).

21 Erin Gregory, 'What does it mean to be Neurodivergent' (Forbes, 20 February 2024) <https://www.forbes.com/health/mind/what-is-neurodivergent/> accessed 16 August 2024.

22 Peter Tyrer, 'A comparison of DSM and ICD classifications of mental disorder' (2018) 20(4) Advances in Psychiatric Treatment 280.

behaviour, highly restricted, fixated interests that are abnormal in intensity or focus, hyper- or hyporeactivity to sensory input, or unusual interest in sensory aspects of the environment.[23]

The prevalence of ASD and ADHD is quite high.[24] Worldwide data by the World Health Organization indicates that 1 in 160 children have autism.[25] The national incidence rate of ASD in children is 1 in 68, showing a congruency with the global numbers.[26] According to a 2023 report by ETHealthWorld, about 18 million people in India are diagnosed with autism, and around 1 to approximately 1.5% of children from the ages of two to nine are diagnosed with the disorder.[27] Another disorder that frequently gets mentioned in the discourse of neurodiversity is Attention Deficient Hyperactivity Disorder; it is defined as a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development. It is observable and present in two or more settings, and symptoms are present in the person before the age of twelve.[28] According to the ADHD Institute in Japan, the world prevalence of ADHD ranges from 0.1% to 8.1%. The results from their meta-analysis show a 7.1% pooled prevalence of ADHD among children and adolescents.[29]

DSM-5 classifies Specific Learning Disorders as difficulties learning and using academic skills that include slow or inaccurate reading, issues in written expression, or impairments in mathematical reasoning and understanding without the presence of intellectual impairments.[30] According to the International Dyslexia Association, it has a prevalence of about 10%. Dyslexia is the most common learning disability and has a

---

23 American Psychiatric Association (n 20) 14.

24 Valeria Scandurra and others, 'Neurodevelopmental Disorders and Adaptive Functions: A Study of Children With Autism Spectrum Disorders (ASD) and/or Attention Deficit and Hyperactivity Disorder (ADHD)' (2019) 10 Front Psychiatry 673.

25 'Autism' (World Health Organisation, 15 November 2023) <https://www.who.int/news-room/fact-sheets/detail/autism-spectrum-disorders> accessed 8 August 2024.

26 'Early Detection and Diagnosis of Autism in India: Importance and Challenges' (India Autism Center, 25 October 2023) <https://www.indiaautismcenter.org/early-detection-and-diagnosis-of-autism-in-india-importance-and-challenges/> accessed 8 August 2024.

27 'World Autism Awareness Day 2024: Theme, date, history, significance and other details' (The Economic Times, 01 April 2024) <https://economictimes.indiatimes.com/news/new-updates/world-autism-awareness-day-2024-theme-date-history-significance-and-other-details/articleshow/108950342.cms?from=mdr> accessed 8 August 2024.

28 American Psychiatric Association (n 20) 14.

29 Johny K Joseph and Babitha K Devu, 'Prevalence of Attention-Deficit Hyperactivity Disorder in India: A Systematic Review and Meta-Analysis' (2019) 16(2) Indian Journal of Psychiatric Nursing 118.

30 Cécile Di Folco and others, 'Epidemiology of developmental dyslexia: A comparison of DSM-5 and ICD-11 criteria' (2022) 26(4) Scientific Studies of Reading 337.

prevalence ranging from 3 to 17.5% among school-age children.[31] Research also points out that 10 to 15% of Indian children have dyslexia.[32] Within the national surveys, a 2022 report of the Office of the Chief Commissioner for Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment, points to possible trends in the variance of neurodiversity in India. Although these categories in this report: mental retardation and mental illness, cannot be superimposed on the categories and dimensions of neurodiversity. However, it does depict the approximate percentages of the students with these conditions.

It mentions that 19,98,692 individuals in India have speech and language disabilities, 15,05,964 suffer from mental retardation, and 7,22,880 from mental illness. (The names of the disabilities are mentioned in the categorisation of The Rights of Persons with Disabilities Act, 2016).[33] Among disabled non-workers with mental retardation, 24.5% are students; among the disabled people with mental illness, 9.3% are students; and for the category of persons with multiple disabilities, 15% of the total are students.[34]

IV. IMPLICATIONS FOR LEGAL EDUCATION

Reviewing the outlay of the statistical trends is essentially the first step to remind us that neurodiversity is indeed the reality of human existence. In recent times, the question of inclusive law schools has gained serious momentum.[35] Rising attention is being paid

31 Akhila B Sunil and Others, 'Dyslexia: An invisible disability or different ability' (2023) 32(1) Ind Psychiatry J S72.

32 ibid.

33 'Acts, Rules & Regulations' (Department of Empowerment of Persons with Disabilities) <https://depwd.gov.in/acts/> accessed 8 August 2024.

34 Office of the Chief Commissioner for Persons with Disabilities (Divyangjan), 'Annual Report 2021-22' (Department of Empowerment of Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment) <http://www.ccdisabilities.nic.in/sites/default/files/2023-11/CCPD_AR_English_2021-22.pdf> accessed 8 August 2024.

35 Devrupa Rakshit, 'Making Indian Legal Education More Inclusive Is Key to Building a More Equitable Judicial System' (The Swaddle, 22 June 2021) <https://www.theswaddle.com/making-indian-legal-education-more-inclusive-is-key-to-building-a-more-equitable-judicial-system> accessed 8 August 2024.

to the specific nature and structure of accommodations required in legal education.[36] In this context, any community that claims to be working for the welfare of all its members cannot minimise social citizenship.[37] Of its neurodivergent population. The previously outlined data loudly echoes that the student population as a subset of the larger population doesn't exist in a vacuum and is indeed neurodiverse.[38]

The seriousness of the question about inclusion intensifies in the case of neurodivergence as it is often invisible. Understanding the experience of the neurodivergent population thus becomes the foundational pre-requisite in designing any accommodation and strategies.[39] Differing contexts breed varied contextual differences, and the specific nature of legal education and law schools calls for specific reconsiderations.

Barriers, discrimination and lack of necessary accommodation are common for people with disability to encounter in the legal profession and education.[40] Transitioning to law school is challenging for most students, but the added pressures of barriers to equal education for students with neurodivergence raise profound questions about their social citizenship.[41] It is pivotal to be cognizant of their distinctive experiences to deconstruct structural challenges and remove these barriers to their education.[42] Discussion in the next sections map the major facets of the experiences and strains of neurodivergence in legal education.

A. Incomplete Schema of a Law Student and Self-Concept

The dialogues of career choice often circulate around how well one fits into one's desired profession. It seems like a rational implication that possessing the traits that

36 Shashank Pandey, 'Accommodating the Differently Abled & the CLAT Consortium' (Bar and Bench, 28 December 2020) <https://www.barandbench.com/apprentice-lawyer/accommodating-the-differently-abled-the-clat-consortium> accessed 8 August 2024.

37 Sandra Liebenberg, 'Social Citizenship: A Precondition for Meaningful Democracy' (1999) 40 Citizenship 59.

38 Scott Michael Robertson, 'Neurodiversity, Quality of Life, and Autistic Adults: Shifting Research and Professional Focuses onto Real-Life Challenges' (2010) 30(1) Disability Studies Quarterly 1.

39 Michael Edward Goodwin, 'Making the Invisible Visible: Let's Discuss Invisible Disabilities' (2020) Special Conference Edition Journal of the Human Anatomy and Physiology Society 62.

40 Peter Blanck and Others, 'Diversity And Inclusion In The American Legal Profession: First Phase Findings From A National Study Of Lawyers With Disabilities And Lawyers Who Identify As LGBTQ+' (2020) 23(1) University of the District of Columbia Law Review 23.

41 Amy L Accardo and others, 'Valuing Neurodiversity on Campus: Perspectives and Priorities of Neurodivergent Students, Faculty, and Professional Staff' (2024) Journal of Diversity in Higher Education 1.

42 Heidi E. Ramos-Zimmerman, 'The Need to Revisit Legal Education in an Era of Increased Diagnoses of Attention-Deficit/Hyperactivity and Autism Spectrum Disorders' (2018) 123(1) Dickinson Law Review 113.

match the demands of the profession would eventually guarantee success; that is what the student is competent in and can eventually gain proficiency in.[43] However, the way this fit is understood in everyday contexts doesn't always speak of this reflection that aptitude has on the fit; rather, it often assembles an incomplete, stereotypical, and skewed archetype of a law student.[44] The linchpin of this ideal law student is often rotating on an assumed identity associated closely with success and not skill development. Further, it constricts the definition of how this 'success' is pictured.

Kelly highlights that cognitive biases are often at play when the preciseness of this definition is envisioned. It frequently follows a singular and reconfirming idea of how a law student should be. Thus, harsh limits are placed on who gets to be an ideal lawyer. [45] The author underlines the confirmation bias at play here, wherein there is a tendency to recruit and select students who are more similar to the people selecting them and maintain the status quo, which leaves negligible space for any form of diversity. This tendency raises grave questions about diversity in law schools.

These biases have significant ramifications on the chances of employment and community citizenship; it is noted that the rate of employment of people with ASD is far less than people with neurotypical cognitions.[46] People with an early childhood ADHD diagnosis show lesser attainments in education and employment as compared to ones without a diagnosis because of the social and structural barriers.[47]

In the present inquiry to understand the schematic motif of this 'good fit', the three participants were prompted to write about who, in their educational experience, would be considered a good law student. O, a former law student who got diagnosed with ADHD in 2017, writes that even though the description of an ideal law student is a subjective matter, according to their professors' perspective, it will repeatedly range between someone who can rote learn to someone exhibiting confidence. A similar impression surfaces in the responses of H, another former law student in his twenties. He

43 Georgy G Rogozin, 'An aptitude test to forecast success in the dispatching activities of graduating students' (2005) 4(2) World Transactions on Engineering and Technology Education 249.

44 Rand Jack and Dana Crowley Jack, 'Women Lawyers: Archetype and Alternatives' (1989) 57(6) Fordham Law Review 933.

45 Katherine Kelly, 'Be Curious, Not Judgmental: Neurodiversity in Legal Education' Ohio State Legal Studies Research Paper No. 830, 2024 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4747401> accessed 8 August 2024.

46 Darren Hedley and others, 'Employment and Living with Autism: Personal, Social and Economic Impact' in Santoshi Halder and Lori Assaf (eds), *Inclusion, Disability and Culture*. An Ethnographic Perspective Traversing Ablities and Challengers (Springer 2017).

47 Aparajita B Kuriyan and others, 'Young adult educational and vocational outcomes of children diagnosed with ADHD' (2013) 41(1) Journal of Abnormal Child Psychology 27.

writes that the characteristics that are seen as a 'good fit' for legal education often involve traits like higher confidence along with good analytical ability, capacity to work hard, and willingness to read extensively.

H has Attentional Deficient Disorder, which is a comorbidity to his obsessive-compulsive disorder. He explains that he struggles with chronic procrastination, inability to focus for over a span of 10-15 minutes, and is only able to work at the final moment, which is often too close to a deadline. When asked about what aspects of his neurodivergence don't fit into the ideal definition he provided, he mentioned meeting deadlines and working continually hard.

O, who also deals with issues in focusing, explains that he gets distracted much faster compared to his peers and subsequently deals with issues in rote learning. He mentions that he also struggles with issues of tasks, as finding the willpower to do them mostly seems challenging. Pointing to the issue of procrastination, which is highly common in ADHD.[48]

Another participant, N, jots down something similar. N was diagnosed with ADHD in 2015 and recently finished her LLM degree. She writes a good law student is considered to be a person who has good memory, logic, and reasoning. When answering the question about the parts of her neurodivergence that do not align with the provided definition, she mentions "all of the above." N describes her issues with attention, time blindness,[49] executive dysfunction, lack of focus on non-interesting things, decision paralysis, and the constant need for sensory stimuli.

The respondents show a big disparity between who would be considered an ideal law student and how far they see themselves from this ideal in the context of their neurodivergence. This experience of not fitting into the imagined epitome brings turbulent feelings of inadequacy, less self-efficacy, and a severe underestimation of their strengths.[50]

A significant facet of this idea of an ideal law student is that they are overachievers and over-produce outputs.[51] If all these traits are layered on one another, the image

48 Marios Adamou and others, 'Occupational issues of adults with ADHD' (2013) 13 BMC Psychiatry 59.

49 R McGee and others, 'Time Perception: Does It Distinguish ADHD and RD Children in a Clinical Sample?' (2004) 32 Journal of Abnormal Child Psychology 481.

50 Deanne Lynn Clouder and others, 'Neurodiversity in higher education: a narrative synthesis' (2020) Higher Education 80.

51 Katherine Kelly (n 45) 35.

constructed of an ideal -Type A[52] law student that comes up looks far from diverse for both neurodivergent as well as neurotypical law students.[53] Rather, one would be compelled to consider if anyone realistically fits the silhouette of this 'ideal' law student completely, identically, and continually in their entire educational journey. Furthermore, research also suggests that this ideality doesn't always determine success. This especially holds true when the demands of the legal market are looked at; the demands are rigorous, but they are also diverse. That is, it is willing to accept multiple and diverse types of "ideal law students".[54]

V. INVISIBILISATION OF STRENGTHS

One might think that one's struggles with neurodivergence and the distance felt from this 'ideal' schema would make law an unsatisfactory career match. A pessimistic ableist idea[55] would guide us toward that expectation. The assumption that a typical mind would have all perfect functions and a neurodivergent mind would have all the non-desirable ones is gently overthrown by the further responses of the participants.[56]

When asked about how their neurodivergence has helped them in legal education, N writes that pattern recognition has proven to be an advantage. O states, "I feel my ADHD has always allowed me to analyse a situation from multiple perspectives, and that sometimes makes me feel more confident of my abilities as a lawyer." H looks back and points out his strengths, "I do believe that I have excelled under pressure due to the very characteristics that make it difficult to take on more long-term projects. This aided me when I was a litigator, and it also served me well during my LLM as there was a continuous spate of deadlines and exams." The cultural preoccupation with this perfect fit often invisibilises the strengths that neurodivergent students have.[57]

The medical outlook of neurodivergence pathologises the variation in diversity, and the clinical picture of the attentional disorders falls short and seems two-dimensional

52 Richard J Contrada and others, 'Personality and Health' in Lawrence A Pervin and Oliver P John (eds), *Handbook of Personality: Theory and Research* (Guillford Press, 1990).

53 Zeus Leonardo and Alicia A Broderick, 'Smartness as Property: A Critical Exploration of Intersections Between Whiteness and Disability Studies' (2011) 113(10) Teachers College Record: The Voice of Scholarship in Education 2206.

54 Katherine Kelly (n 45) 35.

55 Carli Friedman and Aleksa L Owen, 'Defining Disability: Understandings of and Attitudes Towards Ableism and Disability' (2017) 37(1) Disability Studies Quarterly 1.

56 Charlotte Webber and others, 'Representation in fiction books: Neurodivergent young people's perceptions of the benefits and potential harms' (2024) Neurodiversity 2.

57 Carli Friedman and Aleksa L Owen, 'Defining Disability: Understandings of and Attitudes Towards Ableism and Disability' (2017) 37(1) Disability Studies Quarterly 1.

when one looks at the varied strengths harnessed because of and as well as in spite of these cognitive differences. A parallel sentiment is echoed in Peter O'Neil's interview. Peter is an autistic attorney and author from Seattle. He was diagnosed with Autism at the age of 65. Post his diagnosis, he realised that what he thought were his strengths as an attorney were actually the determinants of the clinical picture of his ASD diagnosis. He writes, "As I studied what it means to be autistic, I began to realise that my persistence, my eye for detail and patterns, my ability to focus, my visual style of thought, my creativity, my ability to form an intense interest in the products that injure my clients and my ability to work alone are common with my so-called disorder."[58]

Michael Taylor, a Ph.D. candidate of law from Canada, writes in an autobiographical blog, "My dyslexia has also left me with many gifts. Since I struggled to learn with text, I became a great speaker. I love talking, listening, and engaging people with their ideas. I often see more than most people because I see all the various pieces at one time. I have an amazing sense of direction, visually mapping the world around me. I can now read faster than most people because I read the shape of words. I also learn by picturing individual pieces and have an almost photographic memory for visual things. I can take something apart (like a clock) and put it back together perfectly."[59] He also adds that he struggles with spellings, such as "I always spell the as the," names, and directions. He explains that his dyslexia have its struggles but he has learnt to thrive with it.

The majority of research on ASD has been deficit-based; recent developments also call for a strength-based approach to balance out this limitation- heavy lens.[60] Just like neurotypicals, neurodivergent individuals have areas they are proficient in compared to areas they would struggle in.[61] One example where limitations can transform into advantages is the clinical issue of prolonged attention and possessing limited areas of interest in ASD. These patterns of thinking and processing can become highly valuable in situations and areas of work that require one to maintain deep focus and be in the flow;

58 Peter O' Neil, 'My so-called 'disorder' made me a better attorney' (The Seattle Times, 12 May 2023) <https://www.seattletimes.com/opinion/my-so-called-disorder-made-me-a-better-attorney/> accessed on 8 August 2024.

59 Michael Taylor, 'Dyslexia Stories: Michael Taylor' (Dyslexia Canada, 11 August 2021) <https://dyslexiacanada.org/en/blog/dyslexia-stories-michael-taylor#:~:text=My%20name%20is%20Michael%20Taylor,a%20soldier%20and%20a%20teacher> accessed on 8 August 2024.

60 Robert D Austin and Gary P Pisano, 'Neurodiversity as a Competitive Advantage' (2017) 95(3) Harvard Business Review 96.

61 Aimee Grant and Helen Kara, 'Considering the Autistic advantage in qualitative research: the strengths of Autistic researchers' (2021) 16 Journal of the Academy of Social Sciences 589.

this, combined with the hyper-focus on details and keen interest, can be extremely adaptable and helpful.[62]

Contrary to the widespread myth that there is no space for neurodiversity in legal classroom studies, it is suggested that different ways of processing information add varied perspectives to classroom discussions and make the learning process more enriching for all members.[63] Research indicates that having a non-diverse group can lead to groupthink; that is, if there is a lack of diversity in the group, including low cognitive diversity, then it puts limits on the creative output of the group.[64] Studies show that, when planned effectively and if introduced at the right stage, legal education, collaborative-cooperative learning, and writing can aid in legal classrooms; that is, it allows the students to share and maximize their strengths and work on their points of struggles.[65] Contrary to predominant belief, a legal classroom can benefit from more than one kind of strength. Similarly, it can also accommodate and address varied kinds of weaknesses.

VI. MASKING

Almost all neurodivergent individuals grow up learning to 'mask', that is to partially or totally conceal their neurodivergence. Masking is constantly reinforced by the social structures as presenting 'typical' ensures a higher degree of social, emotional, and even physical safety. How one is perceived has lasting effects on one's academic and classroom experiences. The collective often suffers from the Halo effect when working with individuals who have a disability. The presence of this effect is often part of the classroom interactions and also affects grading.[66] American Psychological Association describes the Halo Effect as a rating bias in which a general evaluation (usually positive) of a person, or an evaluation of a person on a specific dimension, influences judgments of that person on other specific dimensions.[67] The overall exaggerated and positive evaluation of all the characteristics of the person is based on a singular trait or perception.

---

62 ibid.

63 Thomas Armstrong, 'First, Discover Their Strengths' (2012) 70 Educational Leadership 10.

64 Kaija A DiPillo, 'Diversity, Cohesion, and Groupthink in Higher Education: Group Characteristics and Groupthink Symptoms in Student Groups' (MA Thesis, Youngstown State University 2019) <https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=ysu1558780869354439&disposition=inline> accessed 8 August 2024.

65 Elizabeth L Inglehart and Others, 'From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom' (2003) 9 Legal Writing: The Journal of the Legal Writing Institute 185.

66 Thomas Hugh Feeley, 'Evidence of Halo Effects in Student Evaluations of Communication Instruction' (2002) 51(3) Communication Education 225.

67 Richard E Nisbett and Timothy D Wilson, 'The Halo effect: Evidence for Unconscious Alteration of Judgments' (1977) 35(4) Journal of Personality and Social Psychology 250.

Such as, if a student is seen to be confident in the first impression by their peers and educators, they may assume that the student is also smart, diligent, well-mannered, and competent because of this perceived cognitive halo around them. If this tendency is not reflected upon by individuals and communities, then the students with disability can suffer immensely.

As already discussed, the atypicality of the communication style of an autistic student may be wrongly ascribed to them being rude, asocial, and may assessed as difficult to work with which would severely affect the journey of the student.

This all-bad and all-good idea of atypical and typical cognition, respectively, often braided with the stereotypes about neurodivergence, affects the well-being, social, and academic citizenship of the neurodivergent students. These students are often suffering from stereotype threats,[68] That is they are reluctant to present their original and diverse ways of behaving and thinking as these diversions from the norms are often perceived negatively by others.[69] The common stereotypes that are unfortunately associated with people who are neurodivergent are that they are incapable of performing in class, are unable to study well, are asocial and intellectually inferior. Thus, voicing one's behavioural and cognitive atypicality in a competitive climate that is immensely preoccupied with a straight-jacketed idea of 'smartness' comes with a lot of internal resistance. Masking one's behaviour, emotions, and imperative needs, regrettably, is the way most neurodivergent students avoid being perceived as inferior.

Masking can take different forms in a classroom; a student with sensitivity to light and sound may sit through the entire class even though they are in sensory discomfort, not asking questions when facing confusion, trying to mimic the way others talk, pretend to understand unfamiliar or confusing social cues, not asking for a short break when required and at the risk of complete exhaustion, suppressing emotions, avoiding social interactions, refusing to ask for help or assistance or refusing to share point of struggles.

VII. EFFECTS OF MASKING

Masking is not only a behavioural adjustment that one makes, but it also takes hold of one's emotional patterns, cognitions, familial or interpersonal relations, and, more crucially, one's self-perception.[70] This attempt of masking, that is to conform to the

68 Joshua Aronson, 'The Threat of Stereotype' (2004) 62(3) Educational Leadership 14.

69 Paula J Manning, 'Word to the Wise: Feedback Intervention to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students' (2018) 18 The University of Maryland Law Journal of Race, Religion, Gender & Class 99.

70 Devrupa Rakshit, ''Masking' for Years Can Leave Autistic People Confused About Who They Really Are' (The Swaddle, 25 October 2021) <https://www.theswaddle.com/masking-for-years-can-leave-autistic-people-confused-about-who-they-really-are> accessed 8 August 2024.

typical ways of being to escape the unempathetic consequences of stereotyping often comes at the cost of erosion of their personhood.[71]

Two mental health practitioners reached out to uncover the aspects of masking in neurodivergent students for the present inquiry. V, a counsellor based in the state of Punjab, has extensively worked with neurodivergent learners and stated that what becomes the common reason for masking is both acceptance from peer groups and also to avoid labelling, bullying, and ostracisation.

It is crucial to note that this apprehension is not unfounded, as masking is essentially done to ensure the presence of social opportunities and the maintenance of safety. Neurodivergent individuals are more prone to facing bullying and victimisation compared to their neurotypical peers.[72] Unfortunately, this is not exclusive to educational settings but is also prevalent in workplaces.[73] In the case of children with ADHD, it is noted that they experience a significantly higher rate of rejection from their peers and report lower satisfaction when it comes to their social networks.[74] It is also vital to note that the presence of peer bias against ADHD students is present regardless of the severity of their displayed symptoms.

Another school counsellor, R, communicates what masking looks like in students. She states that masking often involves the emotional suppression of anger, confusion, and frustration, along with conforming behavioural manifestations or social withdrawal. The consolidated persona of masking seen during the adult stages of life often begins in childhood and adolescence.[75] When asked about what becomes the main causal factor for masking, R points to how deviations are reprimanded in our cultural context. She writes that differences are punished in our society. She highlights the struggle of being in a classroom where school educators often have to make sure that the students behave according to the extremely systemic set standards, offering little to no space for varied learners. Students mask as they do not want to be seen as the "so-called

71 Connie Mosher Syharat and others, 'Experiences of neurodivergent students in graduate STEM programs' (2023) Frontiers in psychology 14.

72 Sohyun An Kim and others, 'Discrimination and Harassment Experiences of Autistic College Students and Their Neurotypical Peers: Risk and Protective Factors' (2023) 53 Journal of Autism and Developmental Disorders 4521.

73 Sally Lindsay and others, 'Disclosure and workplace accommodations for people with autism: a systematic review' (2021) 43(5) Disability and Rehabilitation 597.

74 Ailish Power, 'A Qualitative Exploration of Adult ADHD: Masking, Academic, and Psychosocial Self-Concept and Functioning (BSc (Hons.) Dissertation, Dun Laoghaire Institute of Art, Design, and Technology 2024) <https://onshow.iadt.ie/wp-content/uploads/sites/6/2024/03/Thesis-1.pdf> accessed 8 August 2024.

75 Hirotaka Kosaka and others, 'Symptoms in individuals with adult-onset ADHD are masked during childhood' (2019) 269(6) European archives of psychiatry and clinical neuroscience 753.

difficult" person in the class. V explains that masking is often accompanied by nervousness and uneasiness with the fear of judgment and guilt. In some cases, constant masking can also lead to emotional outbursts.

These outbursts are not surprising, given the constant exhaustion and emotional dysregulation one feels while they are pushed round-the-clock to camouflage into the normal. In a fascinating study where the Reddit posts of people with ADHD were thematically analysed, it was concluded that masking to blend in with others causes distress. Students often see themselves as the cause of problems, and this internalisation of the issues dictates that they suffer in silence. Academic setbacks arise as asking for help risks being perceived as the 'other' and standing out from the norm.[76]

Furthermore, this continuous attempt of masking to find a home in social connections comes at the cost of hiding parts of themselves to avoid bullying and participating in society. That also leads to identity confusion and severe perplexities in understanding who they innately are. Unfortunately, these issues can further give rise to more clinical and social comorbidities, such as social anxiety, social withdrawal, and serious esteem issues. 'Successful' masking dictated by the gender roles at the early stages is also the reason that ADHD often goes undiagnosed in women.[77]

VIII. OTHERING, BELONGINGNESS, AND THE SELF

The 'othering' that the students with neurodivergence go through speaks of the social subordination that the population experiences. This othering challenges the basic human need for affiliation, and the neurodivergent students are at greater risk of it.

The above-mentioned process of masking showcases the legitimate apprehension of social exclusion and possible bullying that neurodivergent students deal with.[78] H, the former law student who deals with ADD and OCD, writes, "I usually don't volunteer this information. I especially hide it from family for fear of being misunderstood." He adds, "I don't go out of the way to mask things. However, it sometimes causes undue delays that make me avoid supervisors/people I am answerable to. It also makes me anxious about appearing unprofessional."

---

76 Ailish Power (n 74).

77 Darby E Attoe and Emma A Climie, 'Miss. Diagnosis: A Systematic Review of ADHD in Adult Women' (2023) 27(7) Journal of attention disorders 645.

78 Mehtap Eroglu and Birim Günay Kiliç, 'Peer bullying among children with autism spectrum disorder in formal education settings: Data from Turkey' (2020) 75(5) Research in Autism Spectrum Disorders.

When asked why N masks her behaviour, she writes that masking ensures easier acceptance in society. Having a close sense of social cohesion is integral to the functioning of individuals and communities. As a student, feeling a part of the larger group is positively correlated with academic achievement, engagement, and motivation. Research shows that law students who are from disadvantaged groups feel less connected to the faculty, staff, and peers.[79]

It is often misunderstood that students with neurodivergence do not want to socialise with others. However, research shows that despite having the desire to make connections, anxieties about bullying and rejection are what keep them away from developing deep social relationships and not a lack of want. The basis of this departure away from one's innate need for affiliation is often social stigmatisation. Stigma is often based on differences in bodies, deviations from prescribed and ideal social and cultural character, and prejudices related to lineages, races, and groups.[80]

The stigma becomes a hurdle in expressing their neurodivergence, making them feel that they are in inauthentic social relationships. The participant, N, writes that masking her neurodivergence makes it a lonely experience for her as she feels most people are unaware of who she really is. The loneliness expressed by N is an experience most neurodivergent individuals are familiar with. The large gap between desired proximal social connections and the actual, deficient nature of social connections causes isolation. Recent literature shows that people with autism are more vulnerable to loneliness.[81] It is often thought that individuals with autism don't want social connections; this stands false as they do desire social connections; however, it is the exhaustion caused by the lack of support and understanding that forces them to choose isolation.[82]

O writes that withholding his real ways of being makes him feel that he is not himself around others. This loss of belongingness and connections seems to be two-fold, not only from others but also away from one's actual self. The inauthentic way of being

79 Elizabeth Bodamer, 'Do I Belong Here? Examining Perceived Experiences of Bias, Stereotype Concerns, and Sense of Belonging in U.S. Law Schools' (2020) 69(2) Journal of Legal Education 455.

80 Graham Scrambler, 'Health-related stigma' (2009) 31(3) Sociology of Health & Illness 441.

81 Lisa Quadt and Others, '"I'm Trying to Reach Out, I'm Trying to Find My People": A Mixed-Methods Investigation of the Link Between Sensory Differences, Loneliness, and Mental Health in Autistic and Nonautistic Adults' (2023) Autism In Adulthood 1.

82 Kana Umagami, 'Towards a Better Understanding of Loneliness in Autistic Adults: Examining Measurement Tools and Lived Experiences (PhD Thesis, University College London 2022) <https://discovery.ucl.ac.uk/id/eprint/10164705/> accessed 8 August 2024.

concludes to be counter-intuitive; it is done to ensure/restore peer acceptance. However, this departure from one's true self leaves the student feeling lonely and confused about their sense of self.[85] Subjective assessment of one's well-being in university is seen to be directly correlated to a healthy family and social networks and a perception of good social support.[86] Students with neural atypicality, thus, are at a greater risk of feeling a lack of belongingness in their student community. Research shows that law students who learn differently are not only at a greater risk of feeling isolated but are also more prone to hide their struggle with loneliness.[85]

The issues of belongingness are multifaceted, and they can be clearly understood when the student experiences are studied with all the layers of their identity. The intersectional consideration points out that not every student is experiencing the benefits of law school in the same or equal way. Women experience a lower sense of belongingness in law school compared to male students.[86] Similarly, in a study based in Delhi and Rajasthan, it was concluded that as much as there are no differences in the prevalence of ASD across the socio-economic structures, there are great disparities in awareness and access.[87]

O states that the misconception about neurodivergence in law school is that "I think sometimes, it just simply translates to not having mental faculties at par with the "normal" individual." Minority groups are anyway stereotyped as having intellectual inferiority, which, coupled with the diagnosis of neurodivergence, creates multiple disadvantages for the student when navigating law school.[88]

IX. BARRIERS TO ACCOMMODATIONS

When effective systems and needful accommodations for each member of the community are not in place, then this lack of consideration indicates to the student the assumption that the university was not expecting them to be there and their needs don't

83 Devrupa Rakshit (n 70).

84 Santiago Yubero and Others, 'Health Contributing Factors in Higher Education Students: The Importance of Family and Friends' (2018) 6(4) Healthcare 147.

85 Leah M Christensen, 'Law Students Who Learn Differently: A Narrative Case Study of Three Law Students with Attention Deficit Disorder (ADD)' (2008) 21(1) Journal of Law and Health 45.

86 Elizabeth Bodamer (n 79).

87 Kendall Harman, Autism Spectrum Disorder in an Indian Context: Impact of Socioeconomic Factors on the Experiences of Individuals with ASD and Their Families (Independent Study Project Collection 2014) <https://digitalcollections.sit.edu/cgi/ viewcontent.cgi?article=2977& context=isp_collection> accessed 8 August 2024

88 Elizabeth Bodamer (n 79).

matter.[89] The deep-rooted process of 'Othering' not only happens because of the behaviour of the peers and educators, but it is also rather embedded in the structure of the context that determines the inequality in the overall sub-culture.

A huge barrier to providing and bringing about structural accommodation is the false perception of the institutions that accommodation is something extra that the neurodivergent student receives.

That a need-based equaliser is somehow an unfair bargain against the neurotypicals, who, in reality, do not need the accommodation in the first place. In a study about law students with hidden disabilities, the 2019 case of Operation Varsity Blues in the US was discussed, wherein students were given admission into the university through illegal channels such as bribing and obtaining fake disability certificates to use the accommodations set in place for students with disabilities and neurodivergence. The author highlights that, unfortunately, in the larger discussion and perception, the blame for this unfair mechanism used by the normative and often wealthy population falls upon the non-neurotypical students and strengthens the wrong stereotype against them that they are somehow trying to game the system.[90]

It also becomes more complicated to imagine the accommodation needed for neurodivergent students as their conditions fall within the category of invisible disabilities and often lead to non-disclosure of neurodivergence.[91] The non-apparent nature of the issues and the high prevalence of stigma also instil the irrational scepticism in staff and authorities that students face when they open up about their diagnosis.[92]

89 John Morrow, 'Law students with Dyslexia and their experience of academic assessment' (PhD Thesis, University of Chester 2017) <https://chesterrep.openrepository.com/handle/10034/621044> accessed 8 August 2024.

90 Angelica Guevara, 'Perfectly Imperfect: Law Students with Non-Apparent Disabilities and Disability Law' (PhD Thesis, University of California at Berkeley 2019) <https://escholarship.org/uc/item/83x642n4> accessed 8 August 2024.

91 Maria Norstedt, 'Work and Invisible Disabilities: Practices, Experiences and Understandings of (Non)Disclosure' (2019) 21(1) Scandinavian Journal of Disability Research 14.

92 Sheila Graham-Smith and Ssereta Lafayette, 'Quality disability support for promoting belonging and academic success within the college community' (2004) 38(1) College Student Journal 90.

The participant, H, writes that one of the common misconceptions around neurodivergence in legal education is that it's just an excuse for poor behaviour. When asked if he got any accommodations, he states, "Not really, as my diagnosis is very recent. I am also unsure of what the accommodations would even look like." N, the former law student, states that, as much as there isn't much apprehension in discussing her neurodivergence in her legal circles she would rather not test the waters. Her response showcases the hesitation most neurodivergent law students grapple with. She also states that she isn't aware of any accommodation that could have helped her in her educational journey. When asked about the same, O writes that he isn't aware of any accommodations in the country that he could have availed.

It's worthwhile to note that, firstly, there is negligible awareness about what mechanisms are needed for neurodivergent law students, leading to the lack of accommodations. Secondly, this, coupled with the stigma around deviations, often makes it impossible for students to disclose their diagnosis.[93] While situated in a legal, educational framework wherein the idea of 'smartness' has extreme and obsessive academic/social value, it becomes realistically impossible for a student to mention a diagnosis or express their neurodivergence, which would make others wrongly assume that the student is 'intellectually inferior.' Law students with dyslexia often feel this alienation as their issues with writing or reading are easily rendered as an issue of incompetence and them not trying hard enough.[94]

ADHD creates issues of emotional dysregulation and time management,[95] Assignments in law schools, such as lengthy legal writing, responding to an unexpected and direct cold-call question, and written exams that require high-order planning and not breaking the tasks into smaller steps, can be extremely difficult for such law students if they are not provided with adequate support. Similarly, law students with Autism would need to work much harder to comprehend intangible concepts, requiring multiple definitions, and would face greater pressure to mask and pretend to understand sarcasm or not talk about their hyper/hypo sensory discomfort in the classroom.

---

93 Laura Marshak and Others, 'Exploring Barriers to College Student Use of Disability Services and Accommodations' (2010) 22(3) Journal of Postsecondary Education and Disability 151.

94 John Morrow (n 90).

95 Hannah MB Shaw, "'I Don't Suffer from ADHD, I Suffer from Other People": ADHD, Stigma, and Academic Life' (BA (Hons.) Thesis, Dalhousie University 2021) <https://dalspace.library.dal.ca/bitstream/handle/10222/80523/Shaw%20Honours%20Thesis_%20Final.pdf> accessed 8 August 2024.

The unreadiness to accommodate students is also often attributed to a concern that institutions are not ready for drastic changes and are not equipped to make such arrangements. Even though the validity of this apprehension is questionable and might have its roots in the stigma against the students, it is also worthwhile to note that not all accommodations are "drastic."

Contillo, a cyber security analyst who studied criminology, writes in an interview, "My manager is super understanding and allows flexibility in the workplace for me," she said. "An example of what I mean by this is if there were too many meetings, he understands I might be drained and allows me additional time for breaks if need be."[96] She has ADHD and struggles with sustained attention; an extra tea break might sound non-serious to even be called an accommodation, but what it speaks of is a context that understands diverse needs.

X. DESIGNING ACCOMMODATIONS IN LEGAL EDUCATION

The question that often arises is whether the accommodations can reduce the rigor of legal education however in a legal classroom setting, undemanding accommodations such as providing or discussing 5-minute recaps of the previous class, concluding with the summary of the lecture, electronically displaying/ providing handouts of the topic blueprint, repeating the question, offering to scaffold when needed, writing a detailed course structure and providing the seating plans with maps of the classroom in advance can easily be incorporated without changing the integral nature and course structure of legal education.[97]

Additionally, designing an inclusive curriculum with interactive teaching, peer-learning/ mentoring, and practical and experience-based learning, including technological assistance options such as text-to-speech options, mind mapping tools, transcription tools, electronic organizers, and specialized applications, can be beneficial to the students. These strategies, coupled with alternate assessment options with extended timelines, distraction free-examination, and classroom settings with considerations about light and sound sensitivities, can make learning accessible for all students.[98]

---

96 Steven Aquino, 'Inside One Neurodivergent Person's Journey From Joblessness To Belongingness As A Cyber Threat Analyst' (Forbes, 5 May 2022) accessible at <https://www.forbes.com/sites/stevenaquino/2022/05/05/inside-one-neurodivergent-persons-journey-from-joblessness-to-belongingness-as-a-cyber-threat-analyst/> accessed 9 September 2024.

97 Katherine Kelly (n 45) 35.

98 Deanne Lynn Clouder and others, 'Neurodiversity in Higher Education: A Narrative Synthesis' (2020) Higher Education 80.

Further, integrating supportive and specific programs such as cognitive-behavioural therapy, study skills programs, working memory training, and support group programs may provide the necessary holistic support.[99] Establishing mental health support systems that are cognizant of the neurodivergent experiences goes a long way in ensuring students vocalise their struggles and need for accommodations.[100] The way law schools teach has not changed significantly. However, the type of learners has.[101] There is a growing number of neurodivergent law students; the numbers are exceedingly more than what most reports claim, as many of them are undiagnosed/unreported.[102] Creating peer support/lecture systems that help students to understand their style of learning, that is, auditory/visual/kinesthetic/multimodal, can aid law students who learn non-normatively.[103] Teaching using various techniques, not just the Socratic method, is also beneficial for students who face attentional and learning issues.

XI. DIATHESIS-STRESS MODEL AND FUTURE DIRECTIONS

Developing comorbidities is regrettably extremely common in individuals with neurodivergence. Research indicates that women who have a neurodivergent diagnosis also have a higher risk of additional medical and mental health issues, specifically including mood disorders, anxiety disorders, eating disorders, and substance use disorders. The leading cause of early death in neurodivergent females is suicide, especially those who have ASD diagnosis.[104] ADHD, with an overall prevalence rate of 2.5%, has a high overlap with mood, anxiety, personality, and substance use disorders.[105] Over 60% of the children who have dyslexia also have an additional psychopathology.[106]

---

99 Reilly Morgan Gray, 'A Review of Executive Functioning and Social Communication Supports for Neurodiverse College Students' (Honors Theses and Capstones, University of New Hampshire 2024) <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1850&context-honors> accessed 8 August 2024.

100 Devrupa Rakshit, 'Indian Mental Health Professionals Continue To Be Ignorant About Neurodivergence. How Are People Coping?' (The Swaddle, 20 April 2023) <https://www.theswaddle.com/indian-mental-health-professionals-continue-to-be-ignorant-about-neurodivergence-how-are-people-coping> accessed 8 August 2024.

101 David R Lyon and Others, 'More than "learning to think like a lawyer:" The empirical research on legal education' (2000) 34(1) Creighton Law Review 34.

102 Caroline Riches and Angela North, 'Why are so many neurodivergent women misdiagnosed?' (Australian Psychology Society, 14 March 2024) <https://psychology.org.au/insights/why-are-so-many-neurodivergent-women-misdiagnosed> accessed 8 August 2024.

103 Leah M Christensen, 'Law Students Who Learn Differently: A Narrative Case Study of Three Law Students with Attention Deficit Disorder (ADD)' (2008) 21(1) Journal of Law and Health 45.

104 Clive Kelly and others, 'Recognising and Responding to Physical and Mental Health Issues in Neurodivergent Females' (2020) Qeios 1.

105 Martin A Katzman and others, 'Adult ADHD and comorbid disorders: clinical implications of a dimensional approach' (2017) 17 BMC Psychiatry 302.

106 Alaa M Darweesh and others, 'Psychiatric comorbidity among children and adolescents with dyslexia' (2020) 27 Middle East Current Psychiatry 28.

Neurodivergence seems to have a significant burden of susceptibility to additional diagnosis. Surely, the high risk is a worrying condition, but it also poses questions about the disparities in the onset. The fact that not all who are neurodivergent will have another disorder points to the intermediate factors that make or not make an additional disorder a pronounced reality in one's life.[107]

The diathesis-stress model states that pathologies have a predisposition often attributed to internal vulnerabilities; however, the activation of these predispositions takes place because of stress in the environment.[108] This elaborate fusion of nature and nurture determines the possible manifestation of psychopathology. The predispositions are often seen as internal factors such as genetics, cognition, biological and physiological specifications, and personality traits that blend with external life circumstances and the living context.[109]

In the context of neurodivergent students, the higher vulnerability and diathesis are apparent. Reducing vulnerability is not only impossible because of the genetic and organic causal nature of neurodivergence, but it also goes against the idea that neurodiversity is nature's reality; however, what becomes crucial and possible is reducing the risk factors and stressors in the environment. The interplay of the inner and outer causes of this manifestation is where the resolution for the neurodivergent struggle lies.

As mentioned above, reasonable accommodations are crucial to the process, as for most neurodivergent law students, navigating a space that is not designed for them can cause added distress. Incorporation of diverse and inclusive options for assessment, provision for reasonable extra time, the option of additional short breaks, and providing assistive technologies, especially for reading and writing, in the structural fabric of the college systems will ensure that the students can prioritise their academic aspirations and not be worried about how to navigate the university space while camouflaging as neurotypicals.

The existence of these flourishing and accommodative structures is surely a vital response to the diversity in the student population; however, it is also naive to assume

107 Dennis C Turk, 'A diathesis-stress model of chronic pain and disability following traumatic injury' (2002) 7(1) Pain Research and Management 9.

108 L Colodro-Conde and Others, 'A direct test of the diathesis–stress model for depression' (2018) 23 Molecular Psychiatry 1590.

109 Kenneth S Kendler, 'A Prehistory of the Diathesis-Stress Model: Predisposing and Exciting Causes of Insanity in the 19th Century' 177(7) The American Journal of Psychiatry 576.

that the practice of putting them as 'rules and guidelines' to be ticked off is sufficient. Students are unwilling to disclose their neurodivergence as these accommodations make them visible to their peers and increase their chances of being discriminated against.[110] Neurodivergent students, as compared to the majority of neurotypicals, have anxieties about facing discrimination and being seen as non-intelligent or unserious about their classes, which affects their sense of trust and belongingness in the institution.

Providing accommodation in an unequal climate can also lead the students to compare themselves to neurotypicals and can affect their self-confidence. In an environment where non-normative ways of being are perceived with extreme scepticism, the entire onus of accommodating by 'coming forward' and obtaining the accommodation while educating, convincing, and assuring the institution that they belong there cannot be solely and erroneously put on the neurodivergent law students.[111]

Accommodations are not machines operating in a vacuum; they are run by people, their ideologies, and institutional visions. Expecting diversity in law schools, redefining what it means to be a law student, and educating the larger student body, educators, and staff are essential scaffolds that would be required for the accommodations to churn.

XII. CONCLUSION

The growing number of students with autism, ADHD, and dyslexia in legal education poses the question of what experiences are waiting for them in law schools. In a culture that is preoccupied with a singular and rigid idea of legal smartness and ideality, the space that formal and informal institutions offer to neurodivergent students is limited. This, coupled with a lack of accommodation and prevalent stigmatisation, creates an unwelcoming environment for any cognitive diversity. Previously reinforced masking and concealing one's way of being often becomes the only tedious and limiting solution for most neurodivergent law students. This masking often has double-edged results: the student is unable to disclose their neurodivergence and also is unable to value and openly harness their neurodivergent strengths. This double silencing of their reasonable requirements and diverse strengths pushes them away from authentic social connections, forces an inauthentic way of being, and can snowball into further clinical comorbidities.

---

110 Barbara Piotrowska and John Barratt, 'Investigating low intelligence stereotype threat in adults with developmental dyslexia' (2024) 30(2) Dyslexia 1.

111 Angelica Guevara (n 90).

In light of these challenges, it becomes significant for the legal community to readdress what it means to be a law student and expand on the definition, reflect on the stereotypes within the community, and how it is hurting the social, economic, and academic citizenship of the students. This reconsideration becomes antecedent to the reexamination of the teaching and examination structures and further establishment of the need for accommodations.

LOST IN TRANSLATION: LEGISLATIVE DRAFTING AND JUDICIAL DISCRETION

*Renuka Sane and Madhav Goel**

ABSTRACT

This paper studies ambiguous drafting and the exercise of judicial discretion in the context of the Supreme Court decision in Vidarbha Industries Power Ltd. v. Axis Bank Ltd. The Bankruptcy Law Reforms Commission (BLRC) had clearly recommended that the judiciary should not have any discretion in accepting an insolvency petition once certain objective criteria were met. The legislation, however, provides no rationale for why it ignored the BLRC and allowed judicial discretion. The Court also does not provide tests for exercising this discretion. Since this decision, thirteen petitions under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) have been dismissed. Consequent litigation and delayed timelines will result in erosion of the value of the Corporate Debtor's assets and make financial creditors wary of extending credit. The paper underscores the need to improve the quality of drafting and tempering judicial decisions with a practical understanding of commercial realities.

Keywords: *Vidarbha – discretion – legislative intent – commercial and economic realities – may – shall – statutory interpretation*

* Renuka Sane is the managing director of the TrustBridge Rule of Law Foundation. Madhav Goel is an LLM candidate at Columbia Law School. He was previously a visiting fellow at the TrustBridge Rule of Law Foundation and an advocate practising in the Supreme Court of India. The authors can be contacted at goelmg3@gmail.com.

I. INTRODUCTION

Precisely drafted legislation that reflects its objective and boundaries for its applicability, and judicial discretion that confines itself to legislative intent are critical pillars of a rule of law economy. There are concerns that both of these are broken in India. There have been numerous instances of mistakes in drafting.[1] Some of these are minor, such as poor referencing within a legal document,[2] while others are more substantive, such as creating an offence which can impact genuine transactions.[3] Courts are seen to interpret laws in a purely legalistic, technical manner, either ignoring legislative intent or without taking the necessary assistance from experts, or principles of other disciplines.[4] This paper points out the issues with poor drafting and subsequent judicial discretion in the context of the recent decision of the Supreme Court in Vidarbha Industries Power Ltd. v. Axis Bank Ltd.,[5] *('Vidarbha')* pertaining to the Insolvency and Bankruptcy Code, 2016 ('IBC' or 'the Code').[6]

The IBC envisaged a list of objective criteria for admitting an insolvency petition. If a financial creditor initiates an insolvency under Section 7 of the Code, then as long as the objective criteria of 'debt' and 'default' set out in Section 7 are established, the National Company Law Tribunal ('NCLT') is expected to admit the petition and initiate the corporate insolvency resolution process ('CIRP'). The legislative intent was to not allow for discretion in the decision to accept an insolvency petition. The Bankruptcy Law Reforms Commission ('BLRC') adopted this approach in response to the experience of delays owing to continuous litigation in previous legislations such as the Sick Industrial Companies Act, 1985.[7] It was felt that entities with relevant expertise

---

1 Deepak Patel, 'Dealing with poorly drafted laws' (Business Standard, 11 October 2015) <https://www.business-standard.com/article/opinion/dealing-with-poorly-drafted-laws-115101100810_1.html> accessed March 24, 2023.

2 Aditya Singh Rajput and Shubho Roy, 'Drafting hall of shame: A mistake in the Reserve Bank of India Act, 1934' (The Leap Blog, 30 March 2017) <https://blog.theleapjournal.org/2017/03/drafting-hall-of-shame-mistake-in.html> accessed March 24, 2023.

3 Pratik Datta, 'Drafting hall of shame #1: Criminal sanctions for a new concept of exchange control violations' (The Leap Blog, 11 December 2015) <https://blog.theleapjournal.org/2015/12/drafting-hall-of-shame-1-criminal.html> accessed March 24, 2023.

4 Pradeep S. Mehta, 'How Can India's Judiciary be More Economically Responsible?' (The Wire, 26 February 2021) <https://thewire.in/economy/india-judiciary-economically-responsible-environment> accessed March 24, 2023.

5 *Axis Bank Ltd v Vidarbha Industries Power Ltd* (2023) 7 SCC 321.

6 Insolvency and Bankruptcy Code 2016.

7 Bankruptcy Law Reforms Committee, 'The Report of the Bankruptcy Law Reforms Committee' (November 4, 2015) <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed March 24, 2023.

should be responsible for making commercial decisions rather than the judiciary. Until 2022, Supreme Court judgments had respected this intent of the law. In Innoventive Industries Limited v. ICICI Bank,[8] *('Innoventive')* as well as in Swiss Ribbons Private Limited v. Union of India,[9] *('Swiss Ribbons')* when the Supreme Court was laying down the foundational jurisprudence around the IBC, it alluded to the mandatory nature of Section 7 and the fact that the NCLT has to admit a petition under Section 7 if the criteria specified therein have been satisfied. While neither of these decisions directly dealt with this specific issue, both clearly laid out that the Supreme Court viewed admission of an application under Section 7 of the Code as a mandatory outcome subject to the specified criteria being met. In 2022, however, the Supreme Court in its decision in Vidarbha,[10] conferred discretion on the NCLT to not accept an insolvency petition filed by a financial creditor and upended this thought process. It interpreted the use of the word 'may' in the phrase, "may admit the petition", to imply that the NCLT had the discretion not to admit the application even after it was satisfied of the existence of debt and subsequent default. Not only has this caused significant controversy with regard to how the Supreme Court interprets commercial statutes and the downstream effect of this judgment,[11] but has opened the gates to increased discretion in the admission of IBC petitions, potentially derailing the entire reform process.

This paper points out how imprecise drafting can waylay the intent of the law. The BLRC's recommendation on lack of discretion to the judiciary was clear. The legislation, however, provided no rationale for why it chose to ignore the BLRC report and allowed for the possibility of discretion with the NCLT while adjudicating applications under Section 7 by using the word "may" in the said provision. This is particularly relevant as it chose to not do the same for applications by operational creditors under Section 9. Precise and reasoned legislation could have averted the possibility of such an interpretation by the Courts. Not only did the Court ignore the tests laid down in the legislation, but also did not provide guidelines for the exercise of this

8 I*nnoventive Industries Ltd v ICICI Bank* (2018) 1 SCC 407.

9 *Swiss Ribbons (P) Ltd v Union of India* (2019) 4 SCC 17.

10 *Vidarbha* (n 5).

11 See, for example, Amay Bahri, 'Analysis of the Supreme Court's decision in Vidarbha Industries' (Bar & Bench, August 13, 2022) <https://www.barandbench.com/law-firms/view-point/analysis-of-decision-in-vidarbha-industries> accessed July 23, 2024; Shalin Ghosh, 'Vidarbha Industries'- A Problematic Interpretation' (NLIU CBCL Blog, September 26, 2022) <https://cbcl.nliu.ac.in/insolvency-law/vidarbha-industries-a-problematic-interpretation/> accessed July 23, 2024; Rajat Sethi & Robin Goyal, '*Vidarbha Industries v. Axis Bank*: An Unsettling Literal Interpretation' (Mondaq, November 28, 2022) <https://www.mondaq.com/india/insolvencybankruptcy/1255254/vidarbha-industries-v-axis-bank-an-unsettling-literal-interpretation> accessed July 23, 2024; Jahnvi Pandey, 'Aftermath of Vidarbha Judgment: An Insight' (IBC Laws, May 11, 2023) <https://ibclaw.in/aftermath-of-vidarbha-judgment-an-insight-by-jahnvi-pandey/> accessed July 23, 2024.

discretion or for the determination of insolvency. The discretion granted to the NCLT is thus susceptible to expansion in scope and abuse. Since the decision, the NCLT and the Hon'ble National Company Law Appellate Tribunal ('NCLAT' or 'the Tribunal') have dismissed thirteen petitions under Section 7. Litigation and delayed timelines will result in erosion of the economic value of the Corporate Debtor's assets, reducing the chances of the Corporate Debtor being brought back to life. Uncertainty in the likelihood of resolution will also make financial creditors more wary of extending credit, thus reducing the capacity to undertake risks and investments.

In fact, the decision had caused such concerns with the regulators that in January 2023 when the Ministry of Company Affairs proposed a series of amendments to the IBC,[12] two of the proposed amendments to the IBC directly impacted the question of initiation of insolvency by financial creditors. The first sought to make a clarification in the law that the Adjudicating Authority 'shall' (instead of may) admit applications for initiation of CIRP by the Financial Creditors once it is satisfied that there has been a debt and subsequent default, and the procedural requirements are met. The second sought to increase the reliance on the record submitted with the Information Utilities ('IU') while considering applications for initiation of CIRP by Financial Creditors. This was an attempt by the Government to undo some of the impact of Vidarbha.[13] While the first does fix the obvious mistake in the initial drafting, it does not guarantee that the judiciary will take cognizance of legislative intent. There is a need for deeper reform, both of legislative drafting and of the way the judiciary interprets economic and commercial laws.

The paper proceeds as follows. Section II presents the Vidarbha[14] decision and the downstream judgements that have relied on this decision to not admit insolvency petitions. Section III discusses the importance of drafting in the context of Vidarbha,[15] while Section IV discusses the problems of providing discretion without relevant tests that can assist Courts in exercising that discretion. Section V lays out the consequences of Vidarbha,[16] on the way IBC will get implemented, and ultimately on the flow of credit in the economy. Section VI concludes.

---

12 Ministry of Corporate Affairs, 'Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016' (January 18, 2023) <https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf> accessed March 23, 2023

16 *Vidarbha* (n 5).

14 ibid.

15 ibid.

16 ibid.

II. THE VIDARBHA DECISION AND DOWNSTREAM JUDGMENTS

The Vidarbha[17] decision, is an ideal case study to highlight how improper drafting and conferral of unguided discretion on Courts in economic disputes can completely derail an economic statute from achieving its objectives. The decision was based on a peculiar set of facts where a judicial award of a large sum of money owed to the Corporate Debtor (much larger than the debt owed by it to the applicant financial creditor) was stuck at the stage of execution. The Court was of the opinion that it would be unjust to initiate the CIRP of the Corporate Debtor for its inability to pay its debts given these circumstances. The prevailing jurisprudence at the time was that irrespective of the circumstances surrounding the initiation of the petition under Section 7 of the Code, so long as the existence of 'debt' and 'default' was established, the NCLT did not have the discretion to not admit the petition.[18] The Court, however, overturned that jurisprudence in Vidarbha.

Section 7(5)(a) of the IBC says,

> *"Where the Adjudicating Authority is satisfied that — a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application."*

The Court interpreted the word ‘may’ to imply that the law confers upon the NCLT the discretion to not admit the application even after it is satisfied of the existence of debt and default on part of the corporate debtor. The Court held that NCLTs ought to examine whether the corporate debtor is truly insolvent and unable to service its debts, and not simply admit the debtor into the CIRP for temporarily defaulting in repayment of its financial debts. It also held that the NCLT ought to apply its mind to the defence put forth by the debtor, and also explore the feasibility and desirability of initiating the CIRP, notwithstanding such default.

When delivering the verdict, the Supreme Court sounded a warning that discretion should be sparingly used, i.e., the discretion conferred by Vidarbha ought to be used only in absolutely similar cases. The fact that this warning has gone unnoticed by the Tribunals shows precisely why we need carefully drafted laws that sufficiently spell out the legislative intent of the Parliament. The NCLAT/NCLT has relied upon Vidarbha in 13 different instances to dismiss the CIRP initiated by a Financial Creditor in a wide variety of circumstances. The details of each case are presented in Table 1 in the Appendix.

---

17 ibid.

18 *Innoventive* (n 8).

There are, however, 10 instances,[19] besides those mentioned in Table 1, where the NCLT/NCLAT has taken note of the fact that Vidarbha confers upon it the discretion to not admit applications under Section 7 of the Code for initiation of CIRP, but has chosen to not exercise that said discretion and gone ahead with admitting such applications. This goes to show that in a majority (56%) of the reported cases,[20] each with its unique factual matrix, the NCLT has chosen to exercise its discretion and not admit the application for initiation of CIRP.

These range from instances where the corporate debtor is owed money, to where the Court suspects the intention of the creditor to file for insolvency. For example, in the case of GTL Infrastructure,[21] ('GTL'), the Corporate Debtor had monthly revenues of Rs.120 crores and had repaid Rs. 16,915 Crore between 2011 and 2018. The NCLT used these facts to determine that the Corporate Debtor was reasonably healthy and, in a position to repay the sustainable debt. In addition, GTL had claims aggregating to Rs. 13,393.83 Crore against Aircel entities and had yet to recover Rs. 49.84 Crore from Tata Teleservices Limited, Rs. 20.38 Crore from ATC, and Rs. 351 Crore from BSNL in pending arbitration proceedings. The NCLT was of the view that the amounts owed to it would be sufficient to satisfy its debt obligations towards its Financial Creditors. It held that the ratio of Vidarbha[22] was applicable, and consequently dismissed Canara Bank's application for initiation of CIRP. The NCLAT dismissed an appeal filed by the Insolvency and Bankruptcy Board of India ('IBBI')[23] against the NCLT order on GTL.

Another example is that of Jag Mohan Daga v.Bimal Kanti Chowdhary, Interim Resolution Professional of M/s Vindhya Industries Pvt. Ltd. & Anr,.[24] *('Jag Mohan Daga')*, where the NCLAT noted that while there was a default on part of the Corporate

---

19 *Bibhuti Bhushan Biswas & Ors. v Ansal Properties and Infrastructure Limited* MANU/NC/5286/2022; *Induslnd Bank Limited v Hacienda Projects Private Limited* MANU/NC/5231/2022; *Union Bank of India v Goenka Diamond and Jewels Limited* MANU/NC/6009/2022; TV Sandeep Kumar Reddy, Suspended Director, Gayatri Projects *Limited v State Bank of India & Ors* MANU/NL/0026/2023; *SBM Bank (India) Limited v Feedback Energy Distribution Company Limited* MANU/NC/5901/2022; *State Bank of India v Shri Tradco Deesan Private Limited* MANU/NC/0798/2023; *IL and FS Infrastructure Debt Fund v McLeod Russel India Limited* MANU/NC/0706/2023; *Bank of India Limited v Frost International Limited* MANU/NC/0644/2023; *ES Krishnamurthy v Bharath Hi-Tecch Builders Pvt Ltd* MANU/NC/1109/2023; *Chandrakant Khemka v. UCO Bank & Anr Company Appeal* (AT) (Insolvency) No. 1261 of 2022.

20 It is possible that there are more cases where Vidarbha was considered by the NCLAT/NCLT, but the authors were able to find only the ones being discussed in this article.

21 *Canara Bank v GTL Infrastructure Limited* CP (IB) No. 4541(MB)/2019.

22 *Vidarbha* (n 5).

23 *Insolvency & Bankruptcy Board of India v GTL Infrastructure & Ors. Company Appeal* (AT) (Insolvency) No. 103/2023.

24 *Jag Mohan Daga v Bimal Kanti Chowdhary Company Appeal* (AT)(Insolvency) No. 848/2022.

Debtor, the Financial Creditor had not filed the application for initiating the CIRP for the purposes of insolvency resolution of the Corporate Debtor, but for some other ulterior motives, including resolution of family disputes in running the business of the Corporate Debtor. In light of this, the NCLAT was of the view that it was not a fit case for the initiation of CIRP solely because the motivation in filing the CIRP initiation application was not limited to seeking resolution. Consequently, it allowed the appeal and set aside the order of the NCLT initiating the CIRP of the Corporate Debtor.

Furthermore, there are two instances where the NCLT/NCLAT has exercised the discretion conferred by Vidarbha,[25] in respect of applications by operational creditors under Section 9 of the Code.[26] This is despite the fact that the statutory language of Section 9 as well as the decision in Vidarbha,[27] nowhere confers such discretionary powers upon the NCLT/NCLAT. In fact, in Vidarbha,[28] the Supreme Court specifically observed that once the material requirements of Section 9 are satisfied, then the NCLT/NCLAT shall admit the application, and not take into consideration factors such as motive, the financial health of the Corporate Debtor, etc. It was the difference in the phrase "may accept" in Section 7 and "shall accept" in Section 9 that was used to justify discretion in the former and not the latter. And yet, NCLT/NCLAT in these two instances, relied upon Vidarbha,[29] to note that it has the discretion to not admit applications under Section 9 as well. Admittedly, the applications in these two cases had certain other defects as a consequence of which the NCLT/NCLAT were inclined to dismiss the application and not initiate the CIRP of the Corporate Debtor therein. However, if that were the case, then the NCLT/NCLAT could have simply dismissed those applications on those grounds alone, and any reference to Vidarbha[30] and the discretion conferred thereunder was unnecessary. By referring to Vidarbha,[31] in the context of applications under Section 9 of the Code, the NCLT/NCLAT has potentially opened the door to further expansion of the scope of discretion conferred by Vidarbha[32] to extend to applications under Section 9 as well, an outcome that will be fraught with its own issues.

---

25 *Vidarbha* (n 5).

26 *M/s Agarwal Veneers v Fundtonic Service Pvt Ltd Company Appeal* (AT) (Ins) No. 968 of 2020, *Delia Adventure and Resorts Private Limited v VDOIT4U Event Management Private Limited* CP (IB) No. 160(ND)/2020

27 *Vidarbha* (n 5).

28 ibid.

29 ibid.

30 ibid.

31 ibid.

32 ibid.

III. THE IMPORTANCE OF DRAFTING AND LEGISLATIVE INTENT

As stated above, Vidarbha,[33] is a prime example showing how India's legislative drafting process needs to be made more robust to avoid decisions that are wholly contradictory to a particular statute's objectives. This mismatch between the actual underlying intent and the language used becomes clear once we delve into the history of drafting the IBC, more particularly, Section 7 of the Code. The IBC treats default on financial repayment obligations as sufficient evidence of insolvency in order to initiate the CIRP of a Corporate Debtor. The Bankruptcy Legislative Reforms Commission in its first report,[34] had clearly stated the rationale for such an approach. 'Determination of default' is an objective fact that is easy to determine, as opposed to insolvency which does not have any standardized, objective tests. It would reduce the time taken to decide whether CIRP has to be initiated, and would also lead to greater consistency and clarity of law. Section 3.4.2 of the BLRC Report, Volume 1[35] states:

> *"The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. ...*
>
> *The legislature and the courts must control the process of resolution, but not be burdened to make business decisions."*

Furthermore, in Section 3.4.3, the BLRC Report[36] also states that

> *"The Committee recommends that both the debtor and creditors must have the ability to trigger insolvency. In either case, the key principle driving the form of the trigger is for least cost of determination on the bankruptcy and insolvency Adjudicator. The Committee recommends that the debtor can trigger the process after default using detailed disclosure about the state of the entity, accompanied by a Statement of Truth. The creditor can trigger using evidence of a default."*

The BLRC was clear in its intention of providing no discretion in the admission of an insolvency petition.

A. Drafting of law

The draft introduced in Parliament chose to use the word "may" instead of "shall". The Parliament may have good reason for making this choice and going against the recommendations of the Bankruptcy Legislative Reforms Commission, an expert body constituted precisely to provide expert inputs into the structuring of the IBC. However,

---

33 ibid.

34 Report of the Bankruptcy Law Reforms Committee (n 7).

35 ibid.

36 ibid.

there is no explanation for why this material change was introduced. Was it intentional, or was this an inadvertent error? This is wholly unclear. For if it was deliberate, then this should have ideally been accompanied with reasons. If this was the latter, then it highlights the need to make the legislative drafting process more robust. In any case, both these eventualities clearly show that there is a missing link in the legislative drafting process in India. Such errors have far-reaching consequences and cannot be allowed to creep into the drafting process. It is absolutely critical that mechanisms are drawn out to eliminate such errors. On the other hand, if the Parliament is making a deliberate decision to deviate from the well-documented recommendations of expert bodies expressly constituted to assist it in the lawmaking process, then the reasons for doing so should also be freely available so that Courts can examine the drafting history to better understand legislative intent.

The fact that the Parliament's reasoning for deviating from the recommendations of the Bankruptcy Legislative Reforms Commission is not publicly available is harmful for two main reasons. First, it goes against the fundamental tenet of the rule of law that material decisions ought to be accompanied with reasons. Second, equally importantly, the lack of reasoning has led to uncertainty in the law by virtue of faulty decisions which then require the expenditure of substantial public resources to fix. For example, in this case, the Government itself was pushing for a review of the decision in Vidarbha[37] by arguing that it effaces the substratum of the Code, and is now planning to amend the law to reflect the BLRC's intent of removing judicial discretion in adjudicating applications under Section 7.[38] The entire situation is not only undesirable but could have been avoided if the legislative drafting processes were more robust, more transparent, and accompanied with reasons.

B. Interpreting legislative intent

This brings us to the issue of legislative intent. As highlighted above, the lack of publicly available reasoning of the Parliament to ignore the express recommendations of the Bankruptcy Legislative Reforms Commission has led to uncertainty in the mind of various Courts (as is evident from the contrast in the pre-Vidarbha jurisprudence,[39] and the jurisprudence in Vidarbha)[40] that have dealt with the issue as to whether admission of petitions under Section 7 of the IBC (if all conditions spelt out therein are met) is mandatory or not.

---

37 Report of the Bankruptcy Law Reforms Committee (n 7).

38 ibid.

39 ibid.

40 *Vidarbha* (n 5).

This being the background, it is important to note that the jurisprudence on the treatment of the words "may" and "shall" qua judicial discretion has been fairly fluid. The rule of thumb is that the former implies a conferral of discretion, while the latter implies a mandatory obligation. However, the rule can be dispensed in certain cases,[41] and the courts can interpret "may" as "shall" and "shall" as "may".[42] These are cases when an analysis of the real intention of the legislature done through a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon, points to dispensing with the rule of thumb. There are numerous instances where the Courts have interpreted the usage of the term "may" in the statute to mean that there is a mandatory obligation on the concerned authority to act in the manner set out in the statute and that the said statute does not confer any discretion on the concerned authority.[43] In these instances, the Courts have gone beyond the statutory language and treated the legislative intent as its north star in interpreting the words "may" and "shall" while deciding if the concerned authority has discretion under the provision in question. That approach was clearly missing in Vidarbha,[44] due (in part) to the absence of a clear discernible legislative intent. Due to conflicts between the BLRC Report[45] and the statutory language employed in the IBC (the latter, as highlighted above, due to poor drafting processes in India), it was difficult for the Court to assess the legislative intent. Consequently, the Supreme Court, adopted the textual rule of interpretation of statutes, and relied on the use of the word "may" in Section 7(5)(a) of the IBC to hold that the Courts had discretion while deciding whether or not to admit such petitions. Ideally, the Court ought to have adopted a law and economics approach to assess the true legislative intent behind the design of the Code, the objectives it was trying to achieve as well as the BLRC Report,[46] to conclude that Section 7 of the IBC too was an instance of poor drafting and that the legislative intent lay not in the language of the statute but in its inherent design and the history of its drafting. Had it done so, the Court would have reached a different conclusion by interpreting "may" as "shall" much like the previous cases that had interpreted the IBC as it was intended by the Parliament. Unless the Courts start interpreting commercial laws using a law and economics lens, these problems will continue to plague the judicial system.

---

41 *State of Haryana v Raghubir Dayal* (1995) 1 SCC 133.

42 *Sharif-ud-Din v Abdul Gani Lone* (1980) 1 SCC 403; *Mansukhlal Vithaldas Chauhan v State of Gujarat* (1997) 7 SCC 622.

43 *See, for example, AC Aggarwal v Ram Kali* (1968) 1 SCR 205; *Mohan Singh v International Airport Authority of India* (1997) 9 SCC 132; *Sarla Goel v Kishan Chand* (2009) 7 SCC 658.

44 *Vidarbha* (n 5).

45 Report of the Bankruptcy Law Reforms Committee (n 7).

46 ibid.

IV. THE LACK OF TESTS WHEN PROVIDING DISCRETION

When the statute does not spell out these tests or guidelines, the Courts typically fill that gap. While this is a routine phenomenon, it is also a well-established principle of administrative law that unchecked discretion eventually leads to abuse of power and can derail the entire statute from achieving its key objectives. This is even more so when it comes to economic laws since the real expert of economic policy is the legislature and not the judiciary. When the judiciary is given large, unchecked and unguided discretion in economic matters, it often applies that discretion in a strictly "judicial, legal manner" without paying any heed to the economics behind the law. This leads to the law being abused by unscrupulous market actors and reduces the efficacy of the concerned statute. In the case of the IBC, not only did the Court ignore the tests laid down in the legislation, but also failed to provide tests itself for the exercise of this discretion or for the determination of insolvency. This will lead to greater uncertainty in the interpretation and application of the law.

Courts are not expert bodies that can carry out complex financial analysis to assess the financial health of a Corporate Debtor. Furthermore, there are no standardized, indisputable methods or tests to ascertain insolvency. Consequently, the NCLTs will devise their own methods to assess whether a Corporate Debtor is actually insolvent. These methods will vary from member to member, bench to bench. All this will lead to greater uncertainty and reduced consistency and clarity in the application of the law. Very basic empirical analysis shows that these concerns are real - the fact that the NCLT/NCLAT has exercised discretion in 13 different cases to dismiss the CIRP initiation applications,[47] for myriad reasons, whereas there are at least 10 other cases where the NCLT/NCLAT has expressly declined to exercise the discretion.[48] There may also be the possibility of this power being expanded beyond what was envisaged by the Supreme Court. Discretion is not only being exercised in applications under Section 7 of the Code but surprisingly, has been exercised in cases under Section 9 as well.[49] This is clear, cogent evidence that the power conferred upon the NCLT by Vidarbha,[50] is already being expanded disproportionately.

Even if tests had been framed, once the NCLT starts to evaluate the contrasting stories of the debtor and creditor on merit, then admission of a CIRP initiation application will itself become a full-fledged trial. The conferral of discretion will also give rise to appeals, thus destroying the timelines envisaged by the Code. Decisions of

47 See Table 1.

48 supra note 19.

49 *Jag Mohan Daga* (n 24).

50 *Vidarbha* (n 5).

the NCLT will be appealed before the NCLAT,[51] in the hope that the appellate forum will exercise the discretion in favour of the party preferring the appeal. Furthermore, since the IBC provides a statutory appeal to the Apex Court,[52] decisions of the NCLAT will then be appealed in the hope that the Apex Court will favour the side that lost in the Courts below. All this will lead to further delays in the insolvency resolution process, an outcome the Code seeks to expressly avoid. For example, the law and guidelines around bail have been crystallized for decades now. Despite that, bail matters are litigated till the Supreme Court, unless the jailed party runs out of money (which is unlikely here because insolvency litigation is happening amongst businesses willing to spend money).

This clearly points to the fact that judicial discretion ought to be limited in commercial issues as the conferral of discretions has the tendency to induce unnecessary delays and uncertainty in the law, which is most detrimental to the efficient functioning of commercial legal frameworks. Furthermore, in situations where it is necessary to confer judicial discretion, there must be clear and precisely framed guidelines that specifically incorporate law and economics principles and force the Courts to take economic considerations into account while deciding how to exercise their discretionary powers.

V. Economic Impact

The consequences of the Vidarbha[53] on judicial decisions is already evident. As seen in Table 1 in the Appendix, discretion is being exercised to dismiss CIRP initiation applications in cases where the Corporate Debtor is expecting a huge inflow of money which can be used to service its debt repayment obligations. The NCLT/NCLAT is adopting the view that this is enough evidence that the Corporate Debtor is otherwise financially healthy and solvent, and hence should not have to go through the insolvency process.

This logic ignores basic economic logic and key commercial and economic realities. By choosing to ignore economics and its fundamental principles while interpreting commercial statutes, the Courts are preventing commercial legal frameworks from functioning efficiently. This case is no different. Any business runs several risks - risk of delayed payments, risk of disputes, risk of business partners not fulfilling their obligations, etc. The reward for entrepreneurs taking such a risk is the phenomenal return on their investment. Financial creditors do not partake in the risk and the reward

51 Insolvency and Bankruptcy Code 2016, s 61.

52 ibid, s 62.

53 *Vidarbha* (n 5).

of running the business, choosing instead to provide capital for an assured return with a fixed repayment schedule. An insolvency regime only resolves those companies where the risk does not pay off and the company becomes financially unhealthy or unviable. By dismissing CIRP initiation applications on account of certain facts and circumstances that relate solely to the Corporate Debtor, Vidarbha,[54] and downstream decisions force financial creditors to bear part of the brunt of the risk undertaken by the debtor. This fundamentally alters the nature of the bargain struck by and between creditors and debtors and alters the risk dynamic in favour of the management of the debtor.

If one were to extend the logic of these judgements of the NCLT/NCLAT, CIRP will be initiated only in situations where 'fault' is proved on the part of the management of the Corporate Debtor (which will be extremely difficult) or if it can be proved that the Corporate Debtor is a wilful defaulter.[55] Restricting the initiation of CIRP to only such cases is against all settled principles of insolvency economics, for insolvency frameworks are put in place to resolve any and all insolvent companies, not just those that have reached that stage as a consequence of factors within the company's control. This has the potential to affect the nature of credit contracts thus affecting the very flow of credit that gives the economy the capacity to undertake risk and investment.

Increased discretion may also result in increased litigation and delays in the time taken to admit a CIRP application. This implies that the sick, insolvent Corporate Debtor's current management continues to manage its affairs, which was precisely the problem that plagued the previous insolvency regimes.[56] As a consequence, there is a greater erosion of the economic value of its assets, which ultimately has adverse consequences during the resolution process. With lesser value left in the assets of the Corporate Debtor, the chances of the Corporate Debtor being brought back to life through a resolution plan that satisfies the claims of all creditors satisfactorily also reduces significantly. Ultimately, the creditors have to take a greater haircut on their recoveries, thus negatively impacting their financial health. In fact, with lesser value left in the assets of the Corporate Debtor, there is a high chance that the Committee of Creditors does not receive a "good enough" resolution plan, and the Corporate Debtor is condemned to liquidation, which may not be in the interest of the Corporate Debtor's creditors, especially its workmen.[57]

54 *Vidarbha* (n 5).

55 Reserve Bank of India, 'Master Circular on Wilful Defaulters' (1 July , 2015) <https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=9907> accessed March 22, 2023.

56 *Justice V. Balakrishna Eradi Committee*, 'Law Relating to Insolvency and Winding Up of Companies Report' (July 31, 2000) <https://ibbi.gov.in/uploads/resources/July%202000,%20Eradi%20Committee%20Report%20on%20Law%20relating%20to%20Insolvency%20and%20winding%20up%20of%20Companies.pdf> accessed March 24, 2023.

57 *Swiss Ribbons* (n 9).

VI. CONCLUSION

One of the key issues with the previous bankruptcy regimes was that it took a tediously long time to resolve sick companies. Part of the reason for that was the long-drawn court proceedings and the inability to determine sick industrial units in time, such that quick remedial action could not be taken. In fact, a key objective of the Insolvency and Bankruptcy Code was to lay down a transparent and certain commencement standard for initiating insolvency proceedings.[58] The Code was carefully designed in a manner that there is a regulatory hands-off approach from the executive as well as the judiciary, and greater deference is given to commercial actors involved in the CIRP of the Corporate Debtor. This has been undone by the Vidarbha[59] decision.

The Vidarbha case underscores the importance of legislative drafting. The drafting process should ensure that the usage of crucial words and phrases, such as "may" and "shall", is done after considerable due diligence that ensures the desirable impact. Reasons for the usage of certain phrases should be provided as notes to the law so as to help the Courts ascertain the true intention of the legislature. In cases where the legislature is clear about achieving a particular outcome, there should be greater and clearer use of legislative devices such as explanations and provisos. Where the legislature does not want to confer discretion on the concerned authority, it can employ the word "must" instead of "shall", for the interpretation of the latter has, over time, become shrouded in uncertainty. However, none of this will make any difference so long as courts do not consider key economic, business and financial principles while interpreting the law. For example, in the case of motor accident matters, for example, the Courts applied well-established rules that have been shown to be efficient in the economic analysis of liability rules in a manner that has led to inefficiencies and uncertainties.[60] In another example, the decisions of the Supreme Court effectively brought Delhi's functional bus system to a grinding halt, thus increasing pollution levels in the city.[61] Judicial training at every level will play a key role in bringing an economic perspective into judicial decision-making. So long as this 'Law and Economics' training is missing from judicial decision-making qua commercial and economic laws, continued attempts by the legislature and the executive to reform the business regulatory framework of the country will continue to falter.

---

58 *Mobilox Innovations (P) Ltd v Kirusa Software* (P) Ltd (2018) 1 SCC 353.

59 *Vidarbha* (n 5).

60 R. Singh, 'Economics of Judicial Decision-Making in Indian Tort Law: Motor Accident Cases' (2004) 39 (25) Economic and Political Weekly, 2613.

61 Shruti Rajagopalan, 'Altruism and development - it's complicated' (Get Down and Shruti, 12 December 2022) <https://srajagopalan.substack.com/p/altruism-and-development-its-complicated> accessed 23 March, 2023.

This issue prompts a deeper analysis of a new trend - legislative policy in India is increasingly shifting towards the reduction or removal of discretion in economic legislation. There can be numerous reasons for this - judicial delays leading to the destruction of economic value, lack of requisite knowledge/expertise/experience amongst judicial members, the tendency to distinguish precedent thus giving rise to uncertainty of the law, the broader lack of economic perspective in judicial decision-making, etc. Vidarbha and the critique that has ensued necessitates thinking about these broader questions. It is important to analyse why similar legislations in foreign jurisdictions have flourished despite the conferral of judicial discretion, whilst they have failed to deliver results in India.

MARRIAGE (IN)EQUALITY: THE STATE DISCRIMINATED, THE COURT LET IT SLIDE

*Shivani Vij**

ABSTRACT

This paper argues for marriage equality of queer couples under the Indian equality code. In a recent challenge laid to the exclusionary marriage laws in India, queer couples strongly argued unequal treatment meted out to them as compared to heterosexual couples, which was devoid of any intelligible differentia or legitimate State interest that could justify the exclusion. Though the marriage laws, legislated in 1950s, may not have intended to differentiate, their impact was to exclude queer couples from the institution itself and all benefits arising from it, and this was significant.

The act of discrimination sat well with all five judges of the Supreme Court, but relief was not granted. The central question became, why relief was denied under Article 32 of the Constitution and if this could be done with a positive finding of discrimination. The majority's focus on the limited power of the Court to grant relief amidst separation of powers outweighed the minority's focus on judicial review in violation of constitutional rights. This paper draws from the reasoning of the minority to make a strong case for marriage equality.

Keywords: *Same-sex Marriage – equality – fundamental rights – discrimination*

* Shivani Vij is an Advocate-on-Record at the Supreme Court of India.

I. INTRODUCTION

Soon after the decriminalisation of same-sex relations in Navtej,[1] the queer community petitioned the Supreme Court in Supriyo[2] seeking a recognition of their choice to marry. Upon the Court's nudge to steer clear of religious personal laws, the challenge was restricted to marriage under the Special Marriage Act, 1954 (hereinafter referred to as 'SMA'), Foreign Marriage Act, 1969, and adoption under the Juvenile Justice Act, 2015 read with Adoption Regulations.[3] A bench of five promising judges[4] was constituted to hear it, but in a 3:2 split verdict; the rights were denied.

This paper argues that once the Court entertains a challenge basis of the right to equality, it is bound to remedy it based on the right to constitutional remedies. It criticises the majority's overemphasis on the doctrine of separation of powers, which could not have frustrated judicial review. Part I examines whether denying access to marriage is discriminatory under Articles 14 and 15. It explores whether the discrimination is direct or due to disparate impact and discusses how Navtej influenced the Court's analysis of unequal treatment. Part II focuses on 'remedy' and deals with the scope of the Court's power under Article 32 to rectify discrimination. It explains the divergence in majority and minority opinions, and how the majority wrongly distinguishes past precedents to deny relief, despite a positive finding of discrimination. Part III then discusses the necessity of legislative intervention in future, regardless of whether the Court granted relief.

The paper however does not cover (i) whether a fundamental right to marry exists under Article 21 and (ii) if marriage rights can be granted under specific religious laws.

---

1 *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [5J]. [hereinafter 'Navtej'].

2 *Supriyo alias Supriyo Chakraborty v Union of India* 2023 SCC OnLine SC 1348 [hereinafter *'Supriyo']*. Justice Bhat delivered the opinion of the Court, in which Justice Kohli & Justice Narasimha concurred; Justice DY Chandrachud delivered the minority opinion of the Court, in which Justice Kaul concurred. Justice Bhat's opinion therefore constitutes the majority. Besides, Justice Kaul & Justice Narasimha also delivered separate opinions.

3 *Supriyo* (n 2) (DY Chandrachud CJ)(Concurring)[214].

4 'Promising' is based on previous 'pro-rights decisions' delivered by individual judges on the bench, which strengthened the expectation of a positive outcome in Supriyo. For instance, decriminalization of homosexuality *(Navtej* (Chandrachud J)), directions to prevent gendered sexual violence and stereotype (*XYZ vs. State of Madhya Pradesh* (2021) 16 SCC 179 (Bhat J)), striking down bail conditions under Narcotics, Drugs, and Psychotropic Substances Act (*Nikesh Tarachand Shah v. Union of India* (2018) 11 SCC 1 (Kaul J)), rejecting confessions to be used in evidence under NDPS Act (*Tofan Singh vs. State of Tamil Nadu* (2021) 4 SCC 1 (Kohli J)), stay on forced counselling of same sex couples (*Devu G Nair v. State of Kerala* 2023 SCC OnLine Ker 11382 (Narasimha J))

II. IS DENIAL OF ACCESS TO THE 'INSTITUTION OF MARRIAGE' DISCRIMINATORY?

The Indian Constitution safeguards the right to equality. Article 14 guarantees equality before the law, equal protection of laws and protects against unreasonable classification. Article 15, which also forms a part of the equality code, protects against differential treatment based on identity i.e. on the grounds of race, caste, sex, gender, religion etc. Put differently, these are characteristics of people based on which they experience disadvantage and hence discrimination and are popularly known as protected grounds. Though our Constitution recognises only some protected grounds,[5] the Court has identified additional grounds of sexual orientation,[6] gender identity[7] and disability[8] by interpreting Article 15 as inclusive and non-exhaustive. Sexual orientation formed the basis of the decriminalisation of same-sex relations in Navtej and the basis for claiming marriage equality in Supriyo.

A. Direct discrimination & Disparate Impact under Article 15

Under Article 15, Supriyo threw light on two forms of discrimination: direct discrimination and indirect or disparate impact discrimination. Differential treatment could either result from State action that unjustifiably treats one group differently than the other (direct)[9] or from neutral State action that disproportionately affects a group (disparate impact).[10] The Supreme Court has recognised both direct and disparate impact discrimination as constitutionally suspect.[11] Adultery, for instance, a gender-specific

5 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 29. "It is important that these grounds are personal, in the sense that they are characteristics that persons have…the term is understood in a technical sense to connote only certain types of characteristics that persons have, such as race, sex, religion, weight, sexual orientation, age, disability, eye-colour, physical appearance, and marital status." [hereinafter 'Fredman Discrimination Law']

6 *Navtej* (n 1) [268.7], [268.14].

7 *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [66], [81]-[82] [2J] [hereinafter 'NALSA'].

8 *Jeeja Ghosh v Union of India* (2016) 7 SCC 761 [2J] [43]; *Vikash Singh v UPSC* (2021) 5 SCC 370 [2J] [41]-[42].

9 Fredman (n 5) 154; Bob Hepple, Prohibited Conduct, Equality: The Legal Framework (2nd edn, Hart Publishing 2014) 67–104, 81. Hepple states that "Direct discrimination aims to achieve formal equality of treatment; one person must not be less favourably treated than another because of a prohibited characteristic.. indirect discrimination occurs where an apparently neutral provision, criterion or practice is applied by a person (A) against another (B), and puts or would put B and persons with whom B shares a prohibited characteristic at a particular disadvantage when compared with persons who do not share that characteristic."

10 ibid; For examples of disparate impact see *Griggs v Duke Power Co.* 401 US 424 (1971) [US Supreme Court]; *Bilka-Kaufhaus GmbH v Weber von Hartz*, Case 170/84 (1986) [European Court of Justice]; *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 [Canadian Supreme Court].

11 *Navtej* (n 1) [438] (DY Chandrachud J)(Concurring); *Supriyo* (n 3) [263] (DY Chandrachud CJ).

offence, ascribes gender stereotypes about the role of women and discriminates against the accused and complainant directly based on gender.[12] Similarly, a denial of Permanent Commission to women in the Armed Forces discriminated directly on the basis of sex. On the other hand, though unnatural sex was a gender-neutral offence and prohibited for all sexes,[13] it disproportionately affected same-sex couples in consensual relationships.[14] It created a disparate impact on account of sexual orientation and was equally violative of Article 15.

The question then was whether denying access to marriage under SMA, as claimed in Supriyo, was discriminatory, and if so, what type of discrimination it was. The RC Cooper test developed by eleven judges of the Supreme Court tells us that the impact of a statute or state action on individual rights is the most significant.[15] State action would be deemed unconstitutional if the classification it makes has a discriminatory impact on an individual, regardless of its intent. Hence, the purpose or object may not be to exclude, but if the result is so, the classification becomes suspect.[16] In other words, the object of the State cannot determine the extent of protection to an aggrieved individual.[17]

The petitioners in Supriyo argued that SMA, though legislated with the object of recognising inter-faith marriages, the impact was an exclusion of non-heterosexual unions from exercising their choice to marry.[18] All five judges agree[19] A complete denial of institution of marriage to queer couples meant the State did not recognise their social institution and relationship.[20] While marriage itself did not confer dignity, it did provide State legitimacy and was a precondition to avail consequential benefits arising from the marital status, which would not be available otherwise. These include protection from domestic violence,[21] maintenance,[22] benefits like pension and insurance in case of death

12 *Joseph Shine v Union of India* (2019) 3 SCC 39 [5J] [30], [66].

13 *Ministry of Defence v Babita Puniya* (2020) 7 SCC 469 [2J].

14 Supriyo (n 3).

15 *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248 [11J] (Banks Nationalisation Case): "49…But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief...it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights." [hereinafter 'RC Cooper']; *Supriyo* (n 2) (Bhat J) [518], [524].

16 *Navtej* (n 1) (DY Chandrachud J) (Concurring) [440].

17 *RC Cooper* (n 15) [50].

18 *Supriyo* (n 3), Submissions of Senior Advocate Mukul Rohatgi [20], Submissions of Senior Advocate Dr. Abhishek Manu Singhvi [21], Submissions of Senior Advocate Raju Ramachandran [22].

19 *Supriyo* (n 2) [528]-[530], [552] (Kaul J), [270] (Chandrachud CJ).

20 *Supriyo* (n 2) [552], [562]-[564] (Bhat J).

21 Protection of Women from Domestic Violence Act 2005.

22 Code of Criminal Procedure 1973, s 125; *Danial Latifi & Anr v Union of India* (2001) 7 SCC 740 [5J].

of spouse, succession[23] and adoption.[24] In Chief Justice Chandrachud's words, these were material and expressive entitlements which flow from a union.[25] The Court stated and I agree that providing these benefits showed a clear State interest in regulating the institution of marriage, which was not left to varied religious personal laws. Though the State could restrict and regulate the institution, for example by providing a minimum age, which was commensurate to the object to be achieved: it could not however prohibit access to the institution based on a protected characteristic in Article 15. As Chief Justice Chandrachud emphasised, this could also not be justified by a legitimate state interest as it was entirely unconnected to marriage or adoption.[26] For queer couples, this meant total exclusion and direct discrimination on the basis of 'sexual orientation'.

Viewed from another angle, the denial also caused a disparate impact on queer couples. Justice Bhat, speaking for the majority was convinced that a denial of earned and compensatory benefits, for which marital status is an eligibility, had an indirect discriminatory impact on queer couples.[27] In adoption for instance, though the Juvenile Justice Act & Adoption Regulations permitted single women and single men (with restrictions) to adopt, however, heterosexual married couples were only eligible to adopt as a couple.[28] Heterosexual and non-heterosexual unions were entirely excluded. Leaving aside heterosexual unions since Supriyo was not concerned with their rights, non-heterosexual unions were excluded only because of their inability and ineligibility to exercise their choice to marry and be a part of the institution. This ineligibility disproportionately impacted queer couples' right to adopt as a union and they were left with no choice but to adopt as individuals.[29] The same applied to benefits arising from succession and other laws.

B. Unreasonable classification under Article 14

Besides disparate impact under Article 15, the bench also examined the Article 14 challenge of unreasonable classification. The two minority opinions of Chief Justice Chandrachud (minority) & Justice Kaul (minority concurring) successfully upheld the challenge. The test to be applied was whether the classification was based on an intelligible differentia, and whether it had a reasonable nexus to the object sought to be achieved.

---

23 Hindu Succession Act 1956; Indian Succession Act 1925.

24 Juvenile Justice (Care and Protection of Children) Act 2015; Central Adoption Resource Authority Adoption Regulations 2022 [hereinafter 'CARA Adoption Regulations'].

25 *Supriyo* (n 2) (Chandrachud CJ) [261].

26 Ibid [337].

27 *Supriyo* (n 2) (Bhat J) [563],[564(iv)].

28 ibid [546].

29 ibid.

Justice Kaul's compelling minority opinion stood apart and held that SMA failed the Article 14 muster by creating two distinct classes of heterosexual partners who are eligible to marry and non-heterosexual partners who are ineligible.[30] This distinction (causing an exclusion) had no reasonable nexus to the purpose of SMA which was to facilitate inter-faith marriages.[31] SMA was therefore violative of Article 14 for creating an unreasonable classification. Justice Kaulalso disagreed with Justice Bhat that SMA intended to enable marriage between heterosexual couples exclusively.[32] But, even if that were true, the State's decision to regulate only heterosexual marriages was itself an illegitimate objective and constituted exclusion based on sexual orientation under Article 15 (discussed above).

Justice Kauls opinion is the only one which holds SMA unconstitutional in this straightforward manner. Besides this, a nuanced aspect of Article 14 was examined by Chief Justice Chandrachud. While dealing with adoption, Chief Justice Chandrachud reasoned that Regulations 5(3) & 5(2)(a) of CARA Adoption Regulations made 'marriage' a yardstick for couples to adopt. While this created a classification between married and unmarried couples, it had no rationale to the object sought to be achieved i.e. the best interest and safety of the child.[33]It was rather based on a stereotype of ascribed gender roles in a marriage that raised false presumptions of who could be better parents or provide a stable household.[34] Further, the Regulations also suffered from excessive delegation and were ultra vires the Juvenile Justice Act which did not restrict adoption based on marital status.

C. The equality leaning of Navtej gave way

The findings of Supriyo under Articles 14 & 15 reflect that it was positively influenced by Navtej, which is the most prominent case of the queer movement in India. Decriminalising consensual sexual relations (as in Navtej) was a monumental first step for queer persons. To reach this decision, Navtej engaged in a comprehensive equality-leaning analysis and not merely a privacy approach.[35] It held that criminalising 'unnatural sex' under Section 377 of the Indian Penal Code, 1860 not only violated a queer person's dignity, privacy, and personhood (Article 21) but was manifestly

30 *Supriyo* (n 3) (Kaul J) [380].

31 ibid [382], [383].

32 ibid.

33 *Supriyo* (n 2) (Chandrachud CJ) [326]-[329].

34 ibid.

35 It is clarified that Navtej addressed both sexual autonomy and privacy under Article 21 & unequal treatment under Articles 14 & 15, and not just one of them. Under unequal treatment, all judges dealt with manifest arbitrariness under Article 14; J Chandrachud, J Nariman & J Indu Malhotra in their concurring opinions dealt with Article 15 as well.

arbitrary and fundamentally led to unequal treatment (Articles 14 & 15). If queer persons could not be treated differently in relation to sexual relations, the same logic ought to apply to marriage and sequential rights.

South African lawyer Jonathan Berger has argued that this distinction matters because while privacy demands the State to stay completely out of individuals' affairs, equality requires the State to actively ensure equal treatment in all areas of life.[36] Therefore, once equal treatment with heterosexual people is recognized, it should be easier to claim related rights such as equal age of consent, protection from employment discrimination, and rights in marriage and adoption.[37] It was significant to acknowledge inequality in addition to a dignified living. Some international perspectives are helpful here.

In Dudgeon v. UK,[38] the European Court of Human Rights struck down Northern Ireland's buggery law under Article 8 of the European Convention on Human Rights, finding it disproportionately restricted personal and family life without any pressing social need. This privacy-focused approach did not address equal treatment under Article 14, making it harder for a gay couple in Oliari v. Italy[39] to seek marriage rights. The Court in Oliari stated that States were not required to grant marriage equality if they provided some legal recognition, influenced by the fact that many European countries only recognized civil partnerships.

In contrast, queer lawyers and activists in South Africa focused on equality in their litigation, leading to successive victories. Starting with constitutional protection of sexual orientation and judicial recognition of marriage and adoption, they emphasized equality over privacy. In National Coalition of LGBTQ,[40] Justice Ackermann opined that the equality approach offered greater protection for homosexual persons. Thus, in Fourie,[41] the Constitutional Court rejected the State's argument that the Constitution only protected private family life and not marriage. The Court deemed excluding same-sex couples from marriage as contrary to equality, asserting that treating same-sex marriages as inferior was constitutionally unacceptable.

---

36 Jonathan Berger, 'Getting to the Constitutional Court on Time: A Litigation History of Same-Sex Marriage' in Melanie Judge, Anthony Manion, Shaun de Waal (eds), *To Have and To Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008) 17.

37 Shivani Vij, 'A strong case exists for marriage equality' (The Hindu, 31 December 2022) <https://www.thehindu.com/opinion/op-ed/a-strong-case-exists-for-marriage-equality/article66321811.ece> accessed 15 August 2024.

38 *Dudgeon v UK Application* No 7525/76 (1981) [ECtHR].

39 *Oliari & Ors. v Italy* Application Nos 18766/11 and 36030/11 (2015) [ECtHR].

40 *National Coalition of LGBTQ & Ors v Minister of Home Affairs & Ors* (CCT10/99) [1999] ZACC 17 [South Africa Constitutional Court].

41 *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19 [South Africa Constitutional Court].

In the US, both decriminalization of same-sex relation[42] and granting of marriage equality[43] were based on the due process clause of the Fourteenth Amendment, focusing on personal liberty (rather than equality). Justice O' Connor's concurring opinion in Lawrence however highlighted that sodomy laws should be struck down for unequal treatment compared to heterosexual couples, emphasizing that the core issue was unequal treatment, not just liberty.

In Navtej, India belatedly adopted the South African approach. Though sexual autonomy under Puttaswamy substantially helped establish rights under Article 21, another significant part of the analysis was the inequality meted out to queer persons by treating them as a separate class from heterosexual persons and perpetuating stereotypes. When Supriyo was argued, it was this equality-leaning approach which helped the petitioners establish an Article 15 violation, despite a unanimous finding of the bench that a fundamental right to marry did not exist.[44] Sexual orientation was already a protected ground in Navtej and on that basis, the Court questioned the marriage exclusion which adversely impacted queer couples. Both the majority and minority agreed that benefits were denied on account of marital status, which were available to heterosexual couples, without any reasonable basis for this distinction. The foundation of equality laid down in Navtej was extremely crucial. Going forward, this finding of unequal treatment will remain intact and help achieve additional rights.

III. ONCE HELD DISCRIMINATORY, HOW CAN COURTS RECTIFY IT?

Never mind the different approaches, the Court was ad-idem that access to marriage was unfairly and unequally denied to queer persons. Once this was done, why was the Court not convinced of the relief? The majority held itself back from giving a positive declaration of the right to a union, let alone giving positive directions to effectuate the right. It was the 'scope and extent' of Article 32 that was differently understood by the majority and minority, or rather misunderstood by the majority, that led to the conclusion in Supriyo.

A. Scope of Article 32

Article 32 guarantees the right to move the Supreme Court for enforcement of rights conferred by Part III of the Constitution. It is itself placed in Part III, which means that the right to approach the Court is also guaranteed. The 'remedy' is therefore also a fundamental right that cannot be abrogated.[45] This is the same 'effective remedy' under

42 *Lawrence v Texas* 539 US 558 (2003) [US Supreme Court].

43 *Obergefell v Hodges* 576 US 644 (2015) [US Supreme Court].

44 *Supriyo* (n 2) (Bhat J) [365(g)].

45 *Powers, Privileges and Immunities of State Legislatures, In re* 1964 SCC OnLine SC 21: (1965) 1 SCR 413 [7J] [117]; *State of WB v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 [5J] [53] [hereinafter 'Democratic Rights'].

Article 2(3) of the International Convention on Civil & Political Rights (hereinafter referred to as "ICCPR")[46] which obligates its signatories to ensure access to courts. India is one of the few jurisdictions that safeguards the remedy on an equal footing as the right.

Judicial review undertaken by courts casts two obligations on it, first, to safeguard the fundamental right itself, Article 14 in this case and second, to safeguard the remedy and undo the violation of the former, if any. The remedy is therefore equally important. Once the Court finds a violation, it must issue directions under Article 32(2), provided that the type of remedy is squarely at the Court's discretion.[47]

The power to achieve this under Article 32 is very wide.[48] Article 32(2) enables the Court to pass "directions, orders or writs, in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari" for enforcement of rights. 'In the nature of' shows the power is not limited to the writs specified here but extends to any directions or orders which may be appropriate to enforce rights.[49] This reiterates that the duty of the Court is not merely to declare the law unconstitutional but to enforce fundamental rights by issuing these directions and writs.[50] These include varied positive directions, such as, enforcing speedy trial,[51] granting compensation in terms of exemplary damages, preventive, remedial and punitive measures to prevent honour killing,[52] and recognising transgenders as socially and educationally backward classes.[53]

The main difficulty faced by the majority in Supriyo was that granting marriage rights by passing a slew of directions would surpass the judiciary's domain and impinge upon separation of powers, a basic feature of the Constitution which ensures the distribution of powers between the legislature, executive and judiciary.[54] In other words, granting relief that it was asked to, would mean as if the judiciary was legislating. This is

46 International Convention on Civil & Political Rights, UNTS, 1966, Vol 999 171, art. 2(3) [hereinafter 'ICCPR'].

47 *Kanu Sanyal v Distt. Magistrate* (1973) 2 SCC 674 [5J] [7].

48 *L Chandra Kumar v Union of India* (1997) 3 SCC 261 [7J] [78].

49 *Democratic Rights* (n 45) [53].

50 *Democratic Rights* (n 45) [52] "…Whether there is a contravention of any of the rights so conferred, is to be decided only by the constitutional courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or "in the nature of" mandamus, certiorari, habeas corpus, prohibition and quo warranto for this purpose."

51 *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98 [2J] [10].

52 *Shakti Vahini v Union of India* (2018) 7 SCC 192 [3J] [55]; *Tehseen S. Poonawalla v Union of India* (2018) 9 SCC 501 [3J] [40].

53 *NALSA* (n 7) [135].

54 *Supriyo* (n 2) (Bhat J) [551], [553].

also popularly known as the democratic objection. As Jeremy Waldron puts it, giving judges the power to determine the content of human rights disrespects the democratic will of the people that has entrusted this task to the legislature.[55] The objection is particularly strong for rights entailing positive duties.[56]

This reasoning of the majority poses an old, yet significant question i.e. once the violation of a fundamental right is established, does the court's power of judicial review (to grant relief) get curtailed if an exercise of it would violate the separation of powers? A previous Constitution Bench in Democratic Reforms[57] has dealt with the same question and answered it in the negative.[58] The Court unanimously held that once a violation was established, the Court ought to grant relief under Article 32 to remedy it. The principle of separation of powers could not hold the Court back while exercising judicial review, which is also part of the basic structure. The role of the Court was not seen as anti-democratic but as an equal participant in democratic resolution of disputes.[59] The majority in Supriyo did not deal with why the reasoning in Democratic Reforms was not applicable and in fact ignored the decision entirely.

Another difficulty expounded by Justice Bhat speaking for the majority was that of moulding relief.[60] They reasoned that since the relief required applying and tailoring religious personal laws to queer couples, it is not something Courts could do. It is true that the difficulty in formulating relief qua marriage laws is unique to India. Other jurisdictions like the United States & some European States recognise marriage as a license granted by the State. However, two previous Constitution Bench decisions of MC Mehta (Oleum Gas leak) and Anita Kushwaha encountered a similar question on moulding relief. In MC Mehta, Court addressed its remedial powers in granting compensation to victims of the oleum gas leak.[61] In Anita Kushwaha,[62] the Court was asked to grant the right to transfer proceedings in Jammu & Kashmir, despite the lack of an enabling provision and an express exclusion in the Code of Civil and Criminal Procedure. In both cases, the constitutional duty cast upon Courts to frame appropriate reliefs was emphasised.[63] The Court could not say that it was powerless or helpless when

55 Jeremy Waldron, *Law and Disagreement* (OUP 1999); Sandra Fredman, *Comparative Human Rights* (OUP 2018) 80 [hereinafter "Fredman Human Rights"] 80.

56 ibid.

57 The issue before the court was whether it could direct a CBI investigation without the consent of the State under the Delhi Special Police Establishment Act.

58 *Democratic Rights* (n 45) [43]-[44].

59 Fredman Human Rights (n 55) 86.

60 *Supriyo* (n 2) (Bhat J), Part IX - Moulding Relief.

61 *MC Mehta v Union of India* (Shriram - Oleum Gas) (1987) 1 SCC 395 [5J] [hereinafter 'MC Mehta'].

62 *Anita Kushwaha v Pushap Sudan* (2016) 8 SCC 509 [5J] [hereinafter 'Anita Kushwaha'].

63 ibid [42], [45].

a violation occurred.[64] It ought to salvage the threatened right somehow and search for new remedies and strategies if required.[65] Being powerless would mean that the remedy under Article 32 was frustrated, and violation of Article 14 rendered otiose as if it had no consequence. Thus, power ought to be exercised in a manner that would prevent a violation and not further it. The majority in Supriyo seems to unsettle this position, by holding - Yes, there is discrimination against queer couples, but moulding the relief seems difficult and nuanced and therefore cannot be granted.[66] It also fails to deal with the argument raised by Sr. Adv. Raju Ramachandran, that once a violation was established, the onus for curating relief was not on the Petitioner.[67] It was rather on the Court.

This understanding of fundamental rights was main point of divergence between the majority and minority opinions. Chief Justice Chandrachud, speaking for the minority, disagreed with Justice Bhat's conclusion that though the effect of SMA in granting gender-specific marriage rights is discriminatory on queer couples, Courts were incapacitated to remedy it. Chief Justice Chandrachud found that the logical corollary of a finding of discrimination is to grant a remedy, and without it, rights could not be fully realised.[68] A combined reading of the three Constitution Bench decisions cited above has same tenor.

B. Vacuum filling in the absence of law

The relief under Article 32 becomes nuanced and peculiar where the Court looks at inaction of the legislature. Absence of law resulting in a violation of fundamental right(s) magnifies the role of the Court in protecting and restoring it. Here, the burden on

---

64 *MC Mehta* (n 61) "7.…If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can inject such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32."

65 *Khatri (IV) v State of Bihar* (1981) 2 SCC 493 [2J] [7]; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 [3J] [19], [20] - "20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution…".

66 *Supriyo* (n 2) (Bhat J) (Majority) [532], [560], [569].

67 *Supriyo* (n 2), Rejoinder Submissions on behalf of Senior Advocate Raju Ramchandran [17].

68 *Supriyo* (n 2), (DY Chandrachud CJ) (minority) [358] "358. My learned brother contradicts himself when he holds that the SMA is not discriminatory by relying on its object, on the one hand, and that the state has indirectly discriminated against the queer community because it is the effect and not the object which is relevant, on the other…I cannot bring myself to agree with this approach. The realization of a right is effectuated when there is a remedy available to enforce it. The principle of ubi jus ibi remedium (that is, an infringement of a right has a remedy) which has been applied in the context of civil law for centuries cannot be ignored in the constitutional context. Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude."

the Court is heavier since no framework exists in the first place. While the Courts avoid taking over legislative powers, they must act when the legislature fails to do so.[69] Courts therefore engage in filling the vacuum in law till the legislature steps in.

The most prominent example here is Vishakha.[70] A frequently cited judgment redefining the Court's role under Article 32 emerged from the urgent need to protect working women from workplace sexual harassment and safeguard their rights under Articles 14, 19, and 21. There was a complete absence of law or any civil framework to redress workplace harassment. The Court acknowledged this was a difficult task,[71] particularly for the Courts, but they embraced the challenge and established clear guidelines defining sexual harassment. They also outlined specific steps that employers must take to address it. These guidelines were binding and enforceable[72] and had the effect of law under Article 141. The Court was cognizant that legislating was not in its domain, but if the absence of a framework meant that equality and a dignified living were endangered, it ought to act and enforce fundamental rights through the executive.[73] NALSA[74] relied on Vishakha to formulate guidelines to enforce transgender rights and Common Cause,[75] a Constitution Bench decision, reiterated its scope under Article 32 to formulate living will directives to enforce a dignified death as a part of dignified living.

Vishakha, NALSA & Common Cause were strongly urged by the petitioners in Supriyo but were distinguished by the majority, rather oddly. For the majority, the immediate need to obviate workplace harassment or to safeguard the personhood of transgender persons seemed more pressing and justified for granting relief, than the discrimination faced by queer couples.[76] Moreover, the Solicitor General's agreement with the Court in Vishakha[77] influenced the Court's departure from it in Supriyo, where the State vehemently contested marriage rights: a distinction that seems alien to the Court's interpretation of constitutional rights. However, the minority correctly determined that the inadequacies faced by queer couples were neither mild nor tolerable and required immediate action.[78] Queer couples were treated unequally compared to

69 *Anoop Baranwal v Union of India* [Election Commission Appointments] (2023) 1 SCC 161 [5J] [291] [hereinafter 'Anoop Baranwal'].

70 *Vishaka v State of Rajasthan* (1997) 6 SCC 241 [3J] [16] - "16…the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality…, we lay down the guidelines…until a legislation is enacted for the purpose." [hereinafter 'Vishakha'].

71 ibid [8].

72 ibid [18].

73 ibid [7]-[8].

74 *NALSA* (n 7) [7].

75 *Common Cause v Union of India* (2018) 5 SCC 1 [5J] [203] [hereinafter 'Common Cause'].

76 *Supriyo* (n 2) (Bhat J) [557], [558]

77 *Vishakha* (n 70) [9].

78 *Supriyo* (n 3) (Chandrachud CJ) [361].

heterosexual couples, without needing to prove a threshold of intolerance.[79] There was no need to compare the violations or indignity, and even if there was, it would be impossible to objectively consider one more tolerable than the other. Moreover, Vishakha & NALSA arose from Article 14 violations, in addition to Article 21, and both created obligations for private citizens along with the State. They had more commonality than distinction with Supriyo, which ought to have driven the majority to act similarly.

Vineet Narain[80] & Anoop Baranwal[81] (and several others)[82] though not discussed in detail in Supriyo also shows what the Court can and cannot do when the legislature fails to act. In Vineet Narain,[83] the Court was concerned with rampant corruption by public officials, high dignitaries in particular, who controlled the functioning of the Central Bureau of Investigation. The infamous Jain Diaries exposed the lack of a transparent and independent mechanism to prosecute these public officials in a fair and unbiased manner. Inaction by the legislature and executive meant that equality and the rule of law were threatened, and a need was felt to restore them.[84] The Court decided to address these gaps by directing the establishment of the Central Vigilance Commission and the Enforcement Directorate, giving them statutory status, and overseeing the Central Bureau of Investigation's functioning.[85] Again, this was not seen as legislating, but only a measure until Parliament enacted a law.

Similarly, Anoop Baranwal dealt with the inaction of the Parliament under Article 324(2) to create an independent procedure for appointment of the Chief Election Commissioner, a constitutional body. The absence of a law created a void or a vacuum and threatened the right to free and fair elections and therefore democracy.[86] The Court's inability to mandate the legislature to create a law, which it was not asked to do and could not do, did not prevent it from issuing directions to provide a fair appointment procedure.[87]

---

79 ibid.

80 *Vineet Narain v Union of India* (1998) 1 SCC 226 [3J] [hereinafter 'Vineet Narain'].

81 Anoop Baranwal (n 69).

82 *Common Cause* (n 75) [2], [14]; *Dayaram v Sudhir Batham* (2012) 1 SCC 333 [3J] [10]-[11], [17], [22].

83 *Vineet Narain* (n 80) [4]-[5].

84 *Vineet Narain* (n 80) [49], [51], [52] - "52. As pointed out in Vishaka…it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

85 *Vineet Narain* (n 80) [58].

86 *Anoop Baranwal* (n 69) [301], [309].

87 *Anoop Baranwal* (n 69) [308].

While undertaking gap-filling to uphold rights, Indian Courts have distinguished themselves as compared to other jurisdictions. In Canada, unwritten principles like the rule of law, democracy, and judicial independence have been used to fill constitutional gaps.[88] Chief Justice Lamer of the Canadian Supreme Court explained that these gaps had to be filled by principles not explicitly included in the Constitution.[89] In the Privy Council decision of Hinds v. Queen,[90] Lord Diplock read the principle of separation of powers to determine the constitutional validity of the Jamaican Gun Court Act 1974 which transferred jurisdiction of crimes previously exercised by the Supreme Court. South Africa also used constitutional interpretation and values as a means of gap-filling.[91] However, Indian Constitutional Courts addressed these gaps, attentively and actively, by framing concrete measures until law was made by the Parliament. For them, this not only involved constitutional interpretation but creating "law" under the protective umbrella of Article 32. If this was the only way to enforce fundamental rights, it could be done by Courts.

Therefore, the majority in Supriyo claiming that the Court's power was limited in the absence of a legal regime (and would require judicial legislation) contradicted past precedents and did not sit well with the minority.[92] Chief Justice Chandrachud (minority), after disagreeing with Justice Bhat (discussed above), passed the following categorical directions under Article 32:

- Positive Declaration: All persons including queer couples have a fundamental right to enter into a union. The State is obligated to recognise the entitlements that flow from a union.[93]

- Adoption: All unmarried couples, including queer couples, have a right to jointly adopt. The provisions of CARA Adoption Regulations were read broadly to make them marriage-neutral.[94]

- Directions to Executive: First,[95] the Union and State Governments were directed to take steps to prevent violence and discrimination against the queer

88 Andrew Heard, 'Constitutional Conventions: The Heart of the Living Constitution' (2012) 6 Journal of Parliamentary and Political Law 319-338; Han Rou Zhou, 'Legal Principles, Constitutional Principles, and Judicial Review' (2020) 67 American Journal of Comparative Law 899.

89 *Reference Re Remuneration of Judges of the Provincial Court* (P.E.I.) [1997] 3 SCR 3 [Supreme Court of Canada].

90 *Hinds v The Queen* [1977] AC 195 (PC) 211 (appeal taken from Jam.) [Privy Council].

91 Francois Venter, 'Filling Lacunae by Judicial Engagement with Constitutional Values & Comparative Methods' (2014) 29 Tulane European & Civil Law Forum 79-100.

92 *Supriyo* (n 2) [352].

93 ibid [365(i)].

94 ibid [365(p)].

95 ibid [364].

community, ensure access to goods & services, mental healthcare etc, prevent forced treatments and operations concerning gender identity and sexual orientation, and the police were directed to ensure prevention and redressal of violence and effective enforcement of rights. Second,[96] on the assurance of the Solicitor General, the Union Government was directed to constitute a committee chaired by the Cabinet Secretary to define the scope of entitlements to queer couples in a union.

While these directions may not be everything the petitioners desired, they certainly constitute a well-defined starting point to establish the rights of queer couples in a union. Had they been accepted by the majority; they would remain operative till the legislature stepped in.

IV. LEGISLATIVE INTERVENTION WOULD BE NECESSARY IN DUE COURSE

Despite the Court's guidelines, the legislature eventually stepped in after Vishakha (POSH Act),[97] Vineet Narain (CVC Act),[98] NALSA (Transgender Persons Act)[99] and Anoop Baranwal (CEC Act).[100] The POSH Act & CVC Act incorporated all directions, Transgender Persons Act incorporated most and CEC took a contrary approach. Legislative dialogue was therefore needed and, in most cases, gave its acceptance and legitimacy to the Court's decision.

Therefore, even if today's minority becomes tomorrow's majority and the Supreme Court blesses queer couples, the need for future legislative intervention may not be obviated. The bench in Supriyo agreed that Courts were not able to grant the wide bouquet of rights to queer couples by foreseeing all nuances of religious and secular laws.[101] This was an elaborate and extensive task and involved polycentric issues.[102] This was evident from the minority opinion as well, which did not go as far as laying down a regime to provide all benefits arising from marital status. It granted only adoption rights[103] and declined to read into SMA.

The reason this could not be done by a simple mandamus is obvious. The successive rights of having and protecting a family are presently recognized only in heterosexual marriages and in a legal framework tailored to such marriages. Over the years the legislature has taken the positive burden to undo the consequences of the gendered role

96 *Supriyo* (n 2) (Chandrachud CJ) [365(s)].

97 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

98 The Central Vigilance Commission Act 2003.

99 Transgender Persons (Protection of Rights) Act 2019.

100 The Chief Election Commissioner & Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act 2023.

101 *Supriyo* (n 3) (Bhat J) [564(iv)]; *Supriyo* (n 2) (Chandrachud CJ) [365(h)].

102 *Supriyo* (n 3) (Bhat J) [569].

103 *Supriyo* (n 2) (Chandrachud CJ) [325], [329], [333].

of women in heterosexual marriages. This meant protecting women from subjugation, violence, or its threat in a marriage, and ensuring their livelihood by enabling positive rights to property, succession, and maintenance. Hence, both religious personal laws affecting succession, different degrees of prohibited relations for each spouse, and beneficial secular laws dealing with domestic violence, maintenance, and adoption were moulded towards this objective. This included protection to only women against domestic violence, right of only a woman to claim maintenance etc.

In queer marriages with male partners, these laws would either become entirely inapplicable or fail to recognise the disadvantages faced by them, necessitating a new legal framework. Besides, to acknowledge queer marriages with female partners, the laws would require amends to provide equal protection to both spouses, since either or both may have been disadvantaged for their gender and/or sexual orientation. Domestic violence, for instance, would remain common to all queer partners and require a suitable law.

Therefore, whenever the Court recognises queer unions and marriages in future litigation, a need would still be felt to overhaul the existing framework of marriage. The legislature would have a duty to act and ensure a fuller realization of the rights of queer persons. This would help respond to the democratic objection to a judicial determination of rights, that often takes refuge under separation of powers.

V. CONCLUSION

Queer couples are still fighting for the right to marry and have a family. At the heart of this battle is differential treatment by the State. Each time a challenge is brought before the Court, it is this inequality with heterosexual persons that drives the Court to uphold a challenge. This paper initially has addressed two different facets of discrimination faced by queer couples, direct and disparate impact. Denying access to the institution of marriage meant direct discrimination based on sexual orientation. However, since marital status was also the eligibility for claiming sequential rights, the denial caused a disparate impact on queer couples who were unable to exercise the choice to marry. Supriyo acknowledged this and held it to be an article 15 violation. After doing so, however, it did not grant relief. In the next section, the paper discussed the two obstacles of separation of powers and the difficulty in moulding relief that acted as a deterrence for the Court. Both objections had been considered by the Court in past precedents and rejected as obstructions to judicial review but were distinguished by the majority. The forward-looking bench, as it were in Supriyo, refused to venture as far as Vishakha, and pass directions for registration of marriage and guidelines for adoption. Finally, the last section of the paper discussed the need for legislative intervention eventually, to develop a comprehensive legal framework for rights of queer couples.

MAKING OF A GLOBAL CITY – DELHI AND ITS DEVELOPMENT DILEMMAS

*Shraddha Dubey**

ABSTRACT

This article looks at the phenomenon of cities becoming primary drivers of development in countries especially in the Global South. This phenomenon has encouraged the proliferation of what is understood as 'Global Cities' which are characterised as bustling urban centres with robust financial institutions, strong infrastructure, and stable socio-economic conditions, all making them befitting for attracting economic investments. With aspirations of creating 'Global Cities' to pursue developmental goals, many cities in the Global South characterised by strong informal sectors, rapid population growth and deteriorating infrastructure have to straddle between often divergent goals of building cities more conducive for its inhabitants, or upgrading cities to acquire the status of a 'Global City'. In this context, this article will look at the challenges, India's capital city Delhi, faces in pursuing its aspirations of becoming a 'Global City' with thriving economic investment and financial infrastructure, while upholding human rights, primarily that of housing, of those inhabitants whose labour keeps the city running.

Keywords: *Global Cities – Law and Development – Global South – Housing – Divergent – Delhi – Human Rights*

* The author is an Assistant Professor (Law) at the NALSAR University of Law, Hyderabad.

I. INTRODUCTION - CITIES AND THE GLOBAL ORDER

Cities have developed as actors where global influences take place, making them meaningful contributors of 'the global' as we know it.[1] With developments taking place in the international fora, cities often act as actors either on behalf of the state or even as distinct actors, by responding to challenges and developing networks of cooperation. The city's emergence as an important centre in the international fora has been accompanied by the growth of a "body of international urban norms and development policies."[2] Deemed as international urban law, these contemporary rules have reshaped local jurisdictions around a renewed set of aspirations.[3]

In their contemporary form, modern international urban law is traced to the 1972 Stockholm Declaration where local jurisdictions were recognised as the most appropriate setting for achieving environmental sustainability.[4] This perception continued and was also adopted in the 2002 Johannesburg Declaration, which called upon a multi-scalar and multi-jurisdictional approach to social, political, economic and environmental sustainability.[5] A similar trend was observed in numerous other international declarations and resolutions.[6] Contemporaneously cities too, began to take up a proactive role in addressing governance gaps. One of the ways this was done was to create city networks. After the 1992 Rio Declaration, ICLEI – Local Governments for Sustainability was formed.[7] Similarly, the UCLG – World Organisation of United Cities and Local Governments was established to represent, amplify, and defend the voices of local governments.[8]

---

1 Helmut Philipp Aust and Janne Nijman, 'The emerging roles of cities in international law' in Helmut Philipp Aust and Janne Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing 2021) 1.

2 Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015); Gerald Frug and David Barron, 'International Local Government Law' (2006) 38 Urban Lawyer 1.

3 Yishai Blank, 'The City and the World' (2006) 44 Columbia Journal of Transnational Law 875; Helmut Philipp Aust, 'Shining Cities on the Hill? The Global City, Climate Change, and International Law' (2015) 26 European Journal of International Law 255.

4 United Nation Conference on the Human Environment, 'Report of the United Nation Conference on the Human Environment' (1972) Res A/RES/2294.

5 Luis Eslava, 'Cities, Post-coloniality and International Law' in Helmut Philipp Aust and Janne Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing 2021) 88.

6 UN-Habitat, 'REPORT OF HABITAT: UNITED NATIONS CONFERENCE ON HUMAN SETTLEMENTS' (1976) A/RES/31/109; UNCED, 'Rio Declaration on Environment and Development' (1992) A/CONF.151/26; UN-Habitat, 'Implementation of the outcome of the United Nations Conference on Human Settlements' (1998) A/RES/52/190; UNGA, 'Declaration on Cities and Other Human Settlements in the New Millenium' (2001) A/RES/S/25/2.

7 ICLEI, 'Local Governments for Sustainability' (ICLEI) <https://iclei.org/> accessed 10 August 2023.

8 UCLG, United Cities and Local Governments (UCLG) < https://uclg.org/> accessed 10 August 2023.

These advances collectively lead to the development of international urban standards in the form of the 'International Guidelines on Decentralisation and the Strengthening of Local Authorities,' approved by the United Nation Human Settlement Programme, 2007 (UN-Habitat).[9] Along with development of international soft law instruments, international bodies and organisations have begun to develop individual mechanisms of working directly with local administrations. The World Bank's 2000 guidelines document titled 'Cities in Transition' is one of the earliest examples of such initiatives.[10] These guidelines laid down principles directing the Bank's interactions with local administrators. These guidelines have been consistently updated and in 2019, the World Bank released 'Better Cities, Better World: A Handbook on Local Governments Self-Assessments', outlining strategies for addressing challenges faced by urban local governments.[11]

In the backdrop of these developments, it does not come as a surprise that the 2015 Sustainable Development Goals (SDGs) and the New Urban Agenda adopted at the UN Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, 2016, focus on the administration of cities and their unique and crucial role in development. SDG 11 categorically sets out that cities are to become inclusive, safe, resilient, and sustainable by 2030. Even if these terms may be seen as vague, they are a clear indication that urban governance and development in present times are no longer matters of domestic law.[12] The new global order clearly views cities as primary drivers of development. In this context, the phenomenon of 'internationalisation of cities' can be seen as dual process involving “devolution of authority to the city and the greater mobilisation of cities in order to realise new global standards” to ensure the achievement of the goal of development.[13]

II. DELHI AND ITS DEVELOPMENT DILEMMAS

Delhi, the capital city of India has, its own story to boast of as a global, multicultural, and international actor. Delhi's rich history as a global centre spans its days as a trade centre on the Silk Route, to a hub of cultural exchange during the empires of the

9 UN-Habitat, 'Guidelines on decentralization and strengthening of local authorities' (2007) UN Doc HS/C/RES/21/3.

10 World Bank, *Systems of Cities: Harnessing Urbanization for Growth and Poverty Alleviation* (World Bank 2009).

11 World Bank, *Better Cities Better World*: *A Handbook on Local Governments Self-Assessments* (World Bank Group 2019).

12 Helmut Philipp Aust and Anél du Plessis, 'Good Urban Governance as a Global Aspiration: On the Potential and Limits of Sustainable Development Goal 11' in Duncan French and Louis Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing 2018) 201.

13 Luis Eslava (n 5) 81; Ileana Porras, 'The City and International Law: In Pursuit of Sustainable Development' (2009) 36 Fordham Urban Law Journal 537.

Sultanates and the Mughals, and to its declaration as the capital of independent India. In the present times, it is one of the largest metropolises in the world housing over 18.6 million people. Besides, being the administrative head of the country, it is also home to offices of multiple international organisations, many of which work in direct collaboration with its local government.[14] In consonance with global trends, rapid urbanisation in India has resulted in close to 40% of its population living in cities by 2030.[15] As the largest city in Northern India, Delhi continues to see a regular influx of migrants from across the country.

In India currently, 35.2% of its urban population lives in slums or informal settlements.[16] As per the last census and sample survey conducted in 2012, Delhi has approximately 10.20 lakh slum households.[17] It is estimated that at such a rate, the number is likely to be around 16 lakhs today, constituting around 14.66% of the population.[18] It is this slum-dwelling population that is, first and most adversely, affected by any initiatives to create a Global City. These initiatives take many forms and names, as we will see, but are dominated by an overarching intention of creating a clean, world-class city.

Delhi, especially being the capital city of India, has constantly found itself being marketed as a global key player, making it an attractive site for investment. These 'marketing events' are often opportunities to welcome leaders and citizens of other countries and showcase the brilliance of Indian culture and hospitality, along with its social and economic prowess. For the purpose of this article, the focus will be on the spectacle of hosting the G20 Summit in Delhi in November 2024. However, an initial reference will first be made to two similar instances, the Asian Games and the Commonwealth Games.

Independent India had the opportunity to host its first major international event in 1976 when it won the bid to host the Asian Games. Due to the prevailing political turmoil in the country, the Games were finally held six years later in 1982. While India had hosted the first-ever Asian Games in 1951 in Delhi, this was its first opportunity to host sporting contingents from 33 nations along with state officials and sports fans. It was an

14 Ministry of External Affairs, 'International Organisations and Other Agencies' (Ministry of External Affairs) <https://meaprotocol.nic.in/?a2> accessed 18 June 2024.

15 Press Trust of India, 'India's urban population to stand at 675 mn in 2035, behind China's 1 bn: UN' The Economic Times (30June,2020) <https://economictimes.indiatimes.com/news/india/indias-urban-population-to-stand-at-675-mn-in-2035-behind-chinas-1-bn-un/articleshow/92561893.cms?from=mdr> accessed 10 August 2023.

16 The Global Goals, 'Sustainable Cities and Communities' (Global Goals) <https://www.globalgoals.org/goals/11-sustainable-cities-and-communities/> accessed 10 August 2023.

17 Government of National Capital Territory of Delhi, 'Urban Slums in Delhi' (Directorate of Economics and Statistics 2015) <https://des.delhi.gov.in/sites/default/files/urban_slums_in_delhi.pdf> accessed 10 August 2023.

18 Census Organization of India, 'Delhi Population 2023' (Census Organization of India 2023) <https://www.census2011.co.in/census/city/49-delhi.html> accessed 10 August 2023.

occasion to announce to the world India's presence as a nation with developed infrastructure to become a major business and tourist hub. Accordingly, the city underwent substantial infrastructural development. Within an unprecedented duration of time, stadiums, flyovers, roads, hotels, and the Games Village were erected. Old residents of Delhi hail it as a period when the skyline of the city changed.[19] However, these developments came at a cost of exploitation of labourers and harassment of homeless people that were forcibly removed from the streets of Delhi along with other human rights violations. The success of the Asian Games and the triumph of portraying Delhi as a developing city of global standards came at the cost of the poor of the city who were invisible to the powers that be.[20]

A little under 30 years later, India had another such opportunity to promote itself in the global economy, this time by hosting the Commonwealth Games in 2010. Soon after winning the bid to host the games in 2003, a massive Games Village was envisioned to host delegates and officials from 71 countries.[21] A massive area on the floodplains of river Yamuna was identified as the site for the project. Despite contestations on the viability of construction in the region, the Games Village was erected. This was accompanied by "an aesthetic ordering of the city"[22] whereby mass demolitions of slum dwellings within sighting distance on the Yamuna River bank were carried out.[23] Across 20 sites, thousands of homes were demolished with many of the residents still awaiting rehabilitation.[24] The construction of the Games Villages not only resulted in the demolition of homes and the subsequent homelessness of its inhabitants but also affected the ecology of the region, resulting in severe flooding inside the Games Village.[25]

However, these experiences and efforts at showcasing development are not unique to Delhi. It is widely accepted that in contemporary times, "cities have to compete

19 Suzanne Speak, 'The State of Homelessness in Developing Countries' (United Nations Expert Committee) <http://www.ciudad-derechos.org/english/pdf/aai.pdf> accessed 10 June 2024.

20 Vinayak Uppal, 'The Impact of the Commonwealth Games 2020 on Urban Development of Delhi-An analysis with a historical perspective from worldwide experiences & 1982 Asian Games' (2006) 4(10) Theoretical and Empirical Researches in Urban Management 7 <https://ccs.in/sites/default/files/202210/Impact%20of%20Commonwealth%20Games%20on%20urban%20planning%20in%20Delhi.pdf> accessed 10 June 2024.

21 Comptroller and Auditor General of India, 'Performance Audit of XIXth Commonwealth Games'(Report No 6/0211, 2011) <https://cag.gov.in/en/audit-report/details/2586> accessed 10 June 2024.

22 Asher Ghertner, *Rule by Aesthetics: World-Class Making in Delhi* (Oxford University Press 2015) 288.

23 Mathew Idiculla, 'A Right to the Indian City? Legal and Political Claims over Housing and Urban Space in India' (2022) 16(1) Socio-Legal Review.

24 Housing and Land Rights *Network, Planned Dispossession, Forced Evictions and the 2010 Commonwealth Games* (Report No 14 , 2011) <https://www.hlrn.org.in/documents/Planned_Dispossession.pdf> accessed 14 August 2024.

25 Nikhil Babu, 'Man-made factors at play in Delhi going under water, say experts' The Hindu (Delhi, 16 July 2023) <https://www.thehindu.com/news/cities/Delhi/man-made-factors-at-play-in-city-going-under-water-say-experts/article67077551.ece> accessed 9 September 2024.

globally to develop their local economies if they wish to maintain or improve their position." Winning bids to host prestigious sporting events or demonstrating leadership in global conglomerates like the G20, are opportunities for cities to invest in local development to successfully portray themselves as centres of economic development. From the political dispensation to judicial authorities, the view was unanimous, that Delhi, as the capital of the country, "should be its showpiece".[26]

Another opportunity to display this 'showpiece' arose when India prepared to take over the G20 Presidency from December 2022 to November 2023. G20 or Group of Twenty is a forum for international economic cooperation. It was founded in 1999 after the Asian financial crisis to discuss global economic and financial issues by Finance Ministers and Central Bank Governors. It now also includes the participation of Heads of State and Government.[27]

The theme of India's Presidency was 'Vasudhaiva Kutumbakam' or 'One Earth, One Family, One Future'. The theme also spotlighted LiFE (Lifestyle for Environment) which is associated with environmentally sustainable and responsible choice at both levels of national development and individual choices with the end of undertaking globally transformative actions resulting in a cleaner and greener future. Through its Presidency, India looked to push the targets of Green Development, Climate Finance and LiFE; Accelerated, inclusive and Resilient Growth, accelerating progress on SDGs, and multilateral institutions for the 21st century among others.[28]

In a bid to prepare for over 200 meetings in over 50 cities across 32 different work streams wherein G20 delegates and guests would get a glimpse of India's rich cultural heritage and a year-long India experience, numerous efforts were undertaken to make these cities befitting for the visit. In addition to hosting numerous meetings, Delhi, as the capital city also hosted the G20 Leaders' Summit on 9th and 10th September, 2023.[29] This paper will look at the development efforts that were carried out in Delhi in the last few months. These actions reflected an old worrisome trend – that of targeting and getting rid of informal settlements and slums while beautifying and sanitising the city of unwanted elements.[30]

---

26 *Almitra Patel v Union of India* (2000) 2 SCC 679.

27 G20, 'About G20' (G20) <https://www.g20.org/en/about-g20/#overview> accessed 10 August 2023.

28 Ministry of External Affairs, 'Public Information Bureau, Press Release' (Ministry of External Affairs, 10 December 2022) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1882356> accessed 10 August 2023.

29 G20, 'G20 Leaders' Summit' (G20, 2023) <https://www.g20.org/en/g20-india-2023/new-delhi-summit/> accessed 10 August 2023.

30 Usha Ramanathan, 'Illegality and the Urban Poor' (2006) 41(29) Economic and Political Weekly 3193-3197; Usha Ramanathan, 'Demolition Drive' (2005) 40(27) Economic and Political Weekly 2908-2912.

Starting December in 2022, during the bitter cold in Delhi, demolition notices were being sent to residents of many informal settlements, some in existence for many decades.[31] In some of these cases such as a neighbourhood in the locality of Dhaula Kuan, the residents protested against the demolition notices sent to them by the Public Works Department (PWD), Government of Delhi and approached the High Court of Delhi through a writ petition. The Court in responding to the writ petition, did not stay the demolition, and instead ordered the PWD to stop the demolitions until alternate accommodation was provided within a period of three months and mandated the PWD to give notice of five days to the residents before the commencing of demolition to facilitate relocation.[32] However, within a few weeks, on 28th January 2023, the PWD issued subsequent notices mandating residents to evict their houses and move to temporary shelters designated by the Delhi Urban Shelter Improvement Board (DUSIB). The affected families once again approached the High Court of Delhi which issued a stay on the demolitions until 21st February due to ongoing exams of students living in the settlements.[33] This stay was subsequently extended till 20th April. Demolition ultimately took place on 13th May 2023. Despite the directive of the High Court of Delhi, the demolitions took place without any prior notice, early in the morning leaving the inhabitants with little time to retrieve their properties. The PWD had earlier informed the Court that temporary arrangements had been made in the locality of Naraina, though residents claimed that at the time of demolition, they were asked to move into temporary shelters in the area of Dwarka.[34] Around 125 households in slums managed to get temporary stay orders on the demolition with the help of judicial intervention.

Elsewhere in Delhi, the residents of Mehrauli and nearby Gosiya colony were served demolition notice on 12th December, only a few days after India assumed the G20 Presidency.[35] This area has been a bone of contention between the residents and the

31 Land Conflict Watch, 'Beautification drive in Dhaula Kuan renders several families homeless in Delhi' (Land Conflict Watch, 3 July 2023) <https://www.landconflictwatch.org/conflicts/beautification-drive-in-dhaula-kuan-renders-several-families-homeless-in-delhi> accessed 30 May 2024.

32 WP (C) 412/2023.

33 WP (C) 1386/2023.

34 Kashish Singh, 'An Unprecedented Move: Demolition in Delhi's Dhaula Kuan leaves Hundreds of Poor People Homeless' (The Mooknayak, 16 May 2023) <https://en.themooknayak.com/india/an-unprecedented-move-demolition-in-delhis-dhaula-kuan-leaves-hundreds-of-poor-people-homeless > accessed 30 May 2024.

35 Sukriti Mishra, 'Delhi High Court Quashes DDA Demolition Notice For Unauthorised Constructions Near Archaeological Park' (Lawbeat, 9 November 2023) <https://lawbeat.in/news-updates/delhi-high-court-quashes-dda-demolition-notice-unauthorised-constructions-near-archaeological-park> accessed 30 May 2024; Asian News International, 'Delhi HC pulls up DDA over de molition despite stay order in South Delhi' Business Standard (11 February, 2023) <https://www.business-standard.com/article/current-affairs/delhi-hc-pulls-up-dda-over-demolition-despite-stay-order-in-south-delhi-123021100046_1.html> accessed 30 May 2024.

Delhi Development Authority, a central government body. It is alleged by the latter that the boundary between the Mehrauli Archaeological Park and Mehrauli village has been illegally encroached by slum dwellers and builder. However, Mehrauli is classified as an urban village and is known as one of the country's oldest inhabited urban settlements. It is inhabited by a large population, some in apartment buildings overlooking the Park while others reside in slums.[36] Despite instructions from the Delhi state government to conduct fresh demarcations of the disputed land, and orders by the High Court of Delhi to stay the demolition till the status of the property and its inhabitants is clarified, on 12th February, bulldozers arrived and tore town numerous homes in the area.[37] It is now believed that the demolition took place to prepare the area for a heritage walk in Mehrauli to be attended by heads of States and other delegates in September.[38] With nowhere to go, many of the families lived amidst the rubble waiting for rehabilitation. The High Court of Delhi has redirected the Delhi Development Authority to commence demarcation process, give fair and reasonable opportunity for the inhabitants to be heard and not undertake any further demolitions.[39]

Similar stories can be narrated of many different parts of Delhi. The area of Tughlakabad was served demolition notices on 11 January.[40] On the morning of 30th April, 2023 nearly 1000 homes were razed to the ground in Tughlakabad. These demolitions followed an order by the High Court of Delhi on 1st February 2023, instructing the Archaeological Survey of India to remove unauthorised constructions from public land and to ensure rehabilitation of those displaced.[41] However, no efforts of rehabilitation have been made for those deemed as encroachers on public land. While

36 Gursimran Kaur Bakshi, 'Demolition politics: First Tughlakabad, now Mehrauli demolition drive makes residents uncertain of their future' (The Leaflet, 13 February 2023) <https://theleaflet.in/demolition-politics-first-tughlakabad-now-mehrauli-demolition-drive-makes-residents-uncertain-of-their-future/> accessed 30 May 2024.

37 Land Conflict Watch, 'Demolitions carried out in Mehrauli over five days in Delhi: Residents Protest' (Land Conflcit Watch, 9 July 2023) <https://www.landconflictwatch.org/conflicts/demolitions-carried-out-in-mehrauli-over-five-days-in-delhi-residents-protest> accessed 30 May 2023; Aam Aadmi Party on X (formerly Twitter) (Twitter, 11 February 2023) <https://x.com/AamAadmiParty/status/1624376483732144130?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1624376483732144130%7Ctwgr%5Ee9b2de3d9f6a9360c3e0c7edab7f2cd4354d77dc%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.siasat.com%2Fmehrauli-demolition-women-protesters-throw-chilli-powder-at-police-detained-2525045%2F> accessed 30 May 2024.

38 Anuj Behal, 'G20 and the Delhi: Slum dwellers rendered homeless as city 'decks up' for summit' (Down To Earth, 11 May 2023) <https://www.downtoearth.org.in/blog/governance/g20-and-delhi-slum-dwellers-rendered-homeless-as-city-decks-up-for-summit-89252> accessed 30 May 2024.

39 *Dargah Najeebuddin Firdausi v Delhi Development Authorities and Anr* W.P.(C) 840/2023.

40 Archaelogical Survey of India (ASI, Set of Demolition Notices) <https://drive.google.com/file/d/1vDdOlYxNO82vZmE219VabLEoey96qwoA/view> accessed 30 May 2024.

41 *Mazdoor Awaas Smiti v Union of India and Ors* W.P.(C) 1160/2023.

some people have moved out, many others continue to live amidst the rubble, by trying to build temporary shelter.[42]

Local news in Delhi since the start of the year is replete with such news reports.[43] Despite the public uproar in the form of protests, court petitions, as well as interventions by the Delhi state government, little to no rehabilitation attempts, were under existent laws and policy.

In May 2023 public hearings were organised by a collective of organisations working in varied fields called, Concerned Citizens. These hearings collected testimonies from a range of evictees, including street vendors, slum-dwellers, and waste-pickers, along with representations from lawyers and activists, from Delhi as well as other cities like Mumbai, Kolkata, Nagpur, Indore and Udaipur. They spoke of the brutalities of displacement and eviction inflicted on them by authorities due to the preparation for G20 events. On the basis of this, a report was compiled and released by Concerned Citizens elucidating in detail the human rights violations carried out through evictions.[44] It is believed that at least 1,600 homes have been demolished only in Delhi, with over 260,000 people reportedly homeless after the demolition drives carried out collectively by agencies run by the state government of Delhi and the central government through its numerous bodies and agencies.[45]

III. DEMOLITIONS FOR DEVELOPMENT

All these developmental aspirations echo a prevalent characteristic of seeing parts of cities as clusters 'of threat and danger, problems of security risk'. These sites in Delhi - slums and informal settlements - are then dealt with by being managed and brought under control by removal, instead of supporting and fostering the communities that inhabit these sites and aid their development.[46] In response to this existing contemporary history concerning demolitions and forced evictions to facilitate perceived development activities, several judicial and policy interventions were made in the last decade. In

42 Land Conflict Watch, 'Archaeological Survey of India issues eviction notice to families living near Tughlaqabad Fort' (Land Conflict Watch, 24 May 2023) <https://www.landconflictwatch.org/conflicts/archaeological-survey-of-india-issues-eviction-notice-to-families-living-near-tughlaqabad-fort> accessed 30 May 2024.

43 Prudhviraj Rupavath, 'Thousands Traumatised in New Delhi: As law is ignored, homes and lives are torn apart for G20' (Article 14, 8 May 2023) <https://article-14.com/post/-thousands-traumatised-in-new-delhi-as-law-is-ignored-homes-lives-are-torn-apart-for-g20-summit-64566b6a40ad4> accessed 30 May 2024.

44 Concerned Citizens, 'Report of the Public Hearing on The Fored Evictions Across India and G20 Events' (Concerned Citizens, May 2023) <https://wgonifis.net/wp-content/uploads/2023/07/g-20-public-hearing-6.pdf> accessed 30 May 2024.

45 'No Mercy for the Vulnerable as Authorities Beautified Urban Area for G20 Events: Report' The Wire (New Delhi, 14 July 2023) <https://m.thewire.in/article/rights/g20-cities-forced-evictions-beautification> accessed 9 September 2024.

46 Austin Zeiderman, *Endangered City: The Politics of Security and Risk in Bogotá* (first published 2016, Duke University Press 2016) 193.

Sudama Singh vs. Govt. of Delhi the Court had laid down a clear set of procedures to be followed by authorities before and after carrying out evictions and demolitions.[47] It established that evictions can only be carried out for a public purpose. Before any attempts at evicting inhabitants, a survey must be undertaken to identify eligibility of relocation. Those evicted should also receive "a reasonable opportunity of accessing adequate housing within a reasonable time" and should exercise their right to "meaningful engagement" with the proposed relocation plans.[48] This judgment ultimately resulted in the passing of the Delhi Slum and Jhuggi Jhopdi Rehabilitation and Relocation Policy, 2015 which codified established procedures for evictions and demolitions and made the Delhi Urban Shelter Improvement Board (DUSIB) as the nodal agency responsible for implementing the possible.[49]

Whether or not demolitions and resultant evictions in informal settlements for beautification and preparation for a global event qualify as public purposes can be disputed. With an increasing proliferation of views of Delhi as a key global player, by both domestic and national leaders as well as interested business parties, the goal of urban regeneration or development is not urban revival. Instead, it takes the form of undertaking steps necessary to attract investments. The focus is on "improving the image and financial powerhouse of the city in order to compete in the global economy, other aspects of the city are either neglected or their needs become superseded by the dominant global agenda".[50] As evidenced from the preceding section, aspirations to improve the image of the city became the predominant agenda, leading not only to violating existing policies but also to the non-adherence to directives by authorities or courts. For instance, in the case of demolitions in Dhaula Kuan, the Deputy Chief Minister of Delhi, Manish Sisodia, directed the PWD to withdraw its eviction notices sent to around 150 families. However, the PWD after a few days sent fresh notices, subsequent to which the affected families had to approach the courts.[51] Similarly, in the case of demolitions in both Mehrauli and Tughlakabad, the authorities were under an obligation to make appropriate rehabilitation arrangements for those affected by evictions and demolitions, but in both cases, the arrangements delivered were far from

47 *Sudama Singh & Others vs Government Of Delhi & Anr*, 2010 SCC OnLine Del 612.

48 Mathew Idiculla (n 23).

49 Delhi Slum and Jhuggi Jhopdi Rehabilitation and Relocation Policy 2015 <https://delhishelterboard.in/main/wp-content/uploads/2012/01/Policy-2015.pdf> accessed 10 August 2024.

50 Charlotte Lemanski, 'Global Cities in the South: Deepening social and spatial polarisation in Cape Town' [2007] 24(6) Cities 448-461.

51 Express News Services, 'Demolition stayed at Delhi's Dhaula Kuan slum, where residents were asked to vacate amid biting cold' The Indian Express (New Delhi, 9 January 2023) <https://indianexpress.com/article/cities/delhi/delhi-dhaula-kuan-slum-demolition-manish-sisodia-8370179/> accessed 10 August 2023.

sufficient.[52] In both instances, the contested areas fell within the archaeological park as per government claims, invoking Clause 2(v) of the Delhi Slum and Jhuggi Jhopdi Rehabilitation Policy 2015 which required the DUSIB to "make all efforts" to relocate the households of the demolished slum.

Another complexity at play in Delhi contributing to its development dilemma and urban governance, is its unique status in the eyes of the Indian political administration. Delhi was made the capital of India in 1911 by the British government of India upon shifting it from Calcutta. It was believed that Delhi, which occupied a more central location in India's geography, would make for a more suitable location for administration as compared to Calcutta, located in the extreme east. After India's independence, Delhi continued to be its capital and the centre of all political activity. Considering its unique status as a singular capital city with a unique demography constituted of people from across the country, it was made into a Union Territory in 1956. Union Territories are political units distinct from states into which the rest of the country is organised.[53] They are administered by the President, who is the Head of the State of India through an appointed administrator, in Delhi's case the Lt. Governor. To aid and facilitate local administration, the Delhi Municipal Corporation Act, 1957 was passed.[54] The Delhi Municipal Council that was thereby set up did not have any legislative powers. In response to continuous demand for a State Assembly, the Government set up a committee that recommended measures for streamlining Delhi's administrative measures. In accordance with the Committee's report, the Parliament passed the Constitution (69th Amendment) Act, 1991 through which it inserted two new articles in the Indian Constitution, Article 239AA and 239 AB. These articles provided from setting up a Legislative Assembly for Delhi. Following this, the Government of National Capital Territory of Delhi Act, 1991 was passed which laid down provisions relating to the Legislative Assembly and Council of Ministers. It was established that the Delhi State Assembly, like other state assemblies, had the power to make laws on matters enlisted in the State List and the Concurrent List of the Indian Constitution. However, an exception was made with respect to Entries 1 (Public Order), 2 (Police), and 18 (Land), and entries 64, 65 and 66 of the State List.[55] So, while Delhi is the national

52 Ashutosh Sharma, 'How government neglect left thousands homeless in Delhi's Tughlaqabad' (Frontline, 15 June 2023) <https://frontline.thehindu.com/the-nation/human-rights/spotlight-how-government-neglect-left-thousands-homeless-in-delhis-tughlakabad/article66945206.ece> accessed 10 August 2024.

53 Know India, 'States and Union Territories' (Know India) <https://knowindia.india.gov.in/states-uts/> accessed 10 August 2023.

54 Delhi Municipal Corporation Act 1957.

55 Delhi Legislative Assembly, 'Present form of Delhi Assembly' <https://delhiassembly.delhi.gov.in/sites/default/files/2023-06/aboutdvs.pdf> accessed 15 August 2024.

capital and possesses its own State Assembly which is responsible for its governance, its powers are curtailed with respect to certain issues on which the central government still exercises authority. Additionally, the Delhi Municipal Corporation also continues to function as a democratically elected, independent, local administrative body beyond the purview of state government. Hence, activities carried out in Delhi are often fraught with numerous administrative challenges owing to the different centres of power. This tussle is ongoing and has particularly been exacerbated with the new Government of National Capital Territory of Delhi Act, 2023 being passed which further increases the powers of the centre in Delhi's administration.[56]

The wrangle in carrying out developmental activities and implementing policies is one of the most visible consequences of its complicated power-sharing arrangement. For instance, in June 2022, the DUSIB decided to conduct a survey of people living in slum clusters in Delhi in order to identify beneficiaries for its Rehabilitation and Relocation Policy, 2015 or Mukhya Mantri Awas Yojana. A similar attempt was made in 2019 which was interrupted due to differences with the centrally controlled Delhi Development Authority, which wanted to carry out its own survey and identify beneficiaries under the central government's Pradhan Mantri Awas Yojana. In 2020, the Delhi state government had announced the construction of nearly 90,000 flats for relocation of those living in slums and other informal settlements. It is believed that, that nearly 60,000 flats were partially built but a large number of them had to be given to the Central government under their Affordable Rental Housing Scheme.[57] Hence, the issue of housing and informal settlement has often been caught in the crossfire between different levels of administration.

This struggle was once again witnessed during the beautification and developmental efforts being carried out in preparing for the G20 Presidency and Summit. In the case of the demolitions in Dhaula Kuan, we see that the eviction notices were sent by PWD of the Government of National Capital Territory of Delhi. However, these eviction attempts were opposed by the Deputy Chief Minister of Delhi, Manish Sisodia, who directed the PWD to withdraw the notices. It was believed that evictions were being carried out in preparation of the G20 events, but were denied by PWD authorities who claimed that they were undertaking efforts to deal with the problem of encroachment on public land. Eventually, more such notices were sent and ultimately brought before the

56 Aiman Chisti, 'Government of NCT Delhi (Amendment) Act, 2023 Receives President's Assent' (LiveLaw, 12 August 2023) <https://www.livelaw.in/top-stories/government-of-not-delhi-amendment-act-rvv eceives-president-assent-235059> accessed 14 August 2023.

57 Atul Mathur, 'Delhi Urban Shelter Improvement Board to conduct survey, identify beneficiaries in slum areas for housing' Times of India (New Delhi, 28 June 2022) <https://timesofindia.indiatimes.com/city/delhi/delhi-urban-shelter-improvement-board-to-conduct-survey-identify-beneficiaries-in-slum-areas-for-housing/articleshow/92500752.cms> accessed 10 August 2024.

High Court of Delhi. Such instance of different directives being sent by agencies and authorities of the state government of Delhi creates confusion and raises questions about the exercise of the power of the state government in the city of Delhi.

On the other hand, in Mehrauli and Tughlakabad, the ASI, which is a central government agency led the demolition drives. In both these cases, despite judicial directives to follow the Delhi Slum and Jhuggi Jhopdi Rehabilitation Policy 2015, the authorities did not give due notice to inhabitants or engage in dialogue to facilitate relocation. Many affected families continue to struggle to rehabilitate.[58]

IV. THE QUESTION OF RIGHT TO A CITY IN DELHI

A Global City is characterised by strategies developed from international standards, which focus on economic development and global marketing, evinced by growing real estate, business, and tourist economy.[59] With the increasing expansion of urban centres and promotion of Global Cities, cities have acquired their unique place in the imaginations of the future of humankind. Concerns about the governance of cities, and their intertwining with agendas of economic liberalism and sustainable development are being increasingly addressed in international discourses.[60]

For instance, Sustainable Development Goal 11 is titled 'Sustainable cities and communities'. Unlike any of the other 16 SDGs, it is the only goal which clearly identifies the actors for the goal, which, in this instance is that of the city. It enlists the goal 'to make cities inclusive, safe, resilient, and sustainable' in recognition of the expanding world population and their increasing move to cities. It also recognises that given the developments arising due to climate change, intelligent urban planning to create safe, affordable, resilient, and green city spaces is of utmost importance.[61] The first target (Target 11.1) that it enlists is that of safe and affordable housing. It identifies that the primary threat to safe and affordable housing is the presence of an 'urban population living in slums, informal settlements or inadequate housing'. Such living conditions often entail a lack of access to clean water and sanitation, insufficient living area and risks regarding the durability of the house which constitute a major challenge ensuring safe and affordable housing. So, the target to be achieved under SDG 11 is to

58 Housing and Land Rights Network, 'Forced Evictions in India: 2022 and 2023' (Housing and Land Rights Network, 2024) <https://hlrn.org.in/documents/Forced_Evictions_2022_2023.pdf> accessed 10 August 2024.

59 Matthew Gibb, 'The Global and the Local: A Comparative Study of Developement Practices in three South African Municipalities' (PhD Thesis, Rhodes University 2006).

60 Miha Marčenko, 'International Legal Collage of an Ideal City' in Sofia Stolk and Renske Vos (eds) *International Law's Collected Stories* (Palgrave Studies in International Relations 2020) 100.

61 The Global Goals (n 16).

"ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums".[62]

Even before the SDGs, the International Covenant for Economic Social and Cultural Rights (ICESCR) enshrined the right to adequate housing,[63] and in its General Comments, the UN highlighted the destructive effects of different developmental projects.[64] In its General Comment 7 on the Right to adequate housing and against forced evictions, the UN CESCR accepts that forced evictions occur in the name of development. They are often carried out in connection with "land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games".[65] In a bid to regulate such activities, the Committee has stated that, as a part of its reporting mechanism, information is also sought on "measures taken during, inter alia, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics and other sporting competitions, exhibitions, conferences, etc.) 'beautiful city' campaigns, etc. which guarantee protection from eviction or guarantee rehousing based on mutual consent, by any persons living on or near to affected sites".[66]

In fact, questions on housing and rehabilitation of slum-dwellers have also been raised in the concept of the Right to the City. It refers to the idea of collective right over "democratic management of the city, on the social and environmental function of property and of the city, and on the full exercise of citizenship".[67] It has become an important idea that is constantly invoked for vocalising alternate visions of the city and raising demands concerning housing, evictions, gentrification and urban governance.[68] The Right to the City has been widely adopted in numerous global and multilateral forums. It has its own 'World Chapter' which declares its objective of "recognition of the Right to the City in the international human rights system".[69] The High Court of Delhi

62 Our World in Data, 'Sustainable Development Goal 11: Make Cities Inclusive, Safe, Resilient and Sustainable' (Our World in Data, 18 July 2023) <https://ourworldindata.org/sdgs/sustainable-cities#target-11-1-safe-and-affordable-housing> accessed 05 August 2023; United Nations, 'Sustainable Cities and Affordable Housing' (United Nations) <https://sdgs.un.org/topics/sustainable-cities-and-human-settlements> accessed 10 August 2023.

63 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 1996.

64 UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions' (1997) E/1998/22.

65 ibid [9].

66 ibid [20].

67 Constitution of the Republic of Ecuador 2008, art. 31; Francesca Perry, 'Right to the City: Can this Growing Social Movement win over City Officials' The Guardian (Barcelona, 19 April 2016) <https://www.theguardian.com/cities/2016/apr/19/right-city-social-movement-transforming-urban-space> accessed 10 August 2023.

68 Wojciech Kębłowski and Mathieu Van Criekingen, 'How "Alternative" Alternative Urban Policies Really Are? Looking at Participatory Budgeting Through the Lenses of the Right to the City' (2014) 15 Métropoles 1.

69 World Social Forum, 'World Charter on the Right to the City'(World Social Forum, 2004) <https://hlrn.org.in/documents/World_Charter_on_the_Right_to_the_City.htm> accessed 12 June 2023.

also invoked the idea of the Right to the City in Ajay Maken vs. Union of India[70] to expand the right to housing and provide constitutional protection to slum dwellers from forced evictions. The Court applied the idea specifically in the context of Delhi while referring to its inhabitants of slums as important contributors to the social and economic life of the city. These inhabitants include "sanitation workers, garbage collectors, domestic help, rickshaw pullers, labourers…" who are responsible for providing basic amenities and services to Delhi's urban population for their comfortable life while travelling long distances and living in deplorable conditions. The Court uses the principle to underpin that the housing needs of urban populations, especially those living in informal arrangements need to be prioritised by the State.[71] It implores that "Right to the City is an extension and an elaboration of the core elements of the right to shelter" which has been acknowledged in Delhi's 2015 Rehabilitation Policy which must be upheld in any eviction or demolition attempts.[72]

This "alternative adjectival construction" of slum dwellers as service providers to urban inhabitants is important to identify their contribution to building global cities that they are left out of. These slum dwellers are also often labourers who help construct glorious structures every time the city hosts events like the Asian Games or the Commonwealth Games, or even beautify the city to welcome international dignitaries during the G20 Summit. So, while their labour is recognised, their need for residence in the planning of a city is not. Even now, it is believed that almost 30% of any big city's population are housed in slums.[73]

This is a common experience for many cities in the Global South where implications surrounding the development of Global Cities lead to further spatial segregation and polarisation.[74] So as cities like Delhi are beautified and developed to appear as sites of global development, those whose labours contribute to the construction of this imagination are pushed to the periphery or worse, denied any place at all. These further exacerbate socio-economic divisions that exist in Indian cities due to the prevalence of poverty along with caste and religious discrimination. The situation worsens when often sparse resources are spent on development projects for promoting cities in the global economy. During the Asian Games, the Indian government was widely criticised for spending a large amount of money when the Indian economy was struggling with almost famine-like conditions in many parts of the country.[75] Similarly, the expenses incurred by the Indian government in preparing for the G20 Summit appear significant and

70 WP © 11616/2015.

71 ibid [83].

72 ibid [130].

73 Usha Ramanathan, Demolition Drive (n 30) 2908.

74 Charlotte Lemanski (n 50) 449.

75 Vinayak Uppal (n 20) 13.

disproportionate for the nature of engagement when compared to the expense incurred by previous hosts. [76]

These instances attest to pre-existing patterns in cities of the Global South "where planning and investment patterns have historically segregated different groups and spaces. By investing in core areas of the city that are already affluent in order to demonstrate global strength for both the outside observer and internal elite, existing segregation is deepened".[77] The increasing segregation by way of proliferation of slums is then often perceived as a failure of planned development further necessitating intervention in the name of 'public interest' leading to evictions and unannounced demolitions.[78] And thus, the quest for creating a global city continues.

V. CONCLUSION

This narration of human rights violations that have taken place in the name of necessary development in Delhi in the run-up to the G20 Summit, is a small display of how questions of the poor and marginalised are lost on most when the question of development arises. Development, though multi-faceted, has assumed a unidimensional order, which in the given context does not allow for the existence of the marginalised and poor in informal settlements. While this should be considered an opportunity for improving the status of the marginalised and poor and providing them with better opportunities, it has instead led to them being seen as unwanted features to be erased or hidden in the façade of development in the city.[79] Similar experiences have taken place in other cities in the Global South in the run up to major international events. Direct parallels can be drawn with the developments that took place in Rio de Janeiro while preparing the city for 2016 Olympic Games. Urban development projects were widely criticised for their negative impact on marginal neighbourhoods, their collective autonomy, identity, and livelihood.[80]

Each of the development efforts mentioned above mirror the idea of a 'world-class city' as synonymous with 'an idealised vision of a modern, privatised, and slum-free city

76 The Outlook Business Team, 'G20 Budget: How much has India spent on hosting the Summit?' (Outlook India, 7 September 2023) <https://business.outlookindia.com/news/g20-budget-how-much-has-india-spent-on-hosting-the-g20-summit-in-delhi> accessed 13 June 2024.

77 Charlotte Lemanski (n 50) 450.

78 Gautam Bhan, *In the Public's Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* (Orient Black Swan 2016); Gautam Bhan, 'This is No Longer the City I Once Knew: Evictions, the Urban Poor and the Right to the City in Millennial Delhi' (2009) 21(1) Environment and Urbanization 127.

79 Ribhu Chatterjee and Pranay Dutta Roy, 'Hiding Poverty: Ahead of G20 Summit, Green Sheets keep Delhi Slums Under Wraps' (The Quint, 13 June 2024) <https://www.thequint.com/videos/g20-summit-green-sheets-beautification-delhi-slums-covered-up> accessed 13 June 2024.

80 Luis Eslava and Maria Clara Dias, 'Horizons of Inclusion: Life Between Laws and Developments in Rio de Janeiro' (2013) 44(2) Inter-American Law Review 177; Véronique Karine Simon and Einar Braathen, 'Collective Heritage and Urban Politics: An Uncertain Future for the Living Culture of Rio de Janeiro?' (2019) 25 International Journal of Heritage Studies 380.

assembled from transnationally circulating images of other so-called global cities.'[81] The potential and challenge of creating Global Cities in countries like India is particularly problematic given the legacy of caste discrimination and religious ghettoisation that also exists in society. Not only does this increase polarisation but also neglects the welfare needs of the regular population of the cities who are already less likely to "benefit from the spoils of global activity." In this context, it is important to not just critically look at activities undertaken by State authorities in the name of developing cities but also re-assess the international influences to prioritise global economic advancement in the quest to move up in the 'hierarchy' of Global Cities to ensure growth and development to the people.[82]

81 Asher Ghertner (n 22) 23.

82 Charlotte Lemanski (n 50) 448-461.

2024 NLUD JOURNAL OF LEGAL STUDIES VOL. 6

NATIONAL LAW UNIVERSITY, DELHI
Sector-14, Dwarka, New Delhi-110078
Tel. No : 011-28034255, Fax No:011- 28034254
www.nludelhi.ac.in