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Can there be any scope for pro-prosecution bias in a judge's mind during trial of narcotics cases? A brief critical study of judgments in drug cases instituted in 2022 and disposed of by the Special Court (NDPS Act) in the District of Pathankot in Punjab.

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Problem at hand: Can a Judge be influenced by his own bias as he embarks upon the task of deciding the culpability or otherwise of a person charged with a drug offence? What are the factors that determine the fate of an accused person in such a criminal trial? Is it that a courtroom battle is entirely decided by the quality of evidence gathered by an investigator and the quality of presentation or demolition thereof by the prosecutor or his adversary? Can a Judge be really guided by his implicit bias in the face of black-letter law?

Limited Purview: I intend to take up these questions here and I intend to tentatively answer them by way of presenting a case-study of judgments in drug cases decided by a Special Court (NDPS Act) in Punjab. I was quite intrigued by the data presented by the Ministry of Home Affairs in Rajya-Sabha in 2022 in response to an un-starred question that sought the details of convictions in narcotics cases on a pan-India basis over a period of 5 years¹. The figures present a significant divergence with a State like West Bengal clocking an average of even less than 10% ACVR at one end of the spectrum while quite a few other States presenting ACVRs far above the national average that hovers around 50%².

I choose Punjab as a State for my limited study primarily on account of the fact that I find the e-court records of the State quite well-maintained and user-friendly³. Further, in view of this being a limited exercise, I choose to study the trial court decisions for the cases instituted in the year 2022 for just

¹ Annexure-I is appended, which contains State-wise *conviction Rates (CVR) and average conviction rates (ACVR) in respect of drug cases for the years 2017-2021 obtained from the documents furnished by the Ministry of Home Affairs in response to an un-starred question bearing no 839 answered on 14.12.2022 in the RajyaSabha*. Average conviction rates (ACVR) have been arrived at on the basis of CVR for 5 years, i.e. from 2017 to 2021.

² States like Uttar Pradesh, Kerala, Mizoram, Nagaland, Maharashtra, Punjab present significantly higher ACVRs, i.e. much higher than the national ACVR.

³ While e-court records for drug cases in States like Mizoram, Nagaland or Kerala are far from being available online, the court documents for a State like Uttar Pradesh are all in a central/northern vernacular language and thus, beyond the reach of easy comprehension for the researcher.

one District, i.e. **Pathankot** the District being situated along the Indo-Pak border and thus more vulnerable to drug trafficking.

Statistics:*

District	Year	Number of Possession Cases lodged in 2022	Number of such Cases disposed of	Number of convictions	Number of acquittals	Percentage of convictions for the year 2022
Pathankot	2022	17	17	17	0	100

* Collected from e-court records pertaining to 2022 for the District of Pathankot⁴

The snapshot presents a staggering 100% conviction rate for the NDPS cases instituted in 2022 and disposed of by the Special Court (NDPS Act) at Pathankot. This seems to be interesting indeed and worth being studied.

Jurisprudence in NDPS Act:

Contrary to the general principles of criminal jurisprudence that relies upon the dictum of ***presumptive innocence*** which translates into the 'court holding someone in trial innocent until proved guilty', the narcotic jurisprudence follows the principle of ***presumptive culpability***⁵. However, the narcotic jurisprudence in India being significantly developed by the pronouncements of constitutional courts, such demand of *presumptive culpability* as mandated by the black-letter law of the NDPS Act, 1985 has been largely reined in.

Thus, the import of Section 42 of the Act has been continually modified to the extent that very little operational discretion is left now in the hands of a Sub-Inspector level raiding officer as to whether an operation would be undertaken or not⁶. The second sub-section of the Section 42 mandates such an officer to seek ratification from his immediate official superior and then only proceed for the operation in a closed place. A plain reading of the Section in question would not provide any such hint but then that's how it's sought to be looked at by the constitutional court⁷. Section 43 of the Act apparently used to offer earlier a larger manoeuvring space since it dealt with operations in open place and thus, free from the compulsive rigours thrust upon Section 42. But then *Abdul Rashid*

⁴<https://pathankot.dcourts.gov.in/case-status-search-by-case-type/>

⁵Section 35 and Section 54 of the NDPS Act

⁶Section 42 of the NDPS Act deals with operations of search and seizure in closed places while Section 43 thereof deals with such operations in open places.

⁷*Karnail Singh vs. State of Haryana 2009 (8) SCC 539*

Ibrahim or *Jagraj Singh* happened and any operation in open place undertaken with *prior intelligence* came to be regarded as operation under Section 42 for the purpose of compliance of protocol applicable for closed place operations⁸.

Section 50 of the Act which deals with the substantive procedure for search of person has likewise travelled a long trajectory, if one were to judge purely on the basis of the Act. The constitutional courts' pronouncements have made things far less discretionary for a field officer undertaking a narcotic raid when it comes to documenting a search of person detained under provisions of the NDPS Act⁹. Immediate compliance of Section 52A of the Act following any operation resulting in recovery of contraband has been a recent addition in the mandatory checklist on the part of a drug law enforcement officer following the *Mohan Lal* judgment¹⁰. Compliance of Section 57 of the Act too has been presented as a mandatory obligation for a raiding official¹¹. These substantive provisions are laid down in the text of the Act and the constitutional courts have rendered them mandatory on the part of the drug law enforcement officers.

In fine, conscious possession—both physical and constructive—of narcotic drugs of any quantity whatsoever remains the first ingredient of a narcotics case. However, since the law involves draconian terms—even the constitutional court judges can hardly spare any special treatment in favour of the arrestee under certain given circumstances—the Judges have consciously chosen to look far beyond the realm of black-letter provisions with a view to ensuring a fine balance between the concern for national security on one hand and respect for personal liberty on the other.

Reasons provided for conviction in the Punjab cases under discussion:

A careful reading of the judgments however presents an interesting picture. All the court judgments there seem to suggest how efficient has been the police investigation into the offences and show how forceful the voice of prosecution has been to drive home the guilt of the accused persons in cases after cases.

None of the cases does have any independent witnesses at all and the Judges explain why they need not harp on the presence of any such independent witnesses and why they may proceed solely on the basis of police depositions. The Judgments do not record any significant details in respect of the arguments by the defence and defence submissions are covered only summarily in a couple of

⁸*Abdul Rashid Ibrahim Mansuri vs. State of Gujarat (2000) 2 SCC 51; State of Rajasthan vs. Jagraj Singh (2016) 11 SCC 687*

⁹*State of Punjab vs. Balbir Singh 1994 (3) SCC 299; Vijaysinh Jadeja vs. State of Gujarat. Criminal Appeal No. 943 of 2005 at SCI; State of Rajasthan vs. Parmanand, SCI Cr. Apl 78 of 2005;*

¹⁰*Union of India vs. Mohanlal & Anr. SCI Cr. Apl 652 of 2012*

¹¹*Rakesh Kumar Mehra vs. DRI. Delhi High Court CrI. Apl. 1360 of 2014*

sentences in the text of judgments. The Judges on their own explain why all discrepancies in prosecution depositions may not be acted upon and why on the contrary such discrepancies are rather representative of the truthfulness of prosecution version. And in all the cases, the Judges explain towards the end how the prosecution has been able to establish their charges beyond all reasonable doubt and convict the accused persons¹².

Determinants of Judicial Findings: Is it entirely decided by law?

Is it that judicial findings are entirely decided by the quality of evidence collected and presentation thereof in terms of the legal frame-work in question? Scholarly research never denies any scope for bias in the process of judicial decision-making. Celebrated legal scholars—Gregory Sisk, Michael Heise and Andrew Morriss—showed in their analysis that (i) the judges' voting behaviour could be strongly associated with their political affiliations and (ii) their personal backgrounds and experiences could also shape their decision-making. Judges who had prior experience as prosecutors or in law enforcement were more likely to rule in favour of the government in criminal cases. Similarly, judges who had worked in the private sector were more likely to be sympathetic to business interests in cases involving commercial disputes (Gregory C Sisk, 1998). Eric Posner's research in 2008 also explored the issue of political bias among judges and its potential impact on the legal system. Posner noted further that political bias among judges was nothing new and that throughout history judges had been appointed by political leaders and significantly subject to political pressure (Posner, 2008).

Research on an extensive scale by Epstein & others argues that *explanations of judicial behaviour that fail to incorporate ideology are incomplete at best* (Lee Epstein, 2012). The authors there present a theoretical framework modelled on the role of judges' personal beliefs, which suggests that their ideological preferences play a central role in shaping their decisions, with conservative judges on an average tending to favour conservative outcomes and liberal judges doing the contrary.

Dissimilarity with the US context:

There's however one significant ingredient in the postulate of the US research on judicial behaviour. Judges in those contexts are all nominated by the political actors and not selected following any neutral test of merit from amongst multiple candidates. The US model may find its parallel to *some*

¹² It's a different matter however that none of the Pathankot cases of 2022 involves *commercial quantities* of drugs as defined in terms of Section 2(via) of the NDPS Act, 1985 and thus, not calling for any *mandatory minimalism* attracting a fairly high minimum punishment i.e. 10 years of rigorous imprisonment other than a fine of one lakh rupees. After all, the judicial logic of holding someone guilty of an offence may not depend on the quantum of penalty.

extent in the way Judges are selected for the constitutional courts in India but not for District judiciary here¹³.

However, I find a sufficiently strong parallel with the Pathankot pattern in a unique research study of judicial handling of drug cases in Mexico where the researcher shows with evidence how the judges in the federal District courts trying drug offences have an over-zealous inclination to convict the persons tried for drug offences and how such inclination varies directly proportionately with the degree of militarisation that different States have adopted as a mechanism to fight the drug menace (Cosio, 2016). The study calls it *enemy penology* approach whereby State regards the drug offenders as kind of State enemies equating adoption of anti-narcotic measures with launching of a *war*. It is this *war on drugs* approach that has seen the judiciary there accord an extra-privileged status during trial to the police narrative that seeks to penalise the accused person.

Judges in such circumstances act more as extended arm of the executive than as an objective, party-neutral judiciary as should be otherwise expected in a democracy. Furthermore, the researcher reveals how the convicting judges in Mexico's drug courts consider it a kind of their moral responsibility to punish the drug offenders in view of the all-pervasive damage that drug trafficking has inflicted on the nation. Thus, there remains a strong latent bias in the mind of a drug court judge which acts as an unfailing and forceful multiplier in favour of the prosecution and the accused person fights a doomed battle that he is, as it were, destined *ab initio* to lose.

Drug Menace in Punjab:

India's sole national survey undertaken in 2019 on the extent of substance abuse shows Punjab as one of the country's six worst affected States in terms of *opioid*¹⁴ abuse. In fact, Punjab remains the most affected State in the entire country if we exclude five less populous States in the North-East like Mizoram, Nagaland, Arunachal Pradesh, Sikkim and Manipur¹⁵ (India, 2019).

However, Punjab's tryst with drugs has been far from any recent phenomenon and can be well traced back to the 1980s. A vortex of complex politics witnessing the genesis of self-interest driven, State-induced terrorism borne on the strength of funds generated out of drug trafficking is what the State tentatively started experiencing then (Pal, 2017). The consequences became more than

¹³ I used the expression '*to some extent*' because about 33% of the High Court judges are appointed from amongst the judicial officers of District judiciary, who had been initially appointed following an objective test of merit.

¹⁴ Opioid refers to a class of narcotic drugs that include opium, heroin and also synthetic preparations like fentanyl, oxycodone, hydrocodone, codeine, morphine, etc.

¹⁵ These five States are ahead of Punjab in terms of population percentage impacted by opioid abuse while Punjab has the highest number of such abusers.

palpable by the end of the millennium's first decade¹⁶. The scenario is deeply lamented by two passionate researchers in an article of advocacy promoting the cause of de-addiction of Punjab's youth(Debasish Basu, 2015).

Drug Menace and the Public Psyche:

Could the widespread menace of drug abuse in Punjab have its own impact on public psyche too? **Katherine Beckett** in her research essay provides a framework and showshow public opinion played its role in shaping policy agenda around street crime and drug use in the United States. Beckett argues that media coverage and public opinion have been critical in setting the policy agenda around these issues, particularly in the context of the "war on drugs" and the tough-on-crime movement(Beckett, 1997).

The magnitude of social concern felt across the society in Punjab on account of drug abuse stands vindicated by the spate of media coverage in this regard around that time. The internet was loaded with news reports as to how drug addiction became an electoral issue in the State of Punjab way back in the year 2014¹⁷ and since then it has always remained as a relevant poll issue¹⁸. The popular

¹⁶The Indian Express dated 22th May, 2009 writes: "According to a Punjab Government survey...every third male and every tenth female student has taken drugs on one pretext or the other and 7 out of 10 college-going students abuse one or the other drug. These disturbing details were submitted by Harjit Singh, Secretary, Department of Social Security and Women and Child Development, Chandigarh, in May 2009, in reply to a petition filed by some drug rehabilitation centres before the Punjab and Haryana High Court..."

¹⁷For the first time in the history of free India, substance abuse became an electoral issue in 2014 in a State facing parliamentary elections.

¹⁸<https://economictimes.indiatimes.com/news/politics-and-nation/after-punjab-its-udta-haryana-drug-abuse-emerges-top-election-issue/articleshow/71589504.cms?from=mdr>

¹⁸<https://www.outlookindia.com/national/punjab-polls-2022-unkept-drugs-free-punjab-promises-return-to-haunt-parties-news-183096>

Hindi film *Udta Punjab* exposed the grim reality of the drug addiction that confronts the youth of the State.

It's likely to be natural that the judicial officers of the District Judiciary in Punjab, who had been a part of the society there would have their own psyche duly troubled on this account and they as committed individuals might view the drug offenders as enemies of the State. This essay argues that such a commitment at the individual level of the narcotic court judges oriented towards viewing a particular class of offenders as enemies of the State is liable to make them biased as judicial officers. It's highly likely that this pro-prosecution bias has been reflected in the way judicial decision making is done in the disposal of drug cases effected in 2022 at Pathankot.

(Limitation: This essay only argues why it's likely that the Pathankot judgments in drug cases may contain a pro-prosecution bias. However, it didn't attempt at exploring traces of any such bias. That may call for another research in that regard.)

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**GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS**

**RAJYA SABHA
UNSTARRED QUESTION NO. 839**

**TO BE ANSWERED ON THE 14TH DECEMBER, 2022/ AGRAHAYANA 23,
1944 (SAKA)**

NARCOTICS CASES UNDER NDPS ACT

839 SHRI A. A. RAHIM:

Will the Minister of HOME AFFAIRS be pleased to state:

(a) how many cases have been registered under NDPS Act in each State, year-wise over last five years, what is the conviction rate in each State for the same period;

(b) the reasons for low conviction rate and whether Government is planning any particular measure to make the law more effective and increase conviction rate, if so, details thereof; and

(c) how many cases have been registered by Narcotics Control Bureau (NCB), in each State annually over the last five years and what is the conviction rate in each State for the same period?

ANSWER

**MINISTER OF STATE IN THE MINISTRY OF HOME AFFAIRS
(SHRI NITYANAND RAI)**

(a) As per latest data published by National Crime Records Bureau (NCRB) pertaining to the year 2021, the State/UT wise details of cases Registered (CR) and Conviction Rate(CVR) under the Narcotics Drugs & Psychotropic Substance Act for the year 2017-2021 is at Annexure-I.

(b) The Government through Narcotics Control Bureau (NCB) organises training program to upgrade the skills of the public prosecutors and Drug Law Enforcement Officers to ensure better conviction rate. NCB has initiated quarterly training program for Special Public Prosecutors and two training programs have already been conducted.

(c) The details of cases registered by NCB in each State and conviction rate for the year 2018-2022 (upto October) is at annexure-II.

**State/UT wise details of cases Registered (CR) and Conviction Rate(CVR)
under the Narcotics Drugs & Psychotropic Substance Act for the year 2017-
2021**

SL	State/UT	2017		2018		2019		2020		2021	
		CR	CVR	CR	CVR	CR	CVR	CR	CVR	CR	CVR
1	Andhra Pradesh	682	18.4	534	27.9	717	15.8	866	12.7	1635	25.4
2	Arunachal Pradesh	124	0.0	122	15.4	124	33.3	132	0.0	264	16.7
3	Assam	354	20.0	478	8.0	841	8.2	983	6.8	2291	7.5
4	Bihar	749	46.0	615	75.0	697	72.2	964	76.9	1469	84.6
5	Chhattisgarh	743	55.6	712	57.8	707	54.3	875	70.0	1123	63.0
6	Goa	168	68.0	222	47.4	218	27.3	147	29.6	121	51.9
7	Gujarat	69	11.1	150	25.0	289	30.0	308	44.4	461	33.3
8	Haryana	2200	45.9	2587	54.6	2677	37.3	3060	44.1	2741	57.0
9	Himachal Pradesh	1010	36.5	1342	50.6	1439	40.5	1538	30.6	1537	31.0
10	Jharkhand	204	45.6	237	42.7	242	69.1	415	45.6	609	65.4
11	Karnataka	1126	48.4	1030	61.8	1652	58.9	4054	90.3	5787	93.0
12	Kerala	9244	95.9	8724	96.9	9245	97.4	4968	97.1	5695	98.9
13	Madhya Pradesh	1286	58.4	1874	66.0	3432	84.4	3155	81.1	4068	86.6
14	Maharashtra	14634	73.5	12195	84.1	14158	88.4	4714	94.6	10087	61.0
15	Manipur	275	73.3	381	53.2	338	39.2	304	56.3	354	18.5
16	Meghalaya	56	0.0	81	64.7	117	41.2	76	81.3	69	64.3
17	Mizoram	139	86.3	164	100.0	160	98.6	97	100.0	122	96.4
18	Nagaland	81	75.6	66	91.3	142	93.8	115	97.4	154	94.9
19	Odisha	573	20.5	573	10.2	980	61.0	1179	3.0	1642	25.7
20	Punjab	12356	67.6	11654	59.2	11536	64.8	6909	67.2	9972	77.9
21	Rajasthan	1596	73.1	1862	74.4	2592	75.8	2743	75.6	2989	72.7
22	Sikkim	3	0.0	7	33.3	20	50.0	19	66.7	52	0.0
23	Tamil Nadu	3812	79.9	3717	76.4	4329	79.3	5403	78.2	6852	82.9
24	Telangana	387	7.0	311	42.1	464	8.8	509	23.8	1346	25.6
25	Tripura	84	9.7	431	15.8	316	2.5	307	11.1	357	10.5
26	Uttar Pradesh	7439	86.6	8821	81.6	10198	74.3	10852	86.1	10432	85.4
27	Uttarakhand	1017	84.8	1064	57.0	1396	53.8	1282	81.6	1762	77.9
28	West Bengal	1724	8.9	1479	3.8	1421	8.0	1626	7.8	1890	2.9
	TOTAL STATE(S)	62135	71.0	61433	74.8	70447	76.8	57600	82.1	75881	78.1
29	A&N Islands	34	52.9	49	75.0	133	12.5	55	92.3	28	54.2
30	Chandigarh	244	65.4	178	67.7	226	65.2	134	67.1	89	75.6
31	D&N Haveli and Daman & Diu+	3	0.0	3		0	50.0	5		6	66.7
32	Delhi	376	78.5	507	69.1	712	62.3	748	55.6	566	65.5
33	Jammu & Kashmir*	991	14.6	938	14.8	1173	37.4	1222	15.7	1681	41.3
34	Ladakh	-	-	-	-	-	-	2	-	5	-
35	Lakshadweep	6	-	8	-	4		4	-	3	-
36	Puducherry	11	-	21	-	26	100.0	36	-	72	-
	TOTAL UT(S)	1665	46.4	1704	41.4	2274	51.1	2206	47.2	2450	59.2
	TOTAL (ALL INDIA)	63800	70.6	63137	74.4	72721	76.5	59806	81.6	78331	77.9

Source: Crime in India, NCRB

Note : '+' Combined data of erstwhile D&N Haveli UT and Daman & Diu UT during 2017, 2018

*1 Data of erstwhile Jammu & Kashmir State including Ladakh during 2017, 2018

CONVICTION RATES IN DRUG CASES IN VARIOUS STATES DURING 2017-2021

Sl. No	State	CVR 2017	CVR 2018	CVR 2019	CVR 2020	CVR 2021	CVR AVR (2017-21)
1.	Andhra Pradesh	18.4	27.9	15.8	12.7	25.4	20.04
2.	Arunachal	00.0	15.4	33.3	0.0	16.7	13.08
3.	Assam	20.0	8.0	8.2	6.8	7.5	10.1
4.	Bihar	46.0	75	72.2	76.9	84.6	61.74
5.	Chattisgarh	55.6	57.8	54.3	70.0	63	60.14
6.	Delhi	78.5	69.1	62.3	55.6	65.5	66.2
7.	Goa	68.0	47.4	27.3	29.6	51.9	44.84
8.	Gujarat	11.1	25.0	30.0	44.4	33.3	28.76
9.	Haryana	45.9	54.6	37.3	44.1	57	47.78
10.	Himachal Pradesh	36.5	50.6	40.5	30.6	31	37.84
11.	Jharkhand	45.6	42.7	69.1	45.6	65.4	53.68
12.	Karnataka	48.4	61.8	58.9	90.3	93	70.48
13.	Kerala	95.9	96.9	97.4	97.1	98.9	97.24
14.	Madhya Pradesh	58.4	66	84.4	81.1	86.6	75.3
15.	Maharashtra	73.5	84.1	88.4	94.6	61	80.32
16.	Manipur	73.3	53.2	39.2	56.3	18.5	48.1
17.	Meghalaya	0.0	64.7	41.2	81.3	64.3	50.3
18.	Mizoram	86.3	100	98.6	100	96.4	96.26
19.	Nagaland	75.6	91.3	93.8	97.4	94.9	90.6
20.	Odhisa	20.5	10.2	61	3	25.7	24.08
21.	Punjab	67.6	59.2	64.8	67.2	77.9	67.34
22.	Rajasthan	73.1	74.4	75.8	75.6	72.7	74.32
23.	Sikkim	0.0	33.3	50.0	66.7	0.0	30
24.	Tamilnadu	79.9	76.4	79.3	78.2	82.9	79.34
25.	Telengana	7.0	42.1	8.8	23.8	25.6	21.46
26.	Tripura	9.7	15.8	2.5	11.1	10.5	9.92
27.	Uttar Pradesh	86.6	81.6	74.3	86.1	85.4	82.8
28.	Uttarakhand	84.8	57	53.8	81.6	77.9	71.02
29.	West Bengal	8.9	3.8	8	7.8	2.9	6.28
30.	India (all States)	47.41	53.28	52.77	55.70	54.35	52 (appr)

- ❖ *Conviction Rates (CVR) in respect of drug cases for the years 2017-2021 have been obtained from the documents furnished by the Ministry of Home Affairs in connection with **an un-starred question bearing no 839 answered on 14.12.2022 in the Rajya Sabha.** Average conviction rates (AVR CVR) have been arrived at accordingly.*