THEORY OF *CONFIRMATION BIAS* AND A BRIEF COMPARATIVE STUDY OF DRUG COURT ADJUDICATIONS IN MEXICO AND PUNJAB: ARE THERE ANY TRACES OF *ENEMY PENOLOGY* BIAS?

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ABSTRACT

Do the judges always act impartially or at times in biased ways? What happens in a criminal trial where the judge is unduly inclined towards the prosecution? Delving deep into the theoretical underpinnings of confirmation bias, this essay seeks to draw a parallel between super-high conviction rate in drug cases in Punjab and that in Mexico. Is it that in both the cases, the judges have been unconsciously inclined towards the prosecution version of the alleged offence since they are unknowingly guided by an urge to punish the accused in these drug cases? When does such a mind-set become active? And why do we suspect that Punjab drug court judges probably had such a mind-set? Comparing Punjab adjudications with those in West Bengal, the essay identifies a skewed ratio and thereafter draws a parallel between Punjab and Mexico as both the places have been at the receiving end of the drug menace.

Keywords: Bias, Confirmation, Penology, Enemy, Drugs

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Introduction:

John Lily, the famous 16th century English playwright famously wrote in his *Euphues: The Anatomy of Wit* that "*all is fair in love and war".* The underlying idea was that even ethics can potentially take a back seat when it comes to fighting a war because the overwhelming consideration underlining the dictum seeks to tell us that none really bothers about any so-called fair play vis-à-vis an enemy on the border during a war-like situation. The motto there, though unwritten, is to ensure defeat, if not destruction of that enemy by whatever means possible. In a layman's language, that is what is essentially known as *enemy penology. Penology* refers to the study of punishment and the expression, when prefixed by the term *enemy,* goes to denote a special kind of criminal punishment, as it were, for people considered as *enemies.* Germans call it *Fiendstrafrecht*, meaning *enemy criminal law.* It's decidedly different from regular criminal jurisprudence which relies on the fundamental principle of according equal treatment to both the parties to a trial. That's what *rule of law* is also all about. But *enemy criminal law*, as it were, is a much narrower version of regular criminal jurisprudence where probably *the end* is more important than *the means* and where the end is to ensure the defeat of the adversary who is regarded as an *enemy*. That's how it's a kind of relatively one-sided and restrictive variant of regular manifestation of criminal jurisprudence.

But the black-letter law in a liberal democracy doesn't freely talk about this so-called *enemy penology.* What's more, whatever restrictive legal regimes may be introduced from time to time in order to address specific public policy challenges, the same has been historically known to be tempered and modified by the constitutional courts all over. But even then Cardenas Gonzalez in his extensive research on adjudication of drug cases by the trial judges in Mexico shows how the judges are often swayed by their intrinsic *confirmation bias* in favour of the prosecution and against the defendants And that's how the conviction rate in drug cases in certain Mexican provinces is enormously high[2]. Cardenas calls that *enemy penology* approach of the judges. Interestingly, the conviction rate in drug court adjudications in Punjab is

[2]David Cardenas Gonzalez examines the impact of Mexico's *"war on organized crime"* on the federal judiciary in his cerebral essay ***The effect of the 'war on organized crime' on the Mexican federal judiciary: A Comparative Case study of Judicial decision-making.*** The article employs a comparative case study approach to analyse the judicial decision-making in cases related to organized crime before and after the implementation of the war on organized crime. The study finds that the war on organized crime had a significant impact on judicial decision-making, with judges more likely to favour the prosecution in cases related to organized crime. The article argues that the pressure exerted by the executive branch of government to obtain convictions led to a shift in judicial decision-making, with judges less likely to consider the evidence presented by the defence and more likely to favour the prosecution. Conviction rate in Mexico drug cases, studied by Cardenas, hovered around 90%.

significantly high. In fact, it's one of the highest in India, going by the relevant data in this regard[3]. This essay will make a limited study and see if any parallel may be drawn between judgements pronounced by some Mexican judges and the Punjab judges who authored the judgments in our consideration here.

But we may first appreciate what the term *confirmation bias* connotes and conveys.

What is *Confirmation Bias*?

The term as such may have had a relatively recent origin and begun to gain acceptance in the 1960's but the underlying concept was propounded as early as in the 17th century when **Francis Bacon** wrote: *"The human understanding when it has once adopted an opinion (…) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate (…)"* (Bacon 1878)

Thus, man's inclination to form opinionated hypotheses and orient himself towards holding fast on to them, even in the face of conflicting findings, has been a psychological reality over time immemorial. It was the British psychologist ***Peter Wason*** who coined the term ***confirmation bias*** in 1960 to describe *the tendency of people to favour information that confirms or strengthens their beliefs or values.* The research area expanded rather rapidly between 1968 and 1980, primarily as a result of ***Herbert Simon's*** research on so-called *bounded rationality*. ***Tversky*** and ***Daniel Kahneman*** in the 1970s based their research on the findings of **Herbert Simon** and broke a new ground in their path-breaking research on *heuristics* and *biases* that eventually won them the Nobel in Economic Science in 2003. Their research claimed that *people are often cognitively deficient or disinclined to engage in the often complex information processes that are implied by normative models of decision-making and that because of constraints of time, knowledge and computational resources, people instead*

[3]A reply by Ministry of Home Affairs on 14.12.2022 to an un-starred question bearing ***No 839 in the RajyaSabha*** shows pan-India conviction figures in NDPS cases over 5 years between 2017 and 2021. West Bengal figured there at the lowest point and Kerala at the highest point on a country wide scale. Along with Kerala, some other States as well, like Mizoram or Nagaland or Punjab, figured at significantly higher levels than the country average of 52%. However, I chose Punjab over others on account of certain practical considerations. The e-court records are not that well maintained in Mizoram or Nagaland; and the final case disposal record maintenance in the e-court portal for Kerala leaves a huge scope for improvement.

have to rely on simpler judgmental or decisional heuristics. (Amos Tversky 1973)

The more specific and the most commonly accepted definition of *confirmation bias* was provided by ***Raymond Nickerson*** in 1998: *"the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."*(Nickerson 1998). At the same time, contrary information is either discounted if not outright ignored or interpreted in ways that do not challenge the predetermination.

The notion that people are given to dealing with evidence in terms of their own biases if they are in a position to take a personal interest in the issues under consideration has been an old favourite with psychologists also: *"If we have nothing personally at stake in a dispute between people who are strangers to us, we are remarkably intelligent about weighing the evidence and in reaching a rational conclusion. We can be convinced in favour of either of the fighting parties on the basis of good evidence. But let the fight be our own, or let our own friends, relatives, fraternity brothers, be parties to the fight, and we lose our ability to see any other side of the issue than our own. .. . The more urgent the impulse, or the closer it comes to the maintenance of our own selves, the more difficult it becomes to be rational and intelligent."* (Thurstone 1924)

People in general are desirous of obtaining information, which they expect to put to good use for their own favoured hypotheses or their pet beliefs. They are also eager to interpret their own findings in such a way so that the exercise eventually goes to uphold their hypotheses or beliefs. And more importantly, they tend not to seek—*if not to completely avoid*—information that would carry the potential of running counter to those predetermined hypotheses or beliefs and siding with alternative possibilities (Koriat A 1980).

Conscious and Subconscious Decision Making Processes:

Psychologists majorly agree that human brain is capable of distinguishing between conscious cognition and subconscious cognition. (Kalat 2017). Whether one can however distinguish conscious and subconscious *decision processes* from one another is not that well researched; nonetheless it does have some relevant theoretical as well as empirical basis for assessment.

The empirical foundation for the explanation proffered about *confirmation bias* incidentally is not that sufficient for drawing safe conclusions. A partial support flows from some neuro-

scientific studies according to which there are two neurologically distinct systems for conscious and subconscious processes (Liberman 2003). The theory talks about two so-called cognitive processes, namely System 1 and System 2. These System 1 and System 2 processes are essentially responsible as to how cognitive and social psychological research can be conducted. While the envisaged framework claims that processes of decision-making on the conscious plane can be somewhat distinguished from the decision-making process on the unconscious, one may not be completely disentangled from the other. (Evans 2008). System 1 implies subconscious cognitive processes that are significantly automatic and independent of an individual's intelligence and how his memory functions, which, in its turn, according to some researchers, is comparable to how it works for primates (Evans 2008). (This is different from System 2 which involves slow, explicit and conscious cognitive processes which are restricted by the individual's working memory capacity and intelligence (Evans 2008). System 2 is also associated with intellectual thinking about the future or alternative explanations, for example (Evans 2008). Thus, there exists an amazing synergy in the sense that System 1 gives birth to a kind of intuitive partial judgment which draws sustenance from the System 2 which gives birth to analytical arguments for the judgment. Interestingly, the individual may not be necessarily aware that his own arguments have this purpose but on the contrary, a consciousness tells him as it were that he is reasoning back and forth on an issue and eventually arrives at a conclusion which had been essentially already reached by him. This implies that both subconscious and conscious processes end up bolstering confirmatory reasoning, though most of the processing is actually *subconscious*.

However, dual process theories also claim that it can work the other way round as well, since the established belief wants us to believe that partial System 1 judgments can be resisted and replaced by a conscious intellectual assessment, if the individual falls in a trap, as it were, and consciously makes an effort to produce counterarguments. Thus, how exactly and how much a decision maker actually exhibits a *confirmation bias* seems to be a function of the closer ties between intuitive judgments and conscious decision making processes.

So far, the distinction between Systems 1 and 2, as well as the related dual process theories and neuro-scientific studies may seem to indicate that the respective roles of conscious and subconscious reasoning processes in confirmation bias are relatively easy to separate, at least on an ideational plane. However, some would argue that Systems 1 and 2 should be read far beyond in terms of subconscious and conscious processes and actually better conceptualized

as systems that capture different ways of thinking which may be an amalgamation of both conscious a and subconscious.

When applying this perspective on confirmation bias, it implies that even if both conscious) and subconscious elements can be at play in the reasoning patterns referred to as *confirmation bias*, humans are ordinarily far from aware that their search for, evaluation, interpretation etc. of information takes on a confirmatory pattern (Fiedler Klaus 2010). In other words, the consequences of reasoning in certain ways are not necessarily clear to decision makers.

Kinds of Confirmation Bias:

Bias may be triggered by multiple factors. It may be driven by sociological factors. For example, an adjudicator may be impacted by System 1 cognitive process driven by his race and thus, may be unwittingly and unduly liable to be inclined towards a judgment-debtor in case the latter belongs to the same race as the adjudicator. An adjudicator may be likewise unduly inclined towards one of the judgment-debtors on grounds of color, ethnicity, gender, etc as well. It's only when both the judgment-debtors belong to an identical social category in respect of race, color, ethnicity, gender, etc that these extraneous factors can be expected to cross out each other. Apart from such factors, there may be economic factors as well. An adjudicator originally hailing from an economically ill-off stratum may be taken over by the so-called System 1 cognitive process and may be unwittingly positioned against an adjudicator belonging to an economically well-off stratum pitted against someone from a poorer background. The vice-versa can be true as well.

There may be System 1 factors driven by any shared past. A judgment-debtor and an adjudicator who shared the same alma mater in their early formative years, for example, may provide the genesis of such so-called System 1 processes that may tilt the judge unwittingly in favor of or against the judgment-debtor, as the case may be.

Similarly, political ideology may be responsible for such System 1 biases. Religious ideology too may explain such confirmation biases. An adjudicator's personal beliefs or adherence to certain value system may also run contrary to the judicially and politically accepted standards of morality and the same may go to influence his judgments albeit he may not be consciously aware of the infirmity of his own judgments.

In all such cases however, it may be extremely difficult to find deliberate and explicit traces of bias because a judge cannot afford to be seen as *biased* for or against any of the conflicting parties seeking justice from his good office. He is officially neutral and his institutional neutrality remains in a constantly compulsive yet secretive battle as it were with his System 1 cognitive factors, which is what makes him interpret the facts in a particular way so that the law can be applied accordingly. The judge does not set the black-letter law nor can he afford to ignore the legal principle of *stare decisis*. These are the parameters already given to him and he is not in a position to change them. The only variable that he can decide for himself is how to see the facts and how to make others see them, so that the given law can be dovetailed into that specialized set of facts. It's up to the judge thus as to how he would cause a certain specific aspect of a case to be exposed or otherwise, how he would cause a certain aspect of a case to be negated by exposure or otherwise of a contrary set of facts and thus, how to make a specially documented set of facts fall in line with the given law of the land over which however he mostly does not have any control.

Study of Bias in the Judicial Arena:

Much as we might like to think otherwise, research shows that judges too have been guided by their intrinsic biases. Research literature in the US context is quite rich in this regard. One phenomenal work there is by ***Epstein, Landes and Posner*** who in their work titled ***The Behaviour of Federal Judges: A Theoretical and Empirical Study of Rational Choice***[4] explore the genesis of judicial decision making in the realm of social psychology wherein it's the *attitudes* in a judge's mind that largely determine the way a judge would respond to a given situation rather than the plain legal text of a statute.

Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal along with Epstein argue in ***Ideology and the Study of Judicial Behaviour***[5] that the study of judicial behaviour can be interpreted in terms of judges' ideological leanings. According to this framework, judges' ideological preferences play a central role in shaping their decisions, with conservative judges tending to favour conservative outcomes and liberal judges tending to favour liberal outcomes.

[4] Epstein, L., Landes, W. M., & Posner, R. A. (2013). *The Behavior of Federal Judges*. Harvard University Press. http://www.jstor.org/stable/j.ctt2jbs80

[5]Epstein, Lee, and others, 'Ideology and the Study of Judicial Behavior', in Jon Hanson, and John Jost (eds), *Ideology, Psychology, and Law*, Series in Political Psychology (2012; online edn, Oxford Academic, 24 May 2012), https://doi.org/10.1093/acprof:oso/9780199737512.003.0027, accessed 27 Sept. 2025.

Then, Eric Posner's article ***Does Political Bias In The Judiciary Matter?: Implications Of Judicial Bias Studies For Legal And Constitutional Reform***[6] explores the issue of political bias among judges and its potential impact on the legal system.

If there are studies dealing with the role of political ideologies and political bias in judicial decisions, there are also studies dealing with the rational choices exercised by judges in their decision-making. For example, the article ***Judicial Elections, Public Opinion, and their Impact on State Criminal Justice Policy*** by Travis N Taylor[7] explores the relationship between public opinion, judicial elections including re-elections, and state criminal justice policy in the United States.

The corpus of research studies on the role and extent of bias in judicial decision making by the judges in India is not significantly large. Nevertheless, there have been quite a few socio-legal investigations into such *confirmation bias* that became evident or otherwise in more than one context. As recent as in 2021, an exhaustive research study with a corpus of over 80 million cases from the lower courts in India over a time span between 2010 and 2018 was deeply studied by a group of social science experts drawn from a number of institutes from Europe and the US. Published under the aegis of *Toulouse School of Economics*, the study presents interesting findings as the researchers sought to study the significance of bias in the judicial mind on account of gender and religion (E. Ash 2021).

In a December 2020 study by Nitin Bharti & Sutanuka Roy made in the Indian context, the researchers examined a certain population of trial court judges and showed that judges' personal exposure to communal violence in their early childhood years had left deeply entrenched effects on their psyche which got reflected in the ways they handled and disposed of pre-trial bail application (Roy 2020). The researchers showed that other studies had focused on estimating bias and discrimination in judicial decisions while they also investigated the origins of such judicial bias and their study showed that judges' early life exposure to the socio-political environment had robust effects on adult decisions across generations. It showed that judges exposed to communal violence at least up to the age of 6 years were 16% more prone

[6] Eric Posner, "Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform" (John M. Olin Program in Law and Economics Working Paper No. 377, 2008). https://chicagounbound.uchicago.edu/law_and_economics/180/

[7]Taylor, Travis N., "Judicial Elections, Public Opinion, and their Impact on State Criminal Justice Policy" (2020). Theses and Dissertations--Political Science. 33., https://uknowledge.uky.edu/polysci_etds/33

to deny bail than otherwise.

Enemy Penology Bias in Mexican Drug Law Adjudications:

Cardenas Gonzalez on the other hand shows in his research how the federal judges in Mexico had ended up handling drug cases with a so-called *enemy penology* approach whereby an entirely different mirror is used to dispose of the cases involving drug seizures (Gonzalez 2016). Cardenas draws a trajectory of political developments in Mexico and the concomitant effects on the crumbling law and order scenario and how the State finally decided to rope in the army in order to control the violent crime syndicates all over the country. He divides all the regions in two broad categories depending upon the degree of militarization and specifies them as either Highly Militarised (HM) region or Low Militarised (LM) regions. Crime syndicates in Mexico were largely run by violent drug mafia, which in a way forced the State—both the executive and the legislature—to view them as security threats to the nation.[8]

In a militarized Mexico, such drug operatives, traffickers—following their being intercepted—were viewed as *enemies* even though they would be tried in the court of law. A court of law is expected to offer a judicial setting where both the parties—prosecution and the defendant—should be viewed equally and none goes punished without being heard. In fact, the Latin legal maxim *audialterampartem*meaning *let the other side be heard as well* has remained one of the cornerstones of criminal justice administration since time immemorial. However, this protocol or adherence to the democratic principle of equity is hardly cared for in a battlefield setting where one side should be naturally eager to eliminate the other side at the first available opportunity since each side believes that the survival of the other can happen only at the cost of his life. Thus, Cardenas talks about a special kind of *enemy penology* which is markedly different from a normal scheme of penology which is in evidence in a non-battlefield setting.

However, Cardenas in his research also clarifies that this so-called *enemy penology* is not in official existence in terms of black letter policy or rules meant for the judges. Rather, it's in the

[8]In fact, narcotics does remain a kind of *non-traditional security threat* for many nations. In other words, a large number of nations including India do regard drug trafficking as a veritable *security threat*. The reason is two-fold. First, drugs destroy the human worth of a consumer by way of leaving his central nervous system severely compromised, whereby he gets to be reduced to a wreck in the long run. Drugs, thus, destroy the human resource of a nation and human resource remains the best resource in every organization. It's like the software of a computer system, which, if corrupted, cannot be set right by even the costliest hardware. Second, drugs generate a huge amount of dirty money and this dirty money can impact free functioning of any arms of governance, eg. Judiciary, police, election commission, etc. And when such pillars of democracy or governance crumble, the entire system becomes weaker and weaker beyond redemption.

air, a kind of a *given* from the end of the executive and when the executive is highly militarised, the *given* assumes the force of more than a law regardless of whether the judges officially admit it or not. The conviction rate in drug cases in Mexico hovered around 90%.

Does it mean the judges in Mexico were just too eager to treat the defendants as their *enemies* and not as defendants as such? The research does not subscribe to that perception since almost none of the judges express anything to that effect in their interviews. However, an analysis of their judgments reveals very little traces of *presumption of innocence* of the defendants by the judges. The judges are mostly very eager as it were to find anything of convenience whereby the charge brought by the police might be willy-nilly established. The normal adversarial mechanism of justice administration stipulates that prosecution cannot win in case they cannot prove their charge convincingly against the accused and the judge is not supposed to intervene in the process, unlike in an inquisitorial system of justice administration wherein the judge himself does the job of fact ascertainment. In Mexico however, Cardenas' research shows that gaps in prosecution evidence are often glossed over by the judges themselves in their judgments and strengths of defence arguments are often undermined by the trying judges who often, very conveniently, explore higher court judgments to suit the prosecution's purpose. It's as if the principle of *presumption of innocence* gets to be reduced to the position of an academic relic and the judges are unwittingly over active to ensure that the prosecution charges are established. Normally, in an adversarial setting, the judge sets the accused free because prosecution is not able to present their version beyond any doubt. The judge in many cases may appreciate the truth in his own way but in absence of anything clinching to the contrary of defence version, finds it significantly difficult to act according to his own understanding. Likewise, the judge in many cases may appreciate the gaps in the prosecution version and yet proceed towards conviction in view of the defence not being successful in calling out the prosecution version. In the inquisitorial scheme of things, the judge is free to explore on his own and examine certain aspects that may not have been explored by either side and thus, he may decide which way to incline accordingly. Cardenas' research shows how Mexican judges mostly if not invariably act as though they function in an inquisitorial scheme of justice administration and proceed to arrive at the *truth* in their own way often by way of effectively disregarding the jurisprudential principle of *presumption of innocence* of the accused. Looked this way, one may veritably describe their functioning as one-sided and discriminatory.

Narcotic Jurisprudence in India:

Contrary to the general principle of criminal jurisprudence in a liberal democracy relying upon ***presumptive innocence***, the narcotic jurisprudence almost everywhere follows the principle of ***presumptive culpability***and India is no exception either[9]. 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 not[10]. 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 Section 42 would not provide any such hint but then that's how it's sought to be looked at by the constitutional court[11]. 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 rigors thrust upon Section 42. But then *Abdul Rashid 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 operations[12].

Section 50 of the Act which deals with the substantive procedure for search of person has likewise travelled a long trajectory. 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 Act[13].

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* judgment [14]. Compliance of Section 57 of the

[9]Section 35 and Section 54 of the Narcotic Drugs and Psychotropic Substances Act.
[10]Section 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.
[11]Karnail Singh vs. State of Haryana 2009 (8) SCC 539
[12]Abdul Rashid Ibrahim Mansuri vs. State of Gujarat (2000) 2 SCC 51; State of Rajasthan vs. Jagraj Singh (2016) 11 SCC 687
[13]State of Punjab vs. Balbir Singh 1994 (3) SCC 299; VijaysinhJadeja vs. State of Gujarat. Criminal Appeal No. 943 of 2005 at SCI; State of Rajasthan vs. Parmanand, SCI Cr. Apl 78 of 2005;
[14]Union of India vs. Mohanlal&Anr. SCI Cr. Apl 652 of 2012

Act too has been presented as a mandatory obligation for a raiding official[15]. These substantive provisions are laid down in the text of the Act and the constitutional courts have further deepened them and rendered them mandatory on the part of the drug law enforcement officers.

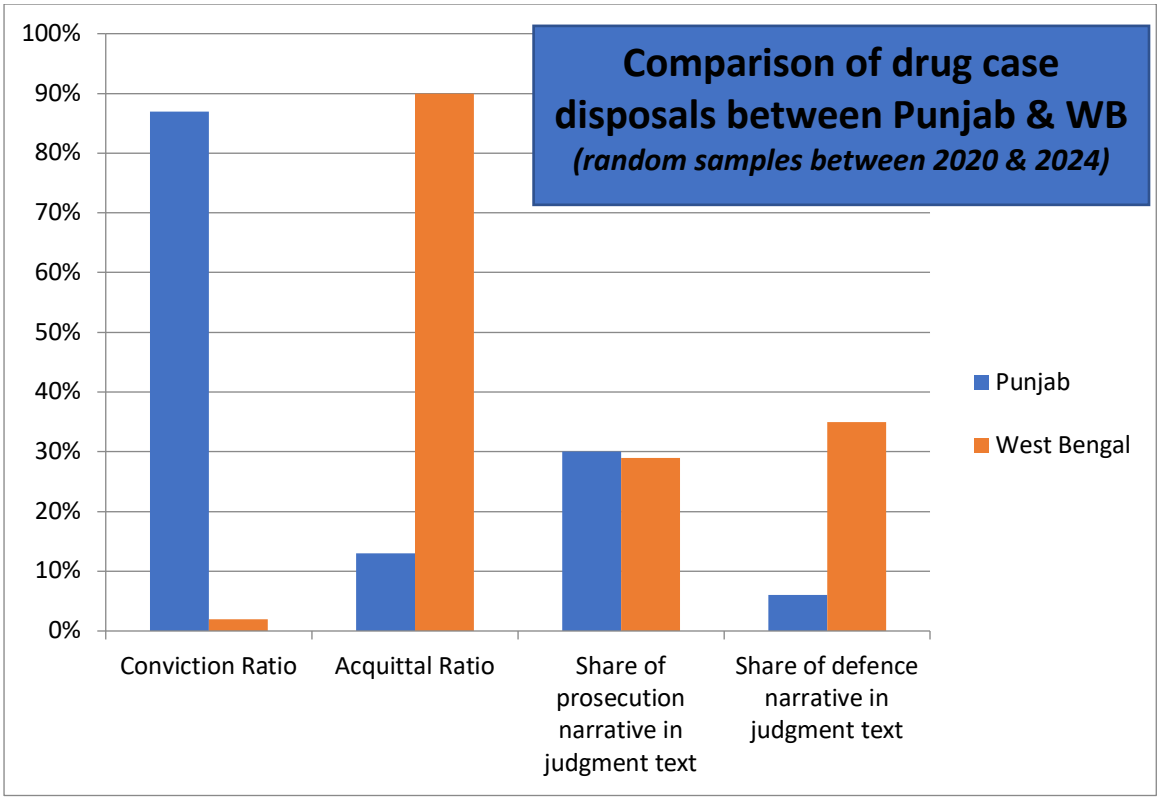
In fine, conscious possession—both physical and constructive—of narcotic drugs of any quantity whatsoever remains the first ingredient of a narcotics case. However, since the law involves draconian terms—even the constitutional court judges can hardly spare any special treatment in favour of the arrestee 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. That's how it has been time and again mandated by the constitutional courts that strictest regard for transparency be adhered to for search and seizure operations under NDPS Act because any deviation therefrom might render one liable for stringent action impairing his life and liberty. In fact, an overwhelming majority of acquittals in drug cases all over India always resulted from non-compliance of any of these provisions, i.e. Sections 42, 43, 50, 52A or 57 of the NDPS Act.

Reasons provided for conviction in the Punjab cases:

A careful study of the judgments of the 20 cases drawn at random from Punjab throws interesting findings. 87% of the Punjab cases resulted in conviction.[16].

[15]Rakesh Kumar Mehra vs. DRI. Delhi High Court Crl. Apl. 1360 of 2014

[16] This is in stark contrast to all-India average of about 52%, as furnished by MHA. A State like West Bengal has an average that varies between 2% and 10%. A limited comparison between fate of drug adjudications in Punjab and that of a State like West Bengal has been attempted to appreciate the difference in approach adopted by trial judges in Punjab.



A detailed examination was done especially in regard to a few specific parameters, i.e. (i) How much space in the judgment texts was accorded to accommodate the prosecution narrative as opposed to the defence; (ii) How many constitutional court judgments were mentioned in the judgment texts in order to bolster the rival points of views proffered by the prosecution and the defence; (iii) Relative importance attached to the critical substantive provisions of the NDPS Act.

It reveals that only about 6% space on an average was spared for the defence in trial court judgments from Punjab. The judgments from West Bengal show on the contrary about 35%. All the court judgments from Punjab 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 Punjab 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 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 because only *a tutored parrot can match 100% what his fellow witnesses may have said*. 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 persons.

The Scourge of Drugs in Punjab:

Punjab has been for quite some time in the past severely impacted by the twin menace of drug consumption and drug trafficking. The relevant data in this regard pose a grim picture indeed. ***The Punjab Opioid Dependence Survey****,* which was conducted only once so far in 2015 across ten districts in Punjab to determine the number of opioid addicts, estimated there were 2,32,856 opioid dependents and 8.6 lakh non-dependent opioid users. Every year, around Rs. 7,575 crores is spent on opioids in Punjab. The most commonly used opioids in Punjab have been heroin (53%), followed by opium (33%), and the remaining 14% opioids were pharmaceutical opioids. Then the question of economic drainage is there. On an average in terms of 2015 figures, a heroin addict was found to spend around Rs. 1400/- per day on heroin while an opium user would spend Rs. 340/- daily and pharmaceutical-opioid users would spend Rs. 265/- per day. The expenditure thus incurred on monthly procurement of heroin would go up to Rs. 42,000/- which would come to Rs. 504,000/- for one year!(Amardeep 2022). A large majority reported suffering from physical, mental or social adverse consequences of their drug use. While only a minority reported having been arrested and having been jailed, almost everyone who had been to jail reported having continued drug use inside the jail.

Another pan-India study subsequently conducted by AIIMS, titled as ***Magnitude of Substance Abuse in India 2019***, which studied the extent and patterns of substance abuse in the entire country also put Punjab's addiction level at a fairly high point. There are even certain villages in the State of Punjab, which are loosely known as *widows' villages* since most of the men there have been reduced to wrecks on account of prolonged drug abuse. The scourge of drug addiction turned out to be so severe in Punjab that narcotic menace had become an electoral issue for the first time in independent India during the parliamentary elections in 2014.

Enemy Penology **bias in Punjab drug law judgments?**

A comparative study of the brief gamut of judgment texts from Punjab and West Bengal shows a strong presence of the so-called enemy penology bias in the Punjab texts. That becomes

starkly evident from the relative weightage given to the defence versions in the judgments. While in West Bengal, the defence narrative occupies often well above 30% of the entire judgment texts on an average, it occupies only about 6% to 8% of the whole in case of Punjab drug court judgments. And this brings us to one of the fundamental premises of the so-called *confirmation bias*, i.e. *a subconsciously biased mind would not take any active interest in hearing the other side of the story.* If asked, such a subconsciously biased judge would never admit at all—much like the Mexican judges in Cardenas' case-study--that he had a conscious design behind such *muting of the other voice* not because he would be telling a lie but rather because he wouldn't be even consciously aware that his inner self is*ab initio* precariously tilted in favour of one side.

In almost all the acquittals in West Bengal sample, one major reason that plays almost an instrumental role is *discrepancy in depositions by witnesses.* The judge cannot be somehow satisfied about the genuineness of the case presented by prosecution and the law being draconian in nature, the judge does not proceed towards discounting the discrepancies and rules against the prosecution. It's not that there are no discrepancies in depositions in the sample from Punjab. However, not in a single case there, such discrepancies mattered for prosecution as the judges were never apparently bothered. The judge just notes them and then goes on to discount them.

Non-compliance of Section 50 also has been a major driver for acquittals in West Bengal. However, it's hardly so in Punjab. In fact, the judgment text in *Pathankot NDPS case number 47/2022 (State vs. Sahil),* makes no bones about the complete absence of consent memo in regard to Section 50 and even then, the accused is convicted.

Conclusion:

It appears thus that the judges in drug courts in Punjab are also fighting a composite battle along with all other State organs against the all-pervasive socio-economic menace of drug addiction. And just as in a war, the soldiers are only mandated to fight a common enemy—*theirs not to reason why, theirs but to do and die,*[17]--the narcotic judges too in Punjab—much like the Mexican judges in Cardenas' study—do appear to be kind of committed to holding the drug accused guilty and thereby probably discharging a moral obligation to do their own bit

[17] Alfred Lord Tennyson in *TheCharge of the Light Brigade*

towards cleansing their own society. This is the so-called *enemy penology* model in adjudication that Cardenas talks about in the context of his Mexican case study where a judge deep down in his mind is also fighting a war as it were, more as a part of the State machinery than otherwise. Wherever this all-pervasive drug menace is absent, maybe, like in West Bengal and unlike in Punjab, the narcotic court judges' judicious neutrality is seen to be in action as they adhere to judicial doctrine of seeing both sides as equal and worthy of each other without really bothering as to which of them might eventually emerge stronger.

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