A CRITICAL APPRECIATION OF *S. SUSHMA* V. *COMMISSIONER OF POLICE*

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I. Introduction

IN JUNE 2021, the Madras High Court delivered its judgment in a petition seeking issuance of a writ of mandamus. The petition was filed against commissioners of police of Greater Chennai and Madurai, inspectors of police at Madurai along with parents of both the petitioners. The petitioners prayed for instructing the respondents not to interfere with the life of the petitioners and to grant necessary police protection.

The petitioners are a lesbian couple, whose relationship was being opposed by the parents of the petitioners (*hereinafter* referred as 'respondent-parents'). Faced with the opposition, the petitioners fled to Chennai. The respondent-parents then filed complaints of missing person with inspectors of police at Madurai. Consequent to the complaints and registered First Information Reports (*hereinafter* referred as 'FIRs'), the petitioners faced interrogation by the police at their residential premises and apprehended threat to their safety. The Court noted that this case was a 'sample' case of how the society is grappling with accepting same-sex relationships and thus, considered that this case required to be dealt with more sensitivity and empathy. The Court then heard the parties in-chamber and referred the petitioners and their respective parents to a counsellor. After the in-chamber hearing, the judge passed an order which states as follows: [1]

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S. Sushma v. *Commissioner of Police,* (2021) SCC OnLine Mad 2096, para 4. The decision was delivered on June 7, 2021 by the Madras High Court.

> It would have been possible for me to pack my order with a lot of research material and get applauded by the outside world for rendering a scholarly order. There was a call from inside which kept reminding me that if I venture into such an exercise . . . the order will not reveal my true and honest feeling about this very important issue. To be open, I am also trying to break my own preconceived notions about this issue and I am in the process of evolving, and sincerely attempting to understand the feelings of the petitioners and their parents thereafter, proceed to write a detailed Order on this issue. That is the reason why I am trying to develop this case brick by brick and ultimately, construct something purposeful on this issue.

This order makes it clear that, the court got an opportunity to treat this as a 'sample' case to lay down broader guidelines to address the issues surrounding non-acceptance of same-sex relationships in India. Accordingly, several governmental bodies were *suo-moto* added as respondents which included: Government of India's Ministry of Social Justice and Empowerment, Ministry of Health and Family Welfare, Ministry of Women and Child Development, National Medical Commission, Indian Psychiatric Society, Department of Higher Education, Department of School Education and Literacy, University Grants Commission (*hereinafter* referred as 'UGC'), All India Council for Technical Education (*hereinafter* referred as 'AICTE'), National Council of Educational Research and Training (*hereinafter* referred as 'NCERT'), etc.

Additionally, the judge, Anand Venkatesh J. underwent psychoeducation and interacted with a member of the Lesbian Gay Bisexual Transgender Queer Asexual+ (*hereinafter* referred as 'LGBTQIA+') community, her mother and vice president of Solidarity and Action Against the HIV Infection in India ('SAATHII') 'to help understand the ground realities, the emotions, social discrimination and exclusion, and several other difficulties faced by the community'.[2]

[2] *Supra* note 1, para 8.

The judgment has two noticeable parts; one in which the judge adopts the 'out-of-the-box' approach and other where the judge follows the conventional method of decision-making. Here, by conventional method of decision-making we imply that judges apply the identified binding legal rules to the facts of a case and non-legal normative consideration are not resorted to while making a decision. Our construction of 'conventional method of decision-making' resembles to some of the foundations of 'legal formalism'[3]. For legal formalists, judges operate within the independent realm of rules, principles and legal reasoning. Since it is also prescriptive theory on how judges should decide cases, it advocates for judges to show commitment to rationally determinate law and independent adjudication.[4]

The instant judgment is 'out-of-the-box' not only because the judgment so claims[5] but because the judge, while rendering the decision, adopted an unprecedented approach for Indian jurisprudence.[6] The adoption of such an unprecedented approach is justified by the judge based on the consideration that cases with similar factual matrix form a separate class warranting a special approach for decision-making. These cases are characterised by presence of a need for de-stigmatisation and acceptance in the eyes of the society. This case is a representation of 'queer persons'[7] experiences with formal legal systems, where litigation arises out of stigmatisation and

[3] Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?" Working Paper No. 320, *University of Chicago Public Law & Legal Theory*, 1 (2010).
[4] *Ibid.*
[5] *Supra* note 1, para 9.
[6] Cases with similar factual matrix have been heard and decided in favour of the couple seeking protection by other High Courts without referring to psychoeducation; *Sultana Mirza.* v. *State of UP*, WP (Civil) No. 17394 of 2020; Omar Rashid, "Allahabad High Court orders protection for same-sex couple" *The Hindu*, January 30, 2021, *available at:* https://www.reuters.com/world/india/indian-court-calls-sweeping-reforms-respect-lgbt-rights-2021-06-07/ (last visited on October 7, 2021); *Paramjit Kaur* v. *State of Punjab* 2020 SCC OnLine P&H 994 "HC tells Mohali SSP to protect lesbian couple" *The Indian Express*, July 22, 2021, *available at:* https://indianexpress.com/article/cities/chandigarh/hc-tells-mohali-ssp-to-protect-lesbian-couple-6517822/ (last visited on October 7, 2021); *Chinmayee Jena* v. *State of Odisha* 2020 SCC OnLine Ori 602 "Ori HC: Same-sex couple have a right to live together outside wedlock; Rights of a woman enshrined in Protection of Women from Domestic Violence Act, 2005 to apply on the "lady" in the relationship" *The SCC Online Blog*, (August 26, 2020), *available at*: https://www.scconline.com/blog/post/2020/08/26/ori-hc-│-same-sex-couple-have-a-right-to-live-together-outside-wedlock-rights-of-a-woman-enshrined-in-protection-of-women-from-domestic-violence-act-2005-to-apply-on-the-lady/ (last visited on October 7, 2021).
[7] The author has used the term 'queer persons' to refer to all members of the LGBTQIA+ community.

non-acceptance of LGBTQIA+ relationships in Indian society, and is further stigmatised by law enforcement.[8]

While this method was celebrated and welcomed,[9] there is a need to revisit the necessity of such an approach to judicial decision-making in general and also particularly in the context of the factual matrix of the present case. This judgement offers a truly novel decision-making exercise, documentation of lived experiences, language and an unprecedented candour of a judge, making it an immensely rich text to analyse. Therefore, in this comment, it is argued that, resorting to such an approach in judicial decision-making, in the context of the factual matrix of the present case, may be appropriate.

However, the author contests the necessity of generally applying such an approach to all cases. To substantiate the limitation the author places on this novel approach, in part II, the author highlights the probable critiques of the 'out-of-the-box' approach adopted by the Court, borrowing from rule-scepticism of American legal realism, such as: the practicality of such an approach in the backdrop of limited resources, importance of judicial time and the necessity of such an approach when the conclusion drawn by the Court is similar to the conclusion which would have been drawn otherwise.

In part III, the author highlights the contributions of the 'out-of-the-box' approach in the context of the factual matrix of the present case. The author considers this as an 'attempt to queering judicial decision-making process' for three reasons. Firstly, it is argued that this method has the potential to address the problems of legal invisibility of same-sex relationships and the heteronormativity of law; secondly, it humanises thea judiciary by accepting a possibility that

[8] International Commission of Jurists, "Unnatural offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity" (February, 2017) 'Chapter III. Police Violence and Harassment', *available at*: https://www.oursplatform.org/wp-content/uploads/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf> (last visited on October 7, 2021).

[9] Sudarshan Varadhan, "Indian court calls for sweeping reforms to respect LGBT rights" *Reuters*, (June 7, 2021), *available at*: https://www.reuters.com/world/india/indian-court-calls-sweeping-reforms-respect-lgbt-rights-2021-06-07/ (last visited on October 9, 2021); Tanvi Akhauri, "You Can't Pray the Gay Away: India's Queer Community Reacts to Madras HC's Landmark Judgement" *She the People*, (June 8, 2021), *available at:* https://www.indiatoday.in/india/story/framing-rules-punish-cops-harass-lgbtqia-tamil-nadu-govt-1860911-2021-10-05 (last visited on October 9, 2021); Tejaswi Subramanian, "Madras HC Judge Admits to Working on Biases About Queer Relationships: Is This The Dawn of Queer Justice In India?" *Gaysi*, (March 31, 2021), *available at*: https://gaysifamily.com/lifestyle/madras-hc-judge-admits-to-working-on-biases-about-queer-relationships-is-this-the-dawn-of-queer-justice-in-india/ (last visited on October 9, 2021).

judges can also be ignorant about certain things and that their ignorance may affect their ability to consider the implications of the law on the lives of queer persons and lastly, this method equips judges to remove personal biases or prejudices to achieve the mental state of being impartial and be sympathetic to the problems of socially marginalised queer persons.

II. Critiquing the 'Out-of- the- Box' Approach

Venkatesh J. authors this judgement in two visibly apparent, realist and formalist ways. First, he inserts the report from his psycho-education session with therapist Ms. Vidya Dinakaran and the report of his interaction with medical intern and digital content-creator, Dr. Trinetra Haldar, a transwoman herself, second, he traces a history of landmark decisions which guarantee constitutional protection to the petitioners. While this comment is concerned with normatively critiquing legal realism and formalism, it specifically studies these two novel aspects of the judgement, what motivates the judge and what gets put on paper. Thus, it first studies what Anand Venkatesh J. does i.e. use of psychoeducation and counselling and second, the written opinion itself i.e. documentation of lived experiences and discrimination faced by queer persons.

The use of psychology as a tool in law has origin in American legal realist Jerome Frank's work, which can be credited for the insert of psychology in debunking legal formalism. Jerome Frank was severely critical of 'hidden elements' which influenced judges' decision making and the formalism which masked such covert behaviour.[10] He suggested the use of psychoanalysis to study the behaviour of judges, psychiatry for government officials and judges to work more efficiently *i.e.,* to cope with stress when feeling overburdened, and lastly, to understand 'legal behaviour' of accused, witnesses and clients;[11] in support he wrote that "lawyers and judges must constantly act as psychologists or psychiatrists."[12] He suggested that psychoanalysis or therapy could be one of the devices for judges to become more efficient by being more self-aware. Roscoe Pound adopted a more modest approach, arguing that "it is the *courts* and the legal tradition that supports them

[10] Julius Paul, "Psychological Materials in the Legal Philosophy of Jerome Frank" 11 *South Carolina Law Review* 300-301 (1959), *available at:* https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1420&context=sclr, (last visited on October 5, 2021).
[11] *Ibid.*
[12] Jerome Frank, "Judicial Fact-Finding and Psychology" 14 *Ohio State Law Journal* 183 (1953).

that deserves psychological attention, not the individual unconscious behaviour of judges."[13] While Frank suggested the use of psychoanalytical treatments for law students and future trial judges,[14] his emphasis was on self-understanding which helps lawyers understand their clients better.

Legal formalism posits that judges are neutral and impartial arbiters who strictly apply the law, and only the law to reach a decision, that they decide almost mathematically by applying the ruled-formula to reach a conclusion. As a result, all judges would reach the same decision in cases with similar factual matrix but, as American legal realists have pointed out, this is rarely true, as research shows that judges judge differently.[15] Therefore, the realists contend that judges are influenced beyond the law.[16] That they are guided by judicial hunches, attitudinal preferences, personal politics, etc. and they often first take a decision and then research precedent to support their pre-decided positions.[17] In the present case, it can be argued that the judge's 'pre-decision' to treat this 'sample' case as an opportunity to address his own personal ignorance and deliver guidelines directing state institutions to address systemic prejudice displayed judge being influenced beyond law. Accordingly, legal realism may help understand the court's approach in this case.

In this backdrop, it is important to note, and this is by Venkatesh's J. own continued admission,[18] that he would have reached the same decision in favour of the petitioners by following a formalist reasoning. That he could have almost academically relied on scholarly material and research

[13] *Ibid.*

[14] *Ibid.*

[15] Alok Prasanna Kumar, "Two Papers on Judicial Bias in India" 56 *Economic & Political Weekly* (2021), *available at:* https://www.epw.in/journal/2021/8/law-and-society/two-papers-judicial-bias-india.html (last visited on September 18, 2021); Elliott Ash, Sam Asher, *et.al*., "In-group bias in the Indian Judiciary: Evidence from 5 million criminal cases" *Development Data Lab* (August 5, 2021), *available at*: https://shrug-assets-ddl.s3.amazonaws.com/static/main/assets/other/India_Courts_In_Group_Bias.pdf (last visited on September 18, 2021); Allison P. Harris and Maya Sen, "Bias and Judging" 22 *Annual Review of Political Science* 241 (2019), *available at:* https://scholar.harvard.edu/files/msen/files/bias-judging-arps.pdf (last visited on September 18, 2021).

[16] Federick Schauer, "American Legal Realism- Theoretical Aspects", M. Sellers and S. Kirste (eds.) *Encylopedia of the Philosophy of Law and Social Philosophy* (Springer, Dordrecht, 2018), *available at:* https://link.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_67-3 (last visited on March 5, 2023).

[17] Timothy J. Capurso, "How Judges Judge: Theories on Judicial Decision Making" 29(1) *University of Baltimore Law Forum* 292 (1998).

[18] *Supra* note 1, para 9.

allowing him to reach a scholarly commendable judgement. However, in his opinion it would be hypocritical if the decision had not come from his heart or be true to his feelings. This need to maintain integrity in decision making can be seen as Venkatesh J. writes: [19]

> I want to give myself some more time to churn. Ultimately in this case, the words must come from my heart and not from my head, and the same will not be possible if I am not fully 'woke' on this aspect. For this purpose, I want to subject myself for psycho-education with Ms. Vidya Dinakaran and I would request the psychologist to fix a convenient appointment for the same. I honestly feel that such a session with a professional will help me understand same-sex relationships better and will pave way for my evolution. If I write an order after undergoing psycho-education, I trust that the words will fall from my heart.

There are two concerns which can be raised. Firstly, when the judge claims that the decision has to come from the heart, the accountability of the judge is to self, however, the judges are bound by systemic standards of judicial integrity and accountability beyond self. Secondly, the objective of psychoeducation was to specifically address this gap between the judge's personal 'rational' and 'emotional'; the consequence of this reconciliation could have been a more effective decision, but the objective was to maintain integrity in judging. The judge was presented with the choice of judging academically- which would still not result in a prejudiced decision per se, but he lays emphasis on being sincere and honest and by doing this he creates a new judicial virtue of judges personally embodying the constitutional spirit and morality.

Here, the judge primarily claims that this is a 'sample' case and so assumes additional responsibility to go beyond the prayer made by the petitioners, he plays an activist's role, adds additional respondents *suo moto* and justifies the same. As a result, this judgement marks an important shift away from formalist reasoning claiming that the 'Court has consciously refrained from adopting the usual course of disposing cases of this nature that knocks the doors of this institution'[20] and justifies adoption of 'out-of-the-box' approach to decision-making.

[19] *Id.* at para 5.
[20] *Supra* note 1, para 1.

Some normative questions emerging from this judicial exercise are: firstly, should judges assume an activist role to address the social concerns related to but beyond the scope of the issue before the court? If yes, then are there any objective parameters to be taken into consideration in justifying the activist role of a judge? Secondly, in the event of clear legal guidance available to a judge, should the judge invest herself emotionally in the decision-making process? Would rendering a decision merely by placing reliance on the pre-established jurisprudence concerning rights and obligations which will not cause any disadvantage to the parties be considered hypocritical if it does 'not come from the heart or be true to her feelings' and should this be a requisite for adjudicating?

With respect to the first set of normative questions, in the instant judgment, the activist role of the judge is justified based on two most prominent reasons viz. there exists a need for 'de-stigmatisation and acceptance in the eyes of the society' and the request made by the counsel for petitioners to set guidelines in the cases of similar nature.[21] Firstly, the willingness to act on this request is mentioned as one of the reasons for shifting to the 'out-of-the-box' approach for decision-making. The judgment contains the report from judge's psycho-education session[22] and the report of judge's interaction with Dr. Trinetra Haldar[23] which is inserted for "the sake of transparency, and understanding and awareness of all stakeholders."[24] Secondly, and rather with higher emphasis, the court claims that this is an opportunity to change the social attitude towards same-sex relationships and when a matter before the court involves the need for changing social attitude, the decision-making approach may be changed accordingly.

The broader questions flowing from such a claim include: whether it is the role of a judge to bring social acceptance? Are the courts equipped to bring social acceptance, and if yes, then what is the scope of their powers to influence social behaviour and social attitudes? But more fundamentally we ask, whether the process and perceived consequences of shaping social attitudes, influence the approach to decision-making rather than letting the decision once made bring about the change in

[21] *Supra* note 1, para 5.
[22] *Id.* at para 7.
[23] *Id.* at para 8.
[24] *Id.* at para 7.

social attitude more organically? It can be argued that it is precisely for this reason that in *Navtej Singh Johar* v. *Union of India*[25] while reading down the part of section 377 of the Indian Penal Code,[26] the Supreme Court stated that a wide publicity through media be given to the judgment at regular intervals for educating the public about decriminalization of homosexuality. In this backdrop, the critics can raise a claim that the Court needs to adopt different approach to achieve social acceptance may encourage unguided and unlimited judicial activism otherwise referred to as judicial overreach. Further, such an act of judicial activism is not to overshadow social activism carried out by civil society, as interview conducted by International Commission of Jurists with Kerala based activist reveals: "the majority of what we do is outside the formal process of the law- the idea of engaging with a law that favours us is a very new thing."[27]

With respect to the second set of normative questions, in the instant judgment, very clear legal guidance was available to the judge. The same is evident when the judge before setting the guidelines acknowledged that "this Court is duty bound to trace the constitutional rights and their guarantee thereof that are available to the petitioners and all those belonging to the LGBTQIA+ community. This Court cannot proceed to issue directions to the State and its instrumentalities unless such directions are based on legal rights."[28]

Following this observation the Court refers to *NALSA* v. *Union of India*[29] with respect to the concept of 'sexual orientation' and *Navtej Singh Johar* v. *Union of India*[30] with respect to constitutional guarantees of non-discrimination, equality and autonomy for the member of LGBTQIA+ community. These precedents, among others as referred to in the judgment provide a strong jurisprudential foundation for rendering the decision in favour of the petitioners of this case and thus the personal concern raised by the judge that the decision should come from the heart and not mind may be irrelevant to the decision-making process.

[25] (2018) 10 SCC 1. In this case Nariman J. declared that insofar as section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is unconstitutional.
[26] The Indian Penal Code, 1860 (Act 45 of 1860), s. 377.
[27] *Supra* note 7, Chapter I : Introduction and summary.
[28] *Supra* note 1, para 19.
[29] (2014) 5 SCC 438.
[30] (2018) 10 SCC 1.

In a way, if the objective is to be truthful to one's own words, then it is not the same as undergoing psychoeducation for being more fair or objective i.e. to be a better judge and uphold the promise of impartiality.[31] Further, if academic engagement of judges is to be looked at as judges only engaging with formal rights and duties, psychoeducation would become an engagement with morality, with the judge commenting on both individual (judge's own) and public morality.[32] More importantly, formal law is not rendered useless, it is worthy of note that the 'out-of-the-box' methods of psychoeducation and counselling may not have been possible at all, if the formalist law recognising rights of same-sex couples did not pre-exist in this case.

Additionally, what does the seeking of non-formally recognised, external counsel tell us about the current justice system? Further, what was the mandate under which Venkatesh J. sought counsel of a therapist, head of Non-Governmental Organisation ('NGO') SAATHII, Dr. Trinetra Haldar and her mother, who he then referred to as his 'gurus' who helped him in his personal evolution.[33] Typically litigants resort to the representation of their grievances and narrative building by their lawyers.[34] And lawyers as officers of the court must help judges to reach a decision.[35] It must be noted that practices of judges seeking external counsel from other third parties is already well recognised and established practice in Indian judicial system in the form of courts appointing *amicus curiae*. In many cases the courts have relied on the help of *amicus curiae* in framing the

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[31] Value 2, Impartiality, "The Bangalore Principles of Judicial Conduct" (2002) *available at*: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last visited on September 27, 2021).

[32] Sparsh Upadhyay, "We Are Not Against Live-in Relation But Can't Give Protection When One of The Live-In Partners Is Married: Allahabad High Court" *Live Law* (June 19, 2021), *available at*: https://www.livelaw.in/news-updates/allahabad-high-court-live-in-relation-but-rejected-a-protection-plea-as-one-of-the-live-in-partners-was-married-175950 (last visited on October 13, 2021); Jagpreet Sandhu, "Live-in relationship morally, social not acceptable: Punjab HC" *The Indian Express* (May 18, 2021), *available at*: https://indianexpress.com/article/india/live-in-relationship-morally-socially-not-acceptable-punjab-hc-7319986/ (last visited on October 13, 2021); Consider a case where clear formalistic law does not exist, for example the Allahabad High Court denied protection to a live-in couple where one of the partners was already married.

[33] *Supra* note 1, para 8.

[34] Sally Frank, "Eve Was Right to Eat the "Apple": The Importance of Narrative in the Art of Lawyering" 8 *Yale Journal of Law & Feminism* 79 (1996), *available at:* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1112&context=yjlf (last visited on September 1, 2021).

[35] The Bar Council of India, "Rules on professional standards", *available at:* http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/ (last visited on October 14, 2021).

guidelines.[36] The example of *Court on its Own Motion* v. *State*[37] of the Delhi High Court is worth noting, where the Court merely reproduced the guidelines pertaining to sting operations drafted by the amices as proposed guidelines and directed the Ministry of Information and Broadcasting to consider the same.[38] Additionally, sections 45 to 51 of the Indian Evidence Act[39] make provisions for expert witness testimony. Even in this case, the process of psychoeducation and counselling consumed additional time and resources of the already overburdened courts. Additionally, in the context of pendency of cases in India one can object the judicial recourse to the 'out-of-the-box' methods for decision-making.

The foregoing critical examination of the 'out-of-the-box' methods for decision-making have highlighted the problems of the conceptual ambiguity and perceived need in the presence of already existing mechanisms for the courts to seek expert assistance and the practical utility based on cost-benefit analysis of such an approach to judicial decision-making. In the following part the author addresses these criticisms which are levelled against the 'in general' use of such a method.

III. Attempt at Queering Judicial Decision-Making Process

After noting the probable criticisms of the approach adopted by the judge in this case, in this part, firstly it is argued that there are significant positive contributions made by the judgement especially by treating this as a sample case and resorting to 'out-of-the-box' approach for decision-making. However, the author intends to clarify that this part examines such positive aspects with respect to the factual matrix of the present case. Three prominent positive contributions are identified viz. the 'out-of-the-box' method contributed to address legal invisibility of same-sex relationships and the heteronormativity of law, it humanised the judiciary in the eyes of the public and this method

[36] *Vishaka* v. *State of Rajasthan* , (1997) 6 SCC 241, noting that "the learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as *amicus curiae* and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature."

[37] 146 (2008) DLT 429.

[38] *Ibid.*

[39] The Indian Evidence Act, 1872 (Act 1 of 1872), ss. 45, 46, 47, 48, 48, 50, 51.

equips judges to remove personal biases or prejudices. Secondly, along with the positive aspects, the author also critically engages with the 'out-of-the-box' method adopted in this case to argue that to adopt such an approach, there is need for a higher degree of methodological clarity and deeper understanding of the underlining jurisprudential issues on the part of the court. Thus, leading to conclusion that such an approach may be resorted to in exceptional cases with caution addressing legal invisibility of same-sex relationships and heteronormativity of law.

It is only recently that India has decriminalised same-sex sexual activities.[40] Same-sex unions are not recognised.[41] The laws are heteronormative,[42] even the courts have noted similar observations.[43] Queer persons' experiences with formal law are still inadequately documented. This results in queer persons, their lived realities and experiences being legally invisible which further perpetuates the heteronormativity of law.[44] These negatively impact queer lives as it not only reduces the accessibility to the state machinery but also subjects queer lives to the biased scrutiny from a heteronormative lens.[45] Such a biased scrutiny contributes to the vicious cycle of queer person's reduced accessibility to the state machinery.

An 'out-of-the-box' approach which would result in breaking this cycle,[46] and queering the approach for queer persons is a necessity. This judgment attempts to do the same. Thus, for a justice system which is so heavily reliant on *stare decisis* such a documentation recording: hostility

[40] *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1.

[41] A five-judge bench of the Supreme Court, headed by Chief Justice of India DY Chandrachud, unanimously ruled against legalizing same-sex marriage in India. The court also ruled in a 3:2 verdict against civil unions for non-heterosexual couples. The majority view was that there is no fundamental right to marry a person of one's choice under the Constitution of India.

[42] Dipika Jain and Kimberly Rhoten, "The Heteronormative State and the Right to Health in India" 6 *National University of Juridical Sciences Law Review* 627 (2013); Saptarshi Mandal, "'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique" 2 *National University of Juridical Sciences Law Review* 525 (2009).

[43] *Supra* note 1, para 7; *Supra* note 40.

[44] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, (Books for Change 2004).

[45] Oishik Sircar and Dipika Jain (eds.), *New Intimacies, Old Desires- Law, Culture and Queer Politics in Neoliberal Times* (Zubaan Academic, 2007); Arvind Narrain (ed.)"Right to Love: Navtej Singh Johar v. Union of India- A Transformative Constitution and the Rights of LGBT Persons" (All India Law Forum, Banglore,2018), *available at*: https://altlawforum.org/publications/right-to-love-navtej-singh-johar-v-union-of-india-a-transformative-constitution-and-the-rights-of-lgbt-persons/ (last visited on March 5, 2023).

[46] *Aparna Bhat* v. *State of M.P.*, AIR 2021 SC 1492, paras 46-47, where SC directs National Judicial Academy to incorporate gender sensitization training; Ann Stewart, "Judicial Attitudes to Gender Justice in India: The Contribution of Judicial Training" 1 *Law and Gender Justice* 5 (2001) *available on*: https://warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/stewart/?external=true (last visited on March 5, 2023).

from neighbours, bullying, chemical castration, electro conclusive therapy, religious and spiritual treatments, corrective rape, pathologizing of same-sex relationships in medicine;[47] makes a permanent record of present conditions of queer persons in the India visible.

What is queer about this decision-making process, is the judge engaging in data collection directly from the sources. Talking to, documenting and relying on the experiences of systemically victimised queer population directly by the judge before laying down the guidelines is equivalent to consultative processes to be followed by the legislature and executive in order to be truly democratic. The approach adopted by the court appears closer to the feminist legal methods[48] which is argued to make a real difference.[49] Thus, the author claims that the 'out-of-the-box' method democratises the judicial decision-making process which contributes to strengthening the foundations of and legitimising the judicial decisions. The benefits of such an approach were witnessed during the pendency of this case.

The claim that uses of formalist reasoning would result in the *same* decision is rendered false, as resorting to the tool of psychoeducation manifestly influences the outcomes of this judgement. Venkatesh J. writes that "I am venturing into unchartered territory and without my understanding the issue, the final outcome will only be half-baked and ineffective."[50] It is evident that what has made its way into the guidelines, for example, roping in State and Central Departments of Higher Education, University Grants Commission, the National Medical Commission as respondents to put an end to the pathologizing of same-sex relationships and changing the curricula of schools and universities to educate students on understanding the community, is a direct result of the judge's interaction with Dr. Trinetra Haldar, a trans-woman who shared her experiences from her time in medical school. Thus, when judges are faced with challenges to the legal and social exclusionary normative standards, the references to non-legal (out-of-the-box) considerations are justified.

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[47] *Supra* note 1, para 8.

[48] Katharine T. Bartlett, "Feminist Legal Methods" 103 *Harvard Law Review* 829 (1990), highlighting three prominent methods viz. asking the woman question, feminist practical reasoning and consciousness raising.

[49] Rosemary Hunter, "Can *feminist* judges make a difference?" 15 *International Journal of the Legal Profession* 7 (2008), arguing that feminist judges can make a difference in judicial decision making.

[50] *Id.* at para 1.

Here, even though what motivated the judge to choose such a non-traditional approach for activism demonstrates legal realism, the nature of the approach chosen: the endeavour made to maintain the relationship between the petitioners and respondent-parents by psycho-counselling and mediation sessions, the considerable efforts in documenting lived experiences of a trans woman herself and grievances of the LGBTQIA+ community, and finally the attempt of a judge to overcome ignorance and extend empathy to a marginalised community is an act of care, upholding the ethics of care.[51] The reference of Venkatesh's J. desire for person 'evolution' on understanding same-sex relationships also truly represents transformative justice.

Since this is identified as a positive aspect of the 'out-of-the-box' method adopted in this case, it is pertinent to question the ability of the chosen queer persons to truly represent the diversity within the queer population. For example, in *NALSA* v. *Union of India,*[52] the Supreme Court referred to the personal testimony of Laxmi Narayan Tripathi, a self-identifying hijra and trans activist, whose right-wing religious ideologies on the third gender inclusion (although not mentioned in the testimony) could have reasonably sanctioned the arguments made, which were rooted in Hindu mythology. This route to rights-affirmation was limiting of queer people alienated by Hinduism and non-binary persons. Hence, care has to be taken to have adequate representation of intersectional experiences of heterogenous LGBTQIA+ community. Thus, if a judgement has the effect of laying down legal rules concerning queer population, the method of arriving at the rules has to be inclusive of diverse experiences of queer persons.

Humanising the Judiciary

The formalist judicial decision-making focuses heavily on the process of deduction from known rules and established facts. Judicial adherence to legal formalism may have the effect of invalidating the context of both rules and the facts. We argue that the factual matrix of the present case made it a perfect 'sample' because the legal rules fail to take into account the context of their

[51] Carol Gilligan, "In A Different Voice: Women's Conceptions of Self and Morality" 47 *Harvard Educational Review* 481 (1977) *available at:* https://pdf.zlibcdn.com/dtoken/c7ca75f01af0d10bd46e06162b064da9/haer.47.4.g6167429416hg5l0.pdf (last visited on September 21, 2021); Louise Campbell-Brown, "The Ethics of Care" 4 *UCL Jurisprudence Review* 272 (1997).
[52] (2014) 5 SCC 438.

application as they emerge out of the laws based on the presumption of heteronormativity of its subjects. The factual matrix challenges this underlying presumption. This transports the court into a terrain where understanding peculiar context of the petitioners is *sine qua non*. While doing so, we claim that, this judgment and open and honest admissions by the judge humanises the judiciary in public eye. Venkatesh J. writes: [53]

> . . . I have no hesitation in accepting that I too belong to the majority of commoners who are yet to comprehend homosexuality completely. Ignorance is no justification for normalizing any form of discrimination . . . .
>
> Since I have never personally encountered or had the need or opportunity to understand and appreciate the emotions and the very nature of persons belonging to the LGBTQIA+ community, the facts of the case led me to an unknown territory . . .
>
> . . . I have never personally known homosexual persons, and 'what do any other know about the shoes he has never walked', for I have not walked in their shoes. The society and my upbringing have always treated the terms "homosexual", "gay", "lesbian" as anathema. A majority of the society would stand in the same position of ignorance and preconceived notions. I have, at the best, read or come across people talking about the LGBTQIA+ community, but not to an extent where it made a positive impact on me or influenced me.

From this, the public can understand that judges are also human beings whose personalities are shaped by their own lived experiences which may sometimes cause them to be ignorant about lived experiences of the socially marginalised queer people, and that their ignorance may affect their ability to consider the implications of the law on the lives of queer people. Thus, this judgement achieves an unprecedented humanising of the court. The unconventional candour of Venkatesh J. in admitting to his ignorance stemming from his personal life experiences, makes room for their redressal. He also removes the "Lordship's'' hat" for the hat of the average commoner, accepting that judges are just as susceptible to ignorance as the rest of society.[54]

[53] *Supra* note 1, paras 10,11,12.
[54] *Supra* note 1, para 10.

This validates the claims of legal realists as the pretence of impartiality of the judiciary is tired and unrecognised bias only creates more problems. Having preconceived notions and an urge to view the world from one's own coloured lenses is human. However, the judges are expected to be unbiased and be impartial and being so involves a continuous process of unlearning and relearning. Highlighting the fact that even the judges need to be sensitised with social realities and developments further humanises the judiciary. In this context, who do the judge consult and seek training from are some fundamental methodical and policy concerns while employing this approach.

Removing personal biases and being impartial

Impartiality is a guarantee that needs to be achieved by judges rather than an innate attribute. Hence, the judiciary does not start out from a place of impartiality, instead sensitivity trainings, psychoeducation and other methods which actively address de-bias, bring it closer to a state of impartiality and fairness. As impartiality[55] is one of core promises of this unelected institution, active methods in achieving this guarantee justifies the legitimacy of it. In *Aparna Bhat* v. *State of M.P.*,[56] where the Madhya Pradesh High Court imposed a regressive and irrelevant condition while granting bail to an accused of attempted sexual harassment, which was to tie a 'Rakhi' to the complainant, the Supreme Court recognised that stereotyping of women and sexual assault victims by judges might compromise the impartiality of a judge and affects women's right to a fair trial and creates barriers to accessing justice, it observed: [57]

> Judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminates against women

[55] *Nemo judex in causa sua* forms a core principle of natural justice which guarantees the independence of the judiciary.
[56] AIR 2021 SC 1492; Criminal Appeal No. 329 of 2021@Special Leave Petition (Crl.) No. 2531 of 2021 arising out of Special Leave Petition (Crl.) Diary No. 20318 of 2021.
[57] *Id.* at para 38.

> or denies them equal access to justice. Stereotyping might compromise the impartiality of a judge's decision and affect his or her views about witness credibility or the culpability of the accused person . . . .

Accordingly, the Supreme Court laid down directions against stereotyping by the judiciary which included that "bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society…courts should desist from expressing any stereotype opinion in words spoken during proceedings, or in course of a judicial order . . . ."[58] Additionally, the Court mandated a module on gender sensitization to be included as part of foundational training of every judge – which taught techniques to judges to be more sensitive in hearing cases of sexual assault and eliminating social bias, further that the National Judicial Academy should organise awareness programs regarding stereotyping and unconscious biases that can creep into judicial reasoning, lastly, the Bar Council of India shall require topics on sexual offences and gender sensitization to be included in syllabus of All India Bar Examination.[59] Thus, this demonstrates the Supreme Court's confirmation to the growing need of sensitivity training. Accordingly, similar guidelines laid down in the present judgement directing District and State Legal Services, the judiciary is also justified in light of the marginalisation faced by queer persons at the hands of law enforcement and judiciary.

In the present case, Venkatesh's J. use of tools of psychoeducation, counselling, interaction with the members of the LQBTQIA+ community resulted in judicial documentation of lived experiences and discrimination faced by them. These methods equip judges to remove personal biases (unlearning) or prejudices and contribute in attaining a mental state of being impartial and be sympathetic (relearning) to the problems of socially and legally marginalised queer population.[60]

In the factual matrix of the case, the activist role of the judge is reasonable as it results in correction of social attitudes but only as far as State institutions are concerned. Accordingly, referring the

[58] *Id.* at paras 44, 45.
[59] *Supra* note, paras 46-48.
[60] *Supra* note 48.

respondent-parents to counselling is well within the ambit of the Court's power, since they are the parties to this case. Psycho-education resulting in changing the judge's own perspective to approach the concerns of queer people and issuing slew of directions for those state institutions which will have direct effect on changing social attitudes such as Department of Higher Education, UGC, AICTE is within the ambit of powers of the Court.

In terms of judicial activism this is a far better practice, for judges to be very critical of social prejudices displayed by state institutions, not only for the objective that it will change the opinions of larger public, but mainly because these institutions are equally obligated to queer citizens to treat them fairly, as often state institutions' negative attitude towards queer persons in India puts them at an increased risk of violence from non-state actors.[61] Queer people are both socially and legally marginalised. But there is a constitutional obligation of state institutions to treat queer people fairly and without prejudice. There is a need for the judiciary to addresses prejudice against queer persons, firstly, because the State is committed to its constitutional obligations for treating all persons fairly and equally; secondly, heteronormativity of law perpetuates the vicious cycle of exclusion and oppression of queer persons and lastly, stigmatisation, non-acceptance and resultant social oppression of queer people compromises their abilities, economic and otherwise, to seek protection of their constitutionally guaranteed equal rights.

It is to be noted here that the first respondents in the instant case are the police commissioners and inspectors of police. There is an overwhelming amount of evidence of sexual and physical violence and harassment by the state of queer people[62] especially on those who are further marginalised by trans identities, economic status, and caste; compared to such instances of brutality, de-biasing methods are only a first step towards accountability, and would probably have to be a repeated exercise by the judiciary.

Therefore, judgements like this which scrutinise the state are not only challenging the heteronormativity of law but also addressing the concerns fundamental to queer lives. It is needless to say that such judgements definitely cannot foreshadow the importance of other means to social

[61] *Supra* note 7, Chapter V, 'International Legal Standards'.
[62] *Supra* note 7.

justice- through NGOs, social movements, etc. The author claims that this judgment does not amount to judicial overreach but engages in meaningful and necessary scrutiny of state institutions. Thus, the 'out-of-the-box' approach has to be cautiously adopted in addressing the context specific issues of a certain class of identities based on sex, gender, sexuality, religious and caste identities having a history of social and legal marginalisation. Further, the judgement claims that the guidelines are only interim.[63] This hint to the fact that there is a need to take adequate legislative and executive actions as the case may be.

IV. Conclusion

The author appreciates the approach adopted by the Court in solving issues requiring actual social change and judges resorting to judicial activism to lead with the baton for change. However, at the same time, we caution against the frequent use of such an approach to judicial decision making as it may lead to judicial overreach, especially when in the context in which such active approach to be employed by the judiciary is both ambiguous and undefined and based on the characterisation of the same in the instant case, may tend to be highly subjective. A cautions recourse to such an approach has to be characterised by methodical clarity and jurisprudential guidance. In the absence of which, it may cause more harm. Additionally, some approaches may be adopted in ensuring that the judges remain impartial, free from their personal prejudices and sympathetic to the issues of stigmatised sections of the society. In this context, the author strongly advocates for sensitivity training for judges at regular intervals throughout their career. The systemic changes brought in training and education of the judges may have a direct impact on their abilities to remain impartial, free from their personal prejudices and sympathetic to the issues of stigmatised sections of the society.

[63] *Supra* note 1, at para 43.