ARNAB GOSWAMI AND OTHERS: THE DISCONTENTS OF ADJUDICATING CRIMINAL PROCEDURE UNDER ARTICLE 32

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There is an increasing trend of litigants approaching the Supreme Court of India ('SCI') directly under Article 32 with writ petitions to claim bail, anticipatory bail, quashing of First Information Reports ('FIRs'), etc. This paper examines this litigation trend and its judicial handling and critique it at various levels. The primary argument is that such a trend nullifies the relevance of statutory remedies under the Code of Criminal Procedure 1973 ('CrPC'), that are specifically tailored for settling criminal procedure claims. This has two further adverse implications. One, there are certain conditions and tests curated into the CrPC provisions that one must satisfy to succeed, for instance, in their anticipatory bail applications. However, adjudication of such claims under Article 32 has enabled litigants to dodge such warranted statutory thresholds. Second, it also leads to asymmetric dispersal of justice since not every similar litigation for criminal procedural claims under the writ jurisdiction is entertained. This paper builds upon these findings by studying several litigations under Article 32 between 2020 and 2023 that point towards the vagaries of the trend in question. The paper proceeds to suggest an adjudicatory framework based on norms of judicial review, like judicial minimalism and constitutional avoidance, to reverse the critiqued trend. The recommended model advocates that the SCI should not entertain its writ jurisdiction when the deserved remedy can be effectively granted through statutory routes of litigation before the 'magistrates, sessions courts, and High Courts' ('CrPC courts'), that the CrPC purposefully designates to settle criminal procedural disputes in the first instance. To conclude, if this trend is allowed to go unregulated, it will further entrench the existing institutional concerns, such as the historical distrust and subordination of the CrPC courts and the top heaviness of the Indian judiciary.

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I. INTRODUCTION

Article 32 of the Indian Constitution occupies a special position in the universe of legal remedies as it allows individuals to directly approach the SCI for the enforcement of fundamental rights. Dr BR Ambedkar even referred to this provision as "the very soul of the Constitution".[1] But it is equally vital to remember that the legal system under the same Constitution has curated a set of other accessible remedies for the various legal problems individuals may encounter. Particularly, to redress grievances that arise when one interacts with the criminal legal system, the CrPC lays down self-sufficient and specifically designed layers of legal remedies before the Magistrates, Sessions Courts and High Courts ('HCs').[2] In fact, many of the CrPC remedies are designed to grant reliefs that either restore or preserve your fundamental rights. Thus, in terms of effect, a constitutional relief under Article 32 may have the same impact as a relief obtained under the CrPC. Yet, certain cases in the past few years involving litigants like Arnab Goswami and Prashant Bhushan, among others, have signalled a trend to bypass the remedies before the CrPC courts by directly filing writ petitions under Article 32 before the SCI to enforce criminal procedural rights. This paper argues against this trend triggered by some litigants and, unfortunately, encouraged by the SCI. Our disapproval turns even more noteworthy given the concerning levels of inconsistency in the SCI's adjudication of such petitions. Notably, this paper does not deal with issues concerning appeals to the SCI on criminal procedural questions; it is exclusively concerned with the propriety of 'first-instance' petitions under Article 32, which can be adequately dealt with under the CrPC.

While some of the litigations discussed in this paper have been individually scrutinised in existing literature,[3] a comprehensive analysis of the impugned 'trend' and its bearing

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1 CONSTITUENT ASSEMBLY DEBATES, Volume No. 7, 9th December 1948, available at https://www.constitutionofindia.net/debates/09-dec-1948/ (Last visited on July 15, 2023).

2 Such courts designated under the CrPC shall be called "CrPC courts" when referred to collectively hereafter.

3 Abhinav Sekhri, *Crafting Accessible Remedies to Deal with Multiple FIRs and Complaints*, THE PROOF OF GUILT , March 11, 2021, available at https://theproofofguilt.blogspot.com/2021/03/crafting-accessible-remedies-to-deal.html (Last visited on July 15, 2023); Justice Madan Lokur, *Rampant Misuse of Criminal Justice System calls for Interventionist Approach from SCI*, LIVELAW , February 7, 2021, available at https://www.livelaw.in/columns/misuse-of-criminal-justice-press-freedom-supreme-court-munawar-faruqui-shashi-tharoor-169519 (Last visited on July 15, 2023); Zaid Wahidi, *Arnab Goswami & India's era of Unequal Liberties*, ARTICLE 14 , November 16, 2020, available at https://article-14.com/post/arnab-goswami-india-s-era-of-unequal-liberties (Last visited on July 15, 2023); Namit Saxena, *Can SCI under Article 32 of the Constitution club FIRs against an Accused?*, *?*, BAR AND BENCH , April 24, 2020, available at https://www.barandbench.com/columns/can-supreme-court-under-article-32-of-the-constitution-club-firs-against-an-accused (Last visited on July 15, 2023); Gautam Khazanchi, *First Among Equals*, LIVELAW , April 30, 2020, available at https://www.livelaw.in/columns/first-among-equals-155978 (Last visited on July 15, 2023); Vakasha Sachdev, *What is Article 32 & can SC "Discourage" petitions under it?*, THE QUINT , November 24, 2020, available at https://www.thequint.com/explainers/article-32-constitution-of-india-why-does-cji-want-to-

on the criminal justice system by reading together all the relevant cases is absent.[4] Moreover, even when authors have incidentally identified threads of such trend in a specific case, they have only suggested that if some litigants are directly approaching the Apex Court under Article 32, so should the others for their criminal procedural claims.[5] To that extent, previous literature has not canvassed the position the authors intend to defend in this paper.

This paper aims to plug this scholarly gap by demonstrating the worrying ramifications of the identified phenomena on the integrity of the criminal justice system in various forms. To serve this purpose, certain litigations before the SCI have been analysed, mainly between 2020 and 2023, which involved judging writ petitions for bail, anticipatory bail, quashing FIRs, and clubbing multiple FIRs. Based on the study, the principal argument made is that for many of these claims, the presence of other purposefully tailored remedies in the CrPC makes Article 32 superfluous,[6] and its overuse leads to selective dispersal of justice for some fortunate petitioners. There are four bases which underlie this and other additional arguments advanced later in this paper:

a. Respect for the logical hierarchy and distinctive significance of particular legal remedies;
b. Equal access to justice and its uniform administration;
c. Reversal of the distrust in the relevant roles of CrPC courts under the law; and

discourage-supreme-court-jurisprudence (Last visited on July 15, 2023); Prasanna S, *Discouraging Article 32 Habeas Corpus Petitions – The Legal Basis*, LIVELAW, November 23, 2020, available at https://www.livelaw.in/columns/discouraging-article-32-habeas-corpus-petitions-the-legal-basis-166230 (Last visited on July 15, 2023); Kashyap Joshi, *When heavens will fall for justice to others…?*, LIVELAW, November 24, 2020, available at https://www.livelaw.in/columns/when-heavens-will-fall-for-justice-to-others-166313 (Last visited on July 15, 2023); Pratap Bhanu Mehta, *SC was never perfect, but the signs are that it is slipping into judicial barbarism*, THE INDIAN EXPRESS, November 18, 2020, available at https://indianexpress.com/article/opinion/columns/supreme-court-arnab-goswami-bail-article-32-pratap-bhanu-mehta-7055067/ (Last visited on July 15, 2023); Sridhar Acharyalu, *Article 32: Rights for all or for a favoured few?*, THE WIRE , November 21, 2020, available at https://thewire.in/rights/supreme-court-article-32-ambedkar-arnab-goswami (Last visited on July 15, 2023). (Last visited on July 15, 2023); Prasanna S, *Discouraging Article 32 Habeas Corpus Petitions – The Legal Basis*, LIVELAW , November 23, 2020, available at https://www.livelaw.in/columns/discouraging-article-32-habeas-corpus-petitions-the-legal-basis-166230 (Last visited on July 15, 2023); Kashyap Joshi, *When heavens will fall for justice to others…?*, LIVELAW , November 24, 2020, available at https://www.livelaw.in/columns/when-heavens-will-fall-for-justice-to-others-166313 (Last visited on July 15, 2023); Pratap Bhanu Mehta, *SC was never perfect, but the signs are that it is slipping into judicial barbarism*, THE INDIAN EXPRESS , November 18, 2020, available at https://indianexpress.com/article/opinion/columns/supreme-court-arnab-goswami-bail-article-32-pratap-bhanu-mehta-7055067/ (Last visited on July 15, 2023); Sridhar Acharyalu, *Article 32: Rights for all or for a favoured few?*, THE WIRE, November 21, 2020, available at https://thewire.in/rights/supreme-court-article-32-ambedkar-arnab-goswami (Last visited on July 15, 2023).

[4] *See also* Divya Trivedi, *SCI's contrasting views on petitions under article 32 raise the hackles of experts*, FRONTLINE, December 2, 2020, available at https://frontline.thehindu.com/the-nation/article-32-and-the-supreme-court-contrasting-views-on-it-raises-legal-experts-hackles/article33213187.ece (Last visited on July 15, 2023); Abhinav Sekhri, *Prashant Kanojia's Case: A Strange Kind of Justice*, LIVELAW, June 12, 2019, available at https://www.livelaw.in/columns/kanojia-gets-bail-a-strange-kind-of-justice-145604 (Last visited on July 15, 2023); Gautam Bhatia, *The Kanojia Bail Order: Two Constitutional Issues*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, June 12, 2019, available at https://indconlawphil.wordpress.com/2019/06/12/the-kanojia-bail-order-two-constitutional-issues/ (Last visited on July 15, 2023) (while most of the literature is situated only around the litigations involving Arnab Goswami, Siddique Kappan, and Amish Devgan, these discuss cases of Prashant Kanojia and Sameet Thakkar albeit in limited depth).

[5] Acharyalu, *supra* note 3; Lokur, *supra* note 3; Wahidi, *supra* note 3; Prasanna, *supra* note 3; Sachdev, *supra* note 3.

[6] The emphasis is mainly on sections 437, 438, 439 and 482 of the CrPC.

d. Re-orientation of misplaced prioritisation of matters that require Article 32's attention.

Kindly factor in these fundamentals while scrutinising this paper's position.

The paper has four substantive parts. Part II sets the context by examining several cases that illustrate the trend under scrutiny regarding the adjudication of criminal procedure under Article 32. Conversely, in Part III, a few other cases have been discussed where the SCI rightly refused to decide direct writ petitions, as well as one where the litigant applied for anticipatory bail before the CrPC courts. These cases stand in stark contrast to the nature of litigation in cases seen in Part II and would help the readers to closely follow the logic of the paper's arguments against the trend. Part IV attempts to identify the kind of exceptional cases where Article 32 may be justifiably invoked, unlike those in parts II and III. Finally, before outlining our concluding annotations, Part V places the arguments within a theoretical framework inspired by the theory of Judicial Minimalism which advocates for a principled nature of judicial review with matured restraint that pays closer attention to the nature of the claims and facts involved.

II. CRIMINAL PROCEDURE LITIGATION UNDER ARTICLE 32: THE TREND AND ITS ANOMALIES

The various aspects of the trend of filing petitions under Article 32 and the adjudication of criminal procedure claims thereunder will be portrayed in this part by examining the nature of the litigation and the SCI's handling of the same in seven different cases which are thematically categorised. One of the cases is an exception to the extent it was decided under Article 226 of the Constitution. Nevertheless, the takeaways from it are directly relevant to the core premises of this paper.

A. CLUBBING MULTIPLE FIRS AND ANTICIPATORY BAIL

During the first wave of COVID-19, Arnab Goswami had several litigations before the courts, mostly at the SCI.[7] The first round of litigation at the top court arose from a news show on the Palghar lynching incident he hosted in April 2020.[8] Several FIRs were registered against him across Rajasthan, Chhattisgarh, Madhya Pradesh, Maharashtra etc., for inciting violence on religious grounds as well as spreading fake news maligning Sonia Gandhi.[9] Immediately, Arnab invoked Article 32 to quash these FIRs on the ground that they were politically motivated to suppress his speech rights. On the first day of the hearing, the SCI bench of Justice DY Chandrachud and Justice MR Shah passed an interim order ('Arnab–I') and stayed all the FIRs against Arnab except for the one in Nagpur.[10] Due to the multiplicity of FIRs and their allegations being similar, the SCI's move to club all the FIRs into one in the accused's jurisdiction was fitting.[11] However, for other prayers, the SCI ought to have directed him to the CrPC courts.

[7] Murali Krishnan, *Seven Petitions in Seven Months: Arnab Goswami's Litigation*, BAR AND BENCH, November 8, 2020, available at https://www.barandbench.com/columns/arnab-goswami-petitions-supreme-court-bombay-high-court (Last visited on July 15, 2023).
[8] Arnab Goswami v. Union of India, *Interim order*, W.P. (Crl.) No. 130/2020, ¶6.
[9] *Id.*, ¶5.
[10] *Id.*, ¶13.
[11] Khazanchi, *supra* note 3; Sekhri, *supra* note 3.

Apart from clubbing FIRs, the SCI granted Arnab interim protection from arrest under the FIRs and extended a period of three weeks to procure anticipatory bail under §438.[12] But note that by way of interim protection, the court effectively granted him anticipatory bail. Under §438, bail applications either before the HC or sessions courts involve a two-step process. In the preliminary hearing, the court may grant an 'interim' anticipatory bail which would only be confirmed or rejected later after a final hearing where the prosecutor's objections would also be heard.[13] Thus, the SCI's interim order is equivalent to the first step under §438(1). Besides, §438(1) lays down a cumulative test that must be crossed by applicants even before they obtain interim anticipatory bail.[14] This test places an advanced burden of proof on the applicant and a critical responsibility on the court to justify their orders. Unfortunately, the interim order in Arnab–I does not indicate any such moves that justified the interim protection from arrest. Thus, while Arnab would have been able to receive similar protection under the statute as well, he would have had to satisfy a higher threshold. By not remanding Arnab back to the CrPC courts for this relevant prayer, the SCI has allowed him to circumvent these statutory requirements, which common litigants must generally cross.[15] The statute prescribes a set of conditions and thresholds for the reason that remedies must correlate to the facts per se. And as long as those rules are not invalidated for violating fundamental rights or otherwise, the principles of functional separation of powers and democracy would require even the SCI to not bypass them via Article 32.

Moreover, the provision of three weeks' time to invoke §438 is unreasonably long, and the interim order lacks any justification whatsoever.[16] The SCI could have ordinarily asked the litigant to take recourse under the CrPC within two or three days, particularly considering the self-sufficient efficiency of the statutory route as clarified earlier and in the absence of any recorded peculiar difficulties in this case.

Similarly, journalist Amish Devgan had several FIRs filed against him in multiple jurisdictions because of certain statements he made during a news show which described a Sufi saint as an 'attacker' and 'robber'.[17] In June, 2020, Devgan filed a writ petition under Article 32 with comparable prayers as in *Arnab–I*. The SCI passed an interim order in *Amish Devgan* v. *Union of India* ('Devgan') granting protection from arrest under the impugned FIRs till the next date of hearing.[18] However, even on the next occasion, the SCI did not limit the interim protection and directed Devgan to invoke §438.[19] Instead, what followed was more disturbing than Arnab–I. The court continued to extend the arrest protection i.e. anticipatory bail, on every date of hearing until the case was disposed of.[20] To make matters worse, the final judgment delivered on 7 December 2020 extended the interim protection from arrest till the end of the investigation.[21] In contrast to *Arnab–I*, in *Devgan*, the bench of Justice AM Khanwilkar and Justice Sanjiv Khanna never deliberated the potential of §438 to provide the remedy of prior protection from arrest and custody

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[12] Arnab Goswami v. Union of India, *Interim order*, W.P. (Crl.) No. 130/2020, ¶6.

[13] The Code of Criminal Procedure, 1973, §438(1), §438(IA).

[14] The following factors must be considered together under Section 438(1) along with the reasonable belief of arrest: nature and gravity of accusations, applicant's antecedents, possibility of the applicant fleeing from justice, and malicious nature of the accusations to humiliate the applicant.

[15] *See also* Khazanchi, *supra* note 3 (detailed critique of this petition's unusually swift listing for hearing which this paper does not intend to examine in depth).

[16] The readers may observe this phenomenon in almost every case discussed in Part II.

[17] Amish Devgan v. Union of India, (2021) 1 SCC 1, ¶10.

[18] *Id.*, ¶6.

[19] Amish Devgan v. Union of India, *Interim order*, W.P. (Crl.) No. 160/2020.

[20] Hearings were conducted on 26 June 2020, 8 July 2020, 15 July 2020, 6 August 2020, 1 September 2020, 8 September 2020, and 25 September 2020.

[21] Amish Devgan v. Union of India, (2021) 1 SCC 1, ¶87.

in either the interim orders or the final judgment. Although Devgan was also justified in invoking Article 32 like Arnab due to the multiplicity of FIRs across states which had the same allegations, the SCI should not have entertained his prayer for protection from arrest beyond a reasonable period after the first hearing.[22] Hence, to such extent, the concerns raised about Arnab–I such as the disregard of specific yet legally self-sufficient remedies under the CrPC and the lack of consideration of pragmatic statutory conditions like the reasonable belief of arrest before the grant of anticipatory bail persists in *Devgan* as well.

In another comparable matter concerning multiple FIRs across states against the same accused persons, including Shashi Tharoor and Rajdeep Sardesai, when the accused filed an Article 32 petition to challenge the criminal proceedings along with a prayer for interim cover from arrest – anticipatory bail – the SCI casually stayed their arrest indefinitely without any identifiable rationale to back such direction. [23] The interim order's limited substantive text read as follows: "Issue notice... In the meantime, there shall be stay of arrest of the petitioners".[24] It is a fundamental rule in criminal law that arrest is not an imminent consequence of the registration of FIRs.[25] In other words, mere registration of FIR is not adequate to automatically apprehend arrest. Thus, the cavalier manner of issuing such directions without even reviewing the basic requirements of §438, like proof for a reasonable apprehension of arrest, is indicative of a constitutional court that feels unbound by the statute. As observed in this sub-part of the paper, when this trend appears across different cases, it must not be neglected, for it would be in acquiescence of entrenching the higher judiciary's unregulated judicial process as well as top-down litigation strategies of privileged petitioners.

B. QUASHING SINGLE FIR AND ANTICIPATORY BAIL: 'WE MUST HAVE FAITH IN OUR HCS OR NOT?

Within two weeks of his first petition, Arnab approached the SCI again under Article 32. This time, he challenged a separate FIR against him based on a complaint that he communalized the COVID crisis during a news show.[26] Here as well, he prayed for quashing the FIR as well as protection from coercive state action. On 11 May 2020, the same bench which decided Arnab–I passed an interim order which reserved the final judgment but curiously extended

[22] . *See* Pawan Khera v. Assam, *Final order*, W.P. (Crl.) No. 74/2023), ¶10 (Similar levels of unreasonableness in the grant of extensive time for certain privileged litigants before the SCI under Article 32 were evident in the recent case of the Congress party leader Pawan Khera as well. Once the court clubbed the multiple FIRs against him to Lucknow in the final order, the SCI recognised that to get regular bail, Khera must approach the jurisdictional CrPC court. Appreciable as it may be, nevertheless, the SCI provided Khera interim bail for 20 long days and directed him to approach the CrPC court for regular bail within that period.).

[23] For more details, *see also* LIVELAW, *Shashi Tharoor, Rajdeep Sardesai move Supreme Court against multiple FIRs for tweets on Sikh youth's death during farmer protests,* February 3, 2021, available at https://www.livelaw.in/top-stories/shashi-tharoor-rajdeep-sardesai-supreme-court-sedition-framers-protest-death-sikh-youthmrinal-pande-zafar-agha-paresh-nath-169315 (Last visited on July 15, 2023) (discusses the FIRs related to offences like sedition, conspiracy, and creation of communal disharmony.).

[24] Shashi Tharoor v. Union of India, W.P. (Crl.) No. 73/2021.

[25] Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1.

[26] BAR AND BENCH, *FIR No. 2: Arnab moves Supreme Court in Bandra incident; accuses Police of malice and ill will, and Congress of "fabricated migrant crisis"*, May 5, 2020, available at https://www.barandbench.com/news/litigation/fir-no-2-arnab-moves-supreme-court-in-bandra-incident-accuses-police-of-malice-ill-will-and-congress-of-fabricated-migrant-crisis (Last visited on July 15, 2023).

the protection granted on April 24 in *Arnab–I* to guard against any coercive action under this new FIR as well ('Arnab–II').[27]

There are four significant problems associated with *Arnab–II* at the inception of this litigation. First, in Arnab–II, there is only a single FIR within Maharashtra under challenge. The Bombay HC can very well adjudicate his claims, such as quashing FIR and anticipatory bail against apprehended arrest under §482, read with §438 of the CrPC. The move under Article 32 in Arnab–I was appropriate only due to the array of FIRs across states. The second problem arises as a consequence of the court clubbing Arnab–I and Arnab–II despite the factual causes of action being entirely different. They relate to separate statements made by Arnab about two unconnected incidents. In criminal law, it is generally admitted that factual peculiarities of each case will affect your procedural rights like bail differently.[28] Thus, it is questionable why the SCI deemed it appropriate to extend the arrest protection from *Arnab–I*. Third, the final judgment delivered by the SCI, commonly for both of Arnab's petitions, extended the protection from arrest granted earlier for another three weeks, once again with instruction for Arnab to invoke relevant statutory remedies in the CrPC within that timeframe.[29] In total, it can be seen that Arnab was protected from arrest, without being subject to the warranted rigours of §438, for more than a month since April 24. Lending such judicial generosity to one litigant without pressing reasons creates a concerning precedent that may not find uniform application, as will be seen in Part III. And finally, despite being granted the safe haven of three weeks in Arnab–I to invoke §438 for anticipatory bail, the petitioner never did so. In this light, the second petition under Article 32 could be reasonably interpreted as a conscious disregard of the default and closely applicable CrPC procedures. Undesirably, in this case, it has become quite clear that the indifference towards the CrPC framework is not merely because of the SCI's complacency but attributable to the litigation approach of the accused/petitioner, which seems dismissive towards the remedial routes before CrPC courts as well.

Around the same time as Arnab's two rounds of litigation at the SCI, an FIR was registered in Gujarat against advocate Prashant Bhushan as well. It was based on his tweet against the then Union Minister Prakash Javadekar, which allegedly hurt Hindu religious sentiments.[30] In response, Bhushan directly filed a writ petition before the SCI. Except for the facts that led to the FIR, the litigation is exactly like that in Arnab–II as far as the singularity of the FIR and the strategy to directly invoke Article 32 are concerned. Following the analysis of Arnab–II, even Bhushan should have ideally moved the Gujarat HC under §482 read with §438 as there was no special circumstance like multiple FIRs across states as seen in the earlier sub-part to justify the direct access to the Apex Court. Unfortunately, like in Arnab–II, without assessing the presence of a reasonable apprehension of arrest or other aspects of §438, the SCI rushed to pass an interim order which granted Bhushan protection from arrest indefinitely, whereas the court ought to have

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[27] Arnab Goswami v. Union of India, *Interim order*, W.P. (Crl.) No. 11189/2020); The order read as: "Until the judgment is pronounced…protection which was granted to the petitioner in…the order dated 24 April 2020 shall continue to remain in operation".

[28] §442 (2) of the CrPC is based on this principle and hence, it mandates that one may be still detained in jail for another case despite receiving bail in a particular case.

[29] Arnab Goswami v. Union of India, W.P. (Crl.) No. 130/2020, ¶54.

[30] LIVELAW, *Prashant Bhushan moves SC for quashing of FIR registered by Gujarat Police*, April 30, 2020, available at https://www.livelaw.in/top-stories/prashant-bhushan-kannan-gopinathan-move-sc-for-quashing-of-fir-registered-by-gujarat-police-156019 (Last visited on July 15, 2023).

remanded the matter the concerned HC maybe even with a direction to dispose of the matter expeditiously.[31]

Besides, the late journalist Vinod Dua's litigation before the SCI is particularly relevant in the line of cases under discussion. In June 2020, an FIR for offences like sedition was registered in Shimla against Dua over his YouTube programme on the citizenship law protests in Delhi.[32] Like Arnab and Bhushan, Dua also straightway knocked at the door of Article 32. What stood out in the court's judgment was that it quashed the lone FIR against Dua even though a few months before this decision,[33] the SCI bench in the Arnab Goswami case had categorically held that FIRs cannot be quashed under Article 32 due to the presence of efficacious remedy under §482 before the HCs.[34] The SCI's inconsistency in recognising the relevance of our statutory remedies and CrPC courts has now become palpable.

Besides, Dua's case presents another instance where Article 32 was permitted beyond the threshold despite the lack of multiple criminal proceedings across jurisdictions against the petitioner. In other words, this case adds up with other similar matters to highlight the fact that in such cases, the jurisdictional HC can effectively decide all related prayers. However, in Dua, the SCI explicitly defended its reliance on Article 32 on the basis that Dua was a journalist whose free speech rights were under threat.[35] It may be quite ironic to remind ourselves that even the CrPC courts, especially the HCs, which also function as constitutional courts under Article 226, can safeguard the fundamental rights of journalists. Affirmingly, the SCI had observed in a recent order that HCs are not subordinate to the SCI as they are also constitutional courts.[36] Hence, the explanation rooted in the journalist card alone may not be sufficient to bypass the CrPC courts. Be that as it may, then such a similar decision that allows evasion of the CrPC should not have been permitted for a non-journalist like Bhushan. This lack of uniformity in the filtration of Article 32 petitions resultantly leaves this area of jurisprudence unpredictable. In turn, it amplifies the primary concerns, such as bypassing the curated CrPC remedies and asymmetrical access to justice.

C. REGULAR BAIL APPLICATIONS AND THE RELEVANCE OF §439

Later in 2020, Arnab was arrested on November 5 under an FIR registered in 2018 that charged him with the offence of abetting the suicide of Anvay Naik, an interior designer.[37] Certain features of the litigation post his arrest repeat concerns this Paper raised in the previous sub-parts. Immediately upon arrest, Arnab filed a writ petition, not under Article 32, but before the Bombay HC under Article 226 to apply for regular bail. The HC rightly dismissed the bail petition after a detailed hearing. The court rationalised their decision in line with this paper's main thesis: "The legislature has provided specific remedy under §439 CrPC for applying for regular

[31] Prashant Bhushan v. Jaydev Rajnikanth Joshi, *Interim order*, W.P. (Crl) No. 131/2020.
[32] SCROLL STAFF, *Delhi Violence: Shimla Police summon journalist Vinod Dua after BJP leader's sedition complaint*, June 13, 2020, available at https://scroll.in/latest/964572/delhi-violence-shimla-police-summon-journalist-vinod-dua-after-bjp-leaders-sedition-complaint (Last visited on July 15, 2023).
[33] Vinod Dua v. Union of India, 2021 SCC OnLine SC 414, ¶80.
[34] Arnab Goswami v. Union of India, W.P. (Crl.) No. 130/2020, ¶49.
[35] Vinod Dua v. Union of India, 2021 SCC OnLine SC 414, ¶102.
[36] Shankar Kumar Jha v. Bihar, (2023) LiveLaw (SC) 114.
[37] NDTV (Saurabh Gupta), *TV Anchor Arnab Goswami arrested, sent to Judicial Custody for 2 weeks*, November 4, 2020, available at https://www.ndtv.com/india-news/arnab-goswami-arrested-for-allegedly-abetting-suicide-of-interior-designer-say-police-news-agency-pti-2320301 (Last visited on July 15, 2023).

bail" and thus,[38] the "petitioner has an alternate and efficacious remedy".[39] Further, the HC displayed due restraint and held that the facts did not reveal anything compelling which necessitated the court to invoke its writ jurisdiction to decide the bail application. This is the judicial attitude which must guide the admission and adjudication of writ petitions for criminal procedural claims. Fortunately, some of the cases discussed in the subsequent part of this paper reveal glimpses of this approach.

Furthermore, this case re-affirms the growing trend of litigants to side-step statutory remedies in favour of the constitutional ones even when the former would be practically and legally effective. Consider that here the Bombay HC had passed a direction that if Arnab moves under §439, his bail application must be decided within four days from filing.[40] However, Arnab predictably refused to invoke §439 despite the HC's assurance of expedited disposal. Rather, he appealed against the HC order to the SCI, which ultimately granted him bail.[41] Though the appeal route cannot be faulted, a parallel inference can indeed be drawn about the litigant's indifference towards trial courts.

III. THE 'RIGHT' JUDICIAL AND LITIGATION APPROACH TOWARDS CRPC REMEDIES

Having substantiated the existence of the trend under scrutiny and its variations in different types of criminal procedural litigation in Part II, this Part will build upon that base. The impugned trend's discontents would become clearer only once the impact of 'contrast cases' i.e., instances where the SCI refused to entertain Article 32 petitions for bail, are examined.

A. SCI'S RECOGNITION OF THE RELEVANCE OF THE HIGH COURTS IN DECIDING BAIL APPLICATIONS

The case of Ishma Arora and her Article 32 petition for regular bail is intriguing because of two factors that link it to Arnab–II: first, both matters were first heard on May 11, 2020, and second, the same bench of Justice Chandrachud and Justice Shah decided both of them. However, what sets these cases apart are the outcomes. While Arnab was granted protection from arrest for a generous period, later in the day, the SCI dismissed Ishma's petition as she had other alternate remedies before the CrPC courts.[42] In light of the analyses in Part II, especially that of Arnab–II, this is a stark illustration of the asymmetrical access to justice under Article 32. It is quite hypocritical for the SCI in Arnab–II to not dismiss the petition despite the petitioner having specific remedies under §482 read with §438 before the parent HC but to remind the petitioner about the applicable CrPC route under §439 later in the day in Ishma. Such contrasting patterns of adjudication leave a slippery precedent for the future. Remarkably, what intensifies the gravity of this episode of inconsistency is the fact that while Arnab's liberty had not been curtailed, Ishma's was, by way of an arrest and custody in jail. This further raises doubts about the apex court's parameters for prioritisation of cases where it invokes the extraordinary writ jurisdiction over and above the CrPC remedies.

[38] Arnab Goswami v. Maharashtra, W.P. (Crl.) No. 4132/2020, ¶45 ('Anvay Naik HC Case').
[39] *Id*., ¶70. We would like to point out that §437 of the CrPC is also a legitimate avenue for bail applications.
[40] *Id*.
[41] Arnab Goswami v. Maharashtra, (2020) 11 SCR 896 ('Anvay Naik SCI Case'). Our position is not on whether Arnab deserved bail or not. The focus is only on the procedure to apply for such bail.
[42] Ishma Arora v. Union of India, *Interim order*, W.P. (Crl.) No. 11169/2020.

In the same context, Sameet Thakker's case portrays a more drastic picture of the SCI's position on the use of Article 32 for bail and related claims. Several FIRs were registered across but within Maharashtra against Thakkar. The cases covered offences in the Indian Penal Code 1860 ('IPC') and the Information Technology Act 2000 ('IT Act') arising out of allegedly offensive tweets against the then Maharashtra Chief Minister Uddhav Thackeray.[43] In fact, during October and November of 2020, Thakkar remained in a vicious cycle of arrest, bail, and re-arrest due to the multiplicity of criminal proceedings.[44] It is against this backdrop that Thakkar approached the SCI under Article 32. Evidently, his personal liberty was being successively curtailed. This factor sharply distinguishes his case from the facts in Arnab–I, Devgan, Arnab–II, Bhushan, etc. Regardless, the SCI bench presided by Justice SA Bobde dismissed the petition and directed Thakkar to the appropriate forum i.e. Bombay HC.[45] Justice Bobde reportedly told the petitioner that the "HC can also uphold your fundamental rights and protect you".[46] This is true, heeding to the fact that even though Thakkar has been rounded in a trap of multiple FIRs, all of them are in Maharashtra, which makes the Bombay HC the appropriate forum under the CrPC.

In this series of discussions, the case of freelance journalist Siddique Kappan cannot be neglected. Kappan was arrested on 5 October 2020 by the Uttar Pradesh police mid-way during his travel to Hathras to report the infamous gang rape murder.[47] The FIR against him covered offences like sedition and other serious crimes under the Unlawful Activities (Prevention) Act 1967.[48] On Kappan's behalf, the Kerala Union of Working Journalists filed a writ petition under Article 32 for release on bail.[49] Like in Thakkar, it was a bench led by Justice Bobde that heard this matter. During the hearings, Justice Bobde reportedly advised the petitioner to approach the parent HC, presumably due to the lack of inter-state series of FIRs and recalled that the apex court is 'trying to discourage Article 32 petitions'.[50] The same approach should have been followed in Dua, Arnab–I, Arnab–II and other cases discussed in Part II, considering that Kappan is also a

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[43] HINDUSTAN TIMES (Pradeep Mitra), *Bombay High Court rejects plea of a person booked for abusive tweets against Maharashtra CM Uddhav Thackeray and son Aaditya*, October 23, 2020, available at https://www.hindustantimes.com/cities/bombay-high-court-rejects-plea-of-a-person-booked-for-abusive-tweets-against-maharashtra-cm-uddhav-thackeray-and-son-aaditya/story-fxEQ1nRXurI5nwy45uHXQJ.html (Last visited on July 15, 2023).

[44] LIVELAW, *Sameet Thakkar arrested again minutes after he got bail over alleged objectionable comments against Uddhav Thackeray*, November 2, 2020, available at https://www.livelaw.in/news-updates/sameet-thakkar-arrested-again-minutes-after-he-got-bail-over-alleged-objectionable-comments-against-uddhav-thackeray-165352?infinitescroll=1 (Last visited on July 15, 2023).

[45] Sameet Thakkar v. Director General of Police, Maharashtra, W.P. (Crl) No. 335/2020.

[46] LIVELAW, *"High courts can also uphold your fundamental rights" SC asks Sameet Thakker to approach HC for his release over tweets against Thackeray*, November 16, 2020, available at https://www.livelaw.in/top-stories/high-courts-can-also-uphold-your-fundamental-rights-sc-asks-sameer-thakker-to-approach-hc-for-his-release-over-tweets-against-thackeray-165916 (Last visited on July 15, 2023).

[47] FIRSTPOST, *Explained: Who Is Siddique Kappan, Journalist Arrested on His Way to Cover 2020 Hathras Gang-Rape and Murder Case?*, September 9, 2022, available at https://www.firstpost.com/explainers/explained-who-is-siddique-kappan-journalist-arrested-on-his-way-to-cover-2020-hathras-gang-rape-and-murder-case-11217641.html (Last visited on July 15, 2023).

[48] LIVELAW (Sparsh Upadhyay), *UAPA, Sedition Case Against Journalist Siddique Kappan & 7 Others Shifted To NIA Court In Lucknow*, December 15, 2021, available at https://www.livelaw.in/news-updates/uapa-sedition-journalist-siddique-kappan-shifted-nia-court-lucknow-187758 (Last visited on July 15, 2023).

[49] Kerala Union of Working Journalists v. Union of India, *Interim order*, W.P. (Crl.) No. 307/2020.

[50] Radhika Roy and Sanya Talwar, *"Approach Allahabad HC": SC tells Kapil Sibal on plea seeking release of journalist Siddique Kappan*, , LIVELAW, October 12, 2020, available at https://www.livelaw.in/top-stories/approach-allahabad-hc-sc-tells-kapil-sibal-on-plea-seeking-release-of-journalist-siddique-kappan-164321 (Last visited on July 15, 2023); S Sachdev, *supra* note 3 (While we agree with Justice Bobde's logic that backs the alternate remedies for bail, we do not intend to discourage Article 32's application as a whole to criminal litigation. Our position would become transparent in the next Part).

journalist like most of those petitioners and the FIR against him involved speech-related crimes that allegedly arose out of his professional activities. The SCI's approach in this case, if taken positively, can potentially reinforce the value of CrPC courts as well in protecting fundamental rights, that too of journalists.

More generally as well, the judicial approach in Ishma, Thakkar and Kappan is ideal to the extent that the SCI, like the Bombay HC in Anvay Naik's case, acknowledged the relevance and effectiveness of CrPC remedies and, thereby, re-directed the writ petitioners to the relevant CrPC courts. Nevertheless, there is a need to clarify the tone of our argument here. By favouring the position that Article 32 may not be invoked for certain criminal procedural disputes, this paper does not conclude that the right to bail or even anticipatory bail, or even the claims to quash criminal proceedings, are merely statutory in nature. Undoubtedly, every criminal procedural right has underlying constitutional values. For instance, in *Gurbaksh Singh Sibbia* v. *Punjab*, the SCI had located the basis of §438 in the right to personal liberty under Article 21.[51] Actually, the entire universe of criminal procedure reflects fundamental rights and values such as life, liberty, and dignity. Thus, the core argument presented in this paper is not anti-rights. The issue is only regarding the forum where the claims based on such rights should be decided.

B. POLYVOCAL VAGARIES AND THE ACCOMPANYING PROBLEM

The cases examined in this sub-section have illuminated the SCI's perennial polyvocality problem. Despite the Apex Court's insistence that deprivation of liberty even for one day is too many days,[52] it is witnessed that the SCI has at times, arbitrarily decided whose personal liberty is more valuable. The contrasts in the judicial approach in cases like *Arnab-II* and *Kappan* for instance, pinpoint that notions of justice and procedural fairness could fluctuate from bench to bench.[53] This means even in matters where the SCI chooses to grant bail under Article 32, 'it is sans equality'.[54]

Additionally, there is a technical yet critical accompanying problem. The SCI's uncertainties in the adjudication of criminal procedure under Article 32 are mainly being exposed through interim orders that are cryptic and devoid of adequate reasoning.[55] This puts the analyst in a quandary when ascertaining why the judges decide differently for different litigants and where the roads diverge. The traditional practice may be that such is the standard form of interim orders, especially of those at the admission stage. However, considering the ramifications of the issues pinpointed, the SCI must be held to a higher level of accountability to justify each judicial move; even the ones that affect initial levels of access to justice and not merely those which determine final outcomes.

C. LITIGANTS' ATTITUDE AND EFFECTIVENESS OF CRPC REMEDIES LIKE §438

At this juncture, it may serve well to discuss a case where not the SCI, but the litigant has shown the relevance of the remedial route under the CrPC in situations like some of the litigations discussed above. Around the same time as Arnab and Bhushan, an FIR for offences under §124A and §153A of the IPC was registered by the Delhi police against Dr Zafarul-Islam

[51] Gurbaksh Singh Sibbia v. State of Punjab, 1980 SCC (2) 565, ¶26.
[52] Arnab Goswami v. State of Maharashtra, (2021) 2 SCC 427, ¶61.
[53] Mehta, *supra* note 3, *See also* Joshi, *supra* note 3 (For the characterisation of this level of hypocrisy as 'judicial barbarism').
[54] Wahidi, *supra* note 3.
[55] Prashant Bhushan v. Jaydev Rajnikanth Joshi, W.P. (Crl) No. 131/2020.

Khan based on his tweet which claimed that Indian Muslims are being targeted by 'Hindutva bigots'.[56] Legally, he moved under §438 – not Article 32 – to seek anticipatory bail from the HC. In the bail application, Khan argued that investigating officers failed to provide written notice under §41A of the CrPC despite repeated requests and orally insisted on taking the applicant to the police station for interrogation.[57] Based on this ground which provided a basis for the reasonable apprehension of arrest, the HC granted interim anticipatory bail under §438(1) and posted the matter for hearing the prosecutor.[58] Finally, after hearing both sides, the anticipatory bail was confirmed by the HC.[59]

There are three takeaways which are relevant to sum up the contrasting analyses across Parts I and II. First, the fact that Khan was able to receive a proper remedy under §438 raises the question of why other litigants cannot follow the statutory route. If there is a meritorious case, a suitable remedy is obviously feasible under the CrPC. Second, unlike the litigations in Part II, the most important statutory condition of reasonable belief of arrest was tested on the facts by the CrPC court before granting the necessary relief. Finally, this case demonstrates that even if the facts concern free speech, the statutory route through the CrPC courts could be sufficient.

IV. CRIMINAL PROCEDURE LITIGATION UNDER ARTICLE 32: OUTLINING THE EXCEPTION

Having highlighted the irregularities in the use of Article 32 in criminal procedural litigation, in this Part, certain exceptions to the same are recognised. These exceptions are of such nature when either the factual circumstances go beyond the territorial jurisdiction of any one HC making the adjudication under the CrPC impossible, or the CrPC has no specifically curated remedies to deal with certain types of claims. To plug such gaps, the writ jurisdiction of the SCI is essential.

A. RELAY FIRS AND BAIL

In our criminal procedural system, even when an accused obtains bail in one case, they may remain in jail due to the formal arrest in another related FIR. This sequence may continue across several FIRs. This scenario turns more precarious when those FIRs are across numerous states. Virtually, the accused becomes remediless under the CrPC as they would have to then file multiple bail applications before different courts across those states, which would become logistically and financially draining for most Indian litigants. In such cases, Article 32 may be legitimately invoked for procuring a common bail as the SCI is the only court which possesses common territorial jurisdiction.

For instance, on June 27, 2022, the Delhi Police arrested journalist Mohammed Zubair under an FIR against him for his tweet about Lord Hanuman in 2018 that allegedly outraged the religious feelings of Hindus.[60] After two weeks, he secured bail from the relevant CrPC court

[56] THE NEW INDIAN EXPRESS, *Delhi Minority Commission Chief Zafarul Islam Khan Booked for sedition*, May 2, 2020, available at https://www.newindianexpress.com/thesundaystandard/2020/may/02/delhi-minority-commission-chief-zafarul-islam-khan-booked-for-sedition-after-social-media-post-2138240.html (Last visited on July 15, 2023).
[57] Copy of the bail application is on file with the authors.
[58] Dr Zafarul-Islam Khan v. State, *Interim order*, Bail Appln. No. 879/2020, (High Court of Delhi).
[59] Dr Zafarul-Islam Khan v. State, Bail Appln. No. 879/2020.
[60] THE PRINT, *Alt News co-founder Mohammad Zubair given bail in Delhi, but will remain in jail in UP Case*, July 15, 2022, available at https://theprint.in/india/alt-news-co-founder-mohammad-zubair-given-bail-in-delhi-but-will-remain-in-jail-in-up-case/1040091/ (Last visited on July 15, 2023).

indicating that the litigant first attempted to seek justice using the CrPC remedies. However, this was not sufficient for him to be released from jail as his arrest had been formally recorded under other similar FIRs registered in Uttar Pradesh against his statements calling certain Hindu seers 'hate mongers'[61] and promoting enmity on religious grounds through fake statements.[62] Jurisdictional trial courts in Uttar Pradesh had refused bail to Zubair in these FIRs.[63] The vicious relay of FIRs, arrests and consequent ineffectiveness of the bail granted are thus, quite evident. This fact-situation makes Zubair's case distinct from Bhushan, Dua or Arnab who filed Article 32 petitions to quash FIRs and seek anticipatory bail. Zubair's circumstance where the state machinery has already curbed his liberty demands more urgency than anticipatory claims to block coercive actions. Thus, when Zubair invoked Article 32, the court justly entertained the petition and granted him a common bail against all similar charges.[64]

B. ILLEGAL ARREST 'BEFORE' MAGISTERIAL REMAND

Article 22(2) of the Constitution mandates the police to produce an arrested accused before a judicial magistrate within twenty-four hours of arrest.[65] Afterwards, the magistrate would decide whether to authorize further custody pursuant to a remand order under §167 of the CrPC. Notably, such orders are judicial in nature. The default legal position is that a writ will not lie against magisterial orders.[66] The only remedies for the arrestee in this scenario are to file bail applications for release or move an appeal on merits against the remand order. However, a habeas corpus petition against illegal arrest may be legitimately moved under Article 32 to challenge the police's 'executive' action. For instance, Prashant Kanojia was arrested on June 8, 2019 under various provisions of the IPC and the IT Act primarily for making allegedly objectionable social media comments against Yogi Adityanath.[67] On June 10, his wife moved a petition under Article 32 challenging the arrest on several grounds, including the non-cognizable nature of alleged offences, non-production before a magistrate within twenty-four hours, lack of arrest memorandum, etc.[68]

However, before the SCI could hear the matter on June 11, Kanojia was produced before the jurisdictional magistrate who remanded him to judicial custody.[69] One must note that the petition was filed well before the remand. Hence, while the ground scenario may have changed *post-facto*, the challenge is still against an executive action and not the remand. Hence, the default

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[61] THE QUINT (Sakshat Chandok), *Alt News co-founder Md Zubair booked for calling Hindutva leader "Hate-Monger"*, June 2, 2022, available at https://www.thequint.com/news/india/altnews-co-founder-mohammed-zubair-hate-monger-bajrang-muni-yati-narsinghanand-anand-swaroop (Last visited on July 15, 2023).

[62] *Four charges and counting: Lakhimpur police obtain warrant against Zubair on Sudarshan TV FIR*, THE WIRE, July 9, 2022, available at https://thewire.in/media/lakhimpur-kheri-police-mohammed-zubair-alt-news-warrant (Last visited on July 15, 2023).

[63] Apoorva Mandhani, *Mohd Zubair got bail, but the guiding principle of India's justice system is still in jail,* THE PRINT, July 23, 2022 https://theprint.in/opinion/newsmaker-of-the-week/mohd-zubair-got-bail-but-the-guiding-principle-of-indias-justice-system-is-still-in-jail/1050976/ (Last visited on July 15, 2023).

[64] Mohammed Zubair v. NCT of Delhi, W.P. (Crl.) No. 279/2022 (S.C.).

[65] Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest … and no such person shall be detained in custody beyond the said period without the authority of a magistrate, *see* The Constitution of India, 1950, Art. 22(2).

[66] State of Maharashtra v. Tasneem Rizwan Siddiquee, (2018) 9 SCC 745, ¶10.

[67] NDTV, *Journalist Charged for alleged objectionable post against Yogi Adityanath*, June 8, 2019, available at https://www.ndtv.com/india-news/journalist-prashant-kanojia-charged-for-alleged-objectionable-post-against-yogi-adityanath-2050238 (Last visited on July 15, 2023).

[68] THE WIRE, *Supreme Court to Take Up Petition Against Prashant Kanojia's Arrest on Tuesday*, June 11, 2019, available at https://thewire.in/media/prashant-kanojia-arrest-supreme-court (Last visited on June 23, 2023).

[69] Bhatia, *supra* note 4.

rule discussed earlier cannot negate the writ remedy, especially considering there was already a substantial delay in producing Kanojia before the magistrate since June 8 which affects the fundamental right discussed under Article 22(2). Moreover, petitioners should not be penalised for the delay in courts hearing their petitions and for any adverse changes that may occur in the interim for which they are not liable for. Thus, it made sense for the SCI to allow bail for Kanojia under Article 32.[70] This position is significant to cover situations where the police may strategically delay the production of arrestees before the magistrate in future cases.

It is vital to consider 'specifics' like the cause of action, the nature of the impugned state action, and the timeline of case events among other nuances before the SCI rushes to entertain Article 32 petitions for criminal procedural matters. Regardless, this strengthens our position that the CrPC and related rules must be generally followed; deviation may be made only if the specifics lend validation.[71]

C. PREVENTIVE DETENTIONS AND HABEAS CORPUS PETITIONS

Habeas corpus writ petitions in the context of preventive detentions under specific criminal legislation are equally worthy that they ought to be urgently and appropriately adjudicated under Article 32. Yet the SCI seems to have not shown the same level of urgency and grit it showed in cases explored in Part II. For instance, the litigation concerning Omar Abdullah's detention in the aftermath of the constitutional amendment to Article 370 would highlight the SCI's misplaced priorities when it comes to the use of Article 32.[72]

On February 10, 2020, Abdullah's sister, Sara Pilot filed a petition under Article 32 challenging his preventive detention.[73] After a delay of three full days, the matter was listed before the bench of Justice Arun Mishra and Justice Indira Banerjee on February 14. The bench issued notice to the Jammu & Kashmir ('J&K') administration and directed them to file their counter affidavit. Quite generously, the court allowed time till March 2 to do so.[74] Reportedly, upon objection by the petitioner against the undue grant of time, the bench casually responded: "If the sister could wait for such a long period, then 15 days won't make a difference".[75] Though the authorities filed their reply, the SCI adjourned the matter due to non-availability of the Attorney General on March 2 and did the same on March 18 because of the Solicitor General's engagement elsewhere.[76] Certainly, if it had the will, the SCI could have mandated one of the other state law

[70] Jagisha Arora v. State of Uttar Pradesh, (2019) 6 SCC 619, ¶7-8.

[71] Readers may contrast *Kanojia* with *Kappan* where the writ petition was filed after the Magistrate delivered the remand order.

[72] *See also* HINDUSTAN TIMES, *Omar Abdullah, in detention since August 5 last year, to be released*, March 24, 2020, available at https://www.hindustantimes.com/india-news/omar-abdullah-in-detention-since-august-5-last-year-walks-out-of-home-jail-in-jammu-and-kashmir/story-yLI1UEjl0OBXr0DDT2RR5I.html (Last visited on July 15, 2023) (Along with many other political leaders, Abdullah was put in detention on 5 August 2019).

[73] Sara Abdullah Pilot v. Union Territory of J&K, W.P. (Crl.) No. 57/2020.

[74] Sara Abdullah Pilot v. Union Territory of J&K, *Interim Order*, W.P. (Crl.) No. 57/2020 (S.C.); *See also* Shrutanjaya Bhardwaj, *Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study,* 13(2) NUJS L. REV . 1, 17 (2020) (For similar judicial treatment in other habeas corpus cases).

[75] LIVELAW (Radhika Roy), *SC issues notice on habeas plea challenging detention of Ex-J&K CM Omar Abdullah under PSA*, February 14, 2020, available at https://www.livelaw.in/top-stories/sc-issues-notice-on-habeas-plea-challenging-detention-of-ex-jk-cm-omar-abdullah-under-psa-152728 (Last visited on July 15, 2023).

[76] LIVELAW (Mehal Jain), *SC to hear plea challenging detention of ex-J&K CM Omar Abdullah on March 5*, March 2. 2020, available at https://www.livelaw.in/top-stories/sc-to-hear-plea-challenging-detention-of-ex-jk-cm-omar-abdullah-on-march-4-153367 (Last visited on July 15, 2023); LIVELAW, *SC adjourns plea for release of former J&K CM Omar Abdullah till next week*, March 18, 2020 https://www.livelaw.in/top-stories/sc-adjourns-plea-for-release-

officers to argue a straightforward habeas corpus petition like this. Notably, such adjournments become graver when one realises that there was not a single substantive hearing on merits in Abdullah's case even after a month of filing the petition due to the state's non-serious approach that went uncondoned by the SCI: our sentinel on the *qui vive*.[77] Navroz Seervai critiqued this track record of the SCI, which prioritised cases like that of *Arnab* on a fast-track basis while keeping in limbo habeas corpus petitions against preventive detentions.[78] Undoubtedly, preventive detention poses a far more intrusive threat to rights than the filing of an FIR.

When contrasted with the SCI's attitude in the cases in Part II, such abdication of primary judicial responsibilities carries a dangerous potential to disintegrate the judicial system's integrity. In fact, the scenario is worse when one realises that in most cases in Part II, the personal liberty of litigants was not curtailed unlike in cases of preventive detention. Moreover, unlike the CrPC, legislation like the J&K Public Safety Act 1980 which authorises preventive detention does not provide for effective remedies for detainees. This peculiarity urges us to justify why Article 32 must be used and legitimately so, to challenge preventive detentions under specific legislation that do not provide any specific remedies otherwise.

V. TOP-HEAVY INDIAN JUDICIARY AND THE NEED FOR JUDICIAL MINIMALISM

The analysis in the previous parts indicate that the tendencies of certain litigants as well as the SCI's inconsistent judicial approaches have contributed to turning the adjudication of criminal procedural claims away from the localised remedial routes through the CrPC courts. Such an observation may not be out of place if one looks at another criminal litigation of a different kind.

In *Tehseen* Poonawalla v. *Union of India*,[79] ('Loya') before the SCI dismissed the Article 32 petition that sought an investigation into the suspicious death of Judge BH Loya, the Court examined the evidence/witness depositions like how a trial court would do except without adopting authenticating procedures like cross-examination that the CrPC and evidence laws require the trial courts to follow.[80] Like the conditions that ought to be satisfied under §438 before anticipatory bail is granted, cross-examination of disputed evidence is essential. Gautam Bhatia's characterisation of *Loya*is reflective of the systemic issues this paper has highlighted:

> "[I]t reads like a trial court judgment that has been delivered without a trial…it seems to be performing both the functions of a trial court, but without the statutory framework that is meant to govern the trial court in determining the truth, and of a

of-former-jk-cm-omar-abdullah-till-next-week-154006 (Last visited on July 15, 2023); *See also* Bhardwaj, *supra* note 77 (For a detailed assessment of how such avoidable reasons lead habeas corpus cases to become meaningless).

[77] *See also Omar Abdullah's Detention & Habeas Corpus Writ Petition: Unnecessary delay in Hearing by the SC?*, March 30, 2020, available at https://www.youtube.com/watch?v=E00a2VFEWy8 (Last visited on July 15, 2023) (To know other procedural infirmities in this litigation).

[78] Navroz Seervai, *Article 14 and the Paradox of Equality*, BAR AND BENCH, August 2, 2020 https://www.barandbench.com/columns/article-14-and-the-paradox-of-equality; FRONTLINE (AG Noorani), *Habeas Corpus Law: A Sorry Decline*, October 11, 2019, available at https://frontline.thehindu.com/cover-story/a-sorry-decline/article29604480.ece (Last visited on July 15, 2023).

[79] Tehseen Poonawalla v. Union of India, (2018) 6 SCC 72.

[80] *Id.*, ¶7, ¶63 (Justice Chandrachud).

> constitutional court, but ruling on issues that a constitutional court is neither equipped nor meant to rule on."[81]

Clearly, the SCI's adjudication of cases discussed in Part II has similarly been without the statutory framework that would have otherwise prudently bound the CrPC courts. Primarily generated by the "proliferation of writ petitions as convenient shortcuts",[82] this phenomenon comes at a cost. What Article 32 seems to allow the litigants, as well as the SCI, to do is to conveniently duck the warranted rigours of adjudication that the CrPC has secured.[83] When *Loya* is read along with the revelations that came out of the trend discussed in Part II, they indicate a strong sense of top-heaviness in the Indian judicial system towards the SCI so far as adjudication of criminal procedural issues is concerned.[84] Unfortunately, this concern has an extra dimension of unpredictability as well. Parts II, III and IV revealed that the SCI arbitrarily decides when it wishes to drop the top-heavy hat or not. Generally, a problem is much worse when it occurs erratically than being perpetually present.

Beyond, the redundant overuse of Article 32 has the tendency to trigger the trend of over-constitutionalisation of all legal remedies and resultantly intensifies the prevailing pathological distrust about the role and status of CrPC courts, especially the trial courts.[85] Robert Moog has detected this pattern of avoiding district courts via the upper court's writ jurisdiction generally, even beyond criminal litigation.[86] Moog says that the sustenance of such trend dents "the public's perception of the quality of justice they receive from the subordinate courts".[87]

A. THE THEORY OF JUDICIAL MINIMALISM AND ITS UTILITY

In *Ashwander* v. *Tennessee Valley Authority*,[88] ('Ashwander') Justice Brandeis's concurring opinion had formulated several useful norms of judicial restraint that judges ought to generally follow in constitutional adjudication. A few of those prescriptions may be particularly useful here. First, while deciding questions of constitutional significance, constitutional courts should formulate the constitutional rules narrowly without being broader than what the "precise facts" of each case require.[89] Cass Sunstein later characterised this norm as a method of Judicial Minimalism ('JM') which discourages broad rulings with abstract theories but encourages cases to be decided on the narrowest possible grounds relevant to the admitted facts.[90] Analogously, Jeff King backs such an approach which nudges judges to "accentuate the distinctive features of the

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[81] Gautam Bhatia, *The First and Final Tribunal: The Judge Loya Case and the Blurring of Judicial Functions*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, April 23, 2018, available at https://indconlawphil.wordpress.com/2018/04/23/the-first-and-final-tribunal-the-judge-loya-case-and-the-blurring-of-judicial-functions/ (Last visited on July 15, 2023) (emphasis added).

[82] This phrase has been borrowed from ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA 3–4 (2017).

[83] *Id*., 115 (In the context of public interest litigations generally, Bhuwania also finds that the SCI has paid less premium for "procedural limitations on common law adjudication" like fact-finding processes).

[84] *See also* Nick Robinson, *Judicial Architecture and Capacity* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016) (For literature that unmasks the top-heavy nature of the Indian judicial system and its downsides).

[85] BHUWANIA, *supra* note 82.

[86] Robert Moog, *The Significance of Lower Courts in the Judicial Process* in THE OXFORD INDIA COMPANION TO SOCIOLOGY AND SOCIAL ANTHROPOLOGY 1392 (2003); as cited in BHUWANIA, *supra* note 82, 3.

[87] *Id*., 1400, as cited in BHUWANIA, *supra* note 82, 4.

[88] Ashwander v. Tennessee Valley Authority, 297 US 288 (1936).

[89] *Id*., 347.

[90] CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, xiii, 3–4, 9–10 & 61 (2001).

case before them" while adjudicating so that decisions can be reasoned upon "particularised grounds".[91] Further in *Ashwander*, Justice Brandeis prescribed that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory…or general law, the Court will decide only the latter".[92] King classifies this idea as Constitutional Avoidance ('CA'),[93] which seems like a particular variant of JM. It can be seen that JM and CA advocate a cautious and attentive judicial process which considers the 'specifics'. Generally, these theories aim to secure the values of certainty, consistency, and adherence to legal rules, and urge judges to adjudicate disputes in a democratically and structurally acceptable manner.[94]

Quite evidently, these theories of judicial review focus on the 'nature of grounds' that judges must base their judgments upon. Put differently; they guide judges on how to decide cases. However, this paper does not aim to use these theories in this manner, for it would sabotage one of the premises clarified in Part III i.e., every criminal procedural right has underlying constitutional value(s). This implies that while deciding criminal procedural claims, it may be necessary to invoke such constitutional norms. Nevertheless, this paper looks to borrow the essential logic of JM and CA to focus on the appropriateness of courts which enforce such procedural rights – the who question. Precisely, this paper suggests that when faced with litigations where the deserved remedy can be effectively granted through statutory routes of litigation before the CrPC courts, the SCI must not entertain its Article 32 jurisdiction. In line with our proposition and that too in the context of criminal procedural litigation, in *Sakiri Vasu* v. *Uttar Pradesh*, the SCI had berated the litigation rush for directions to register FIRs and order effective investigations even under Article 226, and held that HCs must not encourage such petitions as there is an alternate remedy under §156(3) of the CrPC before magistrates.[95]

Such a guiding framework of judicial approach inspired by JM and CA could help us to avoid the over-constitutionalisation of remedies in the long run and potentially leave ample space for the CrPC courts to perform their duties. The paper is cognisant of the assertion that Article 32 is that provision "without which this Constitution would be a nullity".[96] While this oft-quoted statement of Ambedkar must certainly nudge the SCI to use Article 32 righteously for deserving petitions, it may not be loosely tossed to obliviate other nuanced legal provisions, grounds and remedies which can effectively work on their own, if let be. After all, CrPC provisions like §§437, 438 and 439 are not bare vessels; they aim to preserve constitutional rights, and CrPC courts can and must certainly adopt constitutional values in their decisions. In that sense, constitutional law must not be seen as being the 'hegemony' of the SCI. It is not for no reason that trial courts at the district level are the first-instance courts for most legal disputes as opposed to the practically favoured yet perilous top-down nature of the Indian judiciary. To overcome the same, a radical yet legally sound change of the nature described in this Part is imperative in our litigation and judicial culture especially since the SCI has been unjustifiably inconsistent in its maximalist avatar, rather than being legitimately minimalist.

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[91] JEFF KING, JUDGING SOCIAL RIGHTS, 293–294 (2012).
[92] Ashwander v. Tennessee Valley Authority, 297 US 288 (1936), ¶4.
[93] KING, *supra* note 95, 281; Farrah Ahmed and Tarunabh Khaitan, *Constitutional Avoidance in Social Rights Adjudication*, 35(3) OXFORD JOURNAL OF LEGAL STUDIES 608 (2015).
[94] Mrinal Satish and Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian SCI's Approach to Terror-Related Adjudication*, 21(1) NATIONAL LAW SCHOOL OF INDIA REVIEW 51, 55 (2009).
[95] Sakiri Vasu v. Uttar Pradesh, 2008 (2) SCC 409, ¶25–28.
[96] CONSTITUENT ASSEMBLY DEBATES, *supra* note 1.

VI. CONCLUSION

Justice Bobde's remarks about discouraging Article 32 jurisdiction in cases like *Kappan* had the tendency to be interpreted as being anti-rights and hence, uncalled-for.[97] Even if based on reasonable logic, as Kashyap Joshi says, "when the Chief Justice of India, the judicial and administrative head of Indian Judiciary, makes such remarks on Article 32, in open court, its impact is huge and message is negative".[98] The looseness of it being an oral observation during court proceedings may have had a bearing on the critical reception. This paper has consciously tried to avoid that trap by infusing reasoned specificity into its main propositions. This paper does not prescribe a complete avoidance of Article 32 for criminal procedural disputes. This paper illustratively collates the kind of petitions inclusive of criminal procedural issues that could be legitimately adjudicated by the SCI under Article 32:[99]

a. Habeas corpus petitions against preventive detentions (*Abdullah*);

b. Habeas corpus petitions against illegal police arrests before magisterial remand orders are passed authorising post-arrest detention (*Kanojia*);

c. Bail petitions when multiple FIRs across several states disable the arrestee from being released from jail despite receiving bail in some or most of the cases (*Zubair*); and

d. Petitions to club multiple FIRs across states based on the same set of transactions (*Arnab–I*); [100]

e. Petitions for bail or quashing FIRs along with challenges to the constitutionality of statutory provisions.

In all other scenarios, prospective litigants must ideally invoke statutory remedies before the relevant CrPC courts. If such writ petitions are filed anyway, the SCI must responsibly guide those petitioners to withdraw their petitions and take appropriate legal steps under the CrPC. And in cases like Arnab–I or Devgan where a single petition raises multiple prayers, the SCI should solely decide upon the relevant prayer like clubbing of FIRs and simultaneously, effectively remand other issues for determination by the concerned courts.

[97] Prasanna, *supra* note 3; Sachdev, *supra* note 3; Joshi, *supra* note 3.
[98] Joshi, *supra* note 3.
[99] Representative cases are tagged in the list to help readers to ascertain the logic behind the inclusion of these categories of petitions based on the analysis of such cases in earlier portions of the paper.
[100] *See also* Sekhri, *supra* note 3 (For literature that positively advocates for magistracy level remedies even for this kind of cases).