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Editor
Prof.(Dr.) Shaveta Gagneja

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School of Law
Fairfield Institute of Management & Technology

FIMT Campus, Bijwasan Road, Kapashera, New Delhi-110037
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CHAIRMAN'S MESSAGE

Fairfield Institute of Management and Technology in the year 2018 started this journal to facilitate sharing of information, knowledge and experience on diverse legal issues, National and International. Since its inception, it has simulated a great deal of interest amongst legal scholars, academicians, and lawyers. With the passage of time, the journal has proved to be a notable platform for scholarly work.

I hope that this edition of the journal, which contains a fine collection of articles on pressing issues of law and dispute resolution will be a precious reserve for policy makers, administrators, legal fraternity, human rights institutions and defenders, research scholars, members of civil society organizations, students and others.

I sincerely trust that the FIMT Law Journal, Vol.7, Issue 1, will deepen interest and awareness about notable legal issues cursing the justice loving members of our society.

I would like to compliment and express my deep gratitude to the editorial board members for providing their full cooperation and authors for their contribution, enabling FIMT to produce this issue. Insightful critiques of readers are welcome for our further growth.

– V. K. N. Bhardwaj
Chairman
FIMT Group of Institutions

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ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ACROSS JURISDICTIONS

– Ms. Abha Malhotra
Senior Counsel-Union of India
(Delhi High Court), Arbitrator & Mediator
– Mr. J. Karan Malhotra
Advocate, Delhi High Court

ABSTRACT

Enforcing foreign arbitral awards in international commercial arbitration hinges on domestic laws and international conventions. This research paper analyses the core principles and legal frameworks that govern this process, emphasizing how national laws and international treaties facilitate or impede cross-border enforcement. It explores essential procedural aspects such as filing enforcement petitions, judicial scrutiny, and the criteria for treating foreign awards as domestic judgments. The study addresses common challenges like breaches of public policy and jurisdictional disputes across various legal systems. This paper primarily focuses on India, the U.K., the U.S.A., and Singapore.

In India, enforcement under the Arbitration and Conciliation Act, 1996 involves a rigorous process where compliance with the Geneva or New York Conventions is paramount. Challenges to enforcement include procedural irregularities and breaches of public policy, which the courts scrutinize extensively.

In the U.K., the Arbitration Act of 1996 establishes a robust regime for recognizing and enforcing foreign arbitral awards, emphasizing adherence to the New York Convention and limited grounds for challenge based on procedural or jurisdictional errors.

Singapore, as a signatory to the New York Convention, provides a streamlined process through the International Arbitration Act. It upholds a pro-enforcement stance, aligning with international standards while allowing limited grounds for setting aside awards, such as fraud or violations of public policy.

In the U.S., enforcement under the Federal Arbitration Act, 1925 reflects a similarly pro-enforcement approach, ensuring compliance with international conventions and addressing challenges based on the narrow grounds stipulated under the New York Convention.

By synthesizing insights from diverse jurisdictions, this research aims to serve as a valuable resource for the readers. It enhances understanding of the intricacies of enforcing arbitral awards across borders, emphasizing the importance of harmonization and clarity within international arbitration frameworks.

Keywords: *Enforcement, Foreign Arbitral Awards, Challenges, Jurisdictions, Geneva Convention, New York Convention.*

I. INTRODUCTION

The parties to Arbitration are primarily concerned with getting Awards in their favour enforced. Enforcement of the Award is thus the bottom line for the end user of the Arbitral Process. The enforcement of foreign Arbitral Awards in various jurisdictions involves a complex legal process, intricately governed by domestic laws and international conventions. This research explores the thorough procedures and challenges associated with enforcing Foreign Arbitral Awards in India, the United Kingdom, Singapore, and the United States. The examination encompasses the distinctive legal frameworks in these jurisdictions, the impact of international conventions such as the New York Convention, and the nuanced considerations in challenging the enforcement of Foreign Arbitral Awards. This research aims to provide a comprehensive and objective analysis of the mechanisms and obstacles involved in cross-border enforcement, offering valuable insights into the global landscape of arbitration and its legal intricacies.

II. INDIA

a. Enforcement Procedure:

Enforcing Foreign Arbitral Awards in India involves a detailed process under the Arbitration and Conciliation Act, 1996 ("A&C

Act"). To start, one would have to file an execution/enforcement petition in the competent court with the original Award and its authenticated copy.[1] Eligibility is determined under the Geneva or New York Conventions, under Section 46, and the Court reviews for compliance and potential refusal grounds as per Section 48 of the A&C Act. The High Court, having original jurisdiction, oversees jurisdictional thresholds, compliance with the New York or Geneva Convention, compliance as per Section 48, examination of documents, procedural regularity, Public Policy considerations, legality and validity based on the Award's value. After notifying the opposing party, a judicial examination ensures adherence to procedural and substantive principles, including public policy. A temporary stay of enforcement is possible under valid grounds such as evidence of fraud, jurisdictional challenges, and Public Policy concerns[2]. If satisfied, the Court issues an enforcement order, as a decree. Dissatisfied parties can appeal, examining legal as well as factual aspects. Recognizing the Foreign Award as a decree allows execution for recovery, and the Court can award costs and damages.

It is pertinent to note that Section 47 of the A & C Act, 1996 stipulates the mandatory evidence of the Foreign Award that needs to be filed for the enforcement of a foreign Arbitral Award.

b. Awards passed under the Geneva and New York Convention:

In the realm of enforcing Arbitral Awards in India, the New York Convention and Geneva Convention delineate specific procedures under the A&C Act. Section 44 of the Arbitration & Conciliation Act defines a foreign award linked to a commercial dispute in India post-October 11, 1960.[3] Key prerequisites for enforcement include India's New York Convention signatory status and the awards origin in India by the Central Government. During the application process, mandated documents, such as the original award and evidence of its foreign nature,[4] must be submitted. Section 48 of the Act allows the opposing party to raise objections based on specified grounds. Upon the court's satisfaction (Section 49 of the A&C Act), the foreign award attains the status of a court decree.

Sections 53 to 60, Chapter II, Part II, A&C Act deals with

the enforcement of awards under the Geneva Convention. Section 53 defines a foreign award in the commercial context in India after July 28, 1924. Requirements involve adherence to "the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927", "the Geneva Protocol on Arbitration Clauses, 1923", and the award's origin in a reciprocating territory, as recognized by the Central Government. Further, Section 56 outlines necessary documents during the application, including the original award, evidence of finality, and proof of validity under applicable law. Section 57(2) introduces conditions for refusing enforcement, adding nuance to the process, with Section 58 emphasizing the foreign award's attainment of the status of a court decree upon the court's satisfaction with its enforceability.

c. Challenges to Enforcement:

Challenges in enforcing a Foreign Arbitral Award in India may arise based on various grounds. These include situations where parties are legally incapacitated or when the agreement is deemed invalid under governing legislation. Refusal is a possibility in case the contesting party are not properly notified of the appointment of an arbitrator or the proceedings, hindering their effective case presentation.[5]

Enforcement might also be rejected if the award addresses disputes beyond the initially agreed scope or covers subjects outside the agreed-upon submission. Deviations in arbitrator appointments or non-compliance with the applicable legislation or procedures from the parties' agreement can also lead to refusal of enforcement. If the foreign award is not yet binding or set aside by a competent authority or has been suspended, enforcement may be prevented.

Crucially, if the dispute's subject falls outside issues arbitral under Indian law, it constitutes another valid ground for refusal. Lastly, it can also be denied if it contradicts India's public policy to safeguard essential principles and values.[6]

Recently, the Apex Court has held enforcement of foreign awards must be refused only rarely and international standards to be applied to determine bias. limited scope for interference could be merited only in exceptional cases of "blatant disregard of Section

48 of A&C Act"[7] The Court stated that India must take an internationalist stance since it is a member to the New York Convention, but it also made a point to highlight the various public policy norms that apply to international commercial arbitration and domestic arbitration. It continued, saying, "Even though the New York Convention does not specifically mention "bias", Article V(1)(d) (irregular composition of arbitral tribunal), Article V(1)(b) (due process), and the public policy defence under Article V(2)(b) are potential grounds for refusing recognition of a foreign award."

d. Evolution of Case Law in India:

1. *"Renusagar Power Co. Ltd vs. General Electric Co.* [8]*"*

In this case, the Supreme Court ("SC") interpreted the term "Public Policy" narrowly. The Court emphasized that mere contravention of Indian law would not be sufficient to invoke the Public Policy bar; there must be something beyond a legal violation. Public Policy, according to the Court, encompasses (i) Fundamental Policy of Law, (ii) Interest of India (iii) Justice or Morality.

2. *"Phulchand Exports Ltd. vs. O.O.O. Patriot*[9]*"*

The SC again expanded upon the scope of 'public policy' as per Section 48 of the A & C Act, and held that it is at par with Section 34.

3. *"Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc.*[10]*"*

In this case, the SC adopted a pro-enforcement stance and observed that 'Part I of the Arbitration Act would not be applicable to a foreign seated arbitration'.

4. *"ONGC vs. Saw Pipes Ltd.*[11]*"*

The Supreme Court held that an award would be "Patently illegal", if it is in contravention to the substantive provisions of law or the provisions of the A&C Act or against the terms of the contract. Mr. Fali Nariman, an eminent advocate and jurist, criticized it by saying that it would only increase the litigation and that this practice of courts having the last word is not in the spirit of Arbitration, and you might as well do away with the Act.

5. *"Shri Lal Mahal Ltd. vs. Progetto Grano Spa*[12]*"*

It was clarified in this case that the 'patent illegality ground was only applicable to domestic awards', hence, reignited the lamp of *'Renusagar'* to remove obstacles in enforcement.

6. *"ONGC vs. Western Geco International Ltd.*[13]*"*

This case is used to study parameters for the annulment of an Award. It introduced the judicial principle of the "Wednesbury Principle of Reasonableness".

7. *Associate Builders vs. DDA*[14]

Following the proposition set forth in *Western Geco*, it, held that the term "public policy" shall be interpreted broadly. The judgment was passed with a conservative approach as the SC conjointly interpreted Sections 48 & 34 of the Act, 1996, which allowed the parties to go into the merits of the arbitral award.

Position in. the wake of *Western Geco* and *Associate Builders*

i. In its 246th Report, the Law Commission criticized the inclusion of Wednesbury reasonableness and also recommended the incorporation of 'Explanation II' to Section 34(2) (b) (ii).
ii. The Amendment Act of 2015 added Explanation II in both Section 34 and Section 48.

8. *"SsangYong Engineering & Construction Co. Ltd. vs. National Highways Authority of India*[15]*"*

This was the first case that dealt with post-amendment[16] sections and relegated back to the *Renusagar* judgment.

9. *"Vijay Karia vs. Prysmian Cavi E Sistemi Srl*[17]*"*

This case maintained a pro-enforcement stance on foreign awards and introduced a novel concept of the Time Honour Hallowed Principle, although the principle has not been adequately defined.

10. "*National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A*[18]*"*

The Court decided whether an Award for Damages could be enforced based on the provisions of the parties' contracts.

11. *"Avitel Post Studioz Ltd. vs. HSBC PI Holdings (Mauritius) Ltd. (Previously names HPEIF Holdings Ltd.*[19]*"*

The SC stressed upon timely enforcement of foreign arbitral

awards, whilst also observing that it should be the endeavour of the Courts to adopt best practices at par with international standards as opposed to the domestic practice, insofar as determination of bias is concerned.

III. United Kingdom

a. Enforcement Procedure:

Enforcing Foreign Arbitral Awards in the United Kingdom ("U.K.") involves navigating the Arbitration Act, 1996,[20] as this legislation establishes the legal framework and procedures for arbitration in the U.K. The Arbitration Act, 1996 provides a comprehensive set of rules and regulations governing both domestic and international arbitrations that take place in the U.K. It ensures a clear and consistent approach to arbitration proceedings, including the recognition and enforcement of Foreign Arbitral Awards. The initial step is seeking recognition through an application to the Commercial Court, Queen's Bench Division, supported by an affidavit to prove the award's particulars and legal compliance. English courts can refuse enforcement undergrounds like procedural irregularities or jurisdictional issues. Upon the approval of the court, the successful party serves documents on the judgment debtor as per court instructions.[21]

Recognition transforms the Foreign Arbitral Award into an English Court Judgment, enabling the use of domestic enforcement mechanisms. These mechanisms include obtaining a charging order, securing a writ of control for asset seizure, or applying for a third-party debt order to freeze external party assets.

Post-recognition, diverse enforcement strategies can be employed, with the option of appealing to the Court of Appeal, primarily focusing on legal points. While these procedures offer a general framework, the nuanced nature of each case requires tailored legal advice. The Arbitration Act 1996 and associated court rules establish the foundational legal structure for enforcing Foreign Arbitral Awards in the U.K.

b. Awards passed under the Geneva and New York Conventions:

The enforcement of awards under the Geneva and New York

Conventions in the United Kingdom is regulated by the Arbitration Act 1996. Both the conventions, that is, the UN's New York Convention and the European Geneva Convention, significantly aid the recognition as well as enforcement of Foreign Arbitral Awards in the U.K.

The New York Convention, of which the U.K. is a member, streamlines the procedure of recognizing and enforcing Arbitral Awards from other contracting states. The Geneva Convention, governing awards in European countries, aligns with the Arbitration Act 1996 for enforcement in the U.K.

In practice, parties seeking enforcement typically apply to the English courts, specifically the Commercial Court, Queen's Bench Division. The Court ensures the award meets Convention and Arbitration Act criteria, with limited grounds for refusal, such as Public Policy or procedural irregularities.[22]

Enforcement of awards under these Conventions relies on the strong legal framework of the Arbitration Act 1996, in harmony with International Principles and procedures.

c. Challenging Enforcement of Foreign Arbitral Awards:

Challenging Foreign Arbitral Awards in the U.K. is guided by the Arbitration Act 1996 and involves two key grounds specified in Sections 67 and 68.[23]

- **Lack of Substantive Jurisdiction (Section 67, Arbitration Act 1996):**

An award may face challenge and potential annulment if a party contends that the arbitral tribunal was in excess of powers, as outlined in Section 67.[24]

- **Serious Irregularities (Section 68, Arbitration Act 1996):**

Another basis for putting a challenge to an award is serious irregularity affecting the tribunal, proceedings, or the award itself, as provided in Section 68. Furthermore, under Section 69, parties can appeal to the Court on a question of Law arising from the award, unless mutually excluded. This legal framework balances the finality of awards with the need for recourse against jurisdictional overreach, procedural irregularities, or legal errors.[25]

d. Case Law:

1. *"Dallah Real Estate and Tourism Holding Company vs. The Ministry of Religious Affairs, Government of Pakistan*[26]*"*

This case involved Dallah seeking to enforce an International Chamber of Commerce ("ICC") award against the Government of Pakistan. The central issue was the validity of the arbitration agreement under French law. The Court of Appeal dismissed the appeal, emphasizing the government's non-participation in the ICC arbitration and likely adhering to the limited grounds for challenging arbitral awards outlined in the 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards'.[27]

2. *"West Tankers Inc. vs. RAS Riunione Adriatica di Sicurta SpA*[28]*"*

In this case, the Court of Appeal affirmed the decision of the English High Court, wherein the appeal of the insurers had been dismissed. The judgment upheld a broad interpretation of Section 66 of the Arbitration Act, 1996, emphasizing that a declaratory arbitral award could be enforced under Section 66, providing a simpler alternative route. The court noted the insurers' failure to present alternative arguments against the award's validity or show why the order would be against the interests of justice.[29]

IV. Singapore

a. Enforcement Procedure:

The process for enforcing foreign Arbitral Awards in Singapore begins with the initiation of a recognition application with the High Court. Submission of necessary documents, such as the original or certified copy of the award and evidence of the arbitration agreement's validity, is required.[30] The Court then carefully reviews the application and, when satisfied, issues an order recognizing the foreign award. Following this, a separate application for an enforcement order is submitted. Once the application is granted, the prevailing party can take measures like asset seizure to fulfil the award. Singapore, being a participant in the New York Convention, streamlines a process that is efficient and internationally aligned for recognition and enforcement.

b. Awards passed under the Geneva Convention and New York Convention:

In Singapore, the enforcement of awards under the Geneva Convention and New York Convention is regulated by the International Arbitration Act ("IAA").[31] The IAA incorporates New York Convention provisions into Singaporean Law, permitting the recognition and enforcement of Arbitral Awards from member countries.

To pursue enforcement in Singapore, the applicant has to file an application with crucial documents like the original award or a certified copy either with the Singapore High Court or with the Singapore International Commercial Court ("SICC"), being duly authenticated, and the arbitration agreement. The Court meticulously reviews the application, addressing objections from the opposing party. Upon satisfying enforcement requirements, the Court issues an order, treating the award as a Court Judgment. Once recognized and enforced, the award carries the same legal weight as a judgment from a Singapore Court, enabling subsequent enforcement measures.

Singapore maintains a pro-enforcement[32] stance, prioritizing the validity and finality of international arbitration awards. This approach aligns with Singapore's commitment to being a favoured global hub for arbitration. The structured and streamlined process, guided by the International Arbitration Act, reflects Singapore's dedication to creating a favourable environment for international arbitration and bolstering its reputation as a reliable destination for resolving commercial disputes.

c. Challenging the Enforcement:

Challenging the enforcement of Foreign Arbitral Awards in Singapore necessitates submitting an application to either the Singapore High Court or the SICC within the stipulated timeframe. According to Section 6(1) (c) of the Limitation Act (Cap. 163), 'a party wishing to enforce an arbitral award in Singapore must do so within six years from the date the award was passed'.

In Singapore, the grounds for setting aside arbitral awards are outlined in the IAA.[33] The key provision in the IAA that

corresponds to the grounds for setting aside an arbitral award is Section 24. Section 24(1) of the IAA closely aligns with Article 34 of the UNCITRAL Model Law, providing a limited set of grounds on which a party may challenge or seek to set aside an arbitral award. Encompassing aspects such as an invalid arbitration agreement, inadequate notice, disputes exceeding the scope of the arbitration agreement, subject matter not capable of being settled by arbitration, deficiencies/ illegalities in the constitution of the tribunal, incapacity of parties, and award against public policy.[34]

Two more grounds exist under Section 24 of the IAA for setting aside an award:

i. 'The award was influenced or impacted by fraud or corruption, or there was a natural justice violation that occurred during the award-making process, resulting in a party's rights being prejudiced.'

ii. 'An award will not be set aside for a breach of an agreed-upon procedure if the non-observance was caused by the applicant, or if the challenge to the award is based on the arbitral tribunal's procedural orders or directions, which are solely within the arbitral tribunal's jurisdiction.[35]'

An award cannot be readily revoked for allegations of going against Singapore's public policy. 'The Singapore International Commercial Court (SICC)', a branch of the Singapore High Court upheld the bar high for setting aside an award in *Gokul Patnaik v. Nine Rivers Capital Limited*[36]. Despite expert testimony indicating that the underlying contract was unlawful in another country, the SICC declined to set aside an award because the petitioner had not proven that the illegality would "shock the conscience" or "violate the most basic notions of morality and justice".

It is improbable that Singaporean courts will acknowledge the execution of foreign awards that have been annulled at the arbitration venue. The traditional view is that "an award which is set aside at the seat of arbitration has no legal existence or effect because the force of an award comes from the law of the seat, ex nihilo nihil fit." This was stated by Singapore Chief Justice Sundaresh Menon in his patron's speech at 'the Chartered Institute of Arbitrators London

Centenary Conference' on July 2, 2015. This is also one of the grounds listed under Article V (1) (e) of the New York Convention.

The Court meticulously reviews the application, taking into account the presented evidence and adherence to legal requirements. Singapore's legal framework underscores a pro-arbitration and pro-enforcement stance, although valid grounds for setting aside can result in a successful challenge.

Singapore remains committed to offering a fair and transparent process in line with international arbitration principles, solidifying its reputation as a reliable hub for effective dispute resolution.

d. Case Law:

1. *"CZD vs. CZE*[37]*"*

The Singapore High Court upheld the enforcement of the Chinese arbitration award. It rejected the defendant's claims of procedural fraud and dismissed the argument that freezing the defendant's shares satisfied the award. The court, despite acknowledging the claimant's non-disclosure, deemed it inconsequential as the defendant's application had already been rejected. The judgment underscored a strict approach to enforcing foreign arbitration awards.[38]

2. *"Rakna Arakshaka Lanka v. Avant Garde Maritime Services*[39]*"*

The main issue involved was whether the Award should be set aside in lieu of the challenge to jurisdiction and whether the Award should be set aside based on public policy. The Singapore Court of Appeal ("CA") held 'when a properly non-participating respondent was presented with an award, he could exercise all legal remedies available to him, including filing a court application to set aside the award.' Regarding the question of public policy, the CA noted that for the award to fall under public policy grounds, it must come under Section 24(a) of the IAA. Section 24(a) can be applied when the award is induced by corruption or fraud. Regarding Article 34(2)(b)(ii)) of the UNCITRAL Model Law, it noted that before it could consider the applicability and scope of Singapore public policy, it should be

established that the Master Agreement and the other agreements were illegal under their governing law. The Tribunal found that the Master Agreement clearly showed no sign of illegality or contrary to public policy.[40]

V. United States of America

a. Enforcement Procedure:

Enforcing Foreign Arbitral Awards in the United States follows a specific process outlined in the Federal Arbitration Act, 1925 ("FAA"). The initiating party must file an application in a U.S. district court, accompanied by essential documents, including the original or certified copy[41] of the arbitral award and its translation if not in English. Submission of the underlying arbitration agreement and evidence of the award's origin from a convention or treaty-recognized country is crucial.

Upon filing, the Court reviews the application to ensure compliance with the FAA and relevant international conventions. If all prerequisites are met, and no valid grounds for denial exist, then the court issues an order recognizing and enforcing the foreign arbitral award. Following Court approval, the award holder can pursue collection measures, such as asset seizure or other legal means available under U.S. law.

The U.S. legal system generally maintains a pro-enforcement stance towards Foreign Arbitral Awards, reinforcing its reputation as an arbitration-friendly jurisdiction.

b. Awards passed under the New York Convention and Geneva Convention:

In the U.S., Foreign Arbitral Awards under the New York and Geneva Conventions are enforced through the FAA. The process involves filing a petition, judicial review for compliance, potential denial for reasons like fraud, and the issuance of a confirmation order treating the award as a U.S. judgment. The party can then proceed with enforcement actions, emphasizing a pro-enforcement stance, and recognizing the finality and validity of Arbitral Awards.

c. Challenging the Enforcement:

Enforcing Foreign Arbitral Awards in the U.S. poses challenges rooted in the defences outlined in the New York Convention, incorporated into U.S. law through the FAA.[42] These challenges include proving legal incapacity or invalid agreements, demonstrating a lack of proper notice, addressing issues exceeding the arbitration scope, ensuring compliance with agreed procedures, and verifying the binding status of the award. The heavy burden of proof lies with the party contesting enforcement, requiring a comprehensive understanding of U.S. and Foreign legal systems and accurate presentation of evidence and legal arguments.

d. Case Law:

1. *"Parsons & Whittemore Overseas Co. vs. Societe Generale de L'Industrie du Papier (RAKTA)[43]"*

In this case, the court upheld the enforcement of an arbitral award in favor of RAKTA against Overseas. It narrowly construed the public policy defense, emphasizing its applicability to cases violating the most basic notions of morality and justice. The court dismissed claims of non-arbitrability, lack of due process, ultra vires actions, and manifest disregard of the law. Additionally, RAKTA's counterclaim for payment from a letter of credit was deemed unnecessary as Overseas had posted a supersedeas bond. Overall, the court affirmed the arbitral award's enforcement, rejected various defenses, and found the counterclaim unnecessary due to the bond.[44]

2. *"Island Territory of Curacao vs. Solitron Devices, Inc.[45]"*

In this case, the court affirmed the district court's decision to confirm an arbitration award in favor of Curacao and enforce the resulting judgment. Solitron Devices' various defenses were dismissed as lacking merit, and the court upheld the enforceability of the arbitration award under international conventions. The court also rejected Solitron's objections related to jurisdiction, emphasizing that Solitron had previously agreed to arbitration in Curacao. Additionally, the court dismissed Solitron's arguments against the enforceability of the arbitral award, including claims concerning damages.[46]

VI. Conclusion

Arbitration, as a preferred means of dispute resolution, has witnessed a significant evolution in response to the demands of the modern globalized economy. An increasing number of individuals and entities, both corporate and others, are turning to alternative dispute resolution methods to avoid the complexities and delays associated with traditional litigation. Beyond arbitration, alternative dispute resolution ("ADR") mechanisms are gaining prominence. ADR methods, including mediation and negotiation, offer parties flexibility, confidentiality, and, often, a faster resolution compared to formal court proceedings. This trend reflects a broader shift toward collaborative and consensual approaches to dispute resolution. Jurisdictions all over the world are actively shaping their legal frameworks to facilitate and promote arbitration. The harmonization of domestic legislation with international conventions, such as the New York Convention and UNCITRAL Model Law, ensures a standardized and recognized approach to the enforcement of foreign arbitral awards. Foreign arbitral awards, recognized as a global standard, play a crucial role in fostering international trade and investment. The adherence to conventions and treaties, coupled with efforts to minimize procedural hurdles, makes enforcing these awards more straightforward and accessible across borders. This research is not confined to legal circles but aims to be inclusive, catering to a broader audience. By breaking down complex legal concepts into understandable terms, it seeks to empower not only legal minds but also individuals who may encounter arbitration in various aspects of their personal and professional lives. Understanding the procedures and challenges of foreign arbitral awards becomes essential for informed decision-making and effective participation in a globalized world.

In conclusion, the research illuminates the detailed procedures of enforcement of foreign arbitral awards and the challenges in the jurisdictions of India, the United Kingdom, Singapore, and the United States. This research makes the accessibility and relevance of understanding foreign arbitral awards for everyone, contributing to a more informed and empowered global community.

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ARTIFICIAL INTELLIGENCE: AN ANTITHESIS OF HUMAN RIGHTS

– Vipul Vinod
Assistant Professor,
Dr. Ram Manohar Lohia National Law University, Lucknow

ABSTRACT

Artificial Intelligence continues to play a significant and expanding role in various aspects of today's world. Its relevance has grown across diverse fields and industries, influencing how we work, communicate, and interact with the world. The impact of AI on human life has been profound and continues to evolve. While AI brings numerous benefits, it also raises important ethical, social, and economic considerations. Overall, the impact of AI on human life is multidimensional and complex, ranging from positive advancements to potential challenges that need to be navigated thoughtfully to ensure a future that benefits all of humanity. This is to investigate; how human rights are being killed by AI.

Keywords: *Artificial Intelligence, Human Rights, Universal Declaration of Human Rights, Bias, Antithesis.*

I. Introduction

Human rights and artificial intelligence (AI) intersect in various ways, and addressing the ethical implications of AI on human rights is a growing concern. AI technologies, particularly in surveillance and data collection, can infringe upon individuals' right to privacy. Governments and organizations must strike a balance between using AI for security purposes and respecting individuals' privacy rights. AI systems can perpetuate and even exacerbate existing biases and discrimination. This can affect various rights, including the right to

equal treatment, fair employment, and non-discrimination. Efforts are being made to mitigate bias in AI algorithms and ensure fairness.

AI can be used to censor or control online content, limiting individuals' freedom of expression. Ensuring that AI systems respect free speech while tackling harmful content is a challenging balance. AI may be used in the criminal justice system for tasks like risk assessment and sentencing recommendations. If not carefully designed and monitored, AI systems could undermine the right to a fair trial, potentially leading to wrongful convictions.

Automation driven by AI can lead to job displacement, potentially impacting the right to work. Governments and businesses must consider policies to address this, such as reskilling and upskilling programs. AI-powered algorithms control the flow of information online, which can impact individuals' right to access information freely. Striking a balance between personalized content and the diversity of information is a challenge.

Ensuring accountability for AI systems is critical. People have a right to know when and how AI is being used, and there should be mechanisms for appealing decisions made by AI. AI relies heavily on data, and the mishandling of personal data can lead to violations of the right to data protection. Legislation like the GDPR in Europe seeks to protect individuals' data rights in the context of AI.

In healthcare, AI can impact the right to health. Ensuring AI-driven medical decisions are accurate and ethical is essential to protect this right. AI systems often interact with children online. Protecting their rights, including privacy and protection from harmful content, is a specific concern. If AI technologies are not accessible to all, they could exacerbate existing inequalities, impacting various human rights, including the right to education, information, and participation.

II. UDHR and AI

The Universal Declaration of Human Rights (UDHR) is a fundamental document that outlines the basic human rights to which all individuals are entitled. It was adopted by the United Nations General Assembly in 1948. While the UDHR was created long before the advent of artificial intelligence (AI), its principles are highly relevant to the ethical and human rights considerations surrounding AI.

Article 2 of the UDHR asserts that everyone is entitled to the rights and freedoms outlined in the declaration without distinction of any kind. "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[1]

"Some AI systems can display algorithmic bias, and may produce outputs that unfairly discriminate against people based on their social identity. The related ethical problems are significant and well known. Algorithmic bias against people's political orientation can arise in some of the same ways in which algorithmic gender and racial biases emerge. Political biases can thus more powerfully influence people, which increases the chances that these biases become embedded in algorithms and makes algorithmic political biases harder to detect and eradicate than gender and racial biases even though they all can produce similar harm. Since some algorithms can now also easily identify people's political orientations against their will, these problems are exacerbated. Algorithmic political bias thus raises substantial and distinctive risks that the AI community should be aware of and examine."[2] AI algorithms can perpetuate biases and discrimination, making it important to ensure that AI systems do not discriminate against individuals on the basis of race, gender, or other protected characteristics.

Article 12 of the UDHR states that "No one shall be subjected to arbitrary interference with his privacy." AI applications, particularly in surveillance and data collection, can raise concerns about privacy violations. Governments and organizations must ensure that AI systems respect individuals' right to privacy.

"Women, minority groups, marginalized people, in particular, are disproportionately affected by bias in AI,"[3] "insufficient transparency and information sharing."[4] "The operation of AI may not only facilitate privacy intrusions, but such systems will deepen those intrusions in new and concerning ways. The risk to privacy is exacerbated because AI products must be trained on very large amounts of data sets, which often include personal information thus incentivising a broad approach to collecting, storing and processing

as much data as possible. It is already commonplace for many companies to aim to optimise services by collecting as much personal data as is possible. For example, social media companies operate on a business model which is reliant on the collection and monetisation of massive amounts of personal information collected from users. The collection of data to train AI products will only heighten existing issues around data collection."[5]

Article 18 of the UDHR emphasizes the right to freedom of thought, conscience, religion, and expression. AI systems, particularly in content moderation and censorship, can have implications for these rights, requiring a careful balance between combating harmful content and protecting free expression.

"Academic studies usually identify three types of external intervention that can affect human thought. The first and most obvious one is also the most explicit type of external intervention: physical or psychological coercion. Second, neurobiology and neurotechnology have made it possible to detect and affect the biological component of human thought: chemistry and electrical stimulation can monitor and influence how the brain processes information and feelings. Finally, altering people's perceptions of reality can reinforce or weaken some feelings or thoughts, thereby affecting individual behavior. This type of influence can be moderate in size but still deeply impactful, as it can nudge people simply by emphasizing or downplaying information. AI is apt to alter perceptions of reality, especially if it is combined with microtargeting, which consists of profiling individuals through their online and offline activities, then tailoring communications that exploit their weaknesses, prejudices, and preferences. Some in academia have acknowledged that contemporary technologies may infiltrate and affect human minds. Detecting one's thoughts may not require brain scans, it can simply take the form of data mining, by parsing through one's activities, trained software can infer very intimate aspects of an individual with an impressive accuracy."[6]

Article 19 of the UDHR supports the right to seek, receive, and impart information and ideas through any media. AI algorithms control the flow of information online, affecting this right and requiring careful consideration of how AI impacts access to information.

"AI's potential to facilitate surveillance and censorship for both economic and political reasons poses a threat to the right to seek and receive information, as well as to media pluralism. The power and influence of a few intermediaries, as well as the fact that most AI tools operate opaquely with little regulation or oversight, exacerbates this threat."[7]

"AI is used to evaluate content in order to flag, demonetize, deprioritize or remove certain content, or ban specific accounts."[8] "It is regularly deployed as pre-moderation in the form of upload filters and to analyze content once it is online or after users have reported it."[9] "AI will then either take independent action or final assessments remain subject to human review."[10] "AI is still limited in its capability to analyze content. Speech evaluation is highly context-dependent, requiring an understanding of cultural, linguistic and political nuances."[11] "Consequently, AI is frequently inaccurate."[12] False positives lead to unjustified limitations on speech, and false negatives may cause a chilling effect, leading to self-censorship and silencing marginalized voices.

Articles 23 and 26 of the UDHR recognize the right to work and education. Automation driven by AI can impact employment opportunities, making it essential to address job displacement and promote educational opportunities to ensure these rights are upheld.

"AI is introduced in workplaces for increased efficiency in some technical aspect of the work process, or it is introduced explicitly with the aim of replacing human workers and thereby reduce labour costs. Whatever the reasons, a key condition of its success therefore is that it can replicate the outcomes achieved by human workers. It is well established that previous waves of automation propelled by advances in information and communication technology were biased in favor of workers with higher skills, replacing lower skill workers and assisting workers with pre-existing complex skill sets. AI will replace large numbers of jobs and routine work which is often manually conducted and which requires low expertise, hospitality and tourism being typical examples."[13]

Article 25 of the UDHR underscores the right to a standard of living adequate for health and well-being. AI has significant

applications in healthcare, but ensuring ethical and equitable access to AI-driven healthcare is crucial to protect this right.

"AI applications have begun to diagnose some types of cancer better than doctors,"[14] "identify heart rhythm abnormalities like cardiologists,"[15] "diagnose various eye diseases as well as ophthalmologists,"[16] and "identify viable embryos as fertility specialists do."[17] But before AI is used in healthcare settings, we should make sure that companies and AI researchers follow appropriate ethical frameworks and guidelines when developing these technologies. In recent years, a great number of ethical frameworks for AI have been proposed. These frameworks have some recommendations in common. For instance, many draw on the four principles of biomedical ethics: autonomy, beneficence, non-maleficence, and justice. "Among other things, autonomy seeks to ensure that patients and consumers are fully informed of, and understand, the risks and benefits of a particular health AI technology, and voluntarily consent to it. Beneficence aims to guarantee that AI health applications promote the well-being of patients and that of society as a whole. Non-maleficence strives to ensure that health AI technologies do not impose undue harm on patients. Justice seeks to promote the fair and equitable distribution of the benefits and burdens of AI health technologies among individuals and society. In addition to these four principles, many frameworks also list such recommendations as transparency, explainability, and trust, given that some forms of AI are not understood easily, if at all, even by those who program them."[18]

While not explicitly stated in the UDHR, principles of accountability and transparency are fundamental to upholding human rights. AI systems must be designed and operated in a manner that allows for accountability and transparency in decision-making processes. Data protection and the responsible handling of personal data are increasingly important in the context of AI. Ensuring that individuals' data rights, including the right to control their data, align with the UDHR's principles is essential.

While the UDHR predates AI, its principles provide a strong foundation for addressing the ethical and human rights implications of AI. "Governments, organizations, and the AI industry should use

the UDHR as a guide to ensure that AI technologies respect and protect human rights as they continue to evolve."[19]

Aspects of humanity encompass a wide range of qualities, values, and characteristics that define and shape human beings as social, emotional, ethical, and intellectual entities. These aspects collectively contribute to the richness and complexity of human experience.

"Humanity is often associated with the ability to understand and share the feelings of others. Empathy and compassion drive people to care for and help one another, fostering a sense of interconnectedness and community. Similarly, Altruism is the selfless concern for the well-being of others. It involves acts of kindness and generosity without expecting anything in return."[20]

"Humans also possess a sense of right and wrong, and ethical considerations guide their decisions and actions. Concepts of fairness, justice, and integrity are fundamental aspects of human morality. Humanity is characterized by a rich tapestry of cultures, languages, traditions, and belief systems. Embracing and respecting cultural diversity promotes understanding and tolerance."[21]

Humans possess the ability to imagine, create, and innovate. This creative capacity has led to the development of art, science, technology, and countless other achievements. Language and communication are integral aspects of humanity. The ability to express thoughts, emotions, and ideas through various forms of communication facilitates collaboration and social cohesion.

"Humans are inherently curious beings, driven to explore and understand the world around them. The pursuit of knowledge and learning is a defining aspect of humanity. Human beings have the capacity to overcome challenges, adapt to new environments, and bounce back from adversity. Resilience is a testament to the strength of the human spirit. Humanity is marked by the desire for self-improvement, growth, and the realization of individual potential. The pursuit of personal goals and aspirations contributes to a sense of fulfillment. Humans thrive on social interactions and form meaningful relationships with family, friends, and communities. These connections

provide emotional support, a sense of belonging, and a source of happiness."[22]

Humans are naturally curious and driven by a sense of wonder. This curiosity fuels exploration, scientific inquiry, and a deep appreciation for the mysteries of the universe. "Many individuals seek a sense of purpose and meaning beyond the material world. Spiritual beliefs and practices are integral to human identity and provide a framework for understanding existence. Humanity is characterized by a wide range of emotions, from joy and love to sadness and anger. Emotional experiences contribute to the depth of human interactions and personal growth."[23]

The ability to experience and share humour is a unique aspect of humanity. Laughter has the power to connect people, relieve stress, and bring joy. Humanity has a remarkable ability to adapt, learn from mistakes, and drive positive change. This aspect has led to advancements in various fields and the evolution of societies.

These aspects collectively contribute to the rich and diverse tapestry of human nature. They shape how individuals relate to themselves, others, and the world, and they inspire the pursuit of a more harmonious and compassionate existence.

III. Humanity lies in imperfection

The concept of imperfection is deeply woven into the fabric of humanity. "Humans, like all living beings, possess unique qualities, characteristics, and flaws that contribute to their individuality and diversity. Imperfection can manifest in various ways, including physical, emotional, intellectual, and behavioral aspects. It's important to recognize that imperfection is a fundamental aspect of the human experience and should not be viewed solely as a negative trait. Imperfections can lead to growth, learning, and adaptation."[24] They can also foster empathy, compassion, and understanding among individuals, as people come to appreciate the struggles and challenges that others face.

"Embracing imperfection can lead to personal development and a more balanced perspective on life. It allows us to set realistic expectations for ourselves and others, and to recognize that nobody

is perfect. Instead of striving for an unattainable ideal, we can focus on continuous improvement and celebrate the uniqueness that each person brings to the world."[25]

"In art, literature, philosophy, and many other aspects of culture, imperfection has often been celebrated and explored as a source of depth and authenticity. Artists and thinkers have long recognized that imperfections can make things more interesting, relatable, and meaningful. Imperfection is an integral part of the human condition and contributes to the richness of human existence. It's important to embrace our imperfections and those of others, recognizing that they contribute to the tapestry of life and the shared human experience."[26] Throughout history, art, literature, and philosophy have explored the theme of imperfection as a central aspect of human existence. The beauty and depth of these explorations often arise from the struggles and imperfections that characters and individuals face. Imperfection is a driving force behind creativity, innovation, and the pursuit of excellence.

"The concept of imperfection is deeply intertwined with what it means to be human. Imperfections are an essential part of the human experience and contribute to our uniqueness, complexity, and growth as individuals and as a species. Our imperfections shape our identity, drive our motivations, and influence our interactions with the world around us. Embracing imperfection is not only a recognition of our limitations but also a celebration of our capacity to learn, adapt, and evolve."[27] It's through our imperfections that we find opportunities for improvement, connection, and empathy. Imperfection allows us to relate to one another, share experiences, and offer support and understanding during challenging times.

Imperfection is not just a characteristic of humanity; it is a defining feature that shapes our journey, relationships, and aspirations. It's an integral part of what makes us human, and by acknowledging and embracing our imperfections, we can better understand ourselves and the world around us.

"Imperfection is an inherent aspect of humanity. It's through our imperfections that we showcase our vulnerability, uniqueness, and capacity for growth. Our flaws and limitations make us relatable

to one another, allowing us to connect on a deeper level. Embracing imperfection can lead to self-acceptance, empathy, and a more authentic way of interacting with the world."[28] When we acknowledge our imperfections and those of others, we create a space where understanding and compassion can flourish.

So, imperfection is not just a part of humanity; it's intertwined with our identity, shaping how we relate to ourselves, each other, and the world around us.

IV. Emotionless AI is killing humanity

Artificial Intelligence, is indeed changing the way we interact with technology and the world around us. AI systems are designed to perform tasks with precision and consistency, which can lead to improved efficiency and reduced human errors in many fields.

"AI can perform tasks with a high degree of accuracy, reducing errors caused by human imperfections. As AI becomes more capable, there are concerns about job displacement, particularly in tasks where humans are prone to imperfections. This can lead to economic and social challenges. AI systems can inherit and propagate biases present in their training data, leading to unfair or discriminatory outcomes. This can exacerbate human imperfections related to bias and prejudice."[29]

"In some contexts, reliance on AI may reduce human-to-human interaction and personal touch, potentially impacting social relationships and emotional well-being. Overreliance on AI without understanding its limitations can be problematic. Relying solely on AI can lead to a lack of critical thinking and decision-making skills among individuals. Decisions made by AI systems may not always align with human values and ethical considerations, leading to ethical dilemmas."[30] Moreover, AI lacks the common-sense reasoning and contextual understanding that humans possess, making it less effective in handling novel or complex situations.

While AI can assist in reducing certain aspects of human imperfection, it also brings about a set of challenges and considerations. "The key lies in using AI as a tool to complement human abilities, addressing its limitations, and ensuring that the technology is developed

and deployed ethically and responsibly to enhance, rather than diminish, the overall human experience."[31]

This way AI is eliminating human imperfection and human fallibility, or to say humanity, that is well recognised by the Indian Constitution.

Imperfection is an integral part of humanity. No individual or society is perfect. Human beings are inherently flawed, make mistakes, and face various challenges and imperfections throughout their lives. This recognition of imperfection is a fundamental aspect of human existence and is reflected in various aspects of philosophy, psychology, and literature. Acknowledging and embracing imperfection is important. These imperfections can manifest in various ways, including our physical, emotional, and intellectual capabilities, as well as our moral and ethical choices.

It's through our imperfections that we learn, grow, and evolve as individuals and as a society. Imperfections can lead to empathy, compassion, and the desire for self-improvement and positive change.

In the context of governance, legal systems, and social structures, acknowledging the imperfections of humanity is crucial. It informs the need for laws, policies, and institutions that address these imperfections, protect individual rights, and strive for justice and fairness. In essence, understanding and respecting the imperfections of humanity is a fundamental aspect of building a more compassionate, inclusive, and just society. It encourages us to work together to overcome challenges, promote understanding, and strive for a better world that embraces the rich tapestry of human diversity and experience.

V. Conclusion

This is critical intersection between artificial intelligence (AI) and human rights, using the Universal Declaration of Human Rights (UDHR) as a guiding framework. It highlights concerns such as algorithmic bias, privacy violations, and the potential impact of AI on freedom of thought and expression. The disproportionate effects of AI bias on women, minority groups, and marginalized individuals are underlined, calling for increased transparency and ethical considerations in AI development.

The implications of AI in content moderation, surveillance, and censorship, posing challenges to the right to seek, receive, and impart information. Moreover, it explores the potential impact of AI-driven automation on employment opportunities, emphasizing the need for measures to address job displacement and promote educational opportunities.

In the context of healthcare, the AI acknowledges the positive applications but underscores the importance of ethical frameworks and guidelines to ensure equitable access and protect the right to a standard of living adequate for health and well-being. While principles of accountability and transparency are fundamental to upholding human rights, the text suggests that the UDHR's principles provide a solid foundation for addressing the ethical implications of AI. Governments, organizations, and the AI industry are urged to use the UDHR as a guide to ensure that AI technologies respect and protect human rights.

Lastly, AI is threat to various aspects of humanity, emphasizing qualities such as empathy, compassion, ethical considerations, cultural diversity, creativity, resilience, and the pursuit of knowledge. These aspects collectively contribute to the richness and complexity of human experience, providing a holistic perspective on the human element in the era of advancing AI technologies.

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EMERGENCE OF DEEPFAKES AND GENERATIVE ARTIFICIAL INTELLIGENCE: A TECHNO-LEGAL ANALYSIS IN INDIA

– Dr. Praveen Kumar
Associate Professor, Amity Law School
Amity University, Raipur, Chhattisgarh

ABSTRACT

The concept of Deep Fakes and Generative Artificial Intelligence have received a significant attention in almost developing society across the globe for its advantages and similarly every legal system is trying to overcome increasing instances its abuse. The researcher intends to examine the techno-legal aspects of the upcoming developments in Generative Artificial Intelligence and emergence of Deep Fakes across the globe. The researcher also aims to analyse the judicial trends in India while adjudicating the matters pertaining to Deep Fakes with reference to recent decided judgements.

Keywords: *Deep Fakes, Generative Artificial Intelligence, Cyber Crimes, Frauds, Defamation.*

I. Introduction

The days of human interaction in the 'real' world are long gone. According to a study, 502.2 million Indians, or about 77% of the population, use cell phones. India has over 196 million active social network members. Thus, when an act is carried out on Social media intended to hurt society, whether it is fake news or information related to someone's personal life, it can spread like wildfire. Approximately 95% of what the share or view is from unknown sources and thus unconfirmed. This unverified news may easily control and corrupt

large groups of people.[1] The increasing application of Generative Artificial Intelligence (AI) in the twenty-first century is driving a shift in society and economy toward more automation, data-driven decision-making, and the incorporation of AI systems into a wide range of industries and economic sectors, affecting the labour market, healthcare, government, business, education, propaganda, and disinformation. The author intends to inquire more about the question of Generative Artificial Intelligence that is it a bane or a boon? On one hand, the primary aim and objective of a legal system is to regulate the advantages of the technology and on the other hand to safeguard the economic, social and political interests of general public.

Generative Artificial Intelligence can be used to enhance teaching-learning process by allowing academicians to adapt their teaching to students' needs using AI-powered educational tools. However, the findings also highlight that AI can be misused to overcome moral constraints. Overall, Generative AI has the potential to be an effective research tool, provided the same shall be used with utmost care and caution. Deep fakes are a kind of Generative AI technology that creates synthetic media like photos, videos, and audios using machine learning algorithms, especially Generative Adversarial Networks (GANs). Deepfake technology aims to produce extremely lifelike synthetic media that mimics actual people, although with some content manipulation. Two methodologies, Generative Adversarial Networks and Deep Learning, are the foundation of Deep Fakes technology. Deep Learning is defined as:

"A branch of machine learning that processes and analyses vast volumes of data using Artificial Neural Networks—algorithms that are inspired by the composition and operations of the brain".

Numerous fields, including computer vision, robotics, speech recognition, and natural language processing, have benefited from the use of Deep Learning. A type of Deep Learning architecture known as Generative Adversarial Networks (GANs) trains on a dataset to produce new, synthetic data that is similar to the original data using two Neural Networks, a Discriminator and a Generator.

While the Discriminator evaluates the veracity of the created samples and the actual samples from the training dataset, the Generator produces fictitious samples[2].

II. Deepfake and generative artificial intelligence technology

Generative Artificial Intelligence is a regenerative phenomenon of Science & Technology in itself, which leads to the birth of other several innovation technologies such as Deep Fake, Chat-GPT and many more. Generative AI technology is the beginning of a new technological era which needs an effective understanding by the public and law enforcement agencies too.

Generative Artificial Intelligence (AI) refers to:

"The intelligence displayed by machines, especially computer systems. This area of computer science study focuses on creating and analysing tools and software that allow machines to sense their surroundings and use intelligence and learning to make decisions that will increase their chances of accomplishing specific objectives. These devices could be referred to as AIs".

In order to address the fact that the content is phony, the terms *"Deep fake"* and *"Fake"* are combined. Deep is derived from AI Deep-Learning technology, which is a kind of machine learning that comprises many levels of processing. When a Reddit administrator started a subreddit named *"Deep-fakes"* in 2017 and started uploading videos that employed face swapping technology to include celebrities' likenesses into already-existing pornographic videos, the term *"Synthetic Media"* first appeared.

A new phenomenon known as *"Deep-fakes"* has surfaced as a result of the development of AI-based tools (like DALLE-3 and Sora) that can produce images and videos at scale. Deepfake are defined as:

"Deep-fakes are images or recordings that have been expertly altered and manipulated to falsely portray someone as saying or doing something that they have not actually said or done".

Deep-fakes have opened up new creative possibilities, particularly in marketing and entertainment, but they may also be abused for negative outcomes like fraud, slander, and fraudulent advertising. There are certain obstacles for the current legal frameworks, such as privacy and consumer law, in addressing these threats.[3] Deepfake term has been evolved from the concept of Deep Learning and Fake multimedia files. In other words, Deepfake is the end product of application of Deep Learning to produce fake multimedia files such as images or videos by using Advanced Generative Modelling techniques such as Face2Face technique. This technique is used for re-enacting facial expressions from a facial image by using computer vision and forming an *"Avatar"*. Researchers from University College of Berkeley had already introduced a similar technology to alter the appearance of images and videos in 2018. A different team of researchers from the University of Washington put up a plan to sync a video's lip movement to a speech from an external source. Ultimately, the term *"Deep fakes"* first surfaced in November 2017 to refer to the dissemination of pornographic movies in which the faces of celebrities were replaced with the originals.

In addition to these researchers have also developed several algorithms to build Deep-Fakes of an original audio, video clippings where people will listen to the actual voice of the speakers with an edited script. With such technology, researchers of Deep Fakes have produced motion pictures/videos from an original video with a different content, expressions & movements. These Deepfakes are so identical and similar to the identity of a person that it has become nearly impossible to check the Deepfakes and Original files.[4]

Generative AI technology has been developed to mimic any individual's voice and images consistent with the original expressions. Deepfakes videos are frequently created by overdubbing real. It is quite evident that the media sector will face a significant loss of customer trust due to deep fakes. Deep Fakes have become an easy tool to produce fake news which can bring a threat to the public peace

& security by hiking an emergent panic in the society. Deep Fakes may result in to a complete chaotic situation which may result in to an actual threat to the National security in any Country of around the globe. Menace of Deep Fakes have just begun and the global society is getting effected in its day to day life.

III. Instances of abuse of generative AI technology & deepfakes

Deepfake technology creates substantial issues in legal proceedings, notably in criminal cases, with possible consequences for people's personal and professional lives. In most legal systems, the lack of means to authenticate evidence places the burden on the defendant or opposing party to contest manipulation, possibly becomes a widespread problem. To counter this, a suggested rule might require evidence authentication before court admission, possibly through bodies such as the Directorate of Forensic Science Services, albeit this would incur economic costs. Notable instances of abuse of technology are as follows:

a) **Pornography:** Deep fakes are most commonly used to create nonconsensual pornographic content. Female celebrities' or ordinary women's faces are transferred onto porn stars' bodies without their knowledge or consent. This is a violation of privacy and harms one's reputation. For instance, an accused was imprisoned in 2019 for creating deep fakes pornography of his lover in India.[5]

b) **Politics:** Deep fakes can disseminate misinformation and propaganda during elections. During the Delhi elections in India, a leader's actual footage was edited to depict him as disparaging his opponents. Such forgeries can destabilize campaigns and harm candidates in elections. If left uncontrolled, political deep fakes could jeopardize elections in any democratic Country.[8]

c) **Defamation:** This includes several deepfake videos of important persons of a society including leaders, politicians, judges, celebrities etc. Their facial expressions are modulated to depict a funny or satirical content which is sufficient to defame the person in society. Consequently, several people will be

left outrageous and their public image will be destroyed as a result the society will be at peril of destruction because of the abuse of technology.[7]

d) Fraud: Furthermore, it's easy to commit a fraud by using Generative AI technology to clone anyone's voice which will be sufficient to impersonate the key individuals of any organization such as CEOs or other officials to obtain critical information. For instance, this technique had already cost •200,000 to a leading energy company in UK in 2019. Deep fakes can potentially influence stock prices by displaying fraudulent business announcements. Financial frauds can disrupt markets and entities within a spur of moment.[8]

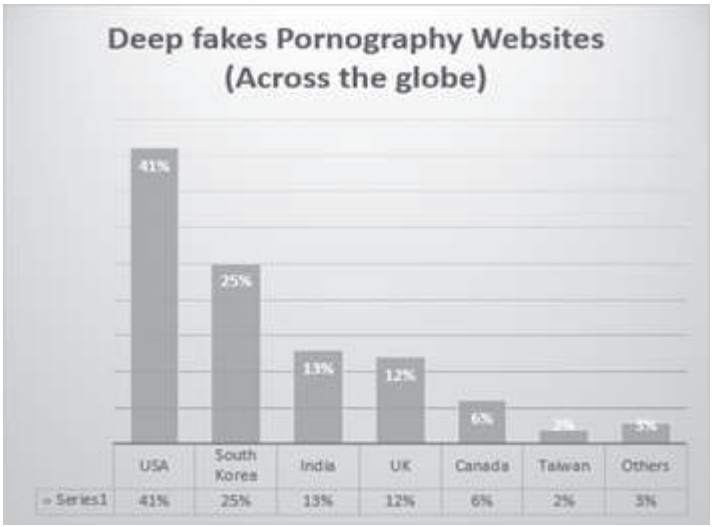
e) Punishment: It is almost impossible to establish that a manipulated image or a Deepfakevideo content is an actual statement of fact or a false statement. The defendant may argue that there are evidence that the image is phony, such as context, that a reasonable person would not interpret it as a statement of reality.[9] This is sufficient to stall the judicial process and to evade from punishment in any judicial system.

Fig. 1: Problems faced due to deepfakeacross the globe

The problem of Deepfakeis on the rise across the globe. Countries like China, Indonesia, Turkey, Brazil etc. are at the peril of a complete state of confusion due to this technology. Several other

countries which are under developed are at the level of extreme risk in terms of social, economic and political security. Elections in many countries can be easily rigged, Stock market can be easily manipulated by such technology. The author finds an alarming threats to many states in protecting their internal & external security as well.

Chart 1: Deep fakes Pornography Websites Across the Globe[10]



In reference to the above Chart, United States of America is on the first position in producing Pornographic websites based on Deep Fakes, followed by South Korea and India. Global situation is alarming and several people are being victimised on account of abuse of technological developments. This indicates that there is a dire need to establish a robust mechanism to protect the rights of the citizens across the globe.

IV. Deepfake & recent judicial trends in India

A survey by a cyber-security company McAfee has revealed that over 75% of Indians have seen some form of deepfake content every year, with at least 38% having encountered with a deepfake scam. Indian population is moving towards use of Smart Phones, Internet, Computers and Social Media at a very high pace since last two decades. People of all age groups have started working on Internet

more often in order to ripe the benefits of the advanced technology by average 06 hours daily (estimated by a report). But due to lack of training and awareness about the challenges, several people circulate the deepfake contents to all of their groups unknowingly, without verifying the source and authenticity. For Instance, In India, the discussion around Deep Fakes gained momentum after a viral clip of actor Rashmika Mandanna went viral in 2023. Eventually, Prime Minister Narendra Modi also warned about the potential harms of technology misuse. Consequently, Central Government has also issued advisories to all the concerned news networks to circulate the credible information only after verification of the facts.

In another incident, Actor Ranveer Singh has filed a complaint over a deepfake video that allegedly showed him endorsing a political party. The video, which was generated using an AI-enabled tool. He was in an interview with the news agency ANI. In the alleged deep fake, he was seen criticizing the present Govt. about several socio-economic issues in India concluding with a message to the Indian population to elect the Opposition Party in the parliamentary election scheduled in May 2024. Singh's team has registered a First Information Report (FIR) against the handle that promoted the AI-generated video. Aamir Khan, an Indian actor, has never endorsed any political party and has focused on raising awareness through Election Commission public awareness campaigns for past elections.[11]

In another incident, a 76-year-old man in India received a video call. He saw the face of a retired senior police office of UP Police and heard his voice. The police officer was seen asking money from the old man. Consequently, he made payments as per the directions received on his Deepfake video call, due to fear of the Police atrocities. As a result, the criminals who sent this deep fake, received the money. After knowing the fact that it was a doctored video created by Deepfake Technology, he approached the Police and an FIR has been registered and a dedicated team was formed to crack the case.

In another incident, Mr. Arvind Sharma, a resident of Govind Puram, was contacted by the Fraudsters through a Facebook video call. He saw a nude pic during the call and disconnected the call. Later, he received a video call on WhatsApp from a police officer,

threatening him to pay the money else his pic will be made viral on social media. However, instead of paying money, he preferred to file a complaint.[12]

Moreover, the Indian Parliamentary election in 2024 was a significant concern due to the potential risks for spreading misinformation online, where a political party already known for violent rhetoric against a specific community, having a stronghold in the country. Whereas, the use of AI-powered video and audio manipulation tools have made it harder to classify certain cases of misinformation. In such situation, dead politicians may be resurrected and famous actors have been pulled into bogus endorsements and the actual malice will be less evident. Such instances of speech which may offend a particular community result in to hateful reaction, leading to riots or internal disturbance in a Country. Generative AI Tools are being used to accelerate the speed of percolation of wrong information in the society within a spur of moment. However, it's the hate speech, which is the primary cause of concern and AI tools are merely adding the fuel to the fire. Another classical example of AI Tools is a Face-Swap video where someone can replace the face of the original speaker and manipulate the words to deceive the audience resulting in to a chaotic situation in the society.[13] For instance, a Deepfake video of Union Home Minister portraying the deceitful statements to abrogate rights of reserved category, made viral and consequently the Maharashtra Youth Congress and 16 others were booked by Mumbai Police under various sections of IPC, 1860 and IT Act 2000 for allegedly creating and sharing that Deepfake video.[14]

In another instance of abuse of technology where Journalist Rana Ayyub was targeted by far-right trolls after being morphed into a pornographic clip. This time, Deepfake technique was used to create fake celebrity pornographic video or revenge porn. Ayyub's face was morphed into the porn actor's images, and the clip was circulated as if she had done the act. She had protested to secure justice to a rape victim in the past. Whereas opposition party leaders were working to save the accused from the judicial grip. They were held responsible for creating deepfakevideo of the journalist to defame

her in the public. Journalist was shocked to see her face in the porn video, which she could tell was not her. She was harassed and had over 100 Twitter notifications sharing the video.[15]

V. Instances of abuse of deepfake technology in United States

Facebook user Mr. Schrems filed a complaint with the Irish data protection authority, claiming that users Date from European Union had transferred illegally to the firms of United States of America. He alleged that this data transfer is a violation of Data Protection Act of European Union and violation of right to privacy of the users from European Union. Whereas authority of Ireland rejected his claim and cited the measures adopted by European Union to protect the data under "*Safe Harbor Scheme*". Aggrieved of the decision of Irish authority, he preferred an appeal to the Irish High Court. Irish High Court after admitting the appeal, referred the matter to Chief Justice of European Union for a preliminary examination. His attorney advocated that "*Safe Harbor Agreement*" between European Union and United States of America must be declared as null and void as it fails to protect the rights of the users. Chief Justice of European Union Court seconded his opinion and decided the review of the agreement to protect the Data of the users.[16]

In another case, a 14-year-old girl, Levy, sued her school for violating her First Amendment rights after posting a Snap chat post expressing her displeasure with cheerleading, softball, and school. The school approached the court, calling it "*an important vindication of school's authority to protect students and staff and to fulfill school's educational missions.*" In fact, the student delivered the speech off campus and earlier as a precedent, US Supreme Court has decided a similar case in favor of the School where the student had acted within the premises of the School and substantially disrupted the school community rights. Moreover, the office of US president seconded the judgement to protect the students if they commit such acts off campus and in order to protect their first amendment rights of free speech.

Similarly, in another case of a teenager from Pennsylvania,

The U.S. Supreme Court has ruled with a majority of 8-1 that in this era of social media and enhanced technology students must not be punished for their acts of free speech outside the campus. Rights related to Free Speech available to them under First Amendment Act must be protected. Eventually, an advisory was issued to all students to restrict their enjoyments of their rights to free speech on campus as this would affect the educational institutions to discharge their essential objectives.[17]

In another case where, Jordan Peele and Buzz Feed collaborated to create a PSA using AI techniques to ventriloquize Barack Obama, highlighting his opinions on Black Panther and Donald Trump. The video, created using Adobe after Effects and the AI face-swapping tool Fake App, has become a symbol of the power of AI in generating misinformation and fake news. Researchers have developed tools for real-time face swaps, Adobe's *"Photoshop for audio"* allows dialogue editing, whereas another Canadian origin company offers a service to produce fake voice by feeding fragmented words as a sample. The judge questioned Buzz Feed News about the potential consequences of broadcasting such clips. While scientists are developing tools to spot AI fakes, the best defense against misinformation is instilling media savvy. Provocative videos can be faked by distortion and blurring, and the future of information will be crucial in preventing a dystopia.[18]

VI. Legal and regulatory framework for deep fakes and generative AI in India

Article 21[19] also safeguards Right to life and personal liberty of people under Indian Constitution. Personal liberty involves the right to move freely, choose one's place of residence, and engage in any authorized vocation. Indian Copyright Act, 1957, especially Section 51,[20] prescribes for protection of Intellectual Property Rights in India.

Under section 66E of Information Technology Act, 2000 a suitable legal action may be initiated for protecting the identity of an individual.[21] Section 67 of The Information Technology Act, 2000, states that:

"Whoever publishes or transmits, or causes to be published or transmitted in electronic form, any material that is lascivious or appeals to the prurient interest, or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years".

In addition to this, accused may be punished under Sections 499, Section 501, Section 502, Section 354C of Indian Penal Code, 1860.

VII. Conclusion

Although in absence of any specific Generative AI law in India, there are a number of laws and regulations that address AI discrimination. Digital Person Data Protection Bill (2022), Information Technology Act (2000), Right to Information Act (2005), and the Draft National Strategy on Generative AI in 2020 by the Ministry of Electronics and Information Technology, all aim to address biases in AI systems. However, enforcing these enactments shall be a challenge, due to lack of dedicated laws, scarcity of specialists, and lack of transparency.

Deep Fakes, a rapidly growing field involving artificial intelligence and multimedia, are creating realistic digital content that can be difficult to distinguish from authentic content. They can be used for entertainment, education, and research, but also pose risks like misinformation, political manipulation, propaganda, reputational damage, and fraud. This Research Paper provides an overview of Deep Fakes techniques, various issues, challenges, and future research trends, aiming to advance the standard of social security and mitigation strategies for a safer digital environment across the globe.

The global nature of the internet and the ease of cross-border access to deepfake content necessitate international collaboration to develop consistent legal frameworks, share detection technologies, and coordinate efforts to combat this evolving threat. Existing legal frameworks often fail to address the complexities of deepfake technology. Specialized legislation, technological advancements, and

international cooperation are essential steps in combating deep fakes-related offenses. A proactive approach and adaptable defenses against misuse are necessary to mitigate the harmful impacts of Deep Fakes technology and preserve the trustworthiness of the digital world.

Deep Fakes pose several legal challenges, including privacy invasion, slander, fraud, and intellectual property issues. Privacy invasion can cause emotional distress and harm, while defamation and reputation damage can lead to financial and personal losses. Fraud and misrepresentation can occur through financial fraud, identity theft, and impersonation, raising concerns about digital identity authenticity and potential economic losses. Intellectual property rights can be infringed when deep fakes incorporate copyrighted materials or use someone's likeness without consent, leading to complex legal disputes.

The Right to Privacy in India is a contentious issue due to the Constitution's lacks of explicit privacy-related feature. The Constitution's authors emphasized the right to life as a fundamental right, and the Supreme Court of India has interpreted Article 21 in different ways. As the country grows, the right to life has expanded to include other rights like speedy trial, shelter, environment & public health, safety & security etc. Every person of India is guaranteed the freedom of opinion, speech, belief, faith, and worship by the Indian Constitution, highlighting the importance of liberty. However, Article 21 of the Constitution, which includes the term *"Personal Liberty"*, requires protection for individuals to lead dignified lives, requiring the right to privacy to be recognized.

The most significant problem would be to detect deep fakes in real time and apply detection models across many sectors and platforms. a challenging task because of its complexities, such as the need for these detection models to be efficient and have almost no false positives, and the computational power needed to detect deep fakes in real-time given the enormous amount of data shared on the internet every second. Advanced learning strategies like meta-learning and metric learning, effective structures like transformers, compression methods like quantization, and calculated investments in solid software and hardware infrastructure foundations can all be used to accomplish this goal.

Deep fake's detection methods face challenges such as generalization and robustness, as deep fakes content often circulates on social media platforms after significant changes. To address this, methods such as data augmentation, adversarial learning, attention-guided modules, and feature restoration have been investigated. But Deep Learning models lack interpretability, which is problematic, especially in critical applications like forensics. Privacy issues also arise as private data access is necessary. The quality of Deep Fakes datasets is another challenge; as large-scale datasets often have visual differences from the actual content. Researchers and technology companies like Google and Facebook continuously improve Deep Fakes detection techniques.

Adversarial perturbations can deceive detection models by exploiting vulnerabilities or weaknesses in the underlying algorithms. Despite these challenges, numerous approaches have emerged to identify and mitigate deep fakes, such as incorporating adversarial perturbations, digital watermarking, and block chain technology. These methods aim to not only detect deep fakes but also hinder their creation and rapid dissemination across platforms.

Deepfake videos are becoming harder to detect as AI algorithms become more sophisticated. This research provides an overview of deepfake generation, deep learning architectures, detection techniques, and datasets. It aims to curb false information spread, protect digital content integrity, and prevent social, political, and economic damage caused by deep fakes. The Research Paper emphasizes the need for a continuous research in deepfake detection techniques. Nevertheless, Deep Fakes have potential significance for artistic communication, entertainment, and visual effects.

Countries worldwide have implemented legislation to combat the misuse of deep fakes. The European Union has established a network of fact-checkers to analyze content creation sources, while tech companies like Google, Meta, and X are required to counter fake accounts. China has labelled doctored content using deepfake tech, and the United States has introduced the Deepfake Task Force Act to counter such technology. India has to take a leap forward to control the growing menace of abuse of Generative AI Technology such as Deep Fakes, which is the need of hour.

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ANALYSIS OF RIGHT TO LIVE IN CLEAN ENVIRONMENT AS A FUNDAMENTAL RIGHT

– Dr Sonia
Assistant Professor, School of Law
Fairfield Institute of Management and Technology
affiliated to GGSIPU, Delhi

ABSTRACT

Environmental pollution and climate change are threat to the mere existence and survival of al living beings of the world. Man depends upon natural resources for its survival rather than only fiscal or economic development. Due to industrialization and technological advancement, environment deteriorated and various problems linked to environment emerged say for example pollution, climate change among others. The survival of human beings depends upon the harmonious balance between the environment and development and focus on sustainable development. When Indian Constitution was framed it did not have any specific provision to protect the natural environment. The provisions dealing with environment and health were contained in Directives Principles of State Policy and to name a few we have provisions regarding public health, agriculture and animal husbandry. Afterwards Constitution was amended and two specific provisions i.e. Article 48-A, and Article 51-A (g), were inserted which imposes duty on State and the citizens to protect and conserve the environment. Thereupon, through judicial activism and liberal interpretation of Article 21 of Indian constitution by higher judiciary "Right to clean environment" became inseparable component of the "Right to Life" and, now is one of the fundamental rights which is given protection by the protected by the Constitution.

Keywords*: Environment, Sustainable Development, Fundamental Right.*

I. Introduction

Environment is a universal phenomenon pervading the world as a whole.[1] In the present era we are facing threat to the environment with rising levels of pollution and climate change which is a major concern all over the world. Environmental pollution and climate change are extremely dangerous for survival of all living beings in the world and obviously affects the human rights because it affects the human beings and other living creatures mentally and physically. Industrialization, urbanization, poverty, population explosion, over exploitation of natural resources, scientific research and development are some of the factors which have contributed which have contributed to environmental degradation all over the world.[2] Man depends upon natural resources for its survival and not only for the economic development and advancement. Economic development and advancement is meaningless if it is done at the cost of the environment. In the 20th Century, environment protection is a matter of the law and practice in regard to human rights.[3] Indian Constitution in its original form was environmentally myopic. But our judiciary through judicial activism and its foresight has given a new vision and dimension to environmental protection through fundamental rights.[4] Having regard to the constitutional provisions and other various statutory provisions which deal with the protection of environment, the Indian Judiciary has interpreted that concepts of "sustainable development", "Precautionary Principle," "Polluter Pays Principle" among others form part of Environmental law of the Country.[5] Sustainable Development leads to a better quality of life for human beings while reducing the adverse effect on the environment.[6] The Supreme Court has stated through various case laws that right to live in a pollution free environment is part and parcel of a civilized society.[7]

The right to have a pollution free environment and live a healthy life because of that has attained the status of a fundamental right by judicial activism and one can move the Indian upper Judiciary Courts if this right is violated. At present, the Right to healthy and clean environment is fundamental right under Right to life and this has become possible only because of the Indian Judiciary.[8]

II. Historical aspect

From historical point of view, environmental preservation and protection used to be very important for the religious, social and cultural beliefs of the people. The Indian traditional culture emphasized the importance of environment protection as man's mere existence depends on environment in its purest form. Due to industrialization and technological advancement, environment deteriorated and we have to face various problems associated with the environment like for example pollution, species extinction, floods, draught, climate change etc. The survival of human beings depends upon the harmonious equilibrium between the preservation of environment and economic development and focus on sustainable development. In a welfare State, the Government has the authority and it is its duty as well to take up measures and policies which strengthen and protect the environment. The Government should focus on protection of environment thereby protecting human rights and improving the quality of life its people.

With the passage of time, now the international communities and nations have also acknowledged the linkage between human rights and environmental deterioration. Most of the nations have enacted laws regarding conservation and protection of environment so the human rights of the citizens can be protected. The Constitution of some nations have given utmost importance to protection of environment and have given it statutory recognition. Now India has also granted status of Fundamental Right to the environmental protection.[9]

III. International perspective

Environmental problems do not affect only a few countries but rather they affect each and every country and all living beings on the planet as well as coming generations.[10] At international level, various conventions, treaties and resolutions have been made in the context of environmental protection; few of them have been discussed in this paper. The Stockholm conference brings mankind more closure to environment by adoption of declaration on the human environment. The Declaration states –"Resources should be made available to

preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose."[11] Ever since, issues linked with environment were the main agendas of discussions in international forums and as a result United Nations Environment Programme (UNEP) was established in 1974. Subsequently, most of the states have passed laws for environment protection and have their Government bodies to look after for the same.

The Rio Declaration also talks about the Sustainable Development as a means to achieve the goal of environment protection. It states-"In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[12] It also states that people have right to live in a pollution free healthy environment and it is there as well duty of the Government to protect it.

The Summit was held in Johannesburg and as the name of the Summit suggests its main aim is to promote the sustainable growth. The Paris Agreement on climate change (2015): The Paris Agreement can be considered a landmark for the climate change process because by this for the very first time all the nations over the world came hands in hand to combat climate change. Its preamble states that its parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights"[13]

Apart from these conferences and debates, resolutions were also taken up at the international level by its agencies in the field of environment. The U.N. General Assembly through its resolution 76/300 taken on 28 July 2022 recognized "the right to a clean, healthy and sustainable environment as a human right."

IV. Indian legal framework

When Indian Constitution was framed it did not have any specific

provision to protect the natural environment. However, environment protection and health was contained in Directives Principles of State Policy on some aspects relating to public health, agriculture and animal husbandry. Afterwards through constitutional amendment two specific provisions i.e. Article 48-A[14], and Article 51-A (g)[15], were added which imposes duty on state as well as the citizens of the state to protect and conserve the environment. The Apex court recognized several unarticulated liberties which were implied by Article 21 and through its interpretation of the right to life included the right to a wholesome environment in it.[16] There is a correlation between a healthy environment and economic condition of the community at large.[17] India being a country committed to protect the natural environment, Indian Government launched the The Swachh Bharat Mission. SBM is being looked after by the Ministry of Housing and Urban Affairs and by the Ministry of Drinking Water and Sanitation.[18] The Indian Judiciary did a laudable job in the environment field through judicial activism and the result is with us and we have the fundamental Right to live in a clean, healthy and pollution free environment.[19] The Constitutional validity of the arbitral official sanctions can be challenged in the courts.[20] Article 21talks about the Right to Life provisions of the Indian Citizens. This right ensures the right to life and all that which ensures the right to life because right to life does not only mere animal existence. It means providing them such environment which ensures overall development of the people as well. The preservation and protection of the ecology from pollution is necessary for the life to be enjoyed to its fullest. Under Article 47 the States are asked to provide attributed level of nutrition, improved health to the people and to ensure that people have appropriate standard of living. So Government should try to make a balance between economic justice and environmental protection.[21]

V. Role of judiciary as a guardian of fundamental rights

In India, the Judiciary has been instrumental for the protection of rights of its people and it is because of its activist approach that right to life got its true meaning and we are able to secure many other rights under Article 21 which were earlier implied. Our judiciary has thereby explicitly secured to us the right to live in a pollution

free environment under Article 21.[22] In the case of *M.C. Mehta v. Union of India*[23] the Apex Court highlighted the importance of environmental education and gave directions in this regard. The Supreme Court in the *M.C. Mehta v. Union of India*[24] held that Government should take steps and prevent vehicular pollution and thereby confirmed that the right to a healthy environment is a basic human right. The case of *Subhash Kumar v. State of Bihar*[25] is a landmark case and the Court that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' In *L.K. Koolwal v. State of Rajasthan*,[26] the High Court of Rajasthan observed "It has been made very clear that it is not the duty of the Court to see whether the funds are available or not and it is the duty of the Administrator, Municipal Council to see that the primary duties of the Municipality are fulfilled. Municipality cannot say that because of the paucity of fund or because of paucity of staff they are not in a position to perform the primary duties."

The Courts also gave liberal interpretation to the constitutional provisions in *A.K. Gopalan v. State of Madras*[27] and *Khark Singh v. State of U.P*.[28] stated that as per Article 21, "the right of life does not mean mere animal existence." In addition, S.C. in *Maneka Gandhi v. Union of India*[29] held, " a law affecting life and liberty of a person has to stand the scrutiny of article 14 and 19 of the Constitution." Again in the case of Rural *Litigation and Entitlement Kendra, Dehradun v. State Uttar Pradesh*,[30] the Apex Judicial Body of India was moved by filing a PIL and court and ordered the closure of those quarries which were upsetting the ecological balance. In the famous case of M.*C. Mehta V. Union of India*[31] the court by its judgement justified the order of closure of tanneries. The Court stated in conclusion: "we are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people". In another case in *Lakshmipathy v. State of Karnataka,* [32] the H.C. observed, "The movement for restoration and maintenance of a livable environment requires curbing of power of narrowly oriented administrative agencies in appropriation of the dwindling acreage of land and water not already irrevocably appropriate."

VI. Conclusion

Human beings existence depends on a healthy and clean environment as we are dependent on natural resources. Economic development is also a necessity which we cannot ignore. There should be coordination between environment factors and economic development and concept of sustainable development should be adopted in every project in true sense. Now no one can deny the linkage between human rights and environment therefore human rights can be ensured to people when we all join hands to the cause of environment protection.. Indian constitution did not have explicit provision for right to live in clean environment. However, through judicial activism and liberal interpretation of Article 21 of Indian constitution by higher judiciary it became possible and now "Right to clean environment" is indispensable part of the "Right to Life" and, thereby is given protection under the constitutional sphere as a fundamental right. However, in spite of a number of legislations, environmental problems continue to prove a menace. Hence, strict implementation of the law and proper regulation and monitoring is to be done if we want to achieve sustainable growth. The judiciary needs to be equally vigilant with rehabilitation of oustees in development process as unjust development process virtually deprives them of their culture, value system and property thereby endangering their right to life. Industrialized nations should also cooperate and help the developing countries by giving financial aid and transfer environmentally sustainable technologies. Everyone should follow the sustainable development path. More awareness programs should be organized only then we can fight the environmental problems because Government will not be able to achieve its targets unless each one of us knows the importance of pollution free environment and contribute in the environment conservation.

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POSITIVISM IN CRIMINOLOGY AND CORRECTIONAL PRACTICES

– Debajit Kumar Sarmah
Assistant Professor
Department of Law
Tezpur University, Assam

ABSTRACT

Positivism or positivist school in criminology has its roots in modern scientific positivism originally propounded by August Comte. The notion of Evolution and Science by Charles Darwin and Social Evolutionism by Herbert Spencer were some other sets of ideas which laid the intellectual foundation of positivism in criminology. Arguably, positivism or the positivist school in criminology is central to the modern approaches in understanding of the causes behind crime and devising appropriate punishments. As a philosophy it is opposed to the classical notion of crime that relies on free will and rational actor model of crime. On the contrary, positivism held that criminal behaviour could result from numerous factors, external and internal to an offender. Such factors may range from biological and psychological to sociological indifferences with such people who are more prone towards criminal tendencies. The correctional aspect of criminal justice ought to take cognizance of such positivist ideas in criminology for better and appropriate treatment of offenders. It is in this context that the laws recognize the role of probation officer as a catalyst of corrections and requires a report of probation officer in cases of children in conflict with law as well those who are released under the Probation of Offenders Act. The paper elucidates on such ideas in a lucid manner.

Keywords: *Criminology, Positivism, Psychoanalysis, Causation, Jurisprudence.*

I. Introduction

The phenomenon of crime in society is a universal and inevitable reality. Crime, with varied intensity, occur in all societies. Though in modern times the intensity of crime has dramatically increased due to various factors, ancient societies were also not immune from the incidents of crime. This unescapable phenomenon, therefore, required to be enquired into more scientifically like any other social phenomenon. Such an awakening generated an interest among scholars belonging to various disciplines to study crime more closely and seriously. Emile Durkheim (1856-1919), noted sociologist opined that 'even a society composed of persons with angelic qualities would not be free from the violations of the norms of that society'[1]. The obvious outcome of such a scientific curiosity led to the birth of Criminology with the quest for answering various questions relating to crime, its causation and the responses by the society to the challenges posed by it. The legal scholarship, particularly criminal jurisprudence, has been immensely benefited from criminology in terms of determining punishment on the basis of causes of crime.

II. Positivism or positivist school

Positivism or positivist school is related with positivist philosophy and positivist science. As a methodology, positivism takes facts or empirical data to be primary in the search for knowledge. The founder of modern scientific positivism was Auguste Comte (1798-1857). To Comte, human knowledge emanates from three sources, namely, theological i.e. super natural entity, metaphysical i.e. abstract ideas, single all-encompassing idea substituted for super natural entity and finally positive state which stands for all laws of knowledge and existence are derived from close observation of positive phenomenon[2]. Legal positivism although shares scientific and sociological positivism the belief in the objectivity of observable facts but devoid of any structured method of enquiry similar to that of scientific and sociological positivism.

III. Emergence of positivism in criminology

Scholarship in criminology has its roots in the classical school propounded by Becearia (1738-1794)[3] and Bentham (1748-1832).

Classicalists were influenced by thinkers like Montesquieu, Hume, Bacon and Rousseau in explaining crime and punishment from naturalistic and rational approaches as opposed to the dominant spiritualistic explanation. Two important events, namely, the American Revolution (1765-1791) and the French Revolution (1789-1799) which were guided by naturalistic ideas of the social contract philosophies had an impact over the emergence of classical criminology. Classicalists believed that it is the free will which enable people to make rational choices about any course of action to be taken, whether legal or illegal, and therefore any rational human being should be fully responsible for his /her actions. Therefore, for any act of crime the punishment should be in proportion to the gravity of the injury irrespective of factors subjective of the offenders.

During the late 18th and early 19th century, particularly in France, the classical ideas about crime came to be challenged due to increase in crime rate and recidivism. The mechanism of prompt and proportionate punishment propounded by the classicalists failed to address such escalation in crimes rates and reoffending incidents. Society in general started looking for better solutions to the problems surrounding them with keen anticipation and interest. It was in such a backdrop that there emerged the positivism or positivist school of thought popularly known as the Positivist Criminology.

IV. Early beginnings of positivism in criminology

Positivism in criminology emerged during the 19th century at a time when there was rapid industrialization and growing capitalism in Europe. Propounders of positivism in the field of criminology were Cesare Lombroso (1836-1909)[4], Enrico Ferri (1856-1928) and Raffaele Garofalo (1852-1934). Three sets of ideas are said to be the intellectual foundation of its beginning and these were, namely, notion of Evolution and Science by Charles Darwin, Social Evolutionism by Herbert Spencer and Scientific Positivism by August Comte. Positivist School of Criminology in general rejected the free-will and rational actor model theory of crime causation and said that criminal behavior can result from numerous factors internal and external to a person. Thus the very emphasis of punishment from

being proportionate to crime has changed to be proportionate to criminal.

i) Biological positivism

Cesare Lombroso (1835-1909) who was a Professor of Legal Medicine at the University of Turin in his book *L'uomo delinquente* (The Criminal Man) published in 1876 proposed that criminals were biological throwbacks to an earlier evolutionary stage and such persons were more primitive and less evolved than their counterparts. He coined the term *'Atavistic'* to refer to such people which means resemblance to remote ancestors. In this context Lombroso also coined an another term *'Homo delinquents'* to refer to such people who are born criminals in contrast to normal human beings who are referred to as *'Homo sapiens'*. He categorized criminals into three major groups, namely, Born criminals (Atavistic reversions to a lower or more primitive evolutionary form of development), Insane Criminals (Idiots, afflicted with general paralysis etc.) and criminaloids (Generally do not suffer from any disorder but their emotional and mental make-up are such that under certain circumstances they indulge in vicious and criminal behavior).

Though later scholars have discarded the theory of atavism, Lombroso's most enduring contribution lies in the fact that for the first time in human history search for the causes of criminal behavior took place rather than emphasizing on the crime alone. Indeed, twenty years later in the 5th edition of his book entitled *L'uoino delinquente*, Lombroso included many other factors of crime causation, as well.

Enrico Ferri (1856-1928), a co-founder of the Positivist tradition, relied upon anthropological, geographical, psychological and economic factors in explaining criminal behavior and categorized such persons as Insane Criminals, Born Criminals, Habitual Criminals and Criminals by Passion. Raffaele Garofalo (1852-1934), an another positivist, gave a categorization as Endemic Criminals, Criminals deficient in probity, Lascivious criminals and Violent criminals. Numerous other theorists who gave biological explanation of crime mostly concentrated on inherited criminal characteristics and carried out their experiments in the lines of criminal family studies, twin studies and adopted children studies etc.

ii) Psychological positivism

Psychological positivism focuses on psychological determinants of deviant or criminal behavior resulting from exploitative personality characteristics, poor impulse control, emotional arousal, an immature personality and others. It primarily deals with how criminal behavior result from abnormal, dysfunctional or inappropriate mental processes within the personality.

Psychoanalysis Theory commonly known as the Id, Ego and Super-Ego Theory developed by the Austrian Psychiatrist Sigmund Freud is the most prominent in psychological positivism. Sigmund Freud coined the term psychoanalysis in 1896 and based his entire theory of human behavior upon it. According to psychoanalysis, criminal behavior is maladaptive or the product of inadequacies inherent in offender's personality. Significant inadequacies may result in full blown mental illness which in itself can be direct cause of crime.

Frustration-Aggression Theory first published in the Yale University Institute of Human Relations monograph in 1939 and was developed by John Dollard, Leonard Dobb, Neal Miller, O.H. Mower and Robert Sears. It held that frustration could be the underlying cause behind various forms of behavior, however, direct aggression towards others is its most likely consequence. The generalization that aggression is always a consequence of frustration leads us to two important propositions-i) the occurrence of aggressive behavior always presupposes the existence of frustration ii) the existence of frustration always leads to some form of aggression. The target of aggressive behavior may be the source of aggression or someone who is innocent and may not be related with the situation. Dollard pointed out that such aggression could be manifested in more socially accepted behavious such as sports, gym, career in military etc.

Lornez (1966)[5] gave the Instinct Theory of criminal behavior wherein he approached the study of aggression from an ethological perspective following the study of animals. He proposed that aggression originates directly from an innate fighting instinct that evolved over generations owing to its benefits for the survival of the species. In this case if the built up energy is unreleased a violet eruption releases the tension. Another theorist called Storr (1970)

further suggested that the way in which an individual manifest aggression in the later life results from unconscious motivations derived from childhood emotional experiences.

V. Sociological positivism

In biological and psychological positivism, reliance was placed on the factors intrinsic to an offender whereas sociological positivism believed that criminal behavior is a result of societal interactions and it stands for an account of factors outside the offenders. French Sociologist, Gabriel de Tarde (1843-1904), was indeed the first criminologist who gave a social explanation of crime and prior to him theorists were exclusively looking at the physical traits of offenders. Trade stated that criminal behavior is the result of a learning process, a person learns criminal behavior just like any other trade which he picks up in his childhood. Sociological theories can be divided into two broad categories –social structural theories and social process theories.

i) Social Structural Theories:

Cartographic School (1830-1880) led by Andre-Michel Guerry, a French Statistician and Adolphe Quetelet, a Belgium Mathematician, was one of the first attempts to look at the relationship between criminal behaviors and physical environments. They did that through mapping of crime to understand relationship between society and physical environment. Another very important addition to the social structural theories was the Culture Conflict Theory propounded by Thorsten Sellin (1896-1994), an American sociologist in the year 1938. Sellin held that rapid urbanization had placed the society in a state of conflict wherein law essentially embodies the normative structure of the dominant culture or ethnic group. Criminal Laws in particular, according to the Culture Conflict Theory, contains crime norms which reflects mostly the values of groups successful in achieving control of legislative process. As a result, less influential people often get into conflict with those dominant values.

Chicago School of Crime in 1920s and 1930s is one of the most influential analysis of crime in relation to social structures in urban areas. It held that a high rate of population in urban neighborhood

which are poverty sicken often experience breakdown in social structure and institutions such as family and schools. This results in social disorganization as it reduces the ability of these institutions to control behavior leading to an environment of deviant behavior. Problems such as juvenile delinquency, prostitution, gambling, illegal drug use, domestic violence etc. are therefore rampant in these areas.

Anomie and Criminality forms the core of social structural perspective in crime causation. Durkheim (1858-1917) who was a French sociologist and Robert Merton (1910-2003), an American Sociologist, were proponents of the social structure and anomie theory. Durkheim said that anomie is the consequence of the shift from small, rural society which are mostly mechanical in nature to a more modern organic society with a large urban population, division of labour and personal isolation. Crime results from such heterogeneity and as long as differences exist crime is inevitable and will continue to be one of the fundamental conditions of social life. Merton on the other hand held that as members of the society are placed in different strata in social structure, social and cultural structures generate pressure for socially deviant behavior upon people variously located in the structure. He further opined that people may respond to such structures in five different ways, which are conformity, innovation, ritualism, retreatism and rebellion.

The Containment Theory proposed by Reckless and Denitz in 1961 maintain that various social controls or containments assist a person from resisting pressures that draw them towards criminality. These containments include inner containments such as strong self-concept, identity, resistance to frustration and outer containments include family and near support systems.

ii) Social Process Theories:

Labelling Theory, a social reaction perspective analogy, emerged during the 1960s in the writings of Howard Becker, American Sociologist. This theory advocates that deviance is the outcome of reaction of society is general towards some particular people who are labelled as deviants. For instance, perception of police regarding young people's behavior in low income neighborhoods and wealthy neighborhoods wherein the manner in which acts are

looked upon by police are different. This leaves a very negative effect over such individuals as they feel more and more alienated and feel content with the ascribed status of deviant.

Another theory in this category is the Shame and Re-Integrative Theory by Braithwaite, an Austrian Criminologist is a recent time. He held that shaming for wrong doing should be done in a more re-integrative rather than disintegrative manner. In the said process those people who are more closely tied to family and community are more likely to feel guilty about their actions and hence their chances of reformation are more.

Rational Choice Theory propounded by Cornis and Clarke in 1986 has its earlier roots in classical criminology. It advocates that participation in criminal activities by people is out of their own rational choices in which people weigh cost benefit before getting into it.

VI. Impact of positivism on correctional practices

Correctional practices are those practices which are meant for correction of the offenders. Though criminal laws ought to have a correctional aspect in terms of punishment being prescribed but that may not be always possible due to other reasons like safety and security of the larger community. Nevertheless, there are numerous correctional laws aimed at correction or treatment of persons who are affected by factors without their own volition to commit a particular type of crime. Important to mention here that discretion given to the courts in terms of awarding punishment of lesser to greater degrees depending on the facts and circumstances of a case is also in a way is a recognition to the fact that punishment ought a fit the criminal rather than the crime-a principle postulate of positivism in criminology.

The earliest philosophy of corrections is rooted in religion and more particularly in the *Quakers Movement* (formerly called the Society of Friends) founded by George Fox in 1650s in England. Propagators of the Movement which included John Bellers (1654-1725) and William Penn (1644-1718) had greatly influenced in the evolution of corrections in criminal justice. Joh Bellers for instance argued that all offenders were creations of an unfair society and hence the society should continue to be responsible for their well-

being once they are released into their midst after serving prison-time. William Penn on the other hand, held that all prisoners should be taught a trade so that they can fend for themselves when they are released from prisons. The Quakers' idea was based on the Great Law, which is nothing but a statute-series which were enacted by the legislature at Pennsylvania in 1682 under William Penn's supervision. This Great Law in turn was based on the Quakers' intellectualism, in that, they Quakers "evidenced an almost puritanical asceticism and austerity in their mode of life though they were not as cruel and vindictive as were the Puritans in punishing deviations from group regulations" This is kinder, more humane approach is very well reflected in the Great Law, where law and religion is intertwined. The Great Law is brimming with the idea that offenders can be redeemed by the Lord and is the first instance of a law which uses the phrase, "houses of Correction" to refer to prisons. In the 'house of Correction', punishment most means hard labour, while death penalty was to be inflicted only in cases of premeditated homicide.

In India, the principle of correction or reformation of offenders was first highlighted by the *India Jails Committee Report of 1919-1920* and subsequently two important developments after independence i.e. visit of UNO subject expert on Prisons Reforms W.C. Reckless in 1951 and All India Conference of Inspectors General of Prisons in Mumbai in 1952, were milestones towards making of specific laws on corrections in India.

The Report of the All India Committee on Jail Reforms (1980-83), which is also known as the *Mulla Committee*, was also very positive about the practice of corrections for juveniles and young offenders. The Report suggested that separate courts should be established for young offenders and in deciding cases of young offenders, pre-sentence investigation reports of the probation officers should be a statutory requirement. It also suggested that only as last resort young offenders should be sent to institutions. For those offences where punishment is for one year and below, non-institutional practices should be adopted and the same also applies to offences punishable with a period exceeding one year in suitable cases. The

Model Prison Manual, 2003, for the superintendence and management of prisons being prepared by Government of India also mentions about "courts for young offenders" for the offenders of the age group of 18years to 21 years and "pre-sentence investigation report" depicting the social, economic and psychological background of the offender, degree of his involvement in the offence and possibility of reformation etc. for the courts to consider before passing an order on young offenders.

Probation officer-a catalyst of corrections

In India role of a Probation Officer is central to two systems of corrections, namely, the Juvenile Justice System and the Probation System. The Juvenile Justice System is governed by the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Probation System is governed by the Probation of Offenders Act, 1958. In both the systems, it is the duty of Probation Officer to ensure the reformation of the offenders. Under the Probation of Offenders Act, Probation Officer is the one on whose report and under whose supervision the court may release an offender who otherwise would have been sent to a jail for conviction. The underlying philosophy behind such a practice is individual intervention for treatment of an offender who is believed to have been infected with the disease of crime. Similarly, under the Juvenile Justice System also a Probation Officer shall inquire into the circumstances of a child, submit a social investigation report to the Juvenile Justice Board on receipt of any information from the Police or Child Welfare Officer. The said social investigation report provides for risk assessment in terms of variables such as aggravating and mitigating factors, vulnerability factors and other information.

Report of Probation Officer is a very important component of both the systems of corrections. So far as the Probation System is concerned, the Supreme Court has given number of judgements related with the report. In the case of *the Public Prosecutor vs Nalam Suryanarayana Murthy*[6], the Andhra Pradesh High Court admitted an appeal by the State against the judgement of Sessions Court, East Godavari for granting the benefit of Probation instead of sentencing under Section 323 IPC to an offender accused for

murdering of his wife. One of the key questions which came up before the court was if the provisions of Section 4(1) of the Probation of Offenders Act rightfully applied to this case as Probation Officer's report was never called for as referred to sub-section (2) of impugned provision. It was contended on behalf of the respondent that the words "if any" mentioned in the sub-section (2) of Section 4 leaves it to the discretion of the court either to call or not to call for any such report and the question of consideration of any such report by the Probation Officer arises only when such a report is called for and otherwise not.

In order to examine the veracity of the contention made by the respondent, the Court had perused through not only the scheme, objectives and material provisions of the Act but also the *Rules*[7] framed there under. Rule 28 of the said *Rules* lays down a procedure for the court to call for Probation Officer's report wherein Form V and Form VI are the prescribed forms to be used by the Probation Officer for the purpose. Particulars to be furnished, particularly, in form VI by a Probation Officer are so crucial that in absence of the same an order of the court regarding release of an offender on probation may not be an appropriate one since it accounts for the antecedents and surrounding circumstances of the offender. Therefore, the court concludes that the report of the Probation Officer is essential for the court to form its opinion relating to the expediency or otherwise of the offender being released on probation of good conduct under Section 4(1) of The Act and the same is therefore a mandatory requirement.

In the case of *M.C.D* vs *State of Delhi*[8], one of the issues before the court was that if the Court was right in releasing an offender under the Probation of Offenders Act without calling for a report of the Probation Officer as mandated by Section 4 of the said Act? In the instant case, offences relate to unauthorized construction and offenders were booked under the Delhi Municipal Corporation (M.C.D) Act by the designated Municipal Court. Subsequently, appeals were made before session's court and the high court. The High Court of Delhi while upholding the conviction order of the lower courts, however, maintained that since the offender did not have

any history of past conviction together with the fact that he suffered trial for 12 years with 3 days of jail term, he be released on probation. Against the said order of the High Court, the M.C.D filled an appeal before the Supreme Court.

One of the questions of law involved in this case was the interpretation of sub-section (2) of Section 4 of the Probation of Offenders Act, and said sub-section is stated herein below:

"Before making any order under sub-section (1) the court shall take into consideration, the report, if any, of the probation officer concerned in relation to the case."

It was contended before the Hon'ble Supreme Court that the High Court order was erroneous not only on the ground that the court did not call for a report of the Probation Officer but also on account of the fact that an incident of previous conviction was concealed by the appellants before the high court and the high court also did not give any opportunity to the M.C.D to file counter affidavits in the matter.

The Supreme Court, after hearing both the parties, concluded that discretion to grant the benefit of probation should be exercised with responsibility considering the antecedents and character of an offender because of which a report of the Probation Officer is important. Sub-section (2) of the Section 4 of the Act needs to understood in the sense that the court is bound to call for a report of the Probation Officer and consider it if such a report is received although the court is not bound by such a report given by a Probation Officer. The word "shall" as referred to sub-section (2) of Section 4 is a mandatory requirement and a condition precedent to the release of an offender under the Act. Not calling for such a report is a procedural infirmity on the part of a court but if in case such a report is not available, the court can decide on the matters on the basis of materials available to it. Referring to the earlier judgments, the Supreme Court further quoted that words "if any" referred to in the aforesaid sub-section would imply only such cases where in spite of court calling for such a report, the probation officer, for any reason whatsoever, has not submitted a report.

However, the Bombay High Court in the case of *Nishant*

Harishchandra Salvi v. State of Maharashtra[9] Cr Appli. No. 269 of 2018 in a criminal revision petition filed against the judgment of a Sessions Court which convicted an accused under Section 354 IPC together Section 8 of the POCSO Act while denying any benefit under Section 4(1) of the Probation of Offenders Act, held as under:

The submission that it is mandatory to call for report, whenever application is made for invoking provisions of said Act as a matter of course and decide the application cannot be accepted. This would lead to situation that every accused would prefer such application and would insists upon calling for report of Probation Officer. In the present case, such report was not warranted and trial Court was not inclined to exercise the powers considering the nature of crime committed by applicant accused. Such powers cannot be exercised randomly in every case. The offences against children who are vulnerable sections of society are anti-social. The Courts are required to exercise utmost caution in interpreting provisions of Probation of Offenders Act. ...There are occasions when an offender is so anti-social that his immediate and sometime prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way because of the paramount need of society.

VII. Conclusion

Positivism is central to the modern approaches in understanding of the causes of crime and devising appropriate punishments. The biological positivism, although discarded by some of the sociological theorists, remains the foundation of the shifting paradigm from crime to criminal. The psychological and sociological positivism form the basis for offenders getting individualized and differential treatment. Rehabilitation and reintegration of juveniles and offenders released under probation depend on an understanding of the psycho-social characteristics of offenders. Positivism in criminology recognizes numerous such psycho –social differences in human beings who commit crime. To sum up it can be said that correctional practices in particular and the criminal justice in general have been greatly influenced by positivism in criminology.

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OTHER AND OTHERING: RE-IMAGINING DIFFERENCE IN LIGHT OF PHENOMENOLOGY AND FEMINIST THEORY

– Ayyagari Subramanyam
PhD Research scholar,
NALSAR University of Law

ABSTRACT

To understand the mechanism behind our habitual failing of the other, it is necessary to **differentiate between the concept of the other and the phenomenon of othering**. Phenomenology deals with experience, and feminist theory positions experience as social fact (that which is constituted). Both of these methods locate the other in a realm that is ever evolving. There are different notions of the other, each ratified by norm and stabilised by power. The truth value of these notions is subject to conditions that precedes itself. Othering is a political project enabled by history and an other is a consolidation of everyday historical performances. In such a context it becomes necessary and urgent to evaluate present historical positions regarding the other and moreover an ethical orientation is a prerequisite in knowing the other.

Keywords: *Feminist, Knowledge, Othering, Ethics, Object, Tradition*

I. INTRODUCTION

What happens when groups or individuals are deprived of, not the right to freedom, but of the right to act; not of the right to think whatever they please, but of the right to express an opinion?[1] What happens when certain populace is deemed unworthy of public

gaze (even though available for the gaze, such groups do not have the requisite characteristics worthy of a gaze, hence, unintelligible to the normative script these groups are rendered invisible).[2] What happens when associations overlook the fundamental principle of human relationality?[3] What happens when, one does not belong? What happens when one is exiled into terra incognita, discursively?[4]

All the above instances are the myriad forms in which othering unfolds. These questions have certain immediacy, they demand suitable but efficient policy injunctions to deal with these real world problems. And often is the case that the approach of study rigorously scrutinises the other. The problem with this approach is that this inquiry of the other is the inquiry of 'the historical other'. It is, foremost, a linguistic category. It is the name that one usually deals with and which is a consequence of multitudinous effects of language, which is primarily historical. But what is missed is a body. Such a scrutiny of the other is inevitable and necessary but paired with an inquiry into the phenomenon of othering by dwelling into the philosophical foundations of the phenomenon of othering, the approach becomes richer and more radical. I approach the problem of the other and othering through phenomenology and feminist ideas of social constitution. It becomes necessary and urgent to dwell into its philosophy, given how othering often takes violent forms. I argue, that the other is often wrongfully categorised as antagonistic. This historical framing in fact conceals an element of the self and the other that lies in the realm of the strange.

Philosophy aims to get at the first principles that make this transcendental leap that joins body with language. Philosophy as a practice, has higher ideals of vanquishing boredom by perpetually questioning truth values and reality principles only to not let consciousness usher into a monotonous rut which is often the case with language. But there is also a downside to this perpetual questioning which might possibly bring in existential restlessness, hence one needs to tread the ground cautiously. Thought is fundamental to being and it is a function of language. And often is the case that language becomes a testimony to being itself. But is language the only metric for being? Philosophy prompts this inquiry,

this inquiry is relevant not only because linguistic definition of being is violent to others that fall beyond the realm of language, and whose language is not ratified or recognised by the norm, but this inquiry takes the attention to the element of strangeness that dictates being. Strangeness that enables the human to be more capacious, free, self-determining, and that which is not regulated by fear and prone to paranoia.

II. THE OTHER

Often 'the other' is a body over there. It is the object of my desire, and contempt. And it is that, which serves the purpose of my gratification, at times, and is the source of my fear, at others. There is also an other that dwells in the territory of the unformed, it does not figure in the public memory. It is that which when effaced does not leave a trace. Its effacement is met with a rationalisation by the normative and in that instance this other that is obscure is collapsed onto the other that is fearful. The other is the limit with which the self is defined. And hence the conflict. The problem of the other is intrinsically linked to the problem of the self. Both are problems of identity, problems of definition. What the self is and what it identifies with decides the fate of the other. And the times when the other is understood as not the self, it becomes the object of violation.

I identify three broad types of others, *the anthropological, the psychological and the philosophical*. Anthropologically, the other is characterised as someone alien to the western tradition. Anthropology as a discipline, was developed during the age of enlightenment, an 18th century European cultural movement that focused on the power of reason to advance society and knowledge. It is premised on the contrast between cultures which were different from the west. In fact the uniqueness of anthropology itself 'stems from the use of the human other'.[5] The anthropological other is epistemological. It is based on perceived differences and is a consequence of a cognitive process involving observation, collection of data and theorising. Anthropology invents the other only to develop a theory, for it the other is instrumental and serves the purpose of producing knowledge. This anthropological knowledge often was

a commentary about the non-western people and how they were seen to embody what the primeval west was before its progress. The other stood for an inferior human and was understood in the paradigm of the native children against the adult west.[6] The basic problem of this anthropological other is not a recognition of the other but its representation. It is just an epistemological other, the other produced by specific theories of knowledge, through specific methods, mediated by certain justified beliefs and opinions. Which says more about the epistemological systems of the ethnographer than give an honest description of the other. Anthropology, unlike other sciences, is not a study of the inanimate, and needs to go beyond the epistemological models of these disciplines. Psychologically, an other is the affective response it evokes. The problem with that is affect is mediated, understanding is prejudiced, and knowledge is historical. In this context the reality of the other is lost. Affective response or the experience of the affect is the function of the experiencer's epistemology. One only comes in contact with few established kinds of others, one among it is that which evokes rage, it demands our immediate attention and beckons us to fortify against itself and might as well invoke a violent reprisal. The other kind emerges from desire it is which enthrals us, enchants us, and disturbs our sleep cycle. It often is the cause for losing the self. And then there is also another kind of "other' that dwells in the realm of obscurity, the unreal, the other against which the human is made, the inhuman which lies beyond what makes one human. To which there is no corresponding human affect, the other which is beyond established knowledge. Philosophically the other is the first truth. Emanuel Levinas argues, that there is an ethical call made to the self by the other which is prior to the reason, metaphysics, and discourse. When the self tends to subsume the other into itself, then there is violence done against the other.[7] Ignoring this ethical call results in viewing the other as an object of knowledge and doing so only eliminates the true identity of the other and re-figures it in the sense of the subject *'thereby incorporating it into the identity of the constituting subject'*.[8] But ethics is not a system of morals but instead an orientation of the subject towards the ethical before acquiring knowledge. Levinas appeals to acknowledge the ethical which is not a consequence of

the hegemony of the subject but is rather a 'pre-cognitive relation' with the other. The subjectivity of the self, arises only because the subject is responding to the other, who is prior to the subject. 'Knowledge of the other, in terms of its representation, comes only after this response to the other'.[9] To respond to the other is to also take up history and to take up history is to assent to the myriad meanings of the other that has existed prior to subjectivity.

In the context of meaning, Derrida conceives a theory on **'Differance'**, and espouses that meaning impossibly exists in the space between the signs and it is the systematic play of differences. The signs depend on other signs for meaning but other signs are always present within the meaning of a single sign by what he calls their trace. Trace is neither present or absent. The trace is rather a simulacrum of presence that dislocates, displaces, and refers beyond itself. The trace has no place, for effacement, belongs to the very structure of the trace.[10]

Meaning is not only contingent on other meanings but also on a certain deferral. The meaning of the other is contingent on a variety of things, by the virtue of language other meanings are inlaid in the meaning of the other, but the reality of it only exists in perpetual postponement. Any attempt at grasping the other is only met with disappointment, as one is only left with traces, ideas of the other which once was. The traces constitute the perpetual absence of the other because the other is structurally absent and always unreachable. Acknowledging this perpetual postponement is basically accepting the implausibility of completeness. Foucault refers to criticism as a constant reassessment, the truth about the other is to be found in an incessant correction, an infinite regression. To be true to the other one ought to acknowledge that ethnography or the mode of knowing the other ought to be ethical or more importantly non-violent.

Phenomenological theory of 'acts' seeks to explain the mundane ways in which social agents *constitute* social reality through language, gesture, and all manner of symbolic sign. This doctrine of constitution demonstrates that the social agent is an *object* rather

than the subject of constitutive acts. People of difference, the non-belonging, citizens, stateless, the queer, and the other, these are in no way stable identities or locus of agencies from which various acts proceed, but, is in fact a tenuous abstraction temporally constituted – an identity instituted through *stylised repetition of acts*.[11] Such formulation moves the conception of the other from a substantial model of identity to that which is conceived or constituted as a social temporality. As a method, phenomenology is focussed on description but forewarns that description has a tendency to overly intellectualise and abstract the experience. Description results in rendering the physical or the tactile secondary, it reduces experience i.e. existence to empiric. A reduction that transforms life into a data point available for analysis and interpretation and in that lies the fallacy of knowledge. This reduction serves as knowledge and becomes history which in turn enables the structural social, which then makes the individual's perception possible.[12] The other is the result of this process. Phenomenology gives primacy to experience, and in that instance rebels against this historicising of life and experience. Consider a thought experiment, where writing as a response to daily speech is the convention, ignoring the complexities of the interaction and working with a rudimentary model, one could see it as a phenomenological exercise. Writing is delayed speech, if a written word would have been a response to an angered speech it would drastically reduce fatal incidents of rage. But it will also alter life processes, because it would mean to practice a different kind of social that which is not sanctioned in history and its testimony follows from the fact that such a method though thought is not practiced as a daily performative ritual. But what about the writing that causes rage, and writing does cause rage. Writing as a convention would mean to respond to rage in writing, though the subsequent rage might violate or even annihilate the writer but it does not say anything much about the method per se. So, it is safe to conclude that such practice would have a ritual that will shape a social whose contours one cannot imagine prior to its happening. This would be in line with the objectives of philosophy i.e. to not state or define the truth but in fact re-instil the strange.

III. OTHERING

An other is a consequence of othering. And othering is an ethos, it is historical and has its own politics and logic. Othering may be understood as the efforts of the members of a politically dominant group to marginalize and subordinate a minority or apolitically weaker group. [13] It is pertinent to extend the scope of othering to dislike in general; negative attitude towards women, gays, foreigners, etc. The critique of othering is situated within the context of lives as they are lived and is guided by the question of what maximizes the possibilities for a liveable life, and what minimizes the possibility of unbearable life, or indeed, social or literal death.[14]

Othering refers to the practice of differentiating the self from the non-self. This differentiation is of the entities that populate an individual's consciousness which are accessed or they come into being for the individual through the senses. These entities are the other for the self. But othering is not so much about the entities per se but is rather about the process of differentiation where the individual consciousness identifies with some inputs and overlook some. This process of identification and differentiation is enabled by history. One is born into a context and imbibes the conventions of the context through everyday rituals of identification and differentiation. *Does othering have an intent, does it have a central processing unit, a prime mover?* To work with this conspiratorial notion is to fawn over individual capacity and short change collective networks. It is humanely impossible to hatch schemes to make people believe in the existence of an antagonistic other that is capable of harming the self. In fact it is the daily doing or believing in one's own paranoia that is often fuelled by groups with vested interests that the antagonistic other is conceived. It is the structural social, self-regulating, and often performed ritually every day.

The veracity of the antagonistic other is dubious and is moreover, a consolidation and a consequence of a war effort that is rooted in violence and is practiced daily in norm. Norms allocate recognition differentially which in turn produce hierarchies. The problem of the other has historical, sociological, and political purchase and its relevance is also a testimony to its composite nature. It is a problem of justice,

because it seeks to answer whether power could ever be just. And hence is also an inquiry into power. When violence becomes a lived reality, which is often the consequence of a power tussle. When the powerful towers over the powerless, and when I am overcome with disgust or hate, it is othering that is being played out. Authoritative declarations on belonging are prejudiced because the normative frames the notion of the body through existing epistemes. An episteme is the underlying network that enables thought to organise itself. Each historical period has its own episteme, it limits the totality of experience and therein knowledge. Phenomenology and feminist ideas has potential to dismantle the notion that 'bodies are discrete' and re-establish that bodies are in fact entities that escape discourse. And in doing so emphasise on the urgency of ethics in understanding bodies.

Othering, when looked at as a psycho-social response or an affective response to stimuli is a 'performative expression' subject to social conventions, it is understood as a speech act or speech that performs some action. To argue that '*the othered*' is called into, using certain performatives, socially sanctioned roles by power groups is to locate othering, as an undesirable consequence of enacting certain linguistic rituals i.e. socially sanctioned norms coded in syntax and performed in language; relations between symbols that constitute or define, their meaning.[15]

Performativity is the concept that language can function as a form of social action and have the effect of change. Language does not simply describe the world but may instead (or also) function as a form of social action. And performative language is deeply entangled with politics and legality. An individual exhibiting agency is already publicly identifiable, in such a context performatives are "inserted in a citational chain", and that means the temporal conditions for making the speech-act precede and exceed the momentary occasion of its enunciation".[16] Feminist theory uses performativity to expose the hegemony of the norm. It accuses the norm of deciding the status of the other and how they are allowed to stand before the law. The law be it juridical or heterosexual, which is a bundling of juridical and disciplinary forms of power ushers one into a discursive performance as a way of being. According to Judith Butler, throughout

one's life, one reiterates performances of gender that conform to a gender norm, which has the discursive function of re-inscribing gender performatives and rendering the individual intelligible. Gender is always a doing, though not a doing by a subject who might be said to pre-exist the deed (Butler, 1990). An often-cited example of performativity is the case of a doctor's announcement, "it's a girl!" The doctor's utterance is a performative act that initiates and constitutes the infant's way of being in the world. The infant is 'interpellated', called into a role of "a girl", a subject status politically and legally controlled. One could object to this assertion and retort that the infant is 'sexed' and is, therefore, a girl but that objection omits the doctor's performative utterance that collapses sex/gender into social identity formation. The social determines the self even before it determines the social. Though in the above example the infant had body parts that allowed the doctor to exclaim it to be a girl. But what actually happens in that pronouncement is that the doctor categorises a body that has no social identity. This act endows the infant body with attributes, it colours the body with history. And by initiating the infant body into girlhood, the doctor hands over a responsibility, the onus that transcends choice. The act of the doctor is not mere performance but is deeply performative because the act of naming the body "a girl" also constructs "her" identity as a "girl" and thereby creates a reality principle. This is not a natural fact of the body but a forcible "citation of a norm, one whose complex historicity is in-dissociable from relations of discipline, regulation, and punishment".[17] The doctor's performative initiates a 'script' or 'form' that "governs", that gives rise to performance of and on the body. This does not mean one cannot reject that script and adopt a new one. The point is that the subject only remains subject so long as they are able to reiterate oneself as an identifiable, intelligible, and hence governable subject, which is dependent on the subject's ability to reiterate performatives coherently. If one initiates a performative without a script, one that is fully outside the bounds of intelligibility, the performance or identity will be unheeded, but it does not mean they are outside the bounds of power, what renders one intelligible also demarcates what is unintelligible. Phenomenology argues, that one cannot understand oneself as a subject, apart from one's body. And when one does think about body, one is not thinking

about a distant object, but oneself embroiled in the life processes, a body which is a means of expression in the world. From this follows, that what one claims about the other is often a commentary on the self and not a definition of the other. The performative expression of the doctor only reiterates his belief but says nothing about the infant. But doing so has real life consequence as the infant leads a life confined within the contours defined by the doctor in the above case and language generally. For feminists, the performative naming of a body upon birth, either male/female or boy/girl, engages an artificial binary that suppresses more subversive sexual disruptions of hegemonic heteronormative discourse. Similarly, the other is legitimised, it is approved and even consolidated, more than transformed, through 'performing' both social and speech acts. Performance then is practice of history.[18] And history that informs the structural social is also political. It is inflected with intent, it frames and controls the visual and the narrative dimensions of war and thereby delimits the discourse and notions of reality. Instruments of war tactically frame populations as instruments, blockades, shields, and targets. It frames and forms the human, it demarcates the extent of humanity and renders those who live beyond the normative frontier as non-human. The frame that others is also a frame of war and it posits an arbitrary truth value, it is a system that endorses violence. This is naturalised in language and practiced as a tradition.

IV. CONCLUSION

By making the distinction between other and othering prominent, there emerges room to call out the historical side of language and inspire to de-historicise language by performing rituals that include. Bodies are that which escape discourse and are in fact relational, and entangled. By taking the attention to the strangeness[19] of bodies, one can radically reimagine the other. From that vantage the other becomes a slur, a motivated attack on precarious lives. By reiterating body's strangeness one can appeal for safeguarding the aberrant. Grounding epistemology or knowing (the other) in the ethical/ in non-violence and repudiating experience that is inflected by violence for being untrue, is to posit that non-violence is the only method to know

the other. Hence, an ethical orientation is a prerequisite in knowing the other.

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18. I rely substantially on Judith Butler's work on 'Frames of War: When is Life Grievable?' where she argues, 'whose life is a 'life' and whose life is an instrument, a target, a statistic? What are the frames which selectively produce and enforce a version of reality?' Embedded in our lives these frames or ways of being are hard to separate from our habit, they are entwined in our practice and routine. Conceptual frames are ways of destroying populations as objects of knowledge and building them into targets of war, and these frames function as medium through which social norms are relayed and made effective.
19. The hypothesis that underneath all human experience lies a common anxiety propelled by the inscrutability of the nature of reality. Anxiety, as Heidegger said is the only human emotion that is unbound from our world. Although it can be triggered by external events that can awaken us from practicality into awareness, contemplation, the feeling itself is not related to anything concrete, rather it is defined by an absence, it relates to the nothing, to the void.

PERSPECTIVE
ONE NATION ONE ELECTION

– S.P. Singh
Professor, School of Law
Fairfield Institute of Management and Technology
affiliated to GGSIPU, New Delhi

India has adopted a parliamentary form of government with a federal structure of governance. Elections are an essential part and parcel of parliamentary democracy which are held at regular intervals at centre, state, and local levels. Indian Constitution has provided a five-year term for Lok Sabha and State Assemblies. Under Art. 324 of the Indian Constitution, there is an election commission to conduct free and fair elections. After independence first general elections were held in 1952 as per the Constitutional scheme i.e., simultaneous elections of five-year terms for Lok Sabha and all State Assemblies which continued till 1967. It could be successful because of uniformity and unity in a socio-political scenario with the dominance of the Congress party which had inherited the legacy of the National movement of independence.

However, after 1967 things started to change with the rise of regionalism in different parts of the country leading to the emergence of regional parties and regional leaders. Political formations based on ideology and regional interests started to influence the political process and political behavior of the people. Politics of right thinking and left thinking also started. Governments of different parties started to emerge in different states and centre. This also led to coalition politics in India.

After 2000 AD, the election and electoral process became very complex and challenging involving time, money, technology, and political competitiveness on several issues.

Keeping in view this complexity and emerging challenges again this issue of conducting simultaneous elections has taken the seat for discussion and debate at different levels.

The demand for conducting simultaneous elections of Lok Sabha and State Assemblies has been emerging fast at different points of time and different political and academic levels. Several key institutions like Niti Ayog, the Law Commission of India, and ECI are also seized with this issue and are having deliberations and recommendations at different points in time favoring simultaneous elections. To be specific, in 1983, the Election Commission of India highlighted this issue.

In 1999, Justice V.P Jeevan Reddy's committee constituted for this purpose gave its positive recommendation for holding simultaneous elections explaining its justification also. Many important political leaders like former PM Chandra Shekhar, Atal Bihari Vajpayee, and BJP leader Lal Krishna Advani have also favored it.

Former Presidents of India Shri Pranab Mukherjee and Ram Nath Kovind also spoke in its favor. In 2017 Niti Ayog and Law Commission again stressed the need and utility of conducting simultaneous elections of Lok Sabha and State Assemblies.

On Constitutional Day i.e., 26th November 2023 Prime Minister Narendra Modi raised this issue again and constituted a committee headed by former President of India Dr. Ram Nath Kovind to study various aspects of this and its recommendations.

This committee has started its 3 functions and called the view of different sections of the society of Pan India level up to 15th Jan. 2024.

It is in this context this issue needs a comprehensive examination to contribute to the present discussion and debate. Let us throw light on the history after independence. We had simultaneous elections for Lok Sabha and state assemblies in 1952, 1957, 1962, and 1967. After 1967, the political scenario started to change and many regional parties emerged on the scene which also had their government. From 1971 till date, regionalism strengthened with the multiplication of regional parties with their government leading to a multiparty system and creating a situation where different governments of different political parties in the centre and states. This also led to the situation of different tenures of different governments in the center and states.

Due to the different schedules of terms of different governments, conducting elections at different times in Lok Sabha and State assemblies became a compulsion. From 1977 till date, we have been following this schedule which has led to multiplicities of complexities, problems, and challenges.

At the same time, we will have to admit that it is also challenging to change time pattern. We will have to keep in mind this side of the picture also.

There are many situations when the tenure of Lok Sabha and State assemblies became uncertain. For example, on the imposition of president rule under Art.356 political uncertainty led to the dissolution of the house and also at defeat of any government at budget. Due to the frequent occurrence of such eventualities, uncertainty, and irregularities in the tenure of the house was created. To be more specific on the issue we refer to certain points in favour of it and also, we will refer to the obstacles in this issue. We will also conclude with certain suggestions for making it possible.

Following are the arguments in support of conducting elections simultaneously:

1. We have a history of conducting elections simultaneously from 1952 to 1977.
2. It will help in saving time.
3. It will help in saving money.
4. It will help in running smoothly and minimally as frequent elections cause delay and inefficiency. We know that when code of conduct is implemented administration becomes almost it and still. No policy decisions are taken due to the imposition of code of conduct.
5. Simultaneous elections will lead to political stability and continuity of the administration.
6. The frequency of the electoral environment will be reduced.

Following are the arguments against the idea of conducting elections simultaneously:

1. It is certainly difficult because of a large number of states having the government of different tenures of different political

parties.

2. Without political consensus, it is not possible and consensus seems to be very difficult given a large number of regional parties with their respective outlook and political intent.
3. To make it possible we will have to amend many parts and articles of the Constitution for which again political understanding and consensus are required. Most of the amendments will have to be ratified by 50 % of the state.
4. To make it possible we will have to bring uniformity in the tenure of Lok Sabha and state assemblies for which we will have to change the tenure either by reducing it or by extending it.
5. Initially it may lead to political instability.

To achieve this objective, we will have to amend Art.75 (3), 83, 85(D), 113, 164(2), 172, 174(1), 203, 243, Part 15 of the Constitution related to elections and Representation of People's Act 1951.

If we throw light on the world scenario on this issue, we find very few examples where there are simultaneous elections of both houses. There are only two cases from across the globe which are South Africa and Sweden. The situation of South Africa is not similar to that of India. Sweden has a unitary government so it also differs from the Indian system. Fixed dates for election to assemblies and federal government are more a common feature rather than simultaneous elections. Canada is an example. Australia and the US also follow almost this pattern. 2015 Nepali Constitution and Art. 67 of the Indian Constitution also can be examined for this purpose.

Serious exercises are being held at different levels and the government is serious about implementing this in the 2029 election. For this law commission is likely to recommend this. It may recommend an amendment to the Constitution to add a new chapter on simultaneous election by proposing synchronizing terms of assemblies in 3 phases. The five years will be spread over 3 phases. The first phase may deal with assemblies where the period will be curtailed to 3 or 6 months.

A high-level committee headed by former President Ram Nath Kovind for this purpose also has completed its task of holding deliberations with different stakeholders including political parties to make it a reality by effecting necessary amendments to the Constitution. The committee submitted its report to the President on 14th March 2024. In its report, it has recommended the simultaneous elections of Lok Sabha and State Assemblies in the first phase and the election of urban and rural local bodies in the second phase. 47 political parties have given their opinion out of which 32 political parties have recommended simultaneous elections. The law commission has already given its recommendation for adding a new chapter for necessary amendments. It may be implemented in 2029 for the 19th Lok Sabha. The amendment will include issues related to simultaneous elections and common electoral rolls for Lok Sabha and State Assemblies, Panchayats, and municipalities.

The new chapter will have an overriding effect over other provisions of the Constitution.

Conclusion

Based on the above information, discussion, debate, deliberations and recommendations of the Law Commission and committee constituted for this purpose, it is being observed that simultaneous elections to Lok Sabha and other Lower house will be possible by affecting certain amendments and additions in the Constitution. Experiences of other countries of the world also suggest that it is difficult but not impossible, what is needed is the unanimity and consensus of all political parties, keeping in view all the ground realities and practical aspects.

CASE COMMENTARY: SHOMA KANTI SEN VS. STATE OF MAHARASHTRA & ANOTHER, CRIMINAL APPEAL NO. 4999 OF 2023

– Prerna Deep
An advocate based in Delhi
She is presently an Academic Fellow at National Law University Delhi and Associate Coordinator at Centre for Criminology and Victimology, NLUD

Introduction

This case was decided by the Bench of HMJ Aniruddha Bose and HMJ Augustine George Masih on April 5, 2024. The Supreme Court granted bail to the appellant (Shoma Kanti Sen), of advanced age with several ailments. The Court noted that although Shoma's ailments may not be severe enough to grant her bail on a medical basis, however, she should be granted bail because of the length of her pre-trial detention, the nature of the allegations, and the materials used against her with certain limitations on her freedom and actions.

Background facts

The case is about the violence occurring at a programme that was organised by Elgar Parishad in Pune on 31.12.2017. Provocative speeches were made, and cultural programmes were done which caused hostilities amongst different groups, disrupted communal harmony, and ended up in violent acts of killing people. A complaint was lodged under sections 153A, 505(1b), and 117 read with section 34 of the Indian Penal Code, 1860 ("1860 Code"). At first, the name of the appellant was not mentioned in the first information report ("FIR"). Later incriminating materials were found by the state police

establishing a wider conspiracy whereof it was alleged that the appellant was involved at that time leading to such charges being pressed against her under "Sections 13, 16, 17, 18, 18B, 20, 38,39 and 40 of Unlawful Activities (Prevention) Act, 1967" ("UAPA"). Appellant was detained in June, 2018. The appellant filed a bail application in Sessions Court Pune after filing the original charge sheet against her as demanded by ordinary law procedure. The request was denied on the basis that it lacked reasonable grounds and, therefore, could not be granted under Section 436 read with Section 289, of the Code of Criminal Procedure 1973 Code ("1973 Code"). The appellant subsequently invoked Section 439 of the 1973 Code before the Bombay High Court, seeking an ordinary bail plea to be taken on file. This matter was handed over to the National Investigation Agency ("NIA") following a transfer order dated January 9, 2020. The appellant responded through her counsel. The proceedings were transferred to the NIA on January 24 of this year. NIA filed a second supplementary chargesheet with further evidence implicating. As a result, the Division Bench of the High Court denied the appellant's request for bail, allowing her to approach the Trial Court and submit a fresh bail application. The appellant challenged this decision.

Case of the appellant

In the legal proceedings of the appellant, various arguments have been put forward by her counsel concerning her being freed on bail. Ms. Sen is a 66-year-old lady, who has remained in jail for four and a half years with no formal charges pressed against her. Her lawyer argues that she suffers from several health challenges warranting her release under humanitarian grounds. Additionally, Mr Grover, senior advocate representing Ms Sen, pointed out that the latest charge sheet does not disclose any fresh or serious allegations to continue detaining or referring back her bail plea to trial court. He urged that Ms. Sen's age, health, and the lack of substantial new evidence against her strongly support her request for bail, making a compelling case for her release as the proceedings continue.

Case of prosecution

The prosecution has made serious allegations and legal arguments against the appellant in the ongoing legal case. Mr. Nataraj, the lead counsel for the prosecution, argued that the appellant did not specifically request bail despite asking the court to set aside the judgment and order. He also emphasized that not all incriminating material was included in the appeal petition, limiting the investigating agency's ability to counter the appellant's arguments. Mr. Nataraj stressed the seriousness of the alleged offenses and urged that any review of bail must strictly adhere to the conditions outlined in the UAPA. The appellant is facing serious charges, including being an active member of the Communist Party of India ("CPI"), involvement in conspiracies to violently overthrow the democratic state, and organizing the Elgar Parishad program that allegedly incited violence. The appellant is also accused of managing funds for the CPI's terrorist activities and recruiting youths for the banned organization. Mr. Nataraj highlighted the appellant's connections in the chargesheets, such as participation in the National Conference of RDF and communication with other CPI members. He presented four witness statements to support the prosecution's case, two of whom were granted protected status. Mr. Nataraj emphasised that bail is not a fundamental right in this situation, and the accused must meet strict conditions under Section 43D (5) UAPA due to the serious nature of the charges involving threats to national security and public order.

ISSUES:

1. Whether the order passed by the High Court to give liberty to the appellant to approach the Trial Court for filing fresh application for bail after a supplementary chargesheet was filed by NIA was valid or not?
2. Whether the offences under Part IV & VI of the UAPA alleged to have been committed by the appellant, are prima facie true or not?

Observations of court

Incarceration should be the exception rather than the rule, particularly in cases when it is clear that the defendant is not going

to evade justice or tamper with the evidence.[1] This idea, however, conflicts with the UAPA's bail clause. The Union government introduced "Section 43D (5) of the UAPA Amendment Act, 2008" in reaction to the terror events in Bombay. According to the NIA chargesheet, if there are reasonable reasons to suspect the accused is guilty as charged, the court is required under this clause to reject bail. The accused cannot support their case with evidence not included in the charge sheet. This provision has been heavily challenged, seen as a violation of several constitutional rights. A three-judge Supreme Court bench has also concluded that the court must determine that, in order for him to be released on bond, there must be an offence under the statute and no other offence.[2] Section 43D (5) states, "that a person cannot be released on bail or their own bond if the court determines, after reviewing the case diary or the final report, that there are reasonable grounds to believe the accusation against them regarding offences under Chapter IV and/or VI of the UAPA is prima facie true[3]". The interpretation of "prima facie" was elucidated in the case of Watali[4] wherein it was held that "Prima facie true" means the material must demonstrate the accused's active involvement in the offense. This material must be sufficient to establish the facts constituting the offense, unless countered by other evidence.

The question of whether bail qualifies as a fundamental right was also addressed in this case. Based on Article 21 of the Constitution of India, 1950, the Court recognised the accused person's entitlement to an extension of bail for offences under the UAPA. While detention may be sanctioned by law under certain circumstances, it must always be balanced against the fundamental rights guaranteed by the Constitution.[5] The majority of the materials related to the allegations of funding terrorist acts that are part of the charges under Section 17 of the 1967 Act have come from the recovery of documents from third-party devices. The Supreme Court also relied on its judgment on Vernon[6] wherein it observed the case of Zahoor Ahmed which held that "prima facie true" means that in the face of it the accusation against the accused ought to prevail.[147] However, in court's opinion it does not satisfy the prima facie "test" unless there is at least a surface-level analysis of the probative value of evidence.

HELD

"The court examined the applicability of the offences contained in chapters IV and V in relation to the materials which have been disclosed before the court and further, provided to apply the general principle of granting bail". (para 23) Since no credible evidence was presented to demonstrate that the frontal groups were a part of CPI(M), accusations under Section 20 of the Act pertaining to "membership of a terrorist organisation engaging in a terrorist act cannot be brought out against the appellant". (Para 34) Further, according to the act, "a person cannot be held accountable for Chapter VI violations under the act just by seeing the accused or having any sort of connection with them". A person cannot be held guilty under sections 39 and 40 of the act because the undated accounts statement does not hold sufficient probative value. (Para 35) The evidence showed that she attended certain meetings and made an effort to persuade women to join the fight for a new democratic revolution, so the accusations made under section 18 of the 1967 Act could not be upheld. (Para. 32) According to the Act, "mere presence on the spot, would not constitute an offence of recruiting any person for a terrorist act u/s 18". (Para 33) It was held that "accusations against appellants for commission of the offences incorporated in Chapters IV and VI are not prima facie true". (Para 36)

The court held that the petitioner's fundamental rights under Article 14 and 21 of Indian Constitution have been encroached upon by the arbitrary actions of the state. Further, the court awarded the petitioner compensation for the violation of her fundamental rights, while upholding the necessity of 'due process of law' and the 'procedural fairness' in the administrative actions which affects the rights and liberties of the citizens. The court instructed the State of Maharashtra to implement better measures to avoid similar occurrences in the future and to ensure better awareness through training regarding Constitutional rights among the officials.

Analysis

In its deliberation on the case, the Court took into consideration the appellant's age and medical condition, even within the restrictive

framework of bail under UAPA. The Court also considered the seriousness and severity of the charges against Shoma Kanti Sen in her bail application, evaluating her eligibility for bail under section 43D (5) of the UAPA restriction clause. The Court asserted that the act must transcend ordinary criminality and necessitate treatment beyond ordinary penal law.[18] Section 15(1) of UAPA, along with its sub-clauses a, b, and c, were construed together to examine the action or intention to cause such an act with the specified means, adopting the test for implementing Section 15, the Court determined that Sen had not, as of then, attempted or committed any acts of terrorism. As a result, it was decided that there was not enough evidence to support the notion that Sen had prima facie committed crimes as per Chapters IV and VI of UAPA.

The Supreme Court, while affirming the rationale behind the High Court's decision to deny bail, allowed the appellant to approach the Trial Court for a fresh bail application after the NIA filed a supplementary chargesheet. Hence, it became imperative for the petitioner to initiate a fresh bail application under Section 439 of the 1973 Code, in order to enable the Trial Court to thoroughly assess all the available material against the applicant. In addition, it was decided that the applicant needs to apply for bail again to the Trial Court in light of the significant changes in the circumstances. This approach would afford the trial court the opportunity to consider all relevant evidence and make a well-informed decision regarding the appellant's bail request.

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तेजस्वि नावधीतमस्तु

School of Law
Fairfield Institute of Management & Technology

FIMT Campus, Bijwasan Road, Kapashera, New Delhi-110037
(INDIA)