Vijay Madanlal Choudhary v Union of India: A systematic breakdown of protections against testimonial compulsion during criminal investigations

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Abstract

The judgment of the Supreme Court of India in *Vijay Madanlal v Union of India* follows a long history of judicial exceptionalism in dealing with 'economic offences', and in doing so, further dilutes the safeguards that apply to ordinary criminal investigations under the Constitution of India 1950, the Code of Criminal Procedure 1973, and the Indian Evidence Act 1872. This article argues that the distinctions between 'investigation' and 'inquiry', and between the police and the Enforcement Directorate, in the Prevention of Money Laundering Act 2002, are specious and unjustified. It problematises the question, 'Who is a police officer?' as misleading, critiques the Court's conclusions regarding the powers and immunities of the Enforcement Directorate, and argues that the Court's judgment leads to a systematic breakdown of the protections against testimonial compulsion available during ordinary criminal investigations when it comes to offences under the Prevention of Money Laundering Act 2002.

Keywords: Economic Offences; Right to Silence; Testimonial Compulsion; Criminal Law and Theory; Constitutional Jurisprudence; Powers of Investigative Authorities

1. Introduction

This paper takes the Supreme Court of India's judgment in *Vijay Madanlal Choudhary v Union of India & Ors*[1] (hereinafter referred to as '*Vijay Madanlal*') as the focal point for analysing an issue profoundly relevant to Indian criminal and constitutional jurisprudence: the breakdown of protections against testimonial compulsion in the course of a criminal investigation. In this case, the Supreme Court delivered a long-pending verdict on the constitutionality and interpretation of various sections of the Prevention of Money Laundering Act 2002 (hereinafter referred to as 'PMLA'). The decision came as a result of a large batch of writ petitions filed directly before the Supreme Court, as well as Special Leave Petitions (hereinafter referred to as 'SLP') in appeal from the decisions of different High Courts in India, the earliest of which had been filed in 2011. In a judgment grappling with a wide range of issues relevant to constitutional law and criminal jurisprudence, the Court upheld the constitutionality of PMLA. The findings of the Court have come under fresh judicial scrutiny through a review petition against the judgment,[2] as well as separate petitions preferred by the Union[3] and private persons.[4] In that sense, the issues addressed in the judgment are by no means settled questions and are likely to see continuing judicial engagement. This makes the present discussion topical and practically significant.

For decades now, 'special criminal laws', or statutes that create new offences and establish unique rules of criminal procedure and evidence to deal with those offences, have been used to

[1] *Vijay Madanlal & Ors v Union of India & Ors* AIR 2022 SC Supp 1283.
[2] *Karti P Chidambaram v Directorate of Enforcement* Criminal Review Petition No 219 of 2022 decided on 25 August 2022 (Supreme Court).
[3] *Directorate of Enforcement v Gagandeep Singh* Criminal Special Leave Petition Diary No 42315 of 2022 decided on 10 February 2023 (Supreme Court).
[4] *Dr Govind Singh v Union of India* Criminal Writ Petition No 65 of 2023 decided on 28 March 2023 (Supreme Court); See also, The Hindu Bureau, 'Supreme Court Seeks Centre's Response on Plea Challenging Sections 50, 63 of Prevention of Money Laundering Act' (*The Hindu*, 28 March 2023). https://www.thehindu.com/news/national/sc-seeks-centres-response-on-plea-challenging-sections-50-63-of-prevention-of-money-laundering-act/article66672120.ece. Accessed 24 February 2024.

side-step the recognised safeguards and protections that apply to ordinary criminal investigations governed by the Code of Criminal Procedure 1973 (hereinafter referred to as 'CrPC') and the Indian Evidence Act 1872 (hereinafter referred to as 'IEA').[5] Some of the ways in which these safeguards are side-stepped include reverse presumptions for sexual offences against children[6] or offences related to drugs and psychotropic substances,[7] special investigative agencies with a wider range of powers and immunities than the police,[8] and exemptions to the police from the restraints of an ordinary criminal investigation.[9] As we argue in Part 2 below, a similar exceptional approach has long been taken in economic offences, which have been held to be a class apart from *ordinary* offences.[10]

While several issues traversed by the Court in *Vijay Madanlal* deserve engagement, it is impossible for us to address each of them within the scope of this article.[11] We focus our critique on the Court's validation of the legislative framing of investigations under PMLA as inquiries,

[5] Kunal Ambastha, 'Designed for Abuse: Special Criminal Laws and Rights of the Accused' (2020) 14 *NALSAR Student Law Review* 1, 3.
[6] Protection of Children from Sexual Offences Act 2012, ss 29 and 30.
[7] Narcotics, Drugs and Psychotropic Substances Act 1985, s 35.
[8] See Prevention of Money Laundering Act 2002, National Investigation Agency Act 2008, Unlawful Activities (Prevention) Act 1967.
[9] Prevention of Terrorism Act 2002, s 32; Before its repeal in 2004, the Prevention of Terrorism Act 2002 allowed confessions made to high-ranking police officials, albeit with additional safeguards, in terror offences. This is in contrast to ordinary criminal law, in which no confession made to a police officer or in police custody may be proved. Similar provisions also existed in the Terrorist & Disruptive Activities (Prevention) Act 1987 prior to its repeal in 2001. See Terrorist & Disruptive Activities (Prevention) Act 1987, s 15.
[10] All italicised words other than case names and are emphases added by the authors, unless otherwise mentioned.
[11] For other critiques of the judgement, see Suhrith Parthasarthy, 'PMLA Verdict, An Erosion of Constitutional Buffers' (*The Hindu*, 1 August 2022). https://www.thehindu.com/opinion/lead/the-pmla-verdict-overlooks-constitutional-safeguards/article65707726.ece. Accessed 24 February 2024; Apurva Vishwanath, 'Explained: The Supreme Court Verdict on PMLA, and Why Petitioners have Sought a Review' (*The Indian Express*, 25 August 2022). https://indianexpress.com/article/explained/supreme-court-pmla-judgment-review-money-laundering-act-8109974/. Accessed 24 February 2024; Abhinav Sekhri, 'Of Old Wine in New Bottles-The Judgement in Vijay Madanlal Choudhary (Part One)' (*The Criminal Law Blog*, 5 October 2022). https://criminallawstudiesnluj.wordpress.com/2022/10/05/of-old-wine-in-new-bottles-the-judgement-in-vijay-madanlal-choudhary-part-one/. Accessed 24 February 2024; Devvrat Singh and Nishita Gupta, 'Bail under PMLA: Comprehending the SC's Imprimatur in Vijay Madanlal Choudhary vs UOI' (*The Criminal Law Blog*, 20 October, 2022). https://criminallawstudiesnluj.wordpress.com/2022/10/20/bail-under-pmla-comprehending-the-scs-imprimatur-in-vijay-madanlal-choudhary-vs-uoi/. Accessed 24 February 2024; Rushil Batra, 'Money Laundering and Predicate Offences–The Aftermath of Vijay Madanlal Chaudhary' (*The Criminal Law Blog*, 21 May 2023). https://criminallawstudiesnluj.wordpress.com/2023/05/21/money-laundering-and-predicate-offences-the-aftermath-of-vijay-madanlal-chaudhary/. Accessed on 24 February 2024.

and of the investigative authority under PMLA, the Enforcement Directorate (hereinafter referred to as 'ED'), as an organisation specifically distinguished from police. This is because such a framing, as we demonstrate through this article, enables investigations of offences under PMLA to side-step the protections and safeguards against testimonial compulsion that are available in ordinary investigations by the police.

In Part 2, we demonstrate that these distinctions are specious, and unjustified by any of the legislative material available on PMLA. Based on this, we argue that the Court's uncritical acceptance of these distinctions allows the ED to exercise police-like powers in the investigation of offences under PMLA, without the corresponding safeguards that apply to investigations by the police. In Part 3, we consider the impact of the judgment on the right against compelled self-incrimination. In Part 3.1, we demonstrate that the weak right to silence in India becomes especially relevant in light of the wide-ranging powers of ED officials to compel (potentially incriminating) statements by the threat of legal sanction. The protection given by Article 20(3),[12] or the right against compelled self-incrimination by a person accused of an offence, is also rendered precarious by the Court's acceptance of the ED's opaqueness in exercising its powers of arrest, custody, interrogation and summons. In section 3.2, we problematise the question 'Who is a police officer?', which has always been the interpretative hook in determining the applicability of Sections 25[13] and 26[14] of the IEA to an investigative authority. We argue that while this line of inquiry is necessitated by the use of the word 'police' in the provisions, logically speaking, it is a red herring. The more useful inquiry would be into whether the powers and immunities of an investigative authority justify the assumption of testimonial compulsion. Seen in this light, since the motives, powers and immunities of the ED

[12] Constitution of India 1950, art 20(3).
[13] Indian Evidence Act 1872, s 25: 'No confession made to a police officer, shall be proved as against a person accused of any offence'.
[14] Indian Evidence Act 1872, s 26: 'No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person'.

to extract compelled testimony are indistinguishable from the police, the protections against compelled self-incrimination that apply to the police should also apply to the ED. The judgment of the Court in *Vijay Madanlal*, in upholding the specious distinction between a 'police investigation' and an 'ED inquiry', therefore, validates the legislative side-stepping of the safeguards of ordinary criminal investigations, and expands the scope for testimonial compulsion in the investigation of offences under PMLA.

2. 'What's in a name?' or why ED officials are police officers?

In his iconic play, Romeo and Juliet, William Shakespeare wrote, 'What is in a name? That which we call a rose by any other name would smell just as sweet.'[15] The quote is widely interpreted to signify that a name has no meaning in its own right, and the essence of a thing does not change if it is called by a different name. In some contexts, however, as the framing and interpretation of PMLA shows, names and labels acquire great significance. The Court in *Vijay Madanlal* finds that the term 'investigation' in PMLA should not be equated with a police investigation, at the end of which a chargesheet is filed. This is because, according to the Court, it is more in the nature of an inquiry for the purposes of evidence collection, which may be for the offence of money laundering defined in Section 3[16] of PMLA, but may *also* be for other proceedings such as confirmation of attachment proceedings or confiscation of property.[17] This distinction is meaningful in the eyes of the Court because the latter are seen as regulatory functions, whereas the former are penal functions.

On closer scrutiny, this distinction appears specious.[18] Attachment of property, its confirmation and confiscation are all linked to penal proceedings under Section 3 or other criminal offences;

[15] William Shakespeare, *Romeo and Juliet* (Act II Scene II, 1st Page Classics 1597) 40.
[16] Prevention of Money Laundering Act 2002, s 3.
[17] Emphasis added. *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [245-48].
[18] Sekhri, 'Of Old Wine in New Bottles' (n 11).

since there can be no attachment unless the property itself is considered proceeds of crime,[19] the attached property cannot be confiscated until the accused is convicted for money laundering,[20] and where there is a finding in the criminal trial that the property is not proceeds of crime, it may be released.[21] Furthermore, the chief purpose of the attachment is to ensure that if the property is, indeed, proceeds of crime, it is not disposed of during the pendency of proceedings under Section 3, PMLA or other criminal offences, thereby frustrating the proceedings.[22] Thus, attachment proceedings, though held to be regulatory proceedings, are deeply intertwined with the criminal trial for money laundering and have no purpose or justification without it. Attachment of property suspected to be proceeds of crime is but a step towards prosecuting someone for the possession, use etc. of such proceeds of crime,[23] viz., the

[19] Prevention of Money Laundering Act 2002, s 5(1): 'Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—
(a) any person is in possession of any proceeds of crime; and
(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed'.

[20] Prevention of Money Laundering Act 2002, s 8(5): 'Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government'.

[21] Prevention of Money Laundering Act 2002, s 8(6): 'Where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it'.

[22] Prevention of Money Laundering Act 2002, s 5(1)(2): 'Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act'.

[23] Prevention of Money Laundering Act 2002, s 3: 'Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.
Explanation: For the removal of doubts, it is hereby clarified that-
(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:
(a) concealment; or
(b) possession; or
(c) acquisition; or
(d) use; or
(e) projecting as untainted property; or
(f) claiming as untainted property, in any manner whatsoever'.

offence of money laundering. A division between powers and functions exercised for the prosecution under Section 3 of PMLA and for attachment of property suspected to be proceeds of crime, the core of any prosecution under Section 3, is therefore untenable.

This artificial distinction is justified by and linked to other similar provisions and interpretations which are intended to set PMLA proceedings apart from other criminal proceedings. For instance, the Parliament was at great pains to specify that offences under PMLA would not fall under the purview of the local police. The statute passed in 2002 provided that the offence under PMLA would be 'cognizable',[24] meaning that as per the definition of a 'cognizable' offence under the CrPC, police officers would be able to arrest a person accused of the offence without a warrant.[25] At the same time, Section 19 (prior to its amendment in 2005) restricted the power of arrest to a Director, Deputy Director, Assistant Director or any other officer authorised under PMLA,[26] and the second proviso to Section 45(1)(b) of PMLA (as it was in 2002) provided that the Special Courts established under PMLA could not take cognizance of an offence except upon a complaint made in writing by the ED.[27] The Amendment Act of 2005 sought to address the contradiction created by these provisions.[28] Now, therefore, PMLA explicitly prohibits police officers from investigating offences under PMLA, unless specifically authorised by the Central government.[29] Thus, offences under

[24] Prevention of Money Laundering Act 2002, s 45(1): 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973,- 2 of 1974, (a) every offence punishable under this Act shall be cognizable'.
[25] Code of Criminal Procedure1973, s 2(c): '"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant'.
[26] Prevention of Money Laundering Act 2002, s 19(1): 'If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest'.
[27] Prevention of Money Laundering Act 2002, s 45(1)(b): 'Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by-
(i) the Director; or
(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government'.
[28] Lok Sabha Secretariat, *Lok Sabha Debate* (Vol 10, 6 May 2005) 505-506, 516.
[29] Prevention of Money Laundering Act 2002, s 45(1A): 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into

PMLA are now to be investigated solely by the ED, and Special Courts can only take cognizance of an offence upon a complaint made by the ED.[30] To drive this point home, PMLA also specifies that the report filed by the authority under PMLA would not be a chargesheet, that is, the report ordinarily filed by the police consequent to their investigation as per Section 2(r) of CrPC.[31] Instead, it would be a 'complaint' under Section 44(1)(b),[32] which, defined in Section 2(d) of CrPC[33] as specifically excluding a police report, is a distinct document.

No reasons appear forthcoming in the Amendment Act of 2005,[34] in the speech of the Finance Minister explaining the said Amendment Act (extracted in the judgment),[35] the Parliamentary debates on the Amendment Act,[36] or in the reasoning of the Court in *Vijay Madanlal*,[37] as to *why* the police are excluded from investigating the offence of money laundering, or *why* the ED was chosen as the investigating authority under PMLA. The international obligations in pursuit of which PMLA was first enacted did not require parties to create a special force or exclude the local police from investigation. They required only the creation of a national legislation on money laundering.[38] It seems, therefore, that there was nothing to prevent the

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an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed'.

[30] Prevention of Money Laundering Act 2002, ss 44, 45, and 48; *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [436].

[31] Criminal Procedure Code 1973, s 2(r): 'police report means a report forwarded by a police officer to a Magistrate under Sub-Section (2) of section 173'.

[32] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [177], See the arguments of the respondent, the Union of India.

[33] Criminal Procedure Code 1973, s 2(d): 'complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report'.

[34] The Prevention of Money Laundering (Amendment) Act 2005, ss 6 and 7(b).

[35] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [435].

[36] Lok Sabha Secretariat, *Lok Sabha Debate* (n 28) 505-518; *Rajya Sabha Debate* (11 May 2005) 227-253.

[37] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [436].

[38] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (entered into force 1998) (hereinafter referred to as 'Vienna Convention') Arts 3(1)(a) and 3(1)(b); 20th Special Session of the United Nations General Assembly (entered into force 21 October 1998) S-20/2 Political Declaration A/RES/S-20/2 15; None of the other International treaties mentioned as sources of these obligations in PMLA require parties to create a special investigating authority for money laundering offences or exclude the police from money laundering offences; The Financial Action Task Force on Money Laundering convened as per the Economic Declaration of the G-7/8 (1989) required only that there should be *an* authority to trace and seize property and conduct investigations as required and coordinate requests from foreign countries and authorities for information. This requirement was created as per the Articles of the Vienna Convention mentioned above (emphasis added); See The Forty Recommendations of the Financial Action Task Force on Money Laundering 1990 [8, 38]; The

police from being responsible for investigation under PMLA, as they are for other offences, including murder, rape, organised crime, and terrorism. As we discuss in the following paragraphs, construing an investigation under PMLA as 'an inquiry to collect evidence', and notifying an investigating authority (ED), specifically distinguished from the police, enables offences under PMLA to be 'inquired into' without many of the restraints that ordinarily apply to an investigation by the police, and weakens the protections available to those involved in the investigation. Unfortunately, there is nothing on the record to indicate whether this was an unintentional side-effect of the nomenclature used in PMLA, or the very purpose of it, because this is not a question the Court in *Vijay Madanlal* asked.

In choosing not to delve into this question, the Court in *Vijay Madanlal* fell in line with a long judicial history of treating economic offences as a *class apart*, in respect of which the rules of ordinary procedure and evidence may be bent and ignored. For instance, in *State of Gujarat v Jitamalji Porwal*,[39] the Supreme Court stated that economic offences conveyed a conscious disregard for the interests of the community compared to offences such as murder, which might be committed in the heat of the moment. We contend that in so comparing economic offences with murder, arguably the most serious offence (punishable with the longest sentences, sometimes with death), and observing that an economic offender was *inevitably* answerable for a calculated offence against the community when a murderer *need not necessaril*y be, the Supreme Court framed economic offences as meriting a response equal to (and in some instances even greater than) murder. This, we argue, amounts to elevating economic offences

Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering 1988 (Basle Statement) likewise placed obligations of due diligence on banks and financial institutions to prevent the use of banking and financial services for money laundering. The only mention of any enforcement authority in this statement is the obligation of banks to cooperate with national law enforcement authority. See Principle VI, Basle Statement.

[39] *State of Gujarat v Jitamalji Porwal* AIR 1987 SC 1321: The Court observed, 'The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community' [5].

to the highest possible level of gravity. Similarly, Courts have held that stricter rules, including a reverse burden of proof, for ordinary civil liberties such as 'bail' are justified in economic offences because of their debilitating effect on the financial health of the nation.[40] In *Directorate of Enforcement v Ashok Kumar Jain*,[41] the Supreme Court held that a person accused of an economic offence is not ordinarily entitled to anticipatory bail, given the serious nature of the offence, a finding which was reiterated in *P Chidambram v Directorate of Enforcement*.[42] This narrative of the seriousness, complexity, uniqueness and debilitating effect of economic offences, offered and accepted by Indian Courts as a justification for deviations from the ordinary safeguards of criminal procedure, informed the approach of the Court in *Vijay Madanlal* as well. In light of this, the Court saw no reason to look deeper into the question and simply followed the long line of precedent of Constitutional Courts, discussed in Part 3.2 below, in accepting special legislation and the exercise of police-like powers by non-police government officials.

Thus, the police stand excluded from investigating the offence of money laundering under PMLA, and the ED is deemed not to be 'police'. Yet, members of the ED exercise coercive powers at par with the police in their 'inquiry' for the collection of evidence. First, the powers of arrest of the ED as per Section 19 of PMLA[43] are on par with those of the police under Section 41 CrPC,[44] meaning that both authorities have equal power to deprive a person of her liberty. But the safeguards available to a person upon arrest by the police are largely absent in case of arrest by the ED.

[40] *Nimmagadda Prasad v CBI* AIR 2013 SC 2821 [24-26]; *YS Jaganmohan Reddy v CBI*, Criminal Special Leave Petition No 5901 of 2012 decided on 9 August 2012 (Supreme Court) [34-35].
[41] *Directorate of Enforcement v Ashok Kumar Jain* AIR 1998 SC 631.
[42] *P Chidambram v Directorate of Enforcement* AIR 2019 SC 4198 [83].
[43] Prevention of Money Laundering Act 2002, s 19.
[44] Criminal Procedure Code 1973, s 41.

In an ordinary criminal investigation, while the accused ordinarily has the right to receive a copy of the first information report (hereinafter referred to as 'FIR') after a chargesheet has been filed against her,[45] a recent judgement of the Supreme Court held that a person would be entitled to receive the same at an earlier stage if she has reason to believe that she has been named in the FIR, as part of the fundamental right to life and liberty under Article 21[46].[47] An investigation being conducted by the ED, unlike an investigation by the police, does not require a document akin to an FIR, although as a matter of practice, an Enforcement Case Information Report (hereinafter referred to as 'ECIR') is registered. However, as the Court in *Vijay Madanlal* holds, even where such a document exists, the accused has no right to receive a copy of the same.[48]

Second, much like the police, ED takes custody of an arrested person beyond 24 hours through Section 167(2) of CrPC. According to this provision, a Magistrate may authorise detention of the arrestee in 'police' custody for 15 days and in judicial custody for a further 45 or 75 days (i.e., a total of 60 or 90 days).[49] This provision has been held to apply to an 'inquiry' by the ED as well. To allow ED to hold arrestees in 'police' custody, even though ED are not meant to be

[45] Criminal Procedure Code 1973, s 207.
[46] Constitution of India 1950, art 21: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.
[47] *Youth Bar Association of India v Union of India* AIR 2016 SC 4136 [11.1-11.3].
[48] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [457-459].
[49] Criminal Procedure Code 1973, s 167(2): 'The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
Provided that—
(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding
(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
(ii) sixty days, where the investigation relates to any other offence'.

police officers, 'such custody' in Section 167(2) of CrPC has been interpreted to mean not just police custody but also the custody of other investigating agencies.[50]

Given the interpretative gymnastics performed by Courts to grant the ED 'police' custody while insisting that they are not police, it is worth considering the implications of 'such custody'. In *Miranda v Arizona*,[51] the Supreme Court of the United States of America (hereinafter referred to as 'USA') observed that even if third-degree methods of torture were not used, the coercive psychological effect created by the privacy and isolation of a police interrogation could not be dismissed. The Indian Supreme Court in *Nandini Satpathy v PL Dani* (hereinafter referred to as '*Nandini Satpathy*') quoted this observation with approval and held that 'compelled testimony' could be induced not just through physical violence, but also through the psychic pressures typical of an interrogation.[52] Given this, the nature of police custody becomes crucial. Police custody gives the police unfettered access to the detainee who is detained in premises controlled by them, whereas judicial custody removes the detainee from the direct control of the police, placing her in a jail, under the control of the Magistrate instead. This does not change when the investigating authority is the ED. Both the ED and the police hold a detainee in a place that is controlled by the police, where the detainee has no access to the outside world, has no right to confer with a lawyer or family member, cannot receive advice or information from any source other than those who arrested her, or cross-check the assertions made by the investigating authority. When it comes to the ED, moreover, there is no oversight over interrogations conducted by them and their procedures are entirely opaque given that their manual of rules, procedure, and practice is a secret document.[53] Thus, the third similarity

[50] *V Senthil Bajaj v State* Criminal Appeal No 2284 of 2023 decided on 7 August 2023 (Supreme Court) [75-79, 92, 95(vi)].
[51] *Ernesto A Miranda v State of Arizona* (1966) 384 US 436 [15-38].
[52] *Nandini Satpathy v PL Dani* AIR 1978 SC 1025 [57].
[53] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [460-461]. That this is not normal or ordinary practice is suggested by the fact that the manual of the CBI is in the public domain. The Supreme Court in *Vineet Narain v Union of India* AIR 1998 SC 889 [12, 58] held that compliance with the manual is mandatory.

between the ED and police is that the nature of police custody and custody by the ED, and the psychological pressures created by such custody, are the same. As we argue in Part 3.2, moreover, the temptations and rationales underlying coercive tactics by the police apply equally to the ED.

Fourth, senior officials of the ED have the power to issue summons to any person to give evidence or produce records.[54] But they are not required to specify why, in what capacity, or concerning which case, the summons has been issued. Like the ED, the police are entitled to require a person who is accused of or suspected of an offence, as well as a person who might be acquainted with the facts and circumstances of the case, to appear before them. However, the scheme of the CrPC makes it clear that an order to a person accused or suspected of an offence,[55] and a person who is merely a witness,[56] are distinct, meaning that the person receiving the notice would know the capacity in which she is summoned.

A person summoned by the ED, moreover, is bound to attend and state the truth,[57] failing which she may face criminal prosecution under Sections 174,[58] 193[59] and/or 228,[60] of the Indian

[54] Prevention of Money Laundering Act 2002, s 50(2).
[55] Criminal Procedure Code 1973, s 41A.
[56] Criminal Procedure Code 1973, s 160.
[57] Prevention of Money Laundering Act 2002, s 50(3).
[58] Indian Penal Code 1860, s 174: 'Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both'.
[59] Indian Penal Code 1860, s 193: 'Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine'.
[60] Indian Penal Code 1860, s 228: 'Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both'.

Penal Code 1860 (hereinafter referred to as 'IPC')[61] or Section 63 of PMLA.[62] In fact, the power under Section 63 of PMLA extends to the refusal to answer questions or sign any statement (purportedly made by the summoned person) that the authority requires the person to sign, and the refusal to produce any documents required to be produced.

Such signed statements can even be used against an accused person during trial, with some Courts equating them to statements recorded by Judicial Magistrates under Section 164 of CrPC.[63] However, this interpretation is flawed because the sanctity accorded to a statement recorded under Section 164 of CrPC comes (at least in part) from the impartiality of the recording authority, that is, a Magistrate. This is evident from the fact that the provision prohibits police officers, on whom the powers of a Magistrate have been conferred, from recording a statement under Section 164[64] of CrPC. Furthermore, a confession under Section 164 of CrPC is only recorded after the Magistrate satisfies herself that it is voluntary, and that the confessor understands its effect.[65] The ED, being the investigating authority itself in PMLA offences and therefore interested in the outcome of the investigation, cannot be expected to be impartial, and Section 50 of PMLA does not provide for any safeguards equivalent to Section 164 of CrPC regarding confessional statements.[66]

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[61] Prevention of Money Laundering Act 2002, s 50(4): 'Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860). This provision implies that ss. 193 and 228, IPC could be operationalised by the senior officials of the ED against a person summoned under s. 50(2), PMLA'.

[62] Prevention of Money Laundering Act 2002, s 63(2): 'If any person,--
(a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or
(b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or
(c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each such default or failure'.

[63] *Rohit Tandon v Directorate of Enforcement* AIR 2017 SC 5309 [31]; *Satyender Kumar Jain v Directorate of Enforcement* 2023 DHC 2380 [67-68].

[64] Criminal Procedure Code 1973, s 164(1): 'Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force'.

[65] Criminal Procedure Code 1973, ss 164(2), 164(3), and 164 (4).

[66] Prevention of Money Laundering Act 2002, s 50(3).

While the CrPC also requires a person (whether accused or witness) to answer questions put to her by a police officer truthfully, there is a right not to answer questions which might have a tendency to incriminate the person.[67] Moreover, a person (whether an accused or simply a witness) is not required to sign her statement to the police if it is reduced to writing.[68] And, most importantly, under Sections 25 and 26 of IEA, no confession made to a police officer or in police custody can be proved as evidence against the confessor.[69] Similar protections also exist regarding summons to produce documents. Section 91 of CrPC gives a Court or an officer-in-charge of a police station the power to order the production of a document or thing necessary for an investigation or other proceeding.[70] Section 93 further empowers a Court to issue a warrant for search in case such documents are not produced or there is an apprehension that they will not be produced.[71] In *State of Gujarat v Shyamlal Mohanlal Choksi*,[72] (hereinafter referred to as '*Choksi*'), a five-judge bench of the Supreme Court, by a majority of four to one, held that these provisions would not apply to an accused person. They reasoned that since the spirit of Article 20(3) underlies all legislative power, it should be assumed that if the legislature wanted Sections 91 and 93 of CrPC to apply to accused persons, they would have mentioned it expressly.[73] This decision was heavily relied on and cited with approval by a division bench of the Supreme Court in *VS Kuttan Pillai v Ramakrishnan*,[74] (hereinafter referred to as '*Kuttan Pillai*') to hold that these provisions to compel production of documents could not apply to accused persons without infringing her right under Article 20(3).[75] Since this judgement in 1980, as Chaudhary demonstrates, the question as to whether Sections 91 and 93 of CrPC would apply to the accused has been answered following this liberty-preserving line of

[67] Criminal Procedure Code 1973, s 161(2).
[68] Criminal Procedure Code 1973, s 162.
[69] Indian Evidence Act 1872, s 25.
[70] Criminal Procedure Code 1973, s 91.
[71] Criminal Procedure Code 1973, s 93.
[72] *State of Gujarat v Shyamlal Mohanlal Choksi* AIR 1956 SC 1251.
[73] ibid [30-31].
[74] *VS Kuttan Pillai v Ramakrishnan* AIR 1980 SC 185.
[75] ibid [8, 10-11].

reasoning.[76] When it comes to special statutes such as PMLA, however, all these statutory and judicial protections are side-stepped.

The Court in *Vijay Madanlal* finds that the power of the ED to extract signed statements notwithstanding their incriminatory tendency on pain of criminal sanction does not amount to testimonial compulsion because the proceedings of the ED are not necessarily to collect evidence for prosecution under Section 3 of PMLA, and can also be towards the attachment of property.[77] Here, again, the Court relies on the distinction between the ED's exercise of regulatory functions on the one hand and penal functions on the other, a distinction we demonstrated earlier in this Part to be artificial in light of the intersections between attachment proceedings and prosecutions for money laundering. Indeed, the Court itself acknowledges that the evidence collected under Section 50 may subsequently be used for criminal prosecution.[78] The other reason given by the Court for ruling out testimonial compulsion is that Article 20(3) is only meant for an accused person.[79] Since the ED is not expected to provide any information at this stage to the summoned person as to why and in what capacity she has been summoned, there is no way for the summoned person to know whether or not she would have the protection of Article 20(3).[80] On this, the Court's vague pronouncements regarding the stage at which a person stands in the shoes of an accused in an investigation under PMLA provide little elucidation. When discussing the ED's power of summons, the Court states that once a person is officially arrested by the ED, protections under Article 20(3) and Section 25 of IEA *may*

[76] Shraddha Chaudhary, 'The Compelling Public Interest in Testimonial Compulsion: A Critique of the Supreme Court of India's Decision in Ritesh Sinha v State of Uttar Pradesh' (2020) 20(2) *Oxford University Commonwealth Law Journal* 342, 346.
[77] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [431-435].
[78] ibid [431].
[79] ibid [425-430].
[80] Rajiv Bhatnagar and Ishan Khanna, 'The PMLA Judgment and How It Allows ED To Give Fundamental Rights a Skip' (*The Quint*, 1 August 2022). https://www.thequint.com/news/law/prevention-of-money-laundering-act-judgment-allows-enforcement-directorate-to-skip-fundamental-rights. Accessed 24 February 2024; Nitya Ramakrishnan, 'Undue Process: Here's What's Wrong With the Supreme Court's PMLA Judgment' (*The Wire*, 3 August 2022). https://thewire.in/law/undue-process-heres-whats-wrong-with-the-supreme-courts-pmla-judgment. Accessed 22 February 2024.

apply.[81] The ambiguity in this statement is obvious but the reasons behind it are not. When do these protections apply? What further conditions must the detainee fulfil for their application? Furthermore, Section 25 of IEA applies only to confessions made to police officers. But if, as the Court finds, the ED are never police officers, how can Section 25 ever apply to them? The answers to these questions are, unfortunately, not forthcoming in the Court's judgment. However, to the extent that the Court finds that a person does not become 'accused' until she is arrested, it follows that a person summoned by the ED would not have the rights of the accused, even if she has been summoned in furtherance of allegations of offences under PMLA, until an official arrest is made.

Thus, the obfuscation of the Court on when a person before the ED becomes an 'accused' renders the rights of an accused that would ordinarily apply in these situations nebulous or inapplicable. This is because the protections of Article 20(3) only apply when a person is 'accused' of an offence,[82] meaning that if a person is not officially an accused (or does not know whether she is), the right against self-incrimination cannot apply. Moreover, removing ED officials from the scope of 'police officers' and dubbing their investigation an inquiry means that the safeguards typically available in an investigation by the police also become inapplicable, even though, as we argued above, the powers exercised by the ED and the police are indistinguishable.

Thus, our argument in this section has been that the 'inquiry' by ED, though couched as a process for the collection of evidence, bears all the trappings of a normal criminal investigation and is theoretically and practically linked to criminal prosecution under Section 3 of PMLA. It

[81] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [431].

[82] *MP Sharma & Ors v Satish Chandra* AIR 1954 SC 300 [10-11]: Concerning the application of Article 20(3), the Court observed, 'It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case. Considered in this light the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein'.

is what might be dubbed in Shakespearean terms 'a criminal investigation by any other name'. Furthermore, though ED officials have been found to not be 'police officers' and police officers have consciously been excluded from investigating offences under PMLA, the ED in fact exercises coercive powers on par with (sometimes greater than), and of the same nature as, the police. In that sense, they are 'police officers by any other name'.

3. The *Vijay Madanlal* judgement and testimonial compulsion

The consequence of the interpretative gymnastics that have propped up the flimsy distinctions discussed in Part 2 has been to rob the persons involved in the ED's investigation of the protections ordinarily available to them under the Constitution of India, the CrPC and the IEA, especially as regards testimonial compulsion. In this Part, we examine this effect in greater detail. In Part 3.1, we argue that Article 20(3), or the right against compelled self-incrimination, is weakened in crucial respects by the interpretation in *Nandini Satpathy*—that testimony extracted by the threat of legal sanction would generally not be considered 'compelled' according to the limited conception of the right to silence in India. These weaknesses become especially relevant with reference to PMLA. In Part 3.2, we problematise the inquiry into 'who is a police officer?' when determining the applicability of Sections 25 and 26 of IEA to investigating authorities as technically necessary but misleading. When seen from the perspective of their motives for extracting compelled confessions and their power and ability to do so, we argue that the ED are no different from the police. Therefore, the Court in *Vijay Madanlal*, by deciding that the ED are not police officers has expanded the scope for testimonial compulsion.

3.1 Chinks in the armour that is article 20(3)

In this Part, we argue that in the context of PMLA, Article 20(3) is significantly weakened by two factors relevant to our discussion. First, the limited scope of the right to silence during

investigations in India, and the interpretation that the threat of legal sanction does not amount to testimonial compulsion in a criminal investigation. Second, the ambiguity in PMLA and its interpretation by the Court in *Vijay Madanlal*, as well as the opaqueness of the ED regarding the capacity in which a person is questioned or investigated. Thus, if Article 20(3) or the right against self-incrimination, is an accused person's armour against the sword of coercion and testimonial compulsion, these two factors are the chinks in that armour.

As we discussed in Part 2, Section 50 obligates a person summoned by the ED to attend and to state the truth,[83] on pain of criminal prosecution under Sections 174, 193 and/or 228 of IPC[84] as well as Section 63 of PMLA.[85] The power under Section 63 of PMLA extends to the refusal to answer questions or sign any statement (purportedly made by the summoned person) that the authority requires the person to sign. In that sense, it goes to the heart of one aspect of the right against compelled self-incrimination, which is, the right to silence during an interrogation. It is not our argument that the right to silence during the pre-trial stage is coextensive with the right against compelled self-incrimination.[86] The right to silence during an investigation is a judicial creation,[87] linked to the privilege/right against compelled self-incrimination in both the

[83] Prevention of Money Laundering Act 2002, s 50(3).
[84] ibid s 50(4).
[85] Prevention of Money Laundering Act 2002, s 63(2): 'If any person,--
(a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or
(b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or
(c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time,
he shall pay, by way of penalty, a sum which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each such default or failure'.
[86] Pat Mclnerney, 'The Privilege against Self-incrimination from Early Origins to Judges' Rules: Challenging the 'Orthodox View' (2014) 18(2) *International Journal of Evidence and Proof* 101: McInerney argues that what we understand as the right not to incriminate oneself consists of three separate though related elements, 'namely the privilege against self-incrimination afforded to witnesses in criminal, civil or non-judicial investigative proceedings, the right of a defendant not to give evidence at trial and the right to silence of a suspect in the pre-trial criminal investigation'. 101, 136. Through his historical analysis of the development of the privilege in common law, McInerney demonstrates that the three related rights developed along distinct historical trajectories.
[87] These requirements have also been laid down in statute, for instance, in the Police and Criminal Evidence Act 1984 (England and Wales); See Susan Easton, *The Case for the Right to Silence* (2nd edition, Ashgate, 1998) 4-9.

USA[88] and in India,[89] and with the right to a fair trial and the presumption of innocence in the European Union.[90] Our focus in this section is on the existing insufficiency of the right to silence in India, and further incursions into it by the provisions of PMLA, which make silence or refusal to answer criminally punishable.

Unlike PMLA, ordinary criminal law in India does not punish a person accused of an offence for refusing to answer a question that might incriminate her. But, because the conception of the right to silence in Indian law is not broad enough, the protection against compelled self-incrimination in India is insufficiently protective even when it comes to ordinary criminal law. As we discussed in Part 2, under ordinary criminal law as well, a person (whether accused or not) is obligated to answer truthfully any questions asked by the police while allowing the person to refuse to answer questions that might have a tendency to incriminate her. In *Nandini Satpathy*, this was interpreted to mean that an accused person may choose not to answer questions that might incriminate her not just for the offence in respect of which she is being questioned, but *any* offence.[91] In the same breath, the Court held that legal penalty for violation would not *ipso facto* count as testimonial compulsion, and the accused would have to take a calculated risk in choosing to remain silent.[92] However, the manner in which the threat of prosecution is mentioned to the accused by a police officer *may* amount to testimonial compulsion.[93] Thus, the Court leaves it up to the accused to gamble with the likelihood of being prosecuted for not answering the question.

[88] *Ernesto A Miranda v State of Arizona* (n 51).
[89] *Nandini Satpathy v PL Dani* (n 52); Law Commission, *Article 20(3) of the Constitution of India and the Right to Silence* (Law Com No 180, 2002) 6.
[90] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (31 August 2022) 41-44; Andrew Ashworth, 'Self-Incrimination in European Human Rights Law-A Pregnant Pragmatism?' (2008) 30(3) *Cardozo Law Review* 751, 756.
[91] *Nandini Satpathy v PL Dani* (n 52).
[92] ibid.
[93] ibid [58].

In our opinion, this approach is flawed for two reasons. For one, the framing of the right to remain silent in *Nandini Satpathy* renders it precarious.[94] The accused must roll the dice on whether or not she may safely exercise that right, a situation that significantly reduces the protective character of the right to silence and, to that extent, of the umbrella right against compelled self-incrimination. Assuming the threat of legal sanction is credible (which, in an efficacious and legitimate criminal justice system, would be the correct assumption) accused persons would, more often than not, choose not to remain silent to avoid the materialisation of the threat. Where there is a general obligation to answer questions truthfully and the obligation carries the threat of legal sanction, the choice not to answer certain questions, especially if they are specific questions, might by itself be incriminatory. If the accused is asked ten questions and chooses to remain silent in response to one or two questions, the content of those questions would give away what incriminates her. It might be argued that this is not necessarily a bad outcome if it only affects those who have something incriminatory against them, that is, those who are in some way guilty. But such an argument does not stand for two reasons. First, the applicability of the rights of the accused, whether it is the presumption of innocence, the right to a fair trial, or the right against self-incrimination of which the right to remain silent would be a part, is not dependent on the innocence or guilt of the accused. Second, if exceptions are allowed to these protective principles, the system would not thereby become more efficient. A system that requires the accused to strategise her way through the questions of the investigating agency (as the right to silence in India does) would only protect those with the best knowledge

[94] Ashworth, 'Self-incrimination in European Human Rights Law' (n 90): We acknowledge that the right to silence as part of the right against compelled self-incrimination must be tempered against the public interest in ensuring effective criminal investigations. While we cannot go into how such a balance is ideally achieved within the scope of this article, we endorse the suggestions made by Ashworth in this regard. He argues, 'A pragmatic yet more rights-sensitive approach would be to suggest that an exception to the privilege may be justifiable in circumstances where a) the citizen has relatively little at stake, b) the citizen could be said to have chosen to participate in a particular social enterprise, and c) there is provision for the citizen to be excused if without fault'. 770.

or most experience of the system or those who would be able to manipulate it cleverly, and not necessarily the innocent.[95]

Another reason why the approach in *Nandini Satpathy* is flawed is that it does not duly consider the effect of a possible legal sanction on the right against self-incrimination and provides no justification for why this coercive threat would not violate the right if other coercive threats, such as the threat of physical violence or mental and emotional duress, would. In the context of a polygraph test, the Court in *Selvi v State of Karnataka* (hereinafter referred to as '*Selvi*') held that the compulsory administration of the test impeded the accused person's 'right to choose between remaining silent and offering substantive testimony.'[96] The existence of the threat of legal sanction, we argue, has a similar effect and is, therefore, indistinguishable from other coercive threats.

Accounts in the philosophical literature on the nature, characteristics, and conditions of coercion abound, although this has not led to absolute clarity or agreement on what coercion is. Notwithstanding their divergences, however, most leading accounts of the concept agree that coercion contains an element of non-voluntariness or an attack on volition. Thus, crudely condensed, Nozick's account of coercion states, 'where Q's whole reason for [doing or] not doing A is to avoid or lessen the likelihood of P's threatened consequences, P coerces Q into [doing or] not doing A.'[97] Similarly, for Feinberg, one of the conditions for coercion is that the voluntariness of the coerced person's action was affected by a credible threat made by another, usually the coercer.[98] Wertheimer, whose theory of coercion takes into account the practical considerations of the law in the USA as well as more general philosophical considerations,

[95] Mike Redmayne, 'Rethinking the Privilege against Self-Incrimination' (2007) 27(2) *Oxford Journal of Legal Studies* 209, 222-23.
[96] *Selvi v State of Karnataka* AIR 2010 SC 1974 [185].
[97] Robert Nozick, 'Coercion' in Sidney Morgenbesser, Patrick Suppes, Morton White (eds), *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (St. Martin's Press 1969) 440, 464.
[98] Joel Feinberg, *The Moral Limits of Criminal Law Vol 3: Harm to Self* (Oxford University Press 1989) 198.

argues that one way in which coercion may invaluably be assessed is by reference to the moral baselines of the person being coerced. According to him, any proposal by A that offers only options which would make B worse off is coercive towards B.[99] However, we do not treat all forms of coercion similarly. A mother 'coercing' her child to go to bed by threat of sanction (say, taking away the child' toy) may not be considered good or appropriate parenting by some, but would not ordinarily be considered morally reprehensible in the same way as a robber coercing a woman to hand over her purse by threatening to shoot her if she did not comply.

Legal systems often achieve compliance with norms (at least in part) through the threat of coercive sanctions.[100] Thus, one may not want to give a portion of one's income to the government as tax, but one does so because one knows that failure to pay tax will lead to prosecution and possibly punishment, consequences one would rather avoid. That said, it is our case that compelling a person's testimony against herself in a criminal investigation or trial (i.e., self-incrimination) is a unique circumstance in which the state should not have the right to secure compliance by the coercive threats of sanction. This is because a criminal investigation and/or trial are not comparable to other circumstances given the exceptional nature of criminal sanction. That is, a person accused of an offence may be visited by harsh punishments that take away her liberty, and in some cases, even her life, and the very label of criminality brings a degree of social opprobrium unparalleled by other kinds of sanction. The likely consequences of a criminal conviction, therefore, make the context of a criminal investigation and/or trial unique. A consideration of the justifications for the right against self-incrimination also indicates an acknowledgement of this unique context of criminality. Thus, Choo groups the justifications for the right into two categories: epistemic (concerned with accurate truth-finding) and non-epistemic (concerned with human dignity and autonomy,

[99] Alan Wertheimer, *Coercion* (Princeton University Press 1987) 204.
[100] Kenneth Einar Himma, *Coercion and the Nature of Law* (Oxford University Press 2020) 15; John D Hodson, *The Ethics of Legal Coercion* (D Reidel Publishing Company 1983) xiii.

including protection from torture).[101] The uniqueness of the criminal investigation and trial underlies both sets of justifications because as concerns epistemic justifications, '[t]he need to ensure that evidence is as reliable as possible is especially important in the case of prosecution evidence in criminal trials, because the admission of unreliable prosecution evidence could lead to the wrongful conviction of an innocent person',[102] and as regards non-epistemic justification, 'respect for dignity, demands that those at risk of prosecution must be given a fair opportunity to formulate a response to allegations of criminal wrongdoing.'[103] This is mirrored in the observation of the three-judge bench of the Supreme Court in *Selvi*,

> We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.[104]

The special nature and likely consequences of a criminal trial are at least partly also the reason why a right against self-incrimination is available to the accused. Any attempt to secure incriminating information during an investigation or trial, including threatening criminal prosecution for non-cooperation, or for choosing not to provide incriminating information during an investigation, cuts at the very essence of the right. This is because the threat of legal sanction acts as a coercive force which *compels* the accused by reducing the set of options available to her to obtain such information, and in that sense makes her worse-off. She must

[101] Andrew L-T Choo, *The Privilege against Self-Incrimination and Criminal Justice* (Hart Publishing 2013) 3-10.
[102] ibid.
[103] ibid.
[104] *Selvi v State of Karnataka* (n 96) [225].

either provide information that might incriminate her or risk facing criminal prosecution for remaining silent or refusing to answer.[105]

Thus, we have argued that the right of a person to remain silent during a criminal investigation in Indian law does not go far enough to protect the right against compelled self-incrimination for two reasons. First, the right to remain silent is not sufficiently robust, so a person is left having to strategise through the process of interrogation and gamble with the risk of giving away incriminatory information in choosing which questions to answer and when to remain silent. Second, Indian law does not recognise evidence extracted through the threat of legal sanction as compelled testimony, even though the effect of legal compulsion is the same as the threat of any other coercive sanction. This discussion has been in the context of general criminal law.

The case of PMLA requires further consideration because of Sections 50 and 63 (discussed in Part 2 and at the beginning of this Part). These provisions, which require a person summoned by the ED to answer all questions posed to her truthfully and sign the statement purportedly made by her as required by the ED, under the threat of criminal prosecution, are arguably violative of Article 20(3) insofar as they make no distinction between questions which have an incriminatory tendency and those that do not. However, as previously mentioned, Article 20(3) applies only to those who have been accused of an offence, the settled meaning of which in Indian law is a formal accusation of a criminal offence,[106] usually when an FIR is lodged against her.[107] Recall that, as discussed in Section 2, the ED does not require an FIR to begin investigation under PMLA, and the ECIR, where it exists, is not a public (or even accessible) document. Thus, a person has no way of discerning the capacity in which she has been

[105] Redmayne, *Rethinking the Privilege against Self-Incrimination* (n 95) [217-224].
[106] *MP Sharma v Satish Chandra* (n 82); *Raja Narayanlal Bansilal v Maneck Phiroz Mistry* (1961) 1 SCR 417.
[107] *Romesh Chandra Mehta v State of West Bengal* (1969) 2 SCR 461.

summoned before the ED. Furthermore, as per the decision of *Vijay Madanlal*, a person may not be considered an accused until she is officially arrested by the ED. This means that before arrest she has no protection of Article 20(3) and is obliged to answer all questions posed by the ED, notwithstanding the incriminatory nature of the answers. Finally, the ambiguity of the Court's language makes it unclear whether and under what circumstances Article 20(3) and Sections 25 and 26 of IEA would apply even in the post-arrest scenario. In light of how the provisions of PMLA have been worded and interpreted, it appears that Sections 50 and 63 would circumvent the protection of the right against self-incrimination.

3.2. Are ED police? A red herring

In this sub-section, we turn to another aspect of PMLA which diminishes the protections available to the accused under general criminal law. The Court in *Vijay Madanlal* concluded, as we discussed in Section 2, that officers of the ED are not police officers and, therefore, that their powers under Sections 50 and 63 of PMLA to summon a person, require her to answer all questions truthfully and sign the statement purportedly made by her on pain of criminal punishment, do not amount to testimonial compulsion, and that Section 25 of IEA would not apply to them. In this section, we argue that the Court's decision was based on a formalistic application of precedent and a lack of critical inquiry into the purpose behind disallowing confessions made to the police and in police custody under Sections 25 and 26 of IEA.

Section 24 of IEA makes a confession by an accused person irrelevant if it was obtained by inducement, threat or promise proceeding from a person in authority, sufficient to make the accused reasonably believe that she would gain an advantage or avoid evil.[108] Without going

[108] Indian Evidence Act 1872, s 24: 'A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or [1]promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him'.

into the particulars of the provision, it is clear that it aims to render confessions made to authority figures irrelevant if they appear to have been (among other things) compelled. This compulsion would have to be proved, as is evident from the terms 'appears to the Court' and 'in the opinion of the Court'. Section 24 of IEA stands in marked contrast to Sections 25 and 26 of IEA which provide that confessions made to a police officer or in police custody (unless made to a Magistrate) may not be proved against the confessor, implicitly (and rightly) assuming the potential for, or likelihood of, compulsion in such confessional statements.[109]

This is supported by the observations of James Fitzjames Stephen, who drafted the IEA: '[s]ections 25, 26, and 27… differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody'.[110]

The report of the first Law Commission of India, which recommended that the police should be prohibited from taking any statements that might be reduced to writing,[111] reflected a similar assumption of compulsion. With regard to Section 25 in particular, this purpose was reiterated by the Calcutta High Court in *R v Hurribole*[112] which held that '[i]ts humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them'.[113]

Since Sections 25 and 26 of IEA use the word 'police officer' and 'police custody', the word 'police' has had an anchoring effect[114] in the judicial interpretations of these provisions. In other words, because Sections 25 and 26 of IEA mention 'police', judges have focused on the

[109] Indian Evidence Act 1872, ss 25 and 26.
[110] James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872) with an Introduction on the Principles of Judicial Evidence* (Thacker, Spink & Co. 1872) 126.
[111] Law Commission, *The Indian Evidence Act, 1872* (Law Com No 69, 1977) 205.
[112] *R v Hurribole* (1876) ILR 1 Cal 207.
[113] ibid [3, 5].
[114] Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) *Science* 1124, 1128: The anchoring effect is a cognitive bias. It describes the commonly observed tendency of humans to overvalue the first piece of information offered (the 'anchor') in decision-making.

ontology of police or what characteristics define a 'police' officer, when deciding the authority figures to whom those provisions should apply. This approach has given rise to a range of controlling precedents (judgments rendered by constitutional benches of five judges of the Supreme Court) that read the term 'police officer' formally, as someone who, beyond holding powers of investigation typically given to a police officer, has the power to file a chargesheet under Section 173 of CrPC.[115] This range of precedents was relied upon by the Court in *Vijay Madanlal* to hold that ED officials are not police even though, as we demonstrated in Section 2, their powers and ability to extract compelled confessions are on par with, and sometimes greater than, that of the police.[116]

The enquiry into 'who is a police officer?', though rendered necessary by the use of 'police' in Sections 25 and 26 of IEA and the rules of legal precedent, is misleading in our view. The actual and complete answer to that question, evident in the literature on the subject, tells us that the police are a tool of social control. Neocleous argues that the function of the police in investigating and preventing crime is an incidental consequence of the fact that the law, and the criminal law in particular, is the chosen mode of social control by the state.[117] Notwithstanding this, the police perform a wide range of other functions,[118] including but not limited to, being first responders in emergencies, patrolling the streets, regulating traffic, controlling and dispersing crowds, and in the Indian context, providing security to high-ranking government officials.[119] Bittner astutely captures this broad canvas of police functions when he says, '[n]o human problem exists, or is imaginable, about which it would be said with

[115] *Badaku Jyoti Savant v State of Mysore* (1966) 3 SCR 698; *Romesh Chandra Mehta v State of West Bengal* (n 107); *Ilias v Collector of Customs* (1969) 2 SCR 613.
[116] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [442-443, 445].
[117] Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (Pluto Press 2000) 113; See also, Andrew Johnson, 'Foucault: Critical Theory of the Police in a Neoliberal Age' (2014) 61(141) *A Journal of Social and Political Theory* 5.
[118] Neocleous, *The Fabrication of Social Order* (n 117) 93-94.
[119] Dev Raj, 'Three Bodyguards Each for an IAS or IPS' (*The Telegraph*, 9 March 2018). https://www.telegraphindia.com/bihar/three-bodyguards-each-for-an-ias-or-ips/cid/1438004. Accessed 24 February 2024.

finality that this certainly could not become the proper business of police.'[120] But it is not these aspects of the police that are relevant to Sections 25 and 26 of IEA. That the police are authorised to direct traffic, for instance, is not the rationale behind the assumption that confessions made to them or in their custody would be compelled, nor does their power to file chargesheets justify such an assumption. It is the normative power of the police to coerce obedience, whether or not accompanied by physical violence, that justifies the assumption of compulsion in a confession made to a police officer or in police custody. As Miller rightly argues, even if we do not consider the ability (and as we discuss below, motivation and opportunity) of the police to use methods of torture and violence, what defines them is their 'normative power to coerce obedience.'[121] This power operates, as Žižek demonstrates, because police officers represent the *authority* of the State.[122]

We argue, therefore, that 'who is a police officer?' is a red herring. The real question ought to be: which investigative authorities wield powers that justify the assumption that confessions made to them or in their custody would be compelled? As we argued above in this section, unlike Section 24 of IEA which requires evidence of compulsion, Sections 25 and 26 of IEA assume compulsion by the police. But there is nothing to suggest that the police are the only investigating authority that can or would use coercive techniques to extract confessions.

Ethnographic accounts of the police demonstrate that the difficulties of following lawful procedures of investigation and evidence collection in the context of time and resource constraints, the belief in the efficacy and necessity of violence and torture as means of ensuring

[120] Egon Bittner, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of Police', in Herbert Jacob (ed), *The Potential of Reform of Criminal Justice* (Sage 1974) 30.
[121] Eric J Miller, 'The Concept of the Police' (2023) 17 *Criminal Law and Philosophy* 573, 583.
[122] Slavoj Žižek, *Tarrying with the Negative: Kant, Hegel, and the Critique of Ideology* (Duke University Press, 1993): Žižek observes, 'we fear the policeman insofar as he is not just himself, a person like us, since his acts are the acts of power, that is to say, insofar as he is experienced as the stand-in for the big Other, for the social order.' 234.

justice, and impunity from consequences are the main reasons why the police in India engage in methods of torture.

In his study of the police and its place in independent India, Bailey found that the perceived need to secure a higher number of convictions to impress senior officials, in combination with the high standard of evidence enforced by courts, made torture and concoction convenient shortcuts for the police during investigation.[123] More recent accounts support this view. Wahl in her semi-structured interviews with thirty-three officers of the Indian Police Service (hereinafter referred to as 'IPS') observed that violence in pursuit of evidence-gathering was justified by the fact that the criminal justice system was otherwise biased in favour of criminals.[124] Lokaneeta's account, in the context of the emergence and increasing adoption of 'scientific' methods of interrogation by the police, demonstrates that the Indian police resort to methods of coercion, including torture, because of the perceived difficulties of lawful investigation. Thus, the interviewed officers cited issues of the limited time in police custody, lack of training and resources, and most importantly, the fact that such methods could lead to 'recoveries' which under Section 27 of IEA[125] would be admissible as evidence in Court.[126] The police engage in methods of torture because they consider these methods to be both just and necessary in the public interest.[127] In his study of police violence in France, Fassin found similar motivations amongst his subjects who believed that in light of perceived judicial

[123] David H Bailey, *The Police and Political Development in India* (Princeton University Press 1969) 143-48.
[124] Rachel Wahl, 'Justice, Context and Violence: Law Enforcement Officers on Why they Torture' (2014) 48(4) *Law and Society Review* 807, 822-23.
[125] Indian Evidence Act 1872, s 27: 'Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'.
[126] Jinee Lokaneeta, *The Truth Machines: Policing, Violence and Scientific Interrogations in India* (University of Michigan Press 2020) 39-44.
[127] Wahl, 'Justice, Context and Violence: Law Enforcement Officers on Why they Torture' (n 124) 820-21; Beatrice Jauregui, 'Dirty Anthropology: Epistemologies of Violence and Ethical Entanglements in Police Ethnography' in William Garrot (ed), *Policing and Contemporary Governance: The Anthropology of Police in Practice* (Palgrave Macmillan 2013) 125, 131.

leniency and systemic loopholes, police violence was often the only avenue for justice.[128] Another reason offered to explain police violence is the culture of impunity surrounding such acts, that is, the belief that such acts will not be punished. Bailey's study noted that supervising IPS officers appeared to know of the unlawful tactics employed by their subordinates but tended to adopt the 'ostrich' approach of overlooking inconvenient truths.[129] This is confirmed by reports[130] indicating the low rates of prosecution and conviction in cases where coercive tactics are used by the police, and the acknowledgement by police officials that 'hardly anyone is ever punished'.[131]

In addition, we argue that the use of such tactics is facilitated by police powers of investigation, especially arrest and detention, and their access to spaces, such as police stations and prisons, with minimal oversight. This argument is bolstered by the fact that judicial efforts to prevent custodial torture have focused on increased accountability and transparency in the exercise of the powers of arrest and detention,[132] and more recently, on monitoring spaces where interrogations are carried out, such as police stations.[133]

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[128] Didier Fassin, 'The Police are the Punishment' (2019) 31(3) *Public Culture* 539.
[129] Bailey, *The Police and Political Development in India* (n 123) 145.
[130] National Crime Records Bureau, Crime in India 2021: Volume III, 1033-1038; National Campaign Against Torture, India: Annual Report of Torture 2020 (18 March 2021). http://www.uncat.org/wp-content/uploads/2021/03/IndiaTortureReport2020.pdf. Accessed 24 February 2024; Debayan Roy, 'There were 300 Custodial Deaths from 2008 to 2016, but Zero Convictions' (*The Print*, 26 June 2019). https://theprint.in/india/there-were-300-custodial-deaths-from-2008-to-2016-but-zero-convictions/254450/. Accessed 24 February 2024.
[131] NC Asthana, 'Why Police Brutality and Torture are Endemic in India' (*The Wire*, 13 December 2021). https://thewire.in/government/why-police-brutality-and-torture-are-endemic-in-india. Accessed 24 February 2024.
[132] *DK Basu v State of WB* AIR 1997 SC 610: Every recommcendation in this judgement, aimed specifically against custodial violence, deals with police powers of arrest and detention.
[133] *Paramvir Singh Saini v Baljit Singh and Others* AIR 2021 SC 64; The awareness of the lack of oversight in a police station and the consequent difficulty of obtaining evidence of wrongdoing within such a space is also highlighted by the suggestion of the 113th Law Commission of India that a presumption to the following effect be added to the IEA, s 114B: 'In a prosecution of a Police Officer for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the Police Officer having custody of that person during that period'; See 113th Law Commission, *Injuries in Police Custody* (Law Com No 113, 1985) [5.2].

Thus, if one asked the question, 'which authority figures in a criminal investigation wield powers that justify the assumption that confessions made to them or in their custody would be compelled?', as we suggest one should, the answer would be broader than 'a police officer'. One would find that any government official (whether described as police or not) who is granted coercive and liberty-limiting powers such as arrest and detention, which can be exercised in spaces over which there is minimal oversight (that is places which are within the control of the investigating authority), for the collection of evidence in matters (whether described as criminal or not) which can result in criminal consequences (such as imprisonment), is indistinguishable from the 'police' for the purposes of Sections 25 and 26 of IEA. Given the fact that methods of custodial violence and torture are aimed, at least in part, at easier collection of evidence and, as we argued above, facilitated by powers of arrest and detention and access to spaces in which such powers may be exercised with relative impunity, any government authority which is motivated to collect evidence and has access to such facilitating conditions would, logically, be prone to using such methods to make their jobs easier and to improve their outcomes of conviction. In other words, it is not the label of 'police' or a police officer's uniform, or the authorisation to file a chargesheet, that creates the scope for unscrupulous methods of evidence collection, but the power, opportunity (including ability and impunity) and incentive to do so.

In this regard, the observation of the Supreme Court in *DK Basu v State of WB* is highly pertinent,

> Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W, Central Bureau of Investigation (CBI) , CID,

> Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act. Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well… Amendment to the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.[134]

This view is echoed in the decisions of some Indian Courts which, as Sekhri rightly argues, have construed the term 'police' under Section 25 of IEA functionally, rather than formally.[135] Thus, in *Nanoo Sheikh Ahmed v Emperor*, the Bombay High Court held that confessions made to a revenue officer would be hit by the bar in Section 25 of IEA because the revenue officer acted as a police officer and exercised substantially the same powers during the course of investigation.[136] Furthermore, the Court observed,

> many extensive powers were thus conferred on Excise officers which previously could only have been exercised by ordinary members of the police under the Criminal Procedure Code. It seems to me, therefore, not to be an unduly wide construction of Section 25 to say that a Police officer there includes an officer of Government with such wide police powers as those we find here.[137]

Similarly, the Calcutta High Court, in *Amin Shariff v Emperor*, held on this subject, '[i]t is the nature of the duties, performance of which was likely to give occasion for improper influence being exercised or felt, and not any particular aversion for a particular department of public

[134] *DK Basu v State of WB* (n 132) [128].
[135] Abhinav Sekhri, '*Confessions,* Police Officers and § 25 of the Indian Evidence Act, 1872' (2014) 7(1) *NUJS Law Review* 55. The relevance of s 25 to the determination of the question 'who is a police officer?' has also been touched upon elsewhere. See Siddhant Kohli, 'Vijay Madanlal Choudhary v Union of India: An Opportunity Lost to Identify "Police Officers"' (*The Project 39A Criminal Law Blog*, 7 September 2022). https://p39ablog.com/2022/09/an-opportunity-lost-to-identify-police-officers/. Accessed 24 February 2024.
[136] *Nanoo Sheikh Ahmed v Emperor* AIR 1927 Bom 4 [94-95].
[137] ibid.

service that must have moved the legislature in enacting the provision'.[138] More recently, a three-judge bench of the Supreme Court in *Raja Ram Jaiswal v State of Bihar*,[139] in concluding that Section 25 of IEA would apply to confessions made to excise officers under the Bihar & Orissa Excise Act, 1915, noted, '[t]he test for determining whether such a person is a 'police officer' for the purpose of s. 25 of the Evidence Act would, in our judgment, be …whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent.'[140]

Thus, if we ask 'which investigative authorities wield powers that justify the assumption that confessions made to them or in their custody would be compelled?', instead of just 'who is a police officer?', it becomes clear that the ED is such an authority. As we demonstrated in Part 2, they have the power to arrest and detain a person, as well as to summon a person and require her, under pain of criminal sanction, to answer questions truthfully and sign statements purportedly made by her, notwithstanding the incriminatory nature of the answers. They can also get custody of a detainee, of the same nature as police custody, during which they have direct access to the arrested person and total control of the space in which she is held, the information to which she has access and the people with whom she can confer. Moreover, the procedures of investigation are entirely without oversight because the ED Manual is a secret. Therefore, the ED has powers equivalent to the police but enjoys immunity from the ordinary safeguards that are available in an investigation by the police. As we argued in Part 2, they are police by any other name, and their inquiry is an investigation by any other name. Furthermore, like any investigating authority, the ED is incentivised, by the prospect of easier PMLA investigations and better chances of conviction, to procure confessions. Recall that Lokaneeta's

[138] *Amin Shariff v Emperor* AIR 1934 Cal 580 [18-23].
[139] *Raja Ram Jaiswal v State of Bihar* 1964 (2) SCR 752. Followed in *Abdul Rashid v State of Bihar* (2001) 9 SC 578 [580].
[140] *Raja Ram Jaiswal v State of Bihar* (n 139) [766].

research reveals that one of the strongest motivators for the use of coercive methods by the police was the chances of recovery under Section 27 of IEA. In light of this, it would not be far-fetched to say that the impetus to secure confessions is likely to be *greater* for the ED since confessions made to them are directly admissible as evidence, without any need for recovery.

Against this, it might be suggested that custodial torture is a practice to which members of the local police, and not senior officials, resort. This was the ground on which the 48th and 69th Law Commission of India Reports suggested that, with certain safeguards, confessions made to senior officials be permitted as evidence during a criminal trial.[141] Even in the Court's decision in *Vijay Madanlal*,[142] the fact that the powers of arrest etc. under PMLA are given to high-ranking officials is considered a safeguard. We find this distinction dubious. As previously noted, Bailey's research indicates the complicity (by failure to respond or prevent) of IPS officials in custodial torture. The views regarding the justifications for police violence in Wahl's research emerge from interviews with a sample composed entirely of IPS officers. A senior police official's anecdotal account of police torture also specifies that the subculture of macho policing that encourages the use of violence and coercion to meet the ends of investigation and justice 'consumes everybody, from constables to IPS officers.'[143] Thus, aside from class-based notions of moral rectitude, there is no reason to believe that a high-ranking official would be immune to the temptations of lower-ranking officers, especially if they are directly involved in the investigation and therefore directly responsible for its outcome. If anything, it is possible to argue that the lack of oversight over high-ranking officers gives them greater impunity. Notably, allegations of coercion to compel self-incriminating statements or confessions,[144] as

[141] Law Commission, *Some Questions under the Code of Criminal Procedure Bill, 1970* (Law Com No 48, 1972) 6-7; Law Commission, *The Indian Evidence Act, 1872* (n 111) 208.
[142] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [322].
[143] Asthana, 'Why Police Brutality and Torture are Endemic in India' (n 131).
[144] *Gurucharan Singh v Union of India & Ors* (2016) 2 DLT (Cri) 973.

well as custodial torture to procure statements against others,[145] have already been made against the ED although, as with allegations against the police, there have been no convictions so far. Consequently, the argument that 'senior officials' or the ED would never engage in custodial torture does not hold water.

So far, we have contended that the range of controlling precedent on which it relied, the Court's decision in *Vijay Madanlal* that ED are not police is not per incuriam, and therefore legally speaking, not wrong. Our argument, however, has been that the very question, 'who is a police officer?' is, logically speaking, a red herring.

One further aspect of the Court's reasoning in *Vijay Madanlal* deserves scrutiny, i.e., the distinctions drawn by the Court from the earlier decision in *Tofan Singh v State of Tamil Nadu* (hereinafter referred to as '*Tofan Singh*').[146] In *Tofan Singh*, a three-judge bench of the Supreme Court (by a majority of 2-1) held that officers investigating offences under the Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS') were, in the context of that legislation, police officers.[147] In doing so, it overruled judgments which had followed the 'chargesheet approach' to determining who is a police officer.[148] To deal with this judgment of the Supreme Court diverging from the earlier formalistic approach in interpreting the scope of Section 25 of IEA, the *Vijay Madanlal* Court chose to distinguish the judgment in *Tofan Singh* on reasons which are not only overly technical but also, incorrect in light of the provisions of PMLA.

The first distinction drawn by the *Vijay Madanlal* Court is that *Tofan Singh* expands the interpretation of 'police officer' on the ground that the NDPS was primarily a penal statute,

[145] *P Radhakrishnan v State of Kerala* Civil Writ Petition No 7641 of 2021 decided on 16 April 2021 (Kerala High Court).
[146] *Tofan Singh v State of Tamil Nadu* AIR 2020 SC 5592.
[147] ibid [158].
[148] *Raj Kumar Karwal v Union of India & Ors* AIR 1991 SC 45; *Kanhaiyalal v Union of India* AIR 2008 SC 1044.

whereas PMLA is a *sui generis* statute which while focusing on regulatory and civil consequences, only incidentally deals with criminal sanction.[149] We demonstrated in Part 2 how such a reading fails to recognise the fact that all attachment proceedings under PMLA are fundamentally based on the criminal prosecution for the offence under Section 3 of PMLA. To reiterate our point, this is because the attachment of property is permitted only if it is 'proceeds of crime' and the confiscation of property is also contingent on a successful prosecution for the offence of money laundering. Second, the *Vijay Madanlal* Court found that unlike the NDPS, where officers of the regular police cadres as well as other cadres, such as the Directorate of Revenue Intelligence (hereinafter referred to as 'DRI'), are permitted to investigate, PMLA expressly prohibits regular cadre police officers from investigating.[150] In the opinion of the Court in *Vijay Madanlal*, the NDPS creates a dichotomy in two aspects which do not exist in PMLA. One, the recording of statements by police officers is subject to the limitation of Sections 161, 162 of CrPC and Section 25 of IEA, which do not apply to statements recorded by the officials of the DRI. Two, investigations by the police would culminate in the filing of a chargesheet as opposed to the complaint filed at the end of an investigation by the DRI. However, the Court is mistaken in concluding that such dichotomies would not arise under PMLA. This is because it fails to consider that, in fact, PMLA also authorises the Central Government to allow police officers to investigate offences under PMLA.[151]

Therefore, the conclusion of the Court in *Vijay Madanlal* that the officers of the ED are not police was based on a formal (though technically correct in law) application of precedent as to the meaning of 'police officer' on the one hand, and overly technical (and not entirely accurate) distinctions to escape the precedent of *Tofan Singh* on the other. We argued in this section, however, that when determining whether Sections 25 and 26 of IEA ought to apply to an

[149] *Vijay Madanlal & Ors v Union of India & Ors* (n 1) [444].
[150] ibid.
[151] Prevention of Money Laundering Act 2002, s 45(1A).

investigative authority, the enquiry into 'who is police?' is misleading, albeit justified in light of the wording of the two provisions. The real question ought to be whether the investigative authority wields powers that would justify the assumption of compulsion in confessions made to them or in their custody. When considered against this question, we argued, it becomes clear that Sections 25 and 26 should apply to the ED, who exercise powers equivalent to, and often greater than the police. The conclusion of the Court in *Vijay Madanlal*, therefore, allows an investigative authority with the powers and coercive potential of the police to circumvent the safeguards ordinarily applicable to the police.

4. Conclusion

In this article, we situated the judgment of the Court in *Vijay Madanlal* in a judicial history of treating economic offences exceptionally and accepting the exercise of police-like coercive powers by authorities to whom the ordinary safeguards of a criminal investigation do not apply. This approach has frequently validated legislative attempts to side-step the protections under the Constitution of India, the CrPC and the IEA, and does so again concerning protections against testimonial compulsion when it comes to 'inquiries' under PMLA.

In Part 2, we demonstrated that the *Vijay Madanlal* Court gives too much weight to the labels selected by the Parliament under PMLA (for which no justification is forthcoming), instead of the essence and practical meaning of what those labels are attached to. Thus, investigation is understood as a 'collection of evidence' because it may be directed not just towards the prosecution of money laundering, but also towards 'civil' proceedings for attachment of property. However, we argued that this collection of evidence is, in fact, a criminal investigation in all but name and the Court's distinction between civil and criminal proceedings under PMLA, insofar as the attachment of proceeds of crime is concerned, is specious. Similarly, the Court's decision to distinguish the ED from police officers, despite the significant overlap in

their powers and functions for an investigation into a crime is concerning. This is because it allows the ED to circumvent the protections available during an ordinary criminal investigation without any justification other than the 'special nature' of money laundering as an economic offence. In other words, we concluded that the ED were 'police by any other name', and their inquiry to collect evidence was 'an investigation by any other name'.

In Part 3, we considered how these specious and unjustified distinctions dismantle the protections available against investigations by the police under the Constitution of India, the CrPC and the IEA. In Part 3.1, we argued that the conception of the right to silence in Indian law has always been insufficient because it requires the detainee to strategise their way through interrogation and does not recognise the coercive effect of the threat of legal sanctions. These weaknesses of the right to silence are particularly relevant in light of the powers of the ED to summon a person (without revealing why or in what capacity she has been summoned) and require her to answer truthfully and sign the statements made by her on pain of criminal punishment. In Part 3.2, we argued that the inquiry into 'Who is a police officer?', though technically necessary, is a red herring when it comes to determining the applicability of Sections 25 and 26 of IEA to an investigative authority. The more appropriate inquiry, we argued, would be whether the authority's powers justify an assumption of compulsion in all confessions made to them or in their custody. When considered in this frame, the powers of the ED to arrest, keep in custody, interrogate and summon persons are of the same coercive nature as the police even as they are immune from the safeguards and restraints that apply to a police investigation. Their ability and motivation to compel testimony, therefore, is indistinguishable from that of the police. Since the Court in *Vijay Madanlal* adopted the formalistic (and legally valid) line of 'who is a police officer?' to distinguish the ED from the police, it did not consider these coercive tendencies of the powers and immunities of the ED.

Consequently, when it comes to 'inquiries' into PMLA offences, the judgment in *Vijay Madanlal* allows, and even enables, a systematic breakdown of the protections against testimonial compulsion.

Declarations

Competing Interests: The authors have no competing interests to declare that are relevant to the content of this article.