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From the Chief Editor

It gives me immense pleasure to announce the release of Volume 14, Issue 1 of Pragyaan: Journal of Law, a testament to the dedication and hard work invested in this endeavor. This issue presents a significant achievement, showcasing impactful contributions from distinguished scholars across various disciplines of legal research.

Keenly observed and appreciated is the continuous improvement in the quality of research with each successive issue. The present volume stands as a commendable presentation of insightful scholarship that we hope will resonate positively with our readers.

Heartfelt gratitude goes to our valued advisors, meticulous reviewers, dedicated contributors, and esteemed editorial board members, whose unwavering support has been instrumental in shaping this issue into its present form.

A sincere thank you to all those who have directly or indirectly contributed to the success of this publication. As we release this issue, we eagerly anticipate a continued and meaningful association with our readers, contributors, and the broader academic community.

Warm regards,

Prof (Dr) Ashish Verma

Chief Editor

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E-Courts and the Right to Justice: Reviewing the Impacts of Digitalisation on Access to Justice in India

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ABSTRACT

A transparent, active, and accessible administration of justice is the bedrock of any civilized society. The traditional or outdated procedures have proved the administration of justice in India slow, time-consuming, costly, and delaying justice. It is evident that over five crore cases are pending before various courts in India, told the law Minister Arjun Ram Meghwal in Lok Sabha.[1] During the COVID-19 outbreak, a large society could not access justice and the outbreak further enhanced the case backlog, one of the highly challenging issues before the Indian Judiciary. The information technology applied by the courts to resolve disputes is enabling accessibility to justice and making the Judiciary transparent and speedy. The present-day tech-based courts or E-Courts have the significant potential to make judicial processes easy and accessible. This paper examines, the process of digitalization of courts in India and how technology enables the courts to meet the Constitutional goal of speedy trial and easy access to justice for all.

Keywords: Digitalisation, E-Courts, Technology, ODR, Tele-Justice

Introduction

An enhanced case backlog is one of the highly challenging issues before the Indian Judiciary. Over 5 crore court cases are pending before various courts, told the Law minister Arjun Ram Meghwal in Lok Sabha. At present, the enormous challenges are faced by the judicial system as a result of arrears, backlogs, and delays that can be partially resolved if the courts have operational efficiency, coordination, accessibility, and speed, all of which are indeed possible with the use of information technology. Because of the lockdown, during the COVID-19 outbreak courts remained closed, which was a major setback for those waiting in line for justice.[2] Amid the pandemic, the technology allowed the courts to continue operating virtually, which made accessibility to justice easy and decreased the number of case pendency. The courts were open, and their proceedings are still streamed live online.[3] Modern technologies like information and computer technology enable systems to be easy, speedy, transparent, and cost-effective. In highly populated countries like India, the goal of speedy trial and easy access to justice can be achieved through information technologies. The digitalization of courts can decrease the pendency of cases by reducing delay and providing speedy justice. However, the current rate of development of courts with information technology is slow, particularly at the subordinate court level, and it is unlikely to have the desired impact any time soon.

Digitalisation of Courts

Digitalization is the process of converting analog information into a digital format, in this process, computers and other devices like computers, facsimile machines, smartphones, electronic mail, electronic databases, video conferencing, and multiple software are used. These technologies allow the processing of large amounts of data in a timely and accurate manner and the exchange of helpful information between different locations. Digitalization assists the judicial system in reaching high-quality decisions. Application of technology will result in significant enhancements in case management, file management, and docket management processes.[4]

The following are areas where technology enhanced the productivity of courts and reduced delays in resolving coses-

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1. The Times of India, Dec. 16, 2023
2. Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)
3. Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)
4. Use of Technology in Judicial Process and Alternative Dispute Resolution Available at: https://www.lawctopus.com/academike/use-technology-judicial-process-alternative-dispute-resolution/ (last visited on 01/11/2022)

(i) Legal Information Data Bases.

(ii) Online query system for precedents, citations, codes, statutes, etc.

(iii) Generation of cause list and online statistical reports.

(iv) Online caveat matching.

(v) Online updating of data, monitoring, and "flagging" of events.

(vi) Pooling of orders and judgments.

(vii) Daily list generation with historical data of each case.

(viii) Word processing with standard templates including generation of

(ix) Notices/processes.

(x) Access to international databases.

(xi) Feedback reports for use of various levels.

After appropriate planning, information technology can be implemented in these different areas. In particular, keeping better track of cases would result in improved monitoring and control of cases by the judges, rather than by the lawyers.[5]

Technology has enabled lawyers to written submissions in real time with the assistance of a smartphone. Video conferencing is an increasing practice inside and outside of the court. The 'Lawnet Service Bureau' is now establishing networking relationships with other law firms, the judiciary, and various databases. Their Differentiated Case Management (DCM) system places cases in subordinate courts on one of several different management tracks depending on the nature and complexity of each case. People from the general public who come to the court have access to a touch screen that provides information on the current status of various cases. This practice encourages openness of communication and helps to strengthen accountability to justice.[6]

Digitalisation of Courts in Different Jurisdictions: Since a few years ago, numerous countries have extensively used information technology in judicial settings. The judicial systems of the following countries make use of various forms of technology, which are shown in the following examples:

(i) USA and UK: The judicial system in the United States of America has been heavily reliant on technological advancements for several years. A significant amount of progress has been made in the area of software development for computers in subordinate courts throughout the United Kingdom. For example, the Local County Court Management System (LOCCS) used in England has a database system which is part of a package called CASEMAN and supports the following judicial applications:

(i) Creates initial court records for registering a case

(ii) Issues summons and monitor the service of the summons

(iii) Stores electronic copies of evidence

(iv) Generates Cause List

(v) Updates records

(vi) Maintains Court Dairy

(vii) Automatically generates other relevant documents and records

(ii) Australia: The use of courtroom technology in Australia is now well established, particularly for larger and more complex litigation. However, there are still challenges associated with its more widespread use. These challenges include cost issues (for both courts and law firms), the need for training, common standards, and a legal culture more supportive of the use of technology in the trial process. Courts are beginning to look to the university sector for assistance in coming to grips with training, research, and the development of policies and protocols. The work being done at the Queensland University of Technology (QUT) is a leading example of this type of partnership.[7] Cyber Courts are there in Australia that use technology extensively. As a result, these courts have demonstrated a significant reduction in the amount of time spent waiting for decisions.

(iii) Singapore: The application of information and communication technology (ICT) in Singapore's judicial system is not limited to computers. An efficient and effective case management system is developed in Singapore's courts to utilize their time and resources. The use of closed-circuit television (CCTV) in jails and court premises drastically reduces the number of instances in which criminal cases require transporting accused parties or witnesses within or outside the country.

(iv) India: There has been a sufficient amount of penetration of information technology into both private and public organizations in India. E-justice is regarded as an organ of e-governance in the country, and its services are provided in that capacity. There are 15,000 courts spread across 2500 court complexes that make up the Indian judicial system. Since the year 1990, people have been working toward the goal of computerization. It has been proposed to implement Information and Computer technology in three phases spread out over five years as

[5] Ibid

[6] Available at: https://blog.ipleaders.in/digitalisation-impact-indian-legal-system/ (last visited on October 31, 2022)

[7] Ros Macdonald & Anne Wallace, "Review of the Extent of the Court Room Technology in Australia" William and Mary Bill of Rights Journal, Vol. 12 Issue 3 2004.

part of the National e-Governance Plan, which has designated the digitalization of courts as a Mission Mode Project (MMP). This project aims to design, produce, deliver, and set up automated decision-making and decision-support systems in the legal system.[8] The main objectives of the MMP are as follows:

(i) To assist the court's administration in streamlining their day-to-day activities.

(ii) To assist judicial administration in reducing the pendency of cases.

(iii) To provide transparency of information to litigants.

(iv) To provide access to the judges to legal and judicial databases.

As soon as the project is completely put into action will enable the services of electronic case filing, online availability of judgments and cause lists, and the delivery of notices to clients provided that their email IDs are available.[9]

Experiences of technology in these countries particularly the United Kingdom may be insightful and helpful to provide pointers, specific tools, and software to the process of enhancing Indian judicial systems.

Digitalisation of Courts (E-Courts) and Access to Justice in India

The E-Courts Mission Mode Project is a Pan-India Project, monitored and funded by the Department of Justice, Ministry of Law and Justice, Government of India for the District Courts across the country. The E-Courts Project was conceptualized based on the "National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary- 2005 submitted by the E-Committee of the Supreme Court with a vision to transform the Indian Judiciary by technology enablement of Courts. E-committee is a body constituted by the Government of India in pursuance of a proposal received from the Hon'ble the Chief Justice of India to constitute an E-Committee to assist him in formulating a National Policy on the computerization of Indian Judiciary and advise on technological communication and management-related changes.[10]

The e-Committee was responsible for developing a national policy and action plan. About 700 courts in metro cities and 900 courts in capital cities have been covered, except the courts in the North East, Ahmedabad, and Patna. The Cabinet's approval has been secured for the execution of the project in 2100 court complexes, and a sum of Rs. 442 crores has been allocated for the implementation of the project in 2 years.

Under the direction of the E-Committee, the National Informatics Centre (NIC) is working and responsible for carrying out the e-Court project.[11] The e-Courts project launched in India will ensure that the status of pending cases from every court will be available online, including the cause list and the case details. The information will be accessible 24 hours a day. Additionally, it will assist the judicial system in issuing instant digitally certified copies. In every courthouse, assistance counters for the filing of cases, the distribution of certified copies, and the retrieval of case information will be established. Citizens will have an easier time reporting crimes and obtaining information if this is implemented.[12]

The production of victims and witnesses will be accomplished through video conferencing during the second phase of this project. Notices and summonses from a superior court will be delivered to the parties electronically through e-mail, SMS, WhatsApp, etc. Courts' orders and judgments that have been digitally signed will be made available online on the Internet.

In addition, the project will assist in the creation of a database of pending cases and the electronic calculation of fees, both of which are important steps toward eliminating corruption. It will use technology to assign cases to the appropriate judges. Cases that are very similar to one another will be grouped, which will aid in the closure of very similar cases all at once. In addition to that, the system will save digital transcripts of the evidence, which will render them unchangeable. In addition to that, the monitoring of process service levels will be made easier with the help of this system.[13]

National Information Commission (NIC) through a satellite-based computer-communication network known as NICNET, all of the High Courts have been computerized and interconnected. The COURTIS project, which is based on NICNET, has successfully interconnected the Supreme Court and High Courts in India, and it is currently working to computerise and integrate all District Courts in the country. The primary features of COURTIS include the case status, the Judgment Information System (JUDIS), cause

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8 Available at: http://onefuturecollective.org/law-and-justice-in-the-digital-age/ (last visited on October 31, 2022)

9 Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

10 Available at: https://ecommitteesci.gov.in/project/brief-overview-of-e-courts-project/ (last visited on 25/05/2024)

11 Available at: https://vidhilegalpolicy.in/wp-content/uploads/2019/05/eCourtsinIndia_Vidhi.pdf (last visited on October 31, 2022)

12 Available at https://kjablr.kar.nic.in/assets/articles/StrengtheningJusticeDeliverySystemSomeChallengesandSolutions.pdf(last visited on October 31, 2022)

13 Available at: https://www.livemint.com/companies/news/cyril-amarchand-mangaldas-to-set-up-india-s-first-legal-tech-incubation-centre-1550602978148.html (last visited on October 31, 2022)

lists, and daily orders accessible through the Internet. In addition, JUDIS's other online databases make the quick reference of cases too easier. These include the likes of Manupatra, Westlaw, and Indian Kanoon, amongst others.[14]

Following in the footsteps of the Supreme Court's computerization, the NIC began the process of computerizing all High Courts and benches. In addition to this, the List of Business Information (LOBIS) has been implemented across all the High Courts by NIC. It has to do with the scheduling of cases that are to be heard by the courts the day after tomorrow. It made it possible for the Registries of the Supreme Court and High Courts to avoid the manual process of generating cause lists and, as a result, eliminate the possibility of manipulation by vested interests.

These databases include information regarding fresh cases, cases that have been resolved, and cases that are still pending. The majority of the High Courts have opened query counters alongside the filing counters to provide litigants and advocates with information regarding the current status of their cases. New cases can only be submitted to the Supreme Court of India and the country's High Courts through the computerized filing counters. While the attorneys wait in line to file their cases in front of the counters, the data entry operator enters the preliminary details that are required for registration. These details include party names, advocate information, and other relevant information.

The computer terminal located at the query counter is utilized to respond immediately to the inquiries posed by the litigants. The flaws, if any, are listed and then given to the litigants or advocates to be fixed. In addition, the system will automatically verify that the time limit has not been exceeded.

National Judicial Data Grid: On 7th August 2013, the Hon'ble Chief Justice of India launched the E-Courts National Portal (ecourts.gov.in) of the E-Courts Project. More than 2852 Districts and Taluka Court have secured their presence on the NJDG portal named ecourts.gov.in and are uploading case status and cause lists online. The data of more than 7 crore pending and disposed of cases and 3.3 crore orders/judgments of District Courts in India is now available on NJDG.

The NJDG serves as a source of information on the judicial delivery system, with dynamic real-time data generated and updated continuously. It is regularly analyzed for meaningful assistance in policy formation and decision-making. The NJDG is working as a national data store for data including the orders/judgments for courts across the country with full coverage of district courts. The Judicial Management Information System will be helpful in litigations and adjudication pattern analysis and also the impact analysis of any variation in governing factors relating to law, amendments, jurisdiction, recruitment, etc.[15]

Recently, the Supreme Court ordered that all records of criminal trials and civil suits at district courts be digitalized to enhance the efficiency of the courts. The court ordered that the Registrar General of High Courts will ensure that in all cases of criminal trial and civil suits, the digitalization of records must be undertaken promptly at all district courts, preferably within the time prescribed (30 or 60 days) for filing an appeal.

Tele-Justice: Tele-justice also known as virtual courts, can enhance the right to justice. In its most basic form, tele-justice refers to the application of information technology in judicial administration. It can be as easy as making a phone call, as complex as utilizing satellite technology to communicate between people in different countries, or as high-tech as utilizing video-conferencing equipment or the internet. Today, a significant number of judicial officers participate in video conferences, and these conferences can even be connected to prisons. In a similar vein, the technology of the intranet can be found in many courts today.[16]

In a system known as Tele-justice, the accused person can now be present in a court through a video link that is established on ISDN lines between the prison and the court. Several states in India, including Maharashtra, Andhra Pradesh, Tamil Nadu, Gujarat, and Bihar, have already implemented tale justice. In Maharashtra, for example, more than 40 jails in and around the city of Mumbai are linked to district courts through the use of video conferencing.

Transporting inmates from the correctional facility to the courtroom is not without its inherent dangers. The deployment of policemen, additional security fees, and the cost of transportation are all additional costs that must be accounted for. The use of tele-justice can result in significant cost savings in these areas. It is becoming increasingly recognized globally as a reliable method for carrying out legal procedures. With a video conferencing system in the courtroom, jails, or correctional centers, defendants/accused can participate in legal proceedings without subjecting law enforcement to the risks normally

14. Available at: https://www.theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/ (last visited on October 31, 2022)
15. Available at: https://ecommitteesci.gov.in/project/brief-overview-of-e-courts-project/ (last visited on 25/05/2024)
16. Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

associated with transporting prisoners from the prison to the courtroom.

During a trial, video conferencing not only enables one to connect to multiple courtrooms but also makes it possible to use multiple applications simultaneously. A straightforward user interface is provided by the system, making it possible for non-technical users such as judges and court staff to operate and maintain the judicial video conferencing system with relative ease.[17] During a proceeding, decisions and actions can be carried out promptly if they are conducted via video conferencing.[18]

Other advantages include making specialization more accessible to rural as well as urban areas, easing prohibitive travel and costs associated with it for litigants, opening up new possibilities for continuing education for isolated or rural legal practitioners, and reducing the costs of legal aid for those who live in rural areas. Tele-justice has the potential to enhance the right to justice in several ways:

(i) **Increased Accessibility:** Tele-justice can reach remote and rural areas, reducing geographical barriers and making justice more accessible to all.

(ii) **Reduced Delays:** Virtual courts can reduce the backlog of cases and minimize delays, ensuring speedy justice.

(iii) **Improved Efficiency:** Tele-justice can streamline the judicial process, reducing the need for physical appearances and minimizing paperwork.

(iv) **Cost-effective:** Tele-justice can reduce the costs associated with traveling, legal fees, and other expenses.

(v) **Transparency:** Virtual courts can provide a digital record of proceedings, enhancing transparency and accountability.

(vi) **Access to legal services:** Tele-justice can connect litigants with legal professionals and resources, improving access to legal aid.

(vii) **Reduced Language Barriers:** Tele-justice can provide real-time translation services, ensuring that language is not a barrier to justice.

(viii) **Improved Accessibility for Abled Persons:** Tele-justice can provide accommodations for persons with disabilities, ensuring equal access to justice.

(ix) **Reduced Intimidation and Trauma:** Tele-justice can protect vulnerable witnesses and victims from intimidation and trauma.

(x) **Enhanced Data Analysis:** Tele-justice can provide valuable data and insights to improve the judicial system and policy-making.

Along with the abovementioned potential ways of enhancing accessibility to justice, there are some other potential applications of tale-justice may include:

- Virtual courts for petty offenses and traffic violations
- Online dispute resolution (ODR) in civil cases
- Telemedicine for medical testimony and expert opinions
- Virtual legal aid clinics for marginalized communities
- Online platforms for filing cases and tracking progress

India can enhance the right to justice, making it more accessible, efficient, and inclusive for all citizens by leveraging tele-justice. However, several obstacles can prevent the traditional justice system from reaching its full potential. In many countries, foreign lawyers are not permitted to practice unless they first obtain a license to do so in that country. Another factor is an inadequate supply of suitable communication technology, particularly prevalent in rural areas.

Online Dispute Resolution (ODR) Enhancing Access to Justice

The practice of e-commerce is becoming increasingly important and unavoidable in the present-day world. However, the absence of appropriate mechanisms for resolving disputes in cyberspace will constitute a significant barrier to the expansion of e-commerce in the future. Online Dispute Resolution (ODR) is a subfield of dispute resolution that uses technology to make it easier for parties to settle disputes. ODR has the potential to supplement the effectiveness of these more conventional approaches to conflict resolution by incorporating cutting-edge strategies and online technologies into the process.[19] ODR requires the creation of a digital copy of the actual location where the dispute will be resolved, as well as the utilization of several channels for the transmission and reception of information, including e-mail, SMS, digitized documents, grid computing, and video or teleconferencing.

ODR is advantageous because it is productive, cost-effective, and non-confrontational. Additionally, it calls for fewer in-person meetings and less in-person data storage. The ODR can become a very effective practice in resolving cases speedily and cost-effectively in India. However, the

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17. K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.
18. Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)
19. K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.

practice of ODR in India is not fruitful owing to the lack of knowledge and inadequate willpower to use information technology for dispute resolution. Perhaps, it is a very bizarre idea for Indian commercial entities to use ODR for dispute resolution.

Impacts of Digitalisation on Access to Justice

The most significant impact of technology concerning the judiciary has been in the domain of court procedure. Investigative agencies have increasingly come to rely on forensic techniques such as analysis of fingerprints, voice, handwriting, blood samples, DNA, and other bodily substances for evidence gathering. Computer programs are also used for reconstructing the images of suspects and aiding the investigation.[20] As newer technologies are introduced to assist investigation agencies, a new branch of investigation known as cyber forensics has gained attention in recent years.[21] The judicial system has achieved total success in integrating the use of contemporary technologies, access to justice will now be able to be provided in a manner that is both prompt and effective for all parties involved. The process of digitalizing courts is currently underway.

The technology in the administration of justice ensures the constitutional goal of accessibility to justice for all. Now tech-enabled courtrooms can decide cases in a timely and cost-effective manner. The technology has facilitated lawyers, law officers, clients, and investigating agencies to work easily and smoothly. The technology has the potential to bring openness or transparency to the judicial system, which is evident now in almost every courthouse. The use of scientific techniques holds immense promise in the criminal justice system. It is proven that technology can be a game-changer in enhancing the functioning of the judiciary or judicial system.

The digitalization of courts has significantly enhanced accessibility to justice by removing traditional barriers between the public and judicial records. Some of the key ways in which digitalization has improved accessibility to justice include:

(i) Easy access to legal documents, judgments, and case records from any part of the country.

(ii) Improved efficiency, transparency, and access to justice.

(iii) Reduced time spent on travel and administrative tasks.

(iv) Cost reductions associated with maintaining physical archives, storage, and infrastructure.

(v) Live-streaming of proceedings contributes to open, transparent, and accountable judicial processes.

Conclusion

The widespread adoption of technology in today's courts is one factor revolutionizing the entire judicial system. The digitalization of courts has significantly enhanced accessibility to justice by removing traditional barriers in the way to justice. The digitalization of courts has made significant progress, and its benefits have become apparent to the entire legal process, which has benefited not only judges and lawyers but also litigants. It has significantly saved the time taken for the various aspects of the judicial procedures, which has resulted in a decreasing backlog of cases. The increased ability of citizens and public institutions to communicate with the help of technology constantly eased the accessibility of justice. It is hoped that the digitalization of courts will allow the judicial system to perform to the best of its abilities. However, there are still many challenges like unavailability of internet connectivity, costly gadgets, lack of digital awareness, and some adverse impacts of modern technologies that need to be conquered. Before accepting each technique we must examine it critically in light of ethical and constitutional aspects.

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20. Haitham A. Haloush & Bashar H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution", 13(327) Harvard Negotiation Law Review 327-348 (2008)
21. B.B. Nanda and R.K. Tewari, "Cyber Crime - A challenge to Forensic Science", The Indian Police Journal 102-103 (2000).

AI And Justice: A Critical Assessment of The Indian Judicial System's Technological Evolution

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Prof.(Dr.) Shikha Dimri**

ABSTRACT

The emergence of Artificial Intelligence (AI) has significantly impacted various sectors by instigating substantial changes including the Indian judicial system. This abstract presents a succinct summary of the substantial influence that AI has exerted on the operations of the Indian legal system.

AI technologies have been implemented in various aspects of the Indian judicial administration, including case management, legal research, and decision support systems. The developments in the field of machine learning techniques for legal documents have aided in the streamlining of the processes and have helped in the decision-making abilities of the people related to legal field. Therefore, there has been an enhancement in operational e□ectiveness, a decrease in pending workload, and expedited settlement of matters.

The professions working in the field of AI still lack consensus about the significant impact of AI on the legal profession. The potential of AI to help reduce the backlog of cases while upholding the foundational principles and policies of the justice system raises questions that must be carefully considered. Furthermore, issues surrounding AI's capacity for neutrality and its power to sidestep predispositions in execution have been brought into question.

This study has conducted an in-depth analysis of the advantages and disadvantages of AI adaptability within the legal profession and justice system, based on the examination of research evaluations available on web portals, AI literature, legal precedents, and the insights provided by AI experts, esteemed legal professionals, and judges. This paper will also explore the uses of artificial intelligence across multiple worldwide legal systems. This paper o□ers an opportunity to acquire knowledge and understanding of AI and its functionalities, while also recognizing its limitations and future restraints. Additionally, it emphasizes the necessity of establishing a thorough regulatory framework to control AI.

Keywords: Artificial intelligence, Legal Profession, Supreme Court, Judges, Lawyers.

Introduction

Throughout history, technology has demonstrated its transformative impact. Across several nations, regions, and the global sphere, significant historical events and technological advancements have exerted profound influence on the way individuals lead their lives. The lack of emphasis on the resolution and prevention of disputes in the face of escalating conflicts and the proliferation of powerful digital technology raises legitimate concerns. The implementation of more streamlined, accessible, and cost-e?ective approaches to conflict resolution has consistently encountered various challenges. A potential way to mitigate or minimize several of these obstacles lies in the adoption of Online Dispute Resolution (ODR) technology.[1]

Contemporary barriers to accessing the court system encompass daunting procedural requirements, exorbitant financial burdens, and intricate information frameworks. Accessing legal information might pose challenges or be burdensome owing to geographical barriers. The presence of administrative regulations, intricate judicial procedures, and the legal occupation often serve as impediments to the attainment of justice by impeding direct engagement between individuals and the legal system. In certain contexts, certain individuals may encounter challenges in exercising their rights and achieving equitable conflict resolution due to the inherent limitations of technology. In contemporary times, there is an increasing abundance of chances to establish a virtual "multi-door courthouse" that surpasses the accessibility envisioned by early advocates of Alternate Dispute Resolution in its physical form. The initial proposal outlined the construction of a courthouse that would effectively guide individuals engaged in different disputes towards the most suitable dispute resolution procedure, taking into consideration their distinct characteristics, values, and goals. The advent of digital technology and internet connectivity has significantly expanded the range of

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[1] Kalendzhian.S,(2021) How Technology is Changing the Nature of Work and Altering the Practice of Law from Technology, Innovation and Access to Justice: Dialogues on the Future of Law on JSTOR, (n.d.).32-33. https://www.jstor.org/stable/10.3366/j.ctv1c29sj0.11

possibilities that may be accessed remotely and at one's convenience. This novel assortment of online conflict resolution venues aim to facilitate access for individuals who were previously excluded, rather than imposing restrictions on their participation.[2]

The enhancement of judicial systems' resilience is achieved through the process of digitalization, which is widely recognized as an essential prerequisite for ensuring the efficacy of justice in the contemporary period. It is hypothesized that this process contributes to the mitigation of delays, improvement of legal precision, and increased accessibility and affordability of justice for all individuals. The obstacles associated with digitalization are also emphasized, encompassing issues such as ensuring equitable access for marginalized groups, examining their impact on procedural justice and fundamental rights, and addressing concerns over the security and privacy of digital solutions. The emergence of novel technology mandates the ongoing assessment of its impacts.

Law And Technology

The primary objective of law is to serve as a regulatory mechanism for governing the actions of the government, while also functioning to constrain the authority of the State to safeguard the legitimate interests and expectations of the populace. Regarding technology, it assumes an autonomous function in attaining predetermined objectives that surpass human agency, functioning as a tool that yields desired outcomes.[3] The process of electronically filing applications necessitates the integration of many technical applications that are essential for both litigants and courts to facilitate the exchange of mandated documents. The utilization of e-filing systems facilitates the organization of judicial procedures by establishing a secure judicial identity and enabling the interchange of documents in relation to this matter. The judicial systems should be designed to accommodate the various parties involved in the delivery of justice, including courts, police, public prosecutors, and prison departments.

Videoconferencing can serve as an information technology tool for facilitating court processes, allowing witnesses to appear remotely. This approach also addresses security concerns related to the transportation and presentation of detainees. The utilization of technology in the court system encompasses various tools and platforms such as web pages, online document evaluation, electronic filing, interactive interviews and surveys, live video telecast systems, security systems for the courts, and the broadcasting of court proceedings. These technological advancements have significantly altered conventional court practices, facilitating enhanced connectivity among court system users.[4]

Washington State Access to Justice is an organization that was established in 1994 by the Washington State Supreme Court. Its purpose was to initiate the Access to Justice Technology Bill of Rights (ATJTBoR) committee, which consisted of judges, clerks, and other court sta?. The committee's role was to evaluate the current and future implementation of technology in the state's justice system administration. There existed an additional collective consisting of individuals from the domains of technology, law, and academia, who collaborated to develop an optimal system. Subsequently, a subcommittee was convened to conduct thorough investigations to comprehend the ramifications of technology utilization on the diverse aspects of criminal justice administration.[5]

TECHNOLOGY IN LEGAL SERVICES

Technological improvements are causing significant disruptions in the legal profession, like other industries, hence altering the way legal tasks are executed. Although lawyers have been slower than other professions to adopt new technology, they are now showing a growing interest in utilizing product offers that aim to improve their productivity and efficiency. There is a discernible and growing tendency for technology to effectively tackle a wider range of challenges encountered in the operational aspects of legal practice.

Despite the proliferation of emerging legal technology start-ups and their expanding array of services, the legal technology ecosystem continues to exhibit fragmentation and diversity due to intrinsic restrictions within the industry it caters to. These limits include:

- **Inadequate emphasis on R&D.**

Research and development are not a major part of the legal industry. Lawyers typically don't have a strong interest in developing new technologies.

- **The Increasingly Greying Legal Community**

A significant barrier is being created by the rapid aging of the legal profession, which helps explain why lawyers tend to be so resistant to innovation.

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2 Ibid.

3 Baladhikari.,& Kanta,S. (2020), Use of Technology in Access to Justice, Indian Journal of Law, and Justice, 11(1),269-289. http://ir.nbu.ac.in/handle/123456789/4020.

4 Ibid.

5 Supra note 1 at 35

- **Each jurisdiction has its own legal market.**

Each nation has its own set of laws and a distinctly different system of justice. It is challenging to build scale in the legal sector across borders and jurisdictions.

- **Highly controlled legal system**

Various regulatory constraints, such as a prohibition on non-lawyer ownership of legal practices or a prohibition on the unauthorized practice of law, are used to stifle innovation in various nations.

Introduction To Online Dispute Resolution

Traditional wisdom held that ODR was essentially a subset of ADR that took place in cyberspace. On the other hand, online dispute resolution (ODR) can be thought of as a method for resolving legal conflict through the medium of digital technology. When trying to pin down exactly what ODR is, it's important to remember that its central tenet is that it can replace face-to-face meetings between the disputing parties.[6]

Since its ultimate purpose is to ensure that everyone is treated fairly, ODR has a wide remit. It does this by making sure individuals know their options, responsibilities, and legal recourses. In turn, this improves citizens' access to justice and the nation's overall legal framework. Online dispute resolution (ODR) can push a country toward a more rule of law-based approach, especially in cases where the words "due process" has not been mentioned but the judiciary tries to read these into the statute like in India.

For a more complete picture of what it means to utilize ODR, it can be instructive to look at some of its distinguishing characteristics. When considering the larger context of information and communication technology tools, ODR is located at the granular level where the use of these technologies is mandatory. However, simple computer use does not qualify as ODR. For instance, ODR will not apply to a dispute if the parties are using email to resolve their di?erences. However, the same shall be deemed to fall under the purview of ODR if the parties' reliance on technology is such that a substantial quantity of communication is being held by using ITC enabled tools and on one of the platforms of ODR.[7]

The origins of ODR can be traced back to the early 21st century, namely to eBay, which pioneered the concept of providing online mediation services in response to customer complaints. With such a huge volume of disputes being handled and resolved online, it became clear how powerful an online redressal mechanism could be, especially in the consumer sphere. Some of the benefits of ODR are as follows:

a. Reduced Expenditures

The primary benefit of employing ODR as a tool to resolve a disagreement is financial. This dramatic decrease in price can be attributed to several things. Since everything is handled digitally, the parties save a ton of money on transportation costs. There is a significant barrier to establishing "access to justice" in India since not all parties can a?ord the cost of litigation. In contrast, the development of ODRs has helped to promote and nourish the spirit of the constitution as contained in Articles 14 and 21, namely, the right to obtain justice.

b. Availability of justice

Access to justice is hampered in India in part because the adversarial nature of the Judiciary is intimidating to many people. However, ODR accounts for the difficulties and provides a method that is adaptable to the requirements of people, making justice available to all.

c. A faster method of settling legal disagreements

The time it takes for a case to be settled when litigated in a court of law is substantial. The stressed-out court system provides proof of this. This emphasizes the need for developing new approaches to delivering justice. On-line Dispute Resolution (ODR) is a multi-step process for handling legal disagreements. Due to the online nature of the process, a lot of time-consuming waiting around is eliminated.

E-Filing and Case Management

The submission of court documents has been brought into the modern era with the advent of electronic filing (e-filing) systems. Lawyers and individuals can now submit court paperwork electronically, eliminating the need to physically appear in court. When a case is initiated and managed electronically, it saves time and money. The potential for human error that comes with paper filing is diminished as a result.

Legal professionals initiate the process of submitting legal cases by utilizing either the online portal or the interface of the system. Data can be transmitted to the court in a systematic manner, either in the form of a structured submission or as a formal document. Typically, the process of initiating a legal proceeding entails the amalgamation of two key components: the provision of data in a format suitable for integration into the court's case management system, and the inclusion of pertinent details pertaining to the substance of the case. The content information can be

[6] Aggarwal, P. (2022) The Use of ICT Technologies in Court, https://articles.manupatra.com/article-details/The-Use-of-ICT-Technologies-in-Court.

[7] Ibid.

presented either through text fields or as an attached document within the filing. Most case details are obtained via the case management system. In the court workspace, the administrator can modify the specifics of the case within the case detail screen, if deemed essential. The case header inside the case document presents a concise summary of crucial details pertaining to the case, including the identities of the parties involved, the court in which the case is being heard, and the scheduled date for the court proceedings. The case history provides a comprehensive account of the progression of the case.[6]

Case Management

Case management systems, sometimes coupled with electronic file systems, are technological platforms that enable the efficient organization, monitoring, and administration of legal matters. These systems provide a variety of advantages like:

Organizing Document: The organization of papers is facilitated through digital storage, encompassing various case-related materials such as pleadings, motions, orders, and communications. This digital format enhances accessibility, searchability, and overall management of these records.

Scheduling and Calendaring: The automation of scheduling and calendaring through case management systems facilitates the efficient management of crucial dates, including court appearances, hearings, and submission deadlines, so aiding lawyers, and courts in their organizational endeavors.

Task Assignment: Task assignment systems facilitate the allocation and monitoring of tasks within the legal profession, hence enhancing collaboration within law firms or legal teams.

Data Analytics: Case management software can provide reports and analytics, providing insights into case progress, workload distribution, and performance measures.

User Notification: Automated notifications and updates regarding case developments can be received by all parties involved in a case using the case management system, hence facilitating real-time dissemination of information to ensure comprehensive awareness.

Remote Access: Cloud-based case management solutions enable authorized people to remotely access case information from any location with an internet connection, hence facilitating the ability to operate remotely.

The implementation of electronic filing (e-filing) and case management systems has been found to have a substantial positive impact on the efficiency and transparency of legal proceedings. These tools e?ectively alleviate the workload on court systems and contribute to the overall improvement of access to justice. Remote access and limited physical interactions have become crucial for the legal profession, especially in times of crises like the COVID-19 outbreak. These technologies not only have the capacity to enhance efficiency and conserve resources, but also play a significant role in fostering a legal system that is more accessible, equitable, and responsive.

Legal Research and Artificial Intelligence

Artificial intelligence (AI) holds considerable importance due to its ability to surpass human performance in specific domains and its capacity to offer organizations unprecedented insights into their operational processes.[7] AI technologies have demonstrated superior efficiency and reduced mistake rates in comparison to human counterparts, particularly in tasks that involve repeated and meticulous actions. An illustrative example is the evaluation of extensive legal papers, wherein AI systems excel at verifying the accuracy and completeness of pertinent information.

Legal research is an indispensable undertaking within the realm of law, necessitating the engagement of lawyers while handling any legal matter. The undertaking is of paramount importance and requires a high level of skill, encompassing elements of both artistic expression and scientific methodology. The ability to anticipate future outcomes through the strategic selection of appropriate solutions to guide an inquiry, together with the creative capacity to emphasize the significance and interconnectedness of the findings, are both essential components for conducting research in a proficient manner.

Lawyers often face two primary obstacles when engaging in legal research: time constraints and uncertainty about the potential outcomes. For many individuals, establishing confidence in how a court or other authoritative figure will perceive the information and argumentation being developed by an attorney or researcher may be an exceedingly daunting task. Conducting legal research requires a substantial amount of time to enhance the level

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6 Mahleka, T. (2021, January 8). Can Technology Be Leveraged to Improve Access to Justice? - Human Rights Pulse. Human Rights Pulse. https://www.humanrightspulse.com/mastercontentblog/can-technology-be-leveraged-to-improve-access-to-justice

7 Locke, S. (2023, April 12). The Role of AI in Legal Research. Legal Practice Intelligence. https://www.legalpracticeintelligence.com/blogs/technology-intelligence/the-role-of-ai-in-legal-research

of certainty associated with it. Unfortunately, due to the limitations imposed by time constraints, it is not feasible for a practicing lawyer to allocate a substantial portion of their time to conducting research.

The process of organizing and refining unprocessed material to generate valid legal research is an additional formidable undertaking.[10]

Currently, there have been notable breakthroughs in the domain of legal study and research due to the progress made in Machine Learning and Artificial Intelligence (AI). In the pursuit of pertinent legal precedents, law students and associates within law firms traditionally allocated significant amounts of time to perusing extensive collections of case law books. The procedure has become digitalized with the emergence of personal computing, and contemporary attorneys engage in research by utilizing various information sources such as Westlaw, LexisNexis, Manu Patra, and others.

TECHNOLOGICAL INNOVATIONS AND ACCESS TO JUSTICE

The rapid progress in technology is fundamentally transforming the global landscape. Through the examination of the requirements of individuals residing in the present period, novel products and services are being developed daily to fulfil these wants. Concurrently, there is a constant inquiry into enhancing our encounters with the world and our interactions with others by means of technical innovations.

Justice actors, despite their adherence to a historically conservative perspective, are not impervious to this transformation. In recent times, there has been a growing interest in exploring the potential benefits of technology within the realm of the legal system.

a. Self-Help Tools and Apps

The advent of self-help legal aids and mobile applications has greatly enhanced the accessibility to justice. The purpose of these tools is to provide users with guidance in navigating a range of legal processes, encompassing the creation of basic legal papers as well as comprehension of intricate legal procedures. These tools frequently provide users with a range of features, including systematic guidance, pre-designed templates, and, in certain instances, chatbots that o?er legal advice. These resources aim to support individuals in autonomously navigating the complexities of the legal system.

Self-help legal applications and websites cater to the demand for cost-e?ective legal aid, specifically for commonplace legal issues such as the creation of wills, divorce filings, or the preparation of commercial contracts. These tools provide individuals with the ability to manage legal problems independently, eliminating the necessity for costly legal assistance. As a result, they enhance the availability of justice for those who may have previously been discouraged by the financial burden associated with legal services.

b. Virtual courts

Enhancing the availability of justice within the contemporary legal system is an imperative undertaking that necessitates a forward-looking approach to advance the efficacy of courts and mechanisms for resolving disputes.[11] This raises the question of whether courts function primarily as service providers or as physical spaces where parties are obligated to convene to seek justice. Does the physical location have a significant role in terms of facilitating access to justice? The term 'virtual courts' evokes a mental image of a traditional courtroom setting with the inclusion of a video-link. Historical evidence demonstrates that video conferences have been utilized in significant legal proceedings, particularly in cases involving serious criminal o?enses or instances when witnesses have been subjected to intimidation. These video conferences have been employed as a means of facilitating crucial conversations related to matters such as bail or remand.

The utilization of expert opinion as a supplementary resource for courts can potentially enhance efficiency. By enabling specialists, such as doctors or fingerprint analysts, to provide testimony from remote locations via video conferencing on large screens within courtrooms, time constraints and prior commitments can be accommodated. In addition to the witnesses, the accused party may also be present in delicate situations, resulting in time and cost savings, as well as reduced susceptibility.

In 2010, the Ministry of Justice released a paper entitled "Virtual Court Pilot: Outcome Evaluation," which demonstrated the potential benefits of utilizing a video link to facilitate initial hearings in most criminal cases, connecting police stations with courtrooms. Additionally, it reduces the occurrence of visual misidentifications, so alleviating the logistical burden associated with transporting detainees between many courtrooms.

In the contemporary era of Skype, the utilization of video calls has expanded the potential of virtual courts. However, its application during trials may create challenges. Nevertheless, it can prove advantageous in the pre-trial phase, as judges can remotely listen to the parties involved from their respective chambers. This finding also confirms that the availability of justice should not be restricted by any

[10] Ibid.

[11] Supra note 3 at 284

means. For instance, in the region of Jammu and Kashmir, adverse weather conditions such as heavy snowfall may pose challenges for witnesses or defendants to attend court hearings. Additionally, they may request a rescheduled date when the climate is more favorable. This situation highlights the limitations in ensuring access to justice, which could be significantly improved through the utilization of technology.

Judiciary view on virtual courts

In the case of ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav,***[12] a video conferencing system was employed to ensure a fair trial. The physical presence of the accused was waived, and the proceedings were held remotely from Tihar Jail in Delhi. The knowledgeable presiding judge further took measures to assure the presence of the accused via video conferencing prior to the recording of statements, to prevent the statements recorded under section 313 from being just perfunctory. When an individual is charged, they may be held in a location separate from the city in which the accusation was made.

In the legal matter of **State of Maharashtra v. Praful B Desai,**[13] the court granted permission for the examination of witnesses via video conference. The issue of conducting witness examination through video conference was juxtaposed with that of virtual reality, raising concerns about potential violations of the accused's rights as guaranteed by Article 21 of the Constitution. The concept of virtual reality involves the creation of an immersive experience in which individuals perceive, hear, or imagine stimuli that are not present in their physical reality. For example, individuals can experience a sensation of being in a cold environment despite being physically present in a humid setting. The integration of video conferencing with virtual reality is not feasible. The advancements in science and technology have facilitated global connectivity, enabling individuals to observe real-time events, such as live sports matches, occurring in distant locations. An individual who observes the action within the confines of the stadium experiences an identical representation of the match, akin to the perception of an individual watching the match from the comfort of their own residence. This shared experience is not a virtual reality, but rather an authentic reality. Video conferencing facilitates communication with those who are geographically separated, allowing for visual, auditory, and verbal interaction, akin to an in-person encounter, without the need for physical contact. The condition of 'presence' as defined in section 273 of the Code of Criminal Procedure is fulfilled when the accused or their legal representative is present during the recording of evidence via video conference. Indeed, the defendant will have enhanced visibility of the witnesses compared to a courtroom that is excessively populated. The inclusion of a playback option for the video would additionally facilitate a more favorable scenario during the process of cross-examination. Witnesses may be subjected to questioning on papers, other forms of evidence, or statements in a manner that simulates a courtroom setting, while ensuring that no unfair bias is imposed upon the accused.

In the legal matter of ***Sujoy Mitra v. State of West Bengal***[14], the Calcutta High Court granted permission for the examination of witnesses by video conference, specifically from a location in Ireland.

In the current situation, all remaining witnesses were documented, except for the crime victim, who is an Irish woman now residing in Ireland. The trial court has granted permission to record the witness's statement via video conferencing. The court also dismissed the notion that a bilateral extradition treaty is unnecessary for the purpose of obtaining witness testimonies between nations. Moreover, it is necessary to submit an affidavit for the deposition to disclose the name of the victim, who was not observed immediately facing the camera.

c. Accessible Legal Aid

Legal aid services play a crucial role in guaranteeing equitable access to justice for individuals who lack the financial means to secure legal representation. The utilization of technology is playing a pivotal role in enhancing the accessibility and efficiency of these services.

Legal aid groups and clinics frequently employ digital platforms as a means of facilitating the connection between individuals and pro bono lawyers or a?ordable legal services. The utilization of online intake forms and case management systems facilitates the application process, hence expediting the provision of legal aid to individuals requiring assistance.

In addition, technology plays a crucial role in enabling the e?ective coordination of pro bono endeavors. The utilization of online platforms enables legal professionals to o?er their services voluntarily, facilitating the ease with which clients may locate and engage with pro bono lawyers. This enhanced accessibility and connectivity

[12] (2005)Cri.L.J. 1441 (India).

[13] (2003) 4 S.C.C. 601 (India).

[14] (2015) 16 S.C.C. 615 (India).

[15] Ghatpande, Y. (2022)Legal Aid 2.0 (Nyaya Bandhu and Tele - law service). (n.d.). https://www.legalserviceindia.com/legal/article-8993-legal-aid-2-0-nyaya-bandhu-and-tele-law-service-.html

contribute to the increased efficiency and responsiveness of the legal aid system.[15]

The advent of technical advancements has brought about a significant transformation in the realm of legal services, rendering them more readily available, streamlined, and economically viable. These technologies enable individuals to autonomously manage their legal matters, participate in judicial procedures from a distance, and readily avail themselves of legal assistance services. By engaging in such actions, individuals contribute to narrowing the disparity in access to justice and facilitating the ability of a greater number of individuals to pursue and attain justice, irrespective of their financial or geographical limitations.

India's Scheme on Access To Justice

Tele-Law: Reaching Unreached

The Department of Justice has partnered with NALSA (National Legal Services Authority) and CSC e-Governance Service India Limited to establish a service called Tele-Law. This service operates through the Common Services Centre and aims to promote the provision of legal aid to marginalized populations. The term "Tele-law" is used to describe the utilization of communications and information technology in the dissemination and provision of legal information and advice.[16]

The utilization of the video-conferencing infrastructure at the CSCs would facilitate the electronic contact between legal professionals and individuals. The concept underlying Tele-Law is to enhance the accessibility of legal counsel through the deployment of a group of lawyers stationed at state Legal Services Authorities (SALSA) and CSC. The project commences by deploying Para-Legal Volunteers to 75,000 identified panchayats, facilitating the connection between residents and lawyers through the utilization of video conferencing technologies. In the year 2021, the Tele-Law mobile application was introduced, catering to both Android and iOS platforms. This application offers convenient and immediate accessibility and is presently accessible in 22 designated languages.

Nyaya Bandhu (Pro Bono Legal Services)

The objective of Nyaya Bandhu is to provide a comprehensive structure for the provision of pro bono legal services across India. Advocates who are interested in volunteering their time and services can register on the Nyaya Bandhu Mobile App, which is accessible on the Android, iOS, and UMANG platforms. By doing so, they can offer legal assistance to individuals who are eligible to receive free legal aid under Section 12 of the Legal Services Authorities (LSA) Act of 1987 and have registered on the Nyaya Bandhu App.

Legal Literacy and legal awareness

Legal Aid is a constitutionally recognized entitlement that serves as a mechanism for ensuring access to legal representation. The prevailing demographic in our nation comprises individuals who experience financial hardship, resulting in their inability to bear the costs associated with high-priced legal proceedings, thereby leading to their exclusion from accessing justice. The legal framework offers mechanisms to address this issue; yet a significant portion of the population remains uninformed of these remedies. Article 39-A, which was introduced through the Constitution (Amendment) Act of 1976, establishes provisions for the provision of legal aid and support to those of low socioeconomic status.

The primary objective of Pan India Legal Literacy and Legal Awareness is to facilitate the provision of information regarding legal rights and entitlements to marginalized segments of society. This initiative also seeks to enhance legal awareness among individuals, hence fostering a citizen-centric approach to the dispensation of justice.

Obstacles To The Attainment of Justice

In present-day societies, the acknowledgment of effective access to justice as a fundamental social right is widespread. However, the precise definition and understanding of the term "effectiveness" remain rather ambiguous. The concept of "equality of arms" in a specific area of law refers to the guarantee that the ultimate result will be determined solely based on the comparative legal strengths of the opposing arguments, without being influenced by extraneous factors that may impact the assertion and enforcement of legal rights, despite their lack of relevance to legal validity. The attainment of idealized equality is unattainable due to inherent disparities that persist among the involved parties. An individual should carefully consider the extent to which they strive to progress towards the concept of an ideal condition, considering the associated implications and sacrifices. Additionally, determining the optimal number of barriers that should be addressed is crucial for achieving effective equality of arms. Therefore, the initial stage in delineating the concept of "efficacy" entails the identification of obstacles or impediments.[17]

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16 Designing Innovative Solutions for Holistic Access to Justice | Department of Justice | India. (n.d.). https://doj.gov.in/designing-innovative-solutions-for-holistic-access-to-justice-disha/

17 Naskar, M. (n.d.). Role of Technology in Enhancing Access to Justice. www.linkedin.com. https://www.linkedin.com/pulse/role-technology-enhancing-access-justice-manisha-naskar

The Expenses Associated With Legal Proceedings.

In most contemporary nations, the process of formal conflict resolution, particularly within the judicial system, is characterized by a significant financial burden. In the realm of legal proceedings, it is customary for the government to assume responsibility for the remuneration of judges and court personnel, as well as the provision of necessary infrastructure for conducting trials. However, the expenses associated with resolving a dispute primarily fall upon the involved parties themselves. These expenses encompass legal counsel fees and court-related expenditures, which may occasionally surpass the financial capacities of the parties involved.

Small Claims Court

Small claims court is a legal venue where individuals can resolve disputes involving relatively minor financial matters.

Claims involving relatively small sums of money are disproportionately impacted by the cost barrier. If the matter is to be resolved through formal legal means, the expenses incurred may exceed the disputed amount or, even if they do not, they may consume a significant portion of the claim, so rendering the entire process futile. The need for additional caution in granting access becomes apparent when addressing small claims situations.

Time.

The concept of time is a fundamental aspect of human existence and plays a crucial role in various disciplines, including physics, philosophy, and In numerous jurisdictions, litigants sometimes experience a considerable delay of at least two to three years before obtaining an enforceable judicial verdict. The potential consequences of this delay, particularly in light of the prevailing inflation rates, could be severe. It results in increased expenses for all involved parties and places significant strain on individuals with lower financial resources, potentially leading them to relinquish their claims or accept significantly reduced settlements. The concept of justice that cannot be obtained within a "reasonable period" is deemed inaccessible by a significant number of individuals, as explicitly mentioned in Article 6, paragraph of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Legal Literacy

The National Survey of India has produced a report indicating that the literacy rate of India in 2022 stands at 77.7 percent. According to a survey conducted by Nielsen, a multinational corporation specializing in audience measurement, data analysis, and analytics, it has been observed that the number of internet users in rural India amounts to 352 million, which is over 20 percent greater than the corresponding figure in metropolitan areas. The findings of the study indicate that a significant proportion, approximately 60 percent, of the rural populace remains inactive in their utilization of the internet. This phenomenon can potentially be attributed to a lack of proficiency in digital literacy.[18]

While this statistical data only accounts for a portion of the population, it is evident that despite the advancements being made to enhance the efficiency of legal service provision, the individuals utilizing these innovations lack proficiency in the complexities of these technologies. This raises the inquiry regarding the way these technologies are being adapted to enhance the availability of justice for individuals who are devoid of technological resources or possess inadequate literacy skills to comprehend these advancements.

Fiduciary Duty

The concept of fiduciary obligation refers to the legal and ethical duty that an individual or entity must act in the best interests.

The lawyer-client relationship is characterized by trust and the lawyer's obligation to exercise a duty of care in the best interests of the client.

The emergence of artificial intelligence software such as ROSS Intelligence and legal chatbots has raised inquiries regarding the individuals or entities responsible for providing legal services and upholding the associated duty of protection. In essence, the query pertains to the identification of the legal entity that may be subject to a lawsuit in the event of a breach of this duty.

The Importance of Cybersecurity in Maintaining Confidentiality

In adherence to legal ethics, lawyers are obligated to uphold the principle of confidentiality, which entails treating specific information entrusted to them as privileged within the lawyer-client relationship. The primary objective of this measure is to guarantee the safeguarding of the client's information pertaining to a legal problem or legal dispute, thereby preventing its disclosure to external entities, except for circumstances permitted by law. The moral obligation is being eroded by shifts in work dynamics, such as the rise of Legal Process Outsourcing (LPO), and advancements in technology, particularly cloud computing. Lawyers and law firms bear a

[18] Srivastava, A. (2023, May 24). Digital Literacy in India- Creating Techies in Rural Areas. Smile Foundation. https://www.smilefoundationindia.org/blog/digital-literacy-in-india-now-find-techies-in-rural-areas/#:~:text=According%20to%20a%20report%20published,20%20percent%20higher%20than%20urban

heightened responsibility to uphold cybersecurity measures while utilizing collaborative tools such as Dropbox and Google Documents for the purpose of sharing clients' information.[19]

Data Retention and Records

The cloud is increasingly becoming recognized as a secure and reliable option for storing and managing data and records pertaining to diverse customer interactions. The utilization of cloud storage addresses the issue of organizing and safeguarding data, in contrast to the vulnerability of physical law offices susceptible to fire or water damage, as well as the potential for computer crashes. However, the extent of reliance placed on cloud storage providers such as Google and Dropbox are quite formidable. It is important to consider that the administration of these cloud storage programs are entrusted to corporations that possess the possibility of undergoing dissolution.

CHALLENGES AND SOLUTION

One of the primary obstacles is in the equitable distribution of information and communication technology (ICT), which necessitates universal access to fundamental resources such as internet connectivity, smartphones, and computer devices. The absence of comprehensive digital infrastructure in various regions of the country gives rise to a digital divide, resulting in uneven utilization of information and communication technology (ICT). In India, a considerable proportion of the population resides in regions characterized by a dearth of fundamental amenities, including but not limited to the absence of internet connectivity. Furthermore, it is important to consider that distant locations often face challenges in accessing traditional courts due to geographical distance. In such cases, individuals often choose for informal settlements. However, the limited availability of online dispute resolution (ODR) procedures in these places may exacerbate the existing disparities between different socioeconomic classes.[20]

The resolution to this matter is already familiar to the governmental and judicial entities. The availability of digital infrastructure, even in rural places, is a necessity for the successful implementation of Online Dispute Resolution (ODR). This is the sole means by which the online approach to conflict resolution may be widely embraced. In addition to the imperative of establishing adequate physical infrastructure, it is essential to prioritize the dissemination of knowledge and promotion of digital literacy. If the gap is successfully closed, the inherent strength of Online Dispute Resolution (ODR) will manifest itself. Several initiatives, such as Digital India, the Bharat Net Project, and the National Broadband Mission, have been undertaken with the objective of facilitating universal access to digital education and promoting digital literacy. The assurance of success is contingent upon the absence of any societal group being marginalized because of the digital divide. When considering the marginalized segment of society, particularly women who are consistently marginalized and deprived of mobile phone and internet access, implementing policies, and raising awareness regarding this issue would significantly contribute to the sustainability of Online Dispute Resolution (ODR) in the long term.

The utilization of online platforms for dispute resolution raises significant problems regarding privacy and breaches of confidentiality. Online approaches pose a greater risk of privacy and confidentiality breaches. The potential exists for the unauthorized disclosure or alteration of any secret material. The potential exists for the unauthorized disclosure of sensitive information, including digital signatures and other personal details.

One potential solution to mitigate these issues involves the implementation of more stringent fines for violations of privacy and confidentiality. It is vital to ensure the protection and verification of the applications employed prior to their utilization. One significant philosophical rationale underlying this type of challenge pertains to the lack of faith individuals have in the Online Dispute Resolution (ODR) system. One potential explanation is that the utilization of online platforms for dispute resolution may not appeal to all individuals due to the deeply ingrained perception of the traditional and antiquated methods of resolving conflicts. Consequently, there may be initial challenges in embracing contemporary platforms for dispute resolution. One potential approach to address this matter involves initiating the process by establishing a foundation of assurance in these protocols. Subsequently, it is advisable to implement specific precautionary measures, such as maintaining a minimal level of disclosure requirements, while resolving con?icts through online means. A comprehensive framework of policies should be implemented to regulate the vast amount of data present on the internet. By adopting this approach, individuals will exhibit a greater inclination towards utilizing these platforms, as they will possess a heightened sense of confidence in the reliability and protection, they offer.

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[19] Peter de Souza, S,. & Spohr, M.(2022) Technology, Innovation and Access to Justice, https://edinburghuniversitypress.com/book-technology-innovation-and-access-to-justice.html

[20] Supra note 6.

Other solutions

a) The utilization of display boards in the district judiciary.

b) Enhancing the e-filing system, wherein documents are submitted electronically. This will benefit judges and other stakeholders involved in the judicial process by providing easier access to the documents, as opposed to dealing with large volumes of paper. Additionally, the electronic documents can be hyperlinked to each other, allowing for efficient referencing and annexure management in manual submissions.[21]

c) The utilization of computer-assisted transcription (CAT) facilitates the gathering of spoken words in a courtroom setting, allowing stenographers to capture and instantaneously convert them into text that is shown on the screens of judges and other participants.

d) The document display system is an additional facilitating tool utilized during legal proceedings to ensure that all participants are in sync and do not experience delays caused by the manual search for papers and files by the parties and judges.

e) Oral arguments hold significant importance in legal proceedings; however, lawyers also have the option to present evidence in many visual formats such as charts, graphs, diagrams, animations, drawings, models, and animations. These visual aids can be conveniently shown on monitors within courtrooms, applicable to both civil and criminal trials. This would be advantageous in comprehending the duration of time, movement of finances, and predicted finish.

f) Court visits are conducted in real-time to facilitate the integration of technology at all levels within the district judiciary. These visits serve the aim of documentation.

g) The utilization of video conferencing for the deposition of witnesses and accused individuals is proposed to be implemented in all legal proceedings. Expert views, such as those provided by a Chief Medical Officer (CMOH), sometimes require the individual to come to the district for deposition after getting leave from the hospital. However, this process can be facilitated by utilizing screens in courtrooms, allowing the doctor to join remotely from their chamber. Similarly, police officials, who are frequently occupied with legal obligations, investigations, and other duties, may encounter difficulties in appearing in court. However, this issue can be addressed by utilizing video conferencing technology, which would allow them to provide their testimonies remotely. This approach would not only streamline the legal process but also reduce the number of dates allocated for witness appearances, thereby optimizing the use of resources.

h) Amendments to the Indian Evidence Act are required to formally recognize and incorporate e-filing, e-filing of applications, e-deposition, and e-adducing of evidence. These amendments are necessary to ensure that all courts in India can adopt these electronic practices and to facilitate the inclusion of these topics in the curriculum of law students from their early university education.

CONCLUSION

The advent of technology has significantly transformed the way individuals lead their daily lives. The advent of the Internet has provided us with an extensive repository of information readily accessible through digital devices. Additionally, the convenience of online shopping has eliminated the necessity of physical presence in brick-and-mortar stores. Furthermore, the introduction of email has significantly transformed the way interpersonal communication is conducted. Nevertheless, the process of obtaining access to justice continues to be prolonged for a significant number of individuals. Despite the implementation of legal aid programs by governments and bar associations to facilitate equitable access to justice, certain individuals continue to have difficulties in availing themselves of these services. The identification of individuals who are being overlooked and the implementation of strategies to assist them is a matter that serves as a driving force for numerous worldwide law firms in establishing pro bono initiatives.

Utilizing technology to bridge the access to justice disparity is a captivating and invigorating endeavor. This circumstance presents an opportunity for us to enhance our operational methods and potentially restructure our justice system. By eliminating outdated procedures that were originally devised for a certain time, we can substitute them with more appropriate approaches that align with the current era. Nevertheless, when utilizing technology for the purpose of achieving access to justice, it is imperative to prioritize the demographic we aim to assist. It is imperative to actively engage in attentive listening, empathetically comprehend their perspective, adopt a position of

[21] Baladhikari.,& Kanta,S. (2020), Use of Technology in Access to Justice, Indian Journal of Law, and Justice, 11(1), 288. http://ir.nbu.ac.in/handle/123456789/4020.

empathy, physically immerse us in their circumstances, and collaboratively cooperate with them. Technology serves as a facilitative instrument that encourages individuals to engage in the process of critically reassessing and reconstructing many aspects of their lives. To accomplish success, it is imperative to maintain a clear understanding of our objectives, transcend narrow perspectives, and enhance collaborative efforts to collectively advance our mission. Law firms can enhance their effect by doing a needs and resources analysis, as well as finding areas where collaboration might lead to even greater outcome

REFERENCES

1. Kalendzhian.S,(2021) How Technology is Changing the Nature of Work and Altering the Practice of Law from Technology, Innovation and Access to Justice: Dialogues on the Future of Law on JSTOR, (n.d.). https://www.jstor.org/stable/10.3366/j.ctv1c29sj0.11
2. Baladhikari.,& Kanta,S. (2020), Use of Technology in Access to Justice, Indian Journal of Law, and Justice, 11(1), http://ir.nbu.ac.in/handle/123456789/4020.
3. Aggarwal, P. (2022) The Use of ICT Technologies in Court, https://articles.manupatra.com/article-details/The-Use-of-ICT-Technologies-in-Court.
4. Mahleka, T. (2021, January 8). Can Technology Be Leveraged to Improve Access to Justice? - Human Rights Pulse. Human Rights Pulse. https://www.humanrightspulse.com/mastercontentblog/can-technology-be-leveraged-to-i improve-access-to-justice.
5. Locke, S. (2023, April 12). The Role of AI in Legal Research. Legal Practice Intelligence. https://www.legalpracticeintelligence.com/blogs/technology-intelligence/the-role-of-ai-in-le gal-research
6. Ghatpande, Y. (2022)Legal Aid 2.0 (Nyaya Bandhu and Tele - law service). (n.d.). https://www.legalserviceindia.com/legal/article-8993-legal-aid-2-0-nyaya-bandhu-and-tele-l aw-service-.html
7. Naskar, M. (n.d.). Role of Technology in Enhancing Access to Justice. www.linkedin.com. https://www.linkedin.com/pulse/role-technology-enhancing-access-justice-manisha-naskar
8. Srivastava, A. (2023, May 24). Digital Literacy in India- Creating Techies in Rural Areas. Smile Foundation. https://www.smilefoundationindia.org/blog/digital-literacy-in-india-now-find-techies-in-rura l-areas/#:~:text=According%20to%20a%20report%20published,20%20percent%20higher%20than%20urban
9. Peter de Souza, S, & Spohr, M.(2022) Technology, Innovation and Access to Justice, https://edinburghuniversitypress.com/book-technology-innovation-and-access-to-justice.ht ml

Legal Perspective on Relevance and Practice of Female Genital Mutilation in India

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ABSTRACT

The right to life is critical and fundamental to human existence and the establishment of a holistic society. The social nature and coexistence of human beings give rise to conflicting interests that need to be balanced to achieve peace and harmony. The first requisite of civilization is that of justice. Justice as a philosophical theory and practice finds a pivotal place in all socio-political and legal systems around the globe. This became more prominent with the development of the State and stretched its roots to different spheres of human activities. In the descent and evolution of man and woman, there has been a significant shift in gender roles and perceptions. With the advent of time and dynamic changes in law and society, women found individual status. Certain customary practices that were propagated and carried out in the name of religion have now been identified as acts violating the dignity and privacy of an individual, being illegal, and in violation of Human Rights. Female Genital Mutilation is one such practice that has slowly been recognized by lawyers, social workers, the Legislature, and the Judiciary as a cruel practice that needs attention to protect the rights and interests of female children and women. Across the globe Legislative and Judicial trends reflect endeavors to protect rights and lives and have opened doors to the questioning of such illegal practices with new variants and narratives of justice in the form of contemporary values and need-based rights. Despite various press reports, news articles, documentaries, interviews, and online petitions; lawmakers around the world have failed to take effective measures against the practice by far. There has been some ray of hope with Sudan criminalizing the practice in May 2020 however there is still a long way to go. In the Indian context, the primary bone of contention has been whether the practice of Female Genital Mutilation relevant and significant for women and children in India. The research paper in the subsequent narrative brings out the understanding of the practice of Female Genital Mutilation, the historical background and physiology, and the Legislative and Judicial approach across the legal systems particularly analyzing the relevance of the practice in the Indian context.

Key Words: Female Genital Mutilation, Gender, Human Rights, Women's Rights

Introduction

Jurisprudence across the globe has shown a paradigm shift, significantly in respect of offenses against women and children in the descent and evolution of man and woman there has been a significant shift in gender roles and perceptions. Ancient society was essentially patriarchal in nature. [1]With the advent of time and dynamic changes in law and society, women found individual status, capable of making decisions in every sphere of life. Certain customary practices that were propagated and carried out in the name of religion have now been identified as acts violating the dignity and privacy of an individual, being illegal, and in violation of Human Rights. Female Genital Mutilation is one such practice that has slowly been recognized by lawyers, social workers, the Legislature, and the Judiciary as a cruel practice that needs attention to protect the rights and interests of female children and women. Across the globe Legislative and Judicial trends reflect endeavors to protect the rights and lives, especially of women, and have opened doors to the questioning of such illegal practices. Marking the International Day of Zero Tolerance against female genital mutilation, the UN Secretary-General Antônio Guterres called the practice an abhorrent violation of fundamental human rights. He called it one of the most vicious manifestations of the patriarchy that permeates our world. With 4.2 million girls at risk in the year 2023 alone it is likely to increase to 4.6 million by 2030 which is also the target year for eliminating female genital mutilation and reaching eliminating female genital mutilation."[1]

In the Indian context, the primary bone of contention has been whether the practice of Female Genital Mutilation relevant and significant for women and children in India. The research paper in the subsequent narrative brings out the understanding of the practice of Female Genital Mutilation, the historical background and physiology, and the Legislative and Judicial approach across the legal systems particularly analyzing the relevance of the practice in the Indian context.

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1 Excerpts from a paper titled "Legal Critique on the Practice of Female Genital Mutilation in India" by Dr Shambhavi Sinha (self) at the IIMT College of Law in January 2024.

Evolution Physiology and Practice of Female Genital Mutilation

The origin and history of Female Genital Mutilation are not known with certainty, but the practice is estimated to be dated at least 2000 years back. "There have been several anthropological and historical research that help us to understand how the practice came into existence. The beliefs and theories surrounding the inception are varied. Gerry Mackie[2] has suggested that infibulation one type of Female Genital Mutilation may have originated in the Meroite civilization before the rise of Islam to increase confidence in paternity. Some researchers have traced the practice to Egypt in the 5th century BC and was believed to be practised as a sign of distinction amongst the aristocracy. The geographical distribution suggests that the practice originated along the coasts of the Red Sea. Egyptian mummies show women infibulated. According to Mary Knight, the Spell 1117[3] of the Ancient Egyptian Coffin Texts may refer in hieroglyphs to an uncircumcised girl. The Spell was found on the sarcophagus of Hedjhotep[4]. Several other historians have also linked the practice of Female Genital Mutilation to have originated and flourished in Egypt. There appears to be a strong linkage between Female Genital Mutilation and slavery. In 1609, it was reported that a group located in the vicinity of Mogadishu, Somalia "had the custom to sew up their females, especially young slaves to make them unable for conception which makes them sell dearer, both for their chastity and for better confidence which their masters put in them". It was reported by Browne in the year 1799 that Egyptians practiced female circumcision and infibulation to prevent pregnancy in women slaves. Some historians believe that the practice started during the slave trade when black slave women entered ancient Arab societies, others believe it to have originated with the inception of Islam in some parts of sub-Saharan Africa. The Romans performed a technique wherein rings were implanted through the labia majora of female slaves to prevent pregnancy and warrant virginity. With its widespread prevalence, a "multi-source origin" has also been proposed".[5]

Female Genital Mutilation essentially includes the "removal of partial or total external female genitalia for non-medical purposes"[6].The Harvard Law Review provides a substantially similar definition of female circumcision which it describes as a "genital operation that entails incision removal of part of or all the female externa; genitalia. The practice is also referred to as Female Genital Circumcision, Female Genital Cutting (FGC), Khatna or Khafd. Locally, pagsunna, pag-islam, or turi are the common terms used to refer to the practice. Though interchangeable, generally pertains to the "circumcision" of women whereas pag-Islam refers to the circumcision of men. In Arabic countries, it is called tahur or tahara which translates to purification.

The practice can be categorically classified into four major categories, Clitoridectomy, Excision, Infibulation, and Other harmful procedures.[7] The WHO classifies FGM into four types and they are as follows[8]:

(1) Clitoridectomy - partial or total removal of the clitoris (a small, sensitive, and erectile part of the female genitals) and in very rare cases only the prepuce (the fold of skin surrounding the clitoris)[9]

(2) Excision- partial or total of the clitoris and the labia minora with or without excision of the labia majora (the labia are "the lips" that surround the vagina)

(3) Infibulation- narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner or outer with or without removal of the clitoris.

(4) Other kinds -all other harmful procedures to the female genitalia for non-medical purposes, e.g., pricking, piercing, incising, scraping, and cauterizing the genital area.

The practice is carried out by traditional circumcisers also called midwives on young girls between infancy and adolescence and sometimes on adult women, usually with a razor or a scissor as a tool. With changing trends and an increase in consequential complexities, in exceptional cases, health professionals are also involved in the process.

Female Genital Mutilation is practiced in 30 countries across the globe and is most common in the western, eastern, and north-eastern regions of Africa, in some countries in the Middle East and Asia. Immigration resulted in the practice spreading to New Zealand, Australia, and Scandinavia. Europe, and North America. In India, it is practiced by the Dawoodi Bohra Community, a sect

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2 political scientist; specialist in the study of harmful social practices, including female genital mutilation.

3 Adrian B, Alan G, The Egyptian Coffin Texts; Volume 7, Chicago University Press, 1961, 448-450.

4 Hedjhotep a minor ancient Egyptian deity; god of fabrics.

5 Excerpts from PhD,Thesis (self)

6 http://www.who.int/mediacentre; (Factsheets/fs241).

7 As defined by the World Health Organization, in WHO/UNICEF/UNFPA Joint Statement, 1997[http://www.who.int/mediacentre; (Factsheets/fs241)]

8 As defined by the World Health Organization, in WHO/UNICEF/UNFPA Joint Statement, 1997; http://www.who.int/mediacentre; (Factsheets/fs241)

9 ibid

among Shia Muslims. Most of the Bohras in India live in Maharashtra, Gujarat, and Rajasthan and now many traders from the community have shifted to Delhi and some other cities like Kerala and Telangana.

Approximately 'two hundred million women across thirty countries have undergone Female Genital Mutilation"[10] as per the research carried out by UNICEF. The practice of Female Genital Mutilation is a global threat that finds its roots in the principles of inequality and is cradled in the name of religious and customary practices. The reasons for practice and propagation vary from region to region. The rationale behind the practice can be divided into two broad categories: religious and non-religious. Unlike popular belief, it is not a practice that finds its roots in religion or a religious duty, but rather cultural and customary practices. The Quran does not specifically mention Female Genital Mutilation or even circumcision, but the subject appears in the Sunnah where according to Annie Marie Schimmel a lesser-known Hadith addresses the practice. This Hadith says that Muhammad suggests excision is allowed but must not be overdone. The multiple schools of Islamic jurisprudence have expressed divergent views Some Egyptian scholars also state that the practice is not endorsed by Islamic jurisprudence. Christian religious authorities endorse that the practice has no mention in the Bible or other teachings. Despite no mention women within Christian communities in Nigeria, Ethiopia, Sudan, Egypt, Kenya, and Tanzania do undergo the practice. The practice is not protected under what constitutes an essential part of a religion as in Article 25 of the Constitution[11]. Religions such as Islam or Christianity do not per se endorse the continuation of the practice. The Syedna i.e., the spiritual leader of the Islamic community however is a staunch proponent of the tradition with followers who endorse the practice.

Non-religious reasons include cultural and other societal customs and acceptances Different communities, and cultures have different reasons for continuing with the practice. These reasons are often complex and can change over time; social acceptability being the most common. The social pressure to adhere to the norms of peer groups and the fear of social rejection serve as a strong impetus to continue this practice. It is considered as a necessary part of raising a girl child and preparing her to play the role of a good woman in adulthood. In some countries, the practice is a part of the "rite of passage" ritual that a girl goes through to be considered a woman. This usually involves ritual activities and teachings designed to strip individuals of their original roles and prepare them for new roles.

The pinch of skin reality is however different. Female genital mutilation has immediate short-term and long-term health consequences sometimes leading to death. The procedure has no proven health benefits for women; rather it interferes with the natural hormonal balances and physiology of a female body. Possible complications include bleeding, urine retention, urinary infection, genital swelling, bacterial vaginosis, dyspareunia, prolonged labor, cesarean section, dystocia, severe pain, shock, sepsis, death, unwanted welding of the labia, surgical interventions for reopening the vagina, chronic anemia due to repeated surgeries for the opening of the vagina, formation of keloid tissue that can lead to severe pain, dermoid cyst and abscess, painful menstruation due to the retention of menstrual blood, dysuria, urinary incontinence, weak urine stream, hematocolpos, genital ulcers, chronic pelvic and low back pain due to chronic infections, urinary and genital tract infection, abscess formation, septicemia, hepatitis and HIV infection.. The impact is not alone restricted to the physical aspects, the consequences, and psychological and emotional in nature. Depression, anxiety, post-traumatic stress disorder, and low self-esteem, are some common ailments. The victim suffers from several psychological disorders.

In Islam, male circumcision is "common, but not compulsory". The medical community recognizes that male circumcision does have certain potential health benefits. Whereas perse the act of circumcision is not mentioned in the Quran, the Muslim community does circumcise male infants. While not enforced, circumcision is strongly recommended in Islamic practice. The incorrectly named "female circumcision," however, is not an Islam-endorsed practice. Genital cosmetic surgery is a modern practice widely accepted as lawful and undertaken, predominantly by women, to improve the aesthetic appearance of the female genitalia.

Relevance of Female Genital Mutilation in India

In the Indian context, the primary question is whether the practice of Female Genital Mutilation relevant and significant for women and children in India. The answer is yes.

Female Genital Mutilation in India is practiced by the Dawoodi Bohra Community, a sect among Shia Muslims. Also called the Tayyabi Mustaili Ismaili sect under Islam the community is found in the western cities of India and Pakistan, East Africa, and Yemen.

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[10] https://data.unicef.org/topic/child-protection/Female-Genital-Mutilation.

[11] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt., test laid down says essential practices will be ascertained with reference to the tenets and doctrines of that religion itself

"Sahiyo"[12] and "We Speak Out" are organizations based in India, dedicated to empowering Dawoodi Bohra and other Asian communities to end the practice of Female Genital Mutilation and create positive social change.

Ms. Masooma Ranalvi, publisher, lawyer, and social activist is at the forefront of the campaign to end female genital mutilation in India, has presented before the UNHRC She is one of the many Dawoodi Bohra women who was mutilated at the age of 7 and started #EndFGM petitions on Change.org. In 2012, Sahiyo co-founder Priya Goswami made a documentary called A Pinch of Skin on the practice of among the Dawoodi Bohra community in India. In 2016, another documentary, "A Small Nick or Cut, they say" was produced by Love Matters India[13] in 2016 and directed by Priya Goswami.

In 2012 several activists circulated a petition calling for the Indian government to ban khatna, and the issue began to appear in the headlines. When two Dawoodi Bohra doctors were arrested for practicing FGM on 7-year-old girls in Detroit, Michigan, in early 2017, the issue started receiving attention from international media. Taking advantage of the sudden spotlight, anti-khatna activists began speaking out and calling for dialogue with the clergy and religious leaders. This was followed by a strong backlash against those who were questioning the practice regarded as questioning the entire faith itself.

We Speak Out, the largest survivor-led movement to end Female Genital Mutilation/Cutting amongst Bohras in collaboration with Nari Samata Manch, a trust for gender equality released a new report on FGM/C in India titled, "The Clitoral Hood A Contested Site: Khafd or Female Genital Mutilation/Cutting (FGM/C) in India" Some key findings of the report are as follows:

1. 75% of all daughters of the study sample were subjected to FGM/C, which means it continues to be practiced on little girls.
2. 97% of women who remembered their FGM/C experience from childhood recalled it as painful. While most women said they suffered immediate pain from the procedure only 2 women said they did not have any immediate or long-term impact from FGM/C.
3. Despite sex being a taboo topic, approximately 33% of women believe it has negatively impacted their sexual life.
4. Close to 10% of the women who had undergone the procedure in the current study specifically mentioned urinary problems, recurring UTIs, burning, and incontinence.

International Legal Regime and Judicial Response

The historical development of Gender Studies and Women's Rights has shown an exponential change. The extension of the rights of human beings to include women came about by a gradual process of change as women increasingly entered public life.

The Charter of the United Nations adopted in 1945, sets out as one of its goals "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and the equal rights of men and women". These rights are said to find their genesis in the classical concept of Natural Law. Women's Rights can be understood as the legal, political, and social rights for women equal to those of men. Women's Rights Are Human Rights.[14] Women's Rights have been the key agenda in several international forums that have resulted in significant commitments to women's human rights and equality. The "Universal Declaration on Human Rights 1948" recognizes numerous such rights. The Universal Declaration of Human Rights adopted in 1948 provides for equal entitlements of women and men to the rights contained in it. The use of the terms "all human beings" and "everyone" universally categorically reflects the intention for everyone, the same for men and women.

Based on a study of international instruments and an understanding of the physiology and practice of Female Genital Mutilation it can be established that the practice is a gross violation of Women's Rights; the Right to be free from Violence: Free from Torture, Cruel, Inhuman and Degrading Treatment; Rights of a Child; Right to be Free from Discrimination; Right to Life and Integrity; Right to Health; Other Social Cultural and Economic rights.

The spectrum of Human Rights includes several conventions and covenants. The "International Covenant on Civil and Political Rights 1966[15], the International Covenant on Economic, Social and Cultural Rights Guarantees 1966"[16] and the Convention on the Elimination of All Forms of Discrimination against Women

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12 https://sahiyo.com/sahiyo-resources/.

13 https://www.youtube.com/watch?v=eouLHP3cx8E&feature=youtu.be

14 Excerpts, Remarks, 5 September 1995, Hillary Rodham Clinton.

15 guarantees, among other rights, the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, rights relating to due process in criminal and legal proceedings, equality before the law, freedom of movement, freedom of thought, conscience and religion, freedom of association, rights relating to family life and children, rights relating to citizenship and political participation, and minority groups' rights to their culture, religion and language.

16 for instance, the right to work, the right to form trade unions, rights relating to marriage, maternity and child protection, the right to an adequate standard of living, the right to health, the right to education, and rights relating to culture and science.

1979[17] are significant ones. The Convention on the Rights of the Child 1989, the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, and the Convention on the Rights of Persons with Disabilities, 2006 are other instruments within the spectrum. Female Genital Mutilation is an abhorrent and cruel practice and categorically a violation of Human Rights and an act of violence against women. All signatories to the instruments are bound to abide by them. Several countries prohibit and punish the practice either by the general laws of the land or by specific legislation on the practice.

Female Genital Mutilation is an abhorrent and cruel practice and categorically a violation of Human Rights and an act of violence against women. All signatories to the instruments are bound to abide by them. Sweden was the first Western country to outlaw the practice of Female Genital Mutilation in in 1982 with the Act Prohibiting the Genital Mutilation of Women followed in 1985 by the United Kingdom. The legislation varies from country to country. The laws in some countries restrict the practice in totality while some restrict the practice with exceptions in government health facilities and by medical practitioners. The penalties range from a minimum of three months to a maximum of life in prison. While some penalize the circumcisers only, others penalize the circumcisers and those that seek for the procedure as an adult or for the minors and some even include anyone who knows that the procedure has been performed and fails to report it. In most African countries legislation involves all age groups while in some non-African countries like the United States and Canada is only illegal among minors.

In Africa, 18 countries, Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Senegal, South Africa, Tanzania, and Togo have enacted laws criminalizing the practice of Female Genital Mutilation. Six countries; Chad, Liberia, Mali, Sierra Leone, Somalia and Sudan still do not criminalize the practice. Kenya and Uganda have efficient stringent laws on the same. The African Union adopted the Maputo Protocol promoting women's rights and calling for an end to the practice of Female Genital Mutilation and into force in November 2005.

With increase in immigration from countries that practice FGM, has led to the introduction of FGM in European and North American countries. The practice is a crime in the United States of America under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and is now a crime in Australia and some other countries as well. Domestic Violence defines and criminalizes the practice. Female Genital Mutilation was made a criminal offense by the Prohibition of Female Circumcision Act 1985, superseded by the Female Genital Mutilation Act 2003, and (in Scotland) by the Prohibition of Female Genital Mutilation (Scotland) Act 2005. The Female Genital Mutilation Act 2003 (c. 31) is an Act of the Parliament of the United Kingdom applying to England, Wales, and Northern Ireland. It replaced the Prohibition of Female Circumcision Act 1985 but does not extend to Scotland: the corresponding legislation there is the Prohibition of Female Genital Mutilation (Scotland) Act 2005. U.S. states have specific laws against Female Genital Mutilation. States that do not have such laws may use other general statutes, such as assault, battery, or child abuse The Transport for Female Genital Mutilation Act was passed in January 2013, and prohibits knowingly transporting a girl out of the U.S. to undergo FGM. In Middle Eastern and Asian countries, the practice of Female Genital Mutilation is prevalent but there exists lesser or no specific legislation.

There have been reports of prosecutions or arrests in cases in several African countries, including Burkina Faso, Egypt, Ghana, Senegal, and Sierra Leone. Twelve industrialized countries that receive immigrants from countries where Female Genital Mutilation is practiced i.e., Australia, Belgium, Canada, Cyprus, Denmark, Italy, New Zealand, Norway, Spain, Sweden, the United Kingdom, and the United States have passed laws criminalizing the practice. In Australia, six out of eight states have passed laws. In the United States, the federal government and 17 states have criminalized the practice. France has relied on existing criminal legislation to prosecute both practitioners and parents seeking the practice.

In *Khalid Adam Case Georgia, United States*[18]. Khalid Misri Adem was the first person to be prosecuted and the first to be convicted for the practice of Female Genital Mutilation in the United States on charges that he had personally excised his 2-year-old daughter. In *Fornah v. Secretary of State for the Home Department,*[19] Ms. Zainab Esther Fornah, a woman from Sierra Leone about 15 years

17 The Convention articulates the nature and meaning of sex-based discrimination and lays out State obligations to eliminate discrimination and achieve substantive equality.

18 686 S.E.2d 339 (2009)

19 [20061 UKHL 46, [2006] 3 FCR 381, [2007] 1 All ER 671; [2006] UKHL 46, [2007] 1 AC 4

20 3. Penetrative sexual assault.
A person is said to commit "penetrative sexual assault" if-
b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person.

old. fled from Sierra Leone where she had been captured by rebels, who had killed her family, and was repeatedly raped and arrived alone at Gatwick airport, UK claiming asylum. She claimed that she was entitled to recognition as a refugee because she would be subjected to the practice if returned to Sierra Leone. In July 2018 in Somalia, Attorney General Ahmed Ali Dahir announced its first prosecution against Female Genital Mutilation, following the severe bleeding and death of a 10-year-old girl, Deeqa Dahir Nuur. The Constitution prohibits the practice, but efforts to pass legislation to punish offenders have been stalled. The existing penal codes of Somalia though do not ban the practice as illegal. Hence the government decided to prosecute the case. In May 2020, the government of Sudan has criminalized the practice.

Legal Regime and Judicial Response in India

There is no specific legislation in India that caters specifically to the practice of Female Genital Mutilation. There is no blanket ban prohibition; however, the general laws of the country do protect the victim and their rights. The practice is a violation of Human rights and Fundamental rights under the Indian legal regime hence protected under the Human Rights laws and regulated by the Protection of Human Rights Act in 1993 amended by the Protection of Human Rights (Amendment) Act, 2006. The practice being a violation of fundamental rights is well protected under the provision of constitutional remedies and by the Judiciary

The practice of Female Genital Mutilation is a cruel act of violence, discriminatory in nature, and violative of the rights of the child, hence a gross violation of Human Rights. The violation of human rights in India can be interpreted as the violations of democratic principles laid down in the Constitution of India as well as the violation of India's commitment to humanitarian international law and international covenants. India has ratified the United Nations Universal Declaration of Human Rights, 1948 explicitly adopted to define the meaning of the words "fundamental freedoms" and "human rights" appearing in the United Nations Charter, binding on all member states.

For the effective implementation of Human Rights, India enacted the Protection of Human Rights Act in 1993 amended by the Protection of Human Rights (Amendment) Act, 2006. The National Human Rights Commission, the State Human Rights Commission in several States, and Human rights courts were constituted under the Act. The Act was enacted to establish the National and State Human Rights Commission and gives immense powers to the Commission for the prevention of violation of human rights. The Act defines Human Rights under Section 2 (1) (d) as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India."

Except for medical purposes, any touching of the genitals of a woman is an offense. The same can be considered as an offence by interpretation under the general criminal laws of the country i.e., the Indian Penal Code, 1860, and the Protection of Children from Sexual Offences Act 2012(POCSO Act). The practice of Female Genital Mutilation can be categorized as an offense under Section 3(b) of the POCSO Act[20] concerning the insertion of tools required to carry out the procedure. The offense is punishable under Section 4 of the Act for a term not less than seven years, but which may extend to imprisonment for life and liability to pay a fine. The practice is an offense under the Indian Penal Code, 1860 (Section/s 320, 322, 334, 335, 336, 337, 338, and 340) read with Criminal Procedure Code, 1973[21]).

The practice violates the fundamental Rights of the victims, Article 14, 21[22] of the constitution of India. Practice is discriminatory against women and the girl child and is a clear violation of the right to a healthy life, the right to privacy the right to consent, and the right to live a life of dignity. Female Genital Mutilation infringes the Right to Privacy, recognized as a Fundamental Right in K. S. Puttaswamy v. Union of India[23] and amounts to a violation of Article 21 of the Constitution. The practice has been imposed not on men but only on the female gender making it a practice against her identity, dignity, and autonomy.

In 2017 Ms. Sunita Tiwari, an advocate from New Delhi filed a Public Interest Litigation in the Hon'ble Supreme Court of India under Article 32 of the Constitution of India seeking a complete ban on the practice of Female Genital Mutilation and making it a cognizable, non-compoundable and non-bailable offence throughout the territory of India with a harsher punishment for the offence (Ms. Sunita Tiwari vs Union of India and Others Writ Petition (CIVIL) No. 286 OF 2017).In September 2018 the Hon'ble Bench decided to send the matter to a larger bench of five judges and is sub-judice in the Hon'ble Supreme Court of India. In the recent 2019 Sabarimala verdict the then CJI Ranjan Gogoi recommended that the matter of Female Genital Mutilation be referred to a seven-judge bench and heard alongside other matters about women's right to pray, stating that it was a "seminal issue".

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21. Section 320, 322, 334, 335, 336, 337 and 338 of IPC, 1960.
22. supra
23. (2014) 6 SCC 433

Conclusion and Suggestions

Female Genital Mutilation is an abhorrent and cruel practice that violates the basic human rights of a woman and there is an imperative need to regulate and protect these rights. Legal Regimes across the world have different approaches towards the practice. Some legal systems have specific legislation on the prevention and protection against the practice of Female Genital Mutilation including rehabilitation measures for the victims. Where legal systems do not have specific legislation, the general legislations serve as the protective shield. Irrespective of these legislative measures sensitization and implementation have always been a major challenge and therefore the practice continues to exist. There are considerable challenges and limitations which arise when examining the practice. Female Genital Mutilation is carried out on girls at a tender age in early childhood mostly at the age of 7 in extreme secrecy.

The persons who take the child for carrying out the procedure are usually the mother or the grandmother who may be reluctant to disclose the actual details on the procedure. The prima facie challenge in research is the very secretive nature of the practice that leads to people not coming out and many cases going unreported. Self-reported data is to be treated with caution for several reasons. First, women may be unwilling to disclose having undergone the procedure because of the sensitivity of the topic or the illegal status of the practice in their country. In addition, women may be unaware that they have been cut or of the extent of the cutting. The women sometimes have faint or harsh memories; there is an innate fear of talking about or going against the practice. The data available is not reflective of the exact numbers and details of the practice. In addition, there are several distorted versions of the origin and procedure.

[24]Based on detailed study suggestions include Preventive and Redressal policy Measures and Legislative and Regulatory Measures. There is a need for a multi-sectorial community-led and sustained approach where the different law-making and implementing agencies work hand in hand. System and Capacity development and strengthening, the State as a custodian should make endeavors to dissuade the practice from being justified on the grounds of customs or traditions

Awareness must be created against the practice by raising campaigns, outreach programs, and sensitization to promote the safety of women, especially by National and International Non-Governmental Organizations Professional organizations such as medical associations and nursing councils including traditional circumcisers should promote awareness and incorporate ethical guidelines in medical training and practice. A child emergency phone outreach mechanism should be created.

The general laws of the legal system must be implemented effectively to protect women from this practice. Ratification and implementation of Human Rights instruments is. There is a need for specific legislative changes in the form of amendments to general law or new specific legislation to ban the practice of Female Genital Mutilation. The legislative changes must be specific, well defined, and based on principles of human rights with effective implementation mechanisms[24].

The practice of Female Genital Mutilation has tentacles that are deep-rooted. It cannot be put to end in a day and so a sustained endeavour must be made. In the words of Robert Kenedy, the glory of justice and majesty of law are created not just by the Constitution - nor by the courts - nor by the officers of the law - nor by the lawyers - but by the men and women who constitute our society - who are the protectors of the law as they are themselves protected by the law". Democracy has its foundation in a generous theory of human rights. For a world to become resilient the citizens must be empowered irrespective of their gender to put an end to all forms of violence and discrimination and Women's Rights must be looked at with renewed vigor and vision

[24] Bases on excerpts from PhD, Thesis (self)

Regulation of Predatory Pricing in the Age of Artificial Intelligence: Examining Legal Issues under Indian Competition and US Anti-trust Laws

Siddharth Balani*

ABSTRACT

Predatory Pricing is a strategy adopted by market players to aid their price discrimination policy whereby such market players offer to sell their products at relatively low prices so (generally below the cost of the production) to eliminate their market competitors and thereby acquire substantial consumer attention. This strategy helps them in penetrating the market and in further establishing a monopoly-like spot in the marketplace. The seller may subsequently surge the charges once he has assimilated considerable market share and consumer attention. Below below-cost pricing strategy by dominant market players compels small players to be driven out of the market as they fail to compete or match up against the excessively low costs offered by the dominant players. As a direct consequence, this not only reduces market competition but also leads to fewer alternatives being left to consumers. Therefore, this may serve as being an anti-competitive practice, when adopted by a dominant market player. Thus, the use of this practice by dominant players has been perceived negatively by Competition and Market regulators across the globe and is considered an abuse of the dominant position. The author seeks to examine how this practice has been regulated under the Competition Act (hereinafter referred to as Comp. Act), 2002 in India through its Section 4 and to highlight the instances where the practice has been adopted by market players. To undertake a comparative analysis with one of the most evolved anti-trust regimes, the author has also undertaken a comparative study with the laws of US Anti-Trust laws that seek to regulate predatory pricing. The Federal Trade Commission (hereinafter FTC) as well as the US Supreme Court have laid down rigid criteria to be fulfilled for establishing an anti-trust claim against predatory pricing. Furthermore, the author also makes a brief assessment of the contemporary issues in the field of predatory pricing in the age of digital markets and artificial intelligence. The author identifies predatory pricing as a practice that makes markets more vulnerable to a monopoly.

Keywords: Predatory Pricing, Competition Act, Anti-Trust, Dominance, Abuse of Dominance.

Introduction

In an ever-competitive marketplace, business players devise various strategies and techniques for placing their products in the market. An important aspect of such strategic positioning is the pricing of the goods. Determining an apt and correct pricing strategy for a business plays a significant role in the overall success of any business in the long run. It is primarily the pricing strategy that takes into consideration aspects such as market conditions, the ability of consumers to pay, competitor's market behavior, trade margins and costs, commercial viability, etc. that help any entity make the final decision of its product/service's pricing.[1] It may either be cost-based pricing, competition-based pricing, or a total revenue generation-based approach that helps one to decide the appropriate pricing model.[2] A positively workable pricing strategy is a key factor in determining financial structuring, revenue streams, profit margins, and reinvestment possibilities for long-term survival and benefits.[3]

There may be various types of pricing strategies such as premium pricing, competitive pricing, skimming pricing, psychological pricing, bundle pricing, dynamic pricing, algorithmic pricing, penetrative pricing, etc.[4] One such method of pricing is 'predatory pricing'. It may be perceived as a competition-based pricing strategy where in the prices of goods and services are determined based on the prices of similar goods and services of the competitors.[5] This form of pricing is founded upon the object of driving the competitors out of the market by

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1. Definition of Pricing Strategies, THE ECONOMIC TIMES, (Aug. 11, 2023), https://economictimes.indiatimes.com/definition/pricing-strategies.
2. Tanya Sammut-Bonnici & Derek F. Channon, Pricing Strategy, RESEARCH GATE (Aug. 22, 2023, 11:50PM), https://www.researchgate.net/publication/272352932_Pricing_Strategy.
3. Ibid.
4. Nine Types of Pricing Strategies to Meet your Business Goals, YELP (Sep. 2, 2023, 9:20PM), https://business.yelp.com/grow/types-of-pricing-strategies/.
5. Supra note 2.

keeping the prices so low (lower than the cost price) that the market competitors opt to rather quit, instead of continuing to compete.[6] The practice becomes worthy of examination when the predator is a dominant market player and is capable of undertaking initial losses by keeping the prices low for a sufficient period and pushing the rivals out of the market. The reasons for the same may be a deep pocket of the dominant player i.e., "greater cash reserves, better financing, or recoupment through other markets and products", etc.[7] It, therefore, becomes imperative to examine how such predatory pricing may be regulated and what is the impact of the same on market competition and consumer interest.

Predatory Pricing and Market Competition

Predatory pricing is a price discrimination strategy that can be used to establish a monopoly-like situation in the market. It can be viewed as a two-step strategy involving two different stages - The first Stage- The predation stage (where a firm charges a price below its actual costs to eliminate competition from the market) and the Second Stage- the recoupment stage (once the competitors are driven out of the market, the dominant firm can charge higher prices to recoup the losses suffered in the predation stage).[8]

In India, the concept of predatory pricing has been defined under the Competition Act, of 2002 to imply "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, to reduce competition or eliminate the competitors".[9] Thus, for any pricing to qualify as 'predatory' in nature, it must be below cost and should be implemented in a manner that the competition can be reduced and competitors can be eliminated from the market.[10]

Price predation strategy requires an enterprise to suffer losses for a certain duration of time and is therefore a strategy that can only be adopted by large, established enterprises having sufficient capital and potential to bear short-term losses in comparison to their rivals.[11] Thus, the predators' financial resources must be greater than the rivals such that the latter may not be able to sustain and withstand the losses as much as the predator. This is sometimes referred to as the "deep-pocket" concept.[12]

Considering the impact of predatory pricing on the market and competition, it essentially is a practice that may benefit the consumers in the short run. In a price war between enterprises and market players to keep the prices low, the consumers are offered choices at lower prices in the market.[13] However, for enterprises, it may lead to a situation of deliberately suffering loss out of the fear of being driven out of the market. It would, however, not be incorrect to suggest that the consumers are the most affected party in the transaction as in the long run, they end up with limited or no choice, but to buy the products with the increased prices that the predator may impose to recoup their losses. As for the predator, it may help him acquire significant market share, minimize, or eliminate substantial competition, and may serve as a barrier for fresh entrants in the market.[14]

It is also necessary to distinguish between the concept of predatory pricing and penetrative pricing. While it has been explained as to what amounts to predatory pricing, penetrative pricing is also another strategy for keeping the prices of products very low. However, this type of pricing method is perceived as promotional or introductory in nature as it is a temporary lowering of prices to be able to penetrate or reach the market swiftly. The strategy is used extensively across many sectors.[15] One such example of the strategy being used is by Reliance Jio to gain sufficient subscribers and later increase the prices. This helps the entrant to establish and promote itself where there are multiple players already existing in the market. It is a short-term incentive-based strategy used by non-dominant

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6. OECD, Predatory Pricing (1989), https://www.oecd.org/competition/abuse/2375661.pdf.
7. Ibid.
8. Christopher R. Leslie, Predatory pricing, and Recoupment, 113 (7) COLUM. L. REV., https://columbialawreview.org/content/predatory-pricing-and-recoupment/.
9. The Competition Act, 2002, §4 Explanation (b), No. 12 of 2003, Act of Parliament (India).
10. Lagna Pando & Prachi Agarwal, When Does CCI Consider Low Pricing Predatory, INDIAN BUSINESS LAW JOURNAL (Feb. 8, 2022), https://law.asia/when-does-cci-consider-low-pricing-predatory/?
11. CFI, Predatory Pricing, https://corporatefinanceinstitute.com/resources/knowledge/strategy/predatory-pricing/.
12. Sriraj V., Predatory Pricing, LEGAL SERVICE INDIA (Sep.11, 2023, 11:25PM), https://www.legalserviceindia.com/article/l267-Predatory-Pricing.html.
13. Hitesh Bhasin, Predatory Pricing: Effects, Advantages, Disadvantages, and Examples, (18 July 2020) https://www.marketing91.com/predatory-pricing/.
14. Ibid.
15. Supra note 2.
16. Priyadarshee Mukhopadhyay, Penetrative Pricing: Understanding its Evolution and Rationale under the Indian Competition Law Regime Through the Revolutionary Jio Case, WOLTERS KLUWER (July.18, 2023, 8:20PM), http://competitionlawblog.kluwercompetitionlaw.com/2019/06/18/penetrative-pricing-understanding-its-evolution-and-rationale-under-the-indian-competition-law-regime-through-the-revolutionary-jio-case/.

entrants.[16] In the case of Bharti Airtel Ltd. v. Reliance Industries Ltd. & Reliance Jio Infocomm Ltd.[17], CCI held that the pricing adopted by Jio was penetrative pricing and "such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act". A similar pricing model was found to be applied by Ola Cabs where CCI held that "it was their penetrative pricing strategy that facilitated them to garner high market shares in a short period as well as develop the networks to a size that could provide sufficient positive externalities to the participants of the network".[18] The decision was appealed against before the NCLAT whereby the Tribunal dismissed the appeal and upheld the decision of CCI.[19]

In the matter of Praveen Khandelwal v. Sppin India Pvt. Ltd.,[20] CCI absolved the Opposite Party of any liability arising under Section 4 of the Act on allegations of predatory pricing as the enterprise was merely a new entrant in a market with established players and did not have significant market power. The Commission cited its earlier decision in Vaibhav Mishra v. Sppin India Pvt. Ltd.[21] decided on 03.03.2022 and applied the same reasoning in favor of the opposite party.

Legal framework to Regulate Predatory pricing in India

The Competition law framework in India has evolved from the former "Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP")" to the current "Competition Act, of 2002". Certain relevant terms like collusion, abuse of power, price fixing, and bid rigging were not defined under the former legislation, and therefore, the MRTP Act became ineffectual in dealing with the emerging issues in the Indian market following the 1991 changes. As a result, the Competition Act of 2002 ("Act") was enacted to address MRTP's shortcomings and to serve as an effective tool for promoting fair trading practices in the Indian market.[22]

As pointed out, the market competition in India is regulated through the Comp. Act, 2002. The practice of predatory pricing is therefore within the purview of the same legislation and is treated as an "abuse of dominant position". The operative provision dealing with "abuse of dominant position" is Section 4. This rule finds its basis in Article 102 of the "Treaty on the Functioning of the European Union", which prohibits the abuse of dominance in the European Union.[23] As per Section 4(2)(a)(ii) of the Competition Act, predatory pricing constitutes an act of abuse of dominance under Section 4(1) of the Act. It suggests that "there shall be an abuse of dominant position if an enterprise or group, directly or indirectly imposes unfair or discriminatory price in purchase or sale of goods or services". It specifically mentions the practice of 'predatory pricing' being included within such unfair or discriminatory pricing. The explanation (b) attached to the Section 4 further defines predatory pricing.[24]

An essential pre-requisite for the provision to be applicable, it is important that the enterprise enjoys a dominant position in the market. As per explanation (a) to Section 4, "dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favor."[25]

Further, the Act also prescribes a list of factors that the Competition Commission of India must consider while determining whether an enterprise enjoys a dominant position in the market or not for Section 4.[26] These factors include the market share of the enterprise, the resources and size of an enterprise, the importance and position of competitors, the economic strength of the enterprise, the dependence of consumers on the enterprise, entry barriers, market structure and size, etc. or any other factors that the Commission may find relevant.[27]

There have been several allegations of predatory pricing by players like OLA Cabs, Reliance Jio, Shopee, etc. wherein the Commission has clarified the legal provisions and their applicability. A perusal of the various CCI decisions suggests significant criteria to be met for a pricing strategy to qualify as predatory pricing. For

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16 Bharti Airtel Ltd. v. Reliance Industries Ltd. & Reliance Jio Infocomm Ltd., CCI Case No. 3 of 2017.
17 Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., CCI Case No. 6 & 74 of 2015.
18 Meru Travels Solution (P) Ltd. v. Competition Commission of India, 2022 SCC Online NCLAT 37.
19 Praveen Khandelwal v. Sppin India Pvt. Ltd., CCI, Case No. 8 of 2022.
20 Vaibhav Mishra v. Sppin India Pvt. Ltd., CCI, Case No 01 of 2022.
21 Nishith Desai Associates, Competition Law in India, (December 2020), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Competition-Law-in-India.pdf.
22 Ibid.
23 Supra note 9.
24 The Competition Act, 2002, §4 Explanation (a), No. 12 of 2003, Act of Parliament (India).
25 The Competition Act, 2002, §19(4), No. 12 of 2003, Act of Parliament (India).
26 Ibid.

instance, in the matter of MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.[28] the Commission held that predatory pricing was a manner of unfair pricing. There was also no justifiable reason for an entity like the National Stock Exchange of India to offer services at zero pricing for a very long duration. The same was, therefore, beyond merely promotional or penetrative pricing. Further, in the matter of M/s Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.[29], the Commission laid down the conditions for identifying a pricing strategy as predatory. These include:

a). the prices of the goods or services must be below cost,

b). the lowering of the price must be implemented to drive the competitors out of the market

c). there is some significant planning to recoup the initial losses by increasing the prices in a later stage when the object is achieved.

In a recent judgment[30] of the Supreme Court on an appeal against the order of the Competition Appellate Tribunal, the Court pointed out that the cab service provider Uber was undertaking a loss of about Rs. 204 per trip for which there was no economic rationale or sense. In the opinion of the court, Uber was a dominant player offering deep discounts with reduced fares amounting to abuse of dominance under the Act.[31]

To summarise, India considers a pricing strategy as unfair or discriminatory under the Act, amounting to an abuse of dominant position if: the enterprise is a dominant player in the market; the prices of products or services are below costs; the intention is to dislodge the competitors; it must continue for a substantial period and there is always significant planning to recover/ recoup the losses after the market rises again and the competitors have already been thrown out.

Legal Framework for Regulating Predatory Pricing in the US

In the US, the antitrust law aims to promote competition and prevent monopolies largely through federal statutes. The primary statutes regulating market competition are "the Sherman Act of 1890; the Clayton Act of 1914 and the FTC Act of 1914". In 1890, Congress established the Sherman Act, the first antitrust law, as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade". The FTC Act, which established the FTC, and the Clayton Act were both passed by Congress in 1914. These are the three fundamental federal antitrust statutes that are still in existence today, with minor changes.[32] Considering the concept/practice of predatory pricing, the same is acknowledged under the Sherman Act. The Sherman Act, Section 2, makes it illegal for anybody to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations....". Section 2 entails three offenses possible under the provision: "monopolization", "attempted monopolization", and "monopolization conspiracy" and it may be regarded that predatory pricing falls under the 'attempted monopolization' category.[33]

The Federal Trade Commission (hereinafter FTC) and the Antitrust Division of the United States Department of Justice (hereinafter DOJ) both enforce federal antitrust laws. Although their certain specifics where one can witness overlap in the working of these two agencies, they work in a cohort manner. With time these agencies have established their competence in specific industries or areas. For example, the FTC focuses most of its efforts on sectors of the economy, such as health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services, where consumer spending is significant.[34] Antitrust laws in the United States provide for both civil and criminal enforcement. The FTC, the Antitrust Division of the United States DOJ, and private parties who are sufficiently affected may all file civil lawsuits in court to enforce antitrust statutes. The DOJ, on the other hand, is solely responsible for criminal antitrust enforcement. States in the United States also have antitrust laws that govern business that occurs primarily within their boundaries.

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28 MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., Case No. 13 of 2009.

29 M/s Transparent Energy Systems Pvt. Ltd., TECPRO Systems Ltd., CCI, Case No. 9 of 2013.

30 Uber (India) Systems (P) Ltd. v. CCI (2019) 8 SCC 697.

31 Ricky Chopra International Counsels, Predatory Pricing and its Legal Regime in India, (Aug. 28, 2023, 12:20 AM), https://rcic.in/uncategorized/predatory-pricing-and-its-legal-regime-in-india/#:~:text=Predatory%20pricing%20is%20defined%20under,competition%20or%20eliminate%20the%20competitors.%E2%80%9D.

32 FEDERAL TRADE COMMISSION, The Antitrust Laws, (Aug. 28, 2023, 12:45 AM), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws.

33 THE US DEPARTMENT OF JUSTICE, Competition & Monopoly: Single Firm Conduct under Section 2 of the Sherman Act: Chapter 1, (November 2009), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#:~:text=Section%202%20of%20the%20Sherman%20Act%20makes%20it%20unlawful%20for,foreign%20nations%20.%20.%20.%20.%22.

34 FEDERAL TRADE COMMISSION, The Enforcers, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

The coming in of the Robinson Patman Act in 1936 and a strengthened enforcement effort by the FTC in the 1940s led to significant changes in predatory pricing litigation. In addition to these statutes, a scholarly work that influenced predatory pricing jurisprudence in US was the Areeda-Turner Rule.[35] It necessitated that for a predatory price case to be made out, one must establish that the prices have been set below marginal costs. It endorsed the view that predatory pricing is rarely attempted; even when attempted, is rarely successful; and even where attempted and successful, are rare to identify.[36]

A general belief that guided the authorities while dealing with concerns of predatory pricing suggests that predation is an irrational and uneconomical technique and therefore, will not be attempted. This is due to the limited possibility of recouping the lost profits. This rationale guided the US Supreme Court's decision in the landmark Matsushita case[37]. The Court denied the possibility of the use of predatory pricing strategies as they are rare to be tried and even more rarely successful. The practice was labelled as speculative, inherently uncertain, and implausible. The Court relied its decision on the empirical studies by John McGee and Roland Koller published in 1958 and in 1969.[38] This was the first instance where the Areeda-Turner rule was embodied in a US Supreme Court decision.

Following a similar rationale, the Supreme Court decided another case in 1993. In the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*[39], the Court opined that unsuccessful attempt at predation are indeed beneficial to consumers. for a case of predatory pricing to be made out, two factors must be established: the prices complained of must be below an appropriate measure of its rivals' costs (below its average variable cost), and the predator's dangerous possibility of recouping the losses must exist. The same principle was applied even in the case of *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company.*[40]

A significant development was the introduction of the Department of Transportation (DOT) Guidelines which categorically recognized predatory pricing as a strategic problem and would permit the proof of recoupment based on the 'reputation effect'. It also reflects on the potential of a dominant air carrier to be able to exclude a new entrant from the market and later charge increased prices from consumers.[41] It is pertinent to note that the guidelines do not necessitate the requirement of proof of cost sales. It focuses more on the gross revenue or output method. However, the Guidelines could address such concerns of the local airline markets and not necessarily set a single legal formulation.

As per the judicial decisions discussed, US Antitrust law presently necessitates the fulfilment of two criteria: below-cost sales and probability of recoupment. This makes it difficult for the Plaintiff's to succeed in predatory pricing challenges. However, a slight change in position can be perceived from the decision of the Sixth Circuit in a later judgment. The decision in Spirit Airlines, Inc. v. Northwest Airlines, Inc.[42] by the Sixth Circuit is a huge divergence from previous case law across the country. The dispute arose when Spirit filed a suit against Northwest Airlines alleging violation of Section 2 of the Sherman Act and engagement in practice of predatory pricing. Relying upon the Brook Case, the trial court granted a summary judgment declaring that the complainant failed to establish the criteria laid down in the Brooke case. However, upon appeal, the Sixth Circuit reversed the decision and held that the intention behind low-cost pricing was to drive Spirit out of competition and that Northwest was also able to recoup its lost investments later. In addition to these two conditions, the Court also went on to consider three more factors - the relevant market, whether Northwest possessed the market power, and whether there were significant barriers to entry or not. Due to the same reason, the decision has been perceived as radically different from existing litigations and has also been criticized for including and relying upon non-price factors to reverse the summary judgment.[43]

It would therefore not be incorrect to suggest that the anti-trust regime on predatory pricing is yet emerging in the US largely through judicial decisions.

Analysis of the Legal Frameworks

US Courts have viewed predatory pricing as a less serious concern and have dealt with the same in a comparatively

35 See Philip Areeda & Donald F. Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 HARV. L. REV. 697 (1974-75).

36 William S. Comanor and H.E.Frech III, Economic Rationality and The Areeda-Turner Rule (Aug. 12, 2023, 10:12 PM), https://escholarship.org/content/qt7vq8v499/qt7vq8v499.pdf?t=nm0qge.

37 Matsushita Electric Industrial v Zenith Radio, (1986) 475 US 574.

38 Patrick Bolton, Joseph F. Bradley & Michael H. Riordan, Predatory Pricing: Strategic Theory and Legal Policy, THE UNITED STATED DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/predatory-pricing-strategic-theory-and-legal-policy.

39 Brooke Group ltd. v. Brown & Williamson Tobacco Corp., (1993) 509 US 209.

40 Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company, 549 U.S. 312 (2007).

41 Christian Barthel, Predatory Pricing Policy under EC and US Law, (2002) https://core.ac.uk/download/pdf/289931396.pdf.

42 Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917,924 (614 Cir. 2005).

43 "Casey Burton, Antitrust -Predatory Pricing – Sixth Circuit Incorrectly y Uses of Post-Chicago Economics and Analysis of Non-Price Predation to Overturn Summary Judgment Granted to an Antitrust Defendant: Spirit Airlines, Inc. v. Northwest Airlines, Inc., 72 (2) J. AIR L. & COM". (2007).

lenient manner than India. The primary focus of the anti-trust law appears to be consumer welfare-oriented. It may be attributed to the adoption of economic and scholarly works and theories in the nascent stages of the development of anti-trust laws. Though the anti-trust law of the US encourages vigorous price competition, it also prohibits certain practices that may hamper market competition and eliminate rivals from the market. With the present requirements set for succeeding in predatory pricing claims, it appears that the plaintiff's claims are likely to fail due to stringent tests such as the recoupment requirement or standard. Also, the US policy seems inclined towards protecting the competitive process and giving more regard to the benefits accrued to consumers, rather than protecting firms or competitors in the market. The same is evident through several summary decisions in the matters concerning allegations of predatory pricing. Concerning factors necessary to establish predatory pricing, the two prongs continue to be appreciated - that the prices complained of must be below an appropriate measure of its rival's cost; and that the competitor recovered or had the probability of recouping its investments in below-cost pricing. It is apparent to suggest that the FTC and DOJ should be allowed liberty to prove claims of predatory pricing without being obstructed by an unsettled and vague standard for proving below-cost pricing.

However, in India, predatory pricing is viewed with more suspicion as it is equally committed to safeguarding the interests of the consumers as well as market players. Since the very initial stages of the development of modern Competition Law in India, predatory pricing has been acknowledged as a matter of great concern. The same is specifically mentioned and explained through the Statutory provisions and the competition regulator has also identified clear and practically logical tests or conditions to be met for establishing a case of predatory pricing. A very clear distinction has also been laid down through various decisions between the object and legitimacy of predatory pricing and penetrative pricing.

Contemporary Issues in the Age of Digital Markets and Artificial Intelligence

Artificial Intelligence refers to the ability of computer systems and programs to behave like humans in processing as well as analyzing data and generating a response. As defined by the European Union in its study, "AI refers to systems that display intelligent behavior by analyzing their environment and taking action - with some degree of autonomy - to achieve specific goals."[44] This technology has been employed by several market players in the e-commerce industry. Many businesses use pricing software to eliminate the application of the human mind from price-setting decisions. These pricing algorithms significantly influence the dynamics of competition and have considerable antitrust concerns.[45] Artificial intelligence-based software can facilitate price decisions based on real-time data available through advanced techniques such as machine learning and deep learning, which are subsets of artificial learning. The growing importance of data in the digital economy, as well as the usage of price-setting algorithms in numerous industries, has sparked worries that these new technologies may result in some unique competitive issues.[46] One fiercely disputed question among competition law and policy researchers is whether intelligent, self-learning price-setting algorithms may enable or even create collusive behavior in oligopolistic marketplaces.[47]

Entities using such techniques employ specific strategies for pricing mechanisms. Initially, a dominant player can utilize pricing algorithms to find and target its rivals' consumers for below-cost pricing while continuing to charge a lucrative price to their current customers, minimizing the predator's losses during the predation phase. Further, in ways that humans cannot, computers can commit to price predation. Furthermore, pricing algorithms, such as algorithmic lock-in and price manipulation, give various new possibilities for recouping the damages associated with predatory pricing.[48] Applying such mechanisms, the decisions are based on data analytics incorporating enormous volumes of historical and real-time market data, including the pricing of other businesses. Such novel Predatory behavior would provide unprecedented challenges for competition law, notably in terms of responsibility, defining dominance, algorithm monitoring, and law enforcement in situations of algorithmic pricing.

An AI system processes newly received information by putting it through a sequence of algorithms to create a prediction, solve a problem, understand circumstances, or actuate anything.[49] A significant feature of AI-based pricing algorithms is that they can do dynamic pricing more readily, in which prices vary frequently in reaction to changing market conditions.[50] This is also referred to as surge pricing, depending upon the market demand. For

44 European Commission, Communication from the Commission on Artificial Intelligence for Europe, COM/2018/237 FINAL, (Apr. 25, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A237%3AFIN.

45 Christopher R. Leslie, Predatory Pricing Algorithms, 98:49 NYU L. REV. 49-111, 49 (2023).

46 Ulrich Schwalbe, Algorithms, Machine Learning, and Collusion, 14 J. COMP. L. & ECON. 568 (2018).

47 Ibid.

48 Christopher R. Leslie, supra note 45.

49 Chris Lewis, The Need for a Legal Framework to Regulate the Use of Artificial Intelligence, 47 U. DAYTON L. REV. 285 (2022).

50 Christopher R. Leslie, supra note 45 at 65.

example, the swift adjustment of prices of airline fares across online booking websites, the prices of products across online e-commerce platforms, the ride fares for cab bookings across applications, etc.[51] Such pricing mechanisms pose further challenges from the perspective of the competition regulators. When combined with large data, algorithmic pricing makes predatory pricing far more realistic than was previously envisioned. The availability of enormous data, called the 'big data' for big firms and the deployment of pricing algorithms leads to manipulation of consumer purchasing decisions and preferences. Dominant businesses often have more and better data. Google, for example, has higher data since it can scan the contents of Gmail and track the movements of customers who use Google-owned Nest equipment. As a result, many enterprises targeted by predatory pricing algorithms will be unable to successfully fight back.

The war for market domination in the AI future will be waged with two weapons: algorithms and data.[52] Finally, predatory pricing mixed with AI has the potential to disrupt market competition and harm smaller businesses and consumers. While AI can provide advantages, it also introduces new obstacles that must be properly addressed to preserve fair and competitive marketplaces.[53]

Conclusion

An analysis of the two regimes indicates that the regulatory regime in India is comparatively more structured and relies on the application of objective criteria that may help establish or negate the case of predatory pricing. However, an analysis of the judicial responses indicates that some degree of clarity is yet required while dealing with the issue of predatory pricing. This is due to the reason that the determination of predatory pricing is dependent upon the "dominant" status of an entity. A determination of predatory pricing is made only when the entity engaged in such practices enjoys a dominant position. On the other hand, in the United States, it is not the dominant position that determines the presence of predatory pricing. Rather, it is the recoupment of the losses by the firm through which it is determined whether there is a presence of predatory pricing. In this new age of artificial intelligence, it is pertinent to understand that certain entities are not dominant in the market but have the potential to disrupt the competition in the market by using the technology. Therefore, the existence of market dominance may not always be necessary or a prerequisite to engaging in abusive conduct. Also, the traditional concept of predatory pricing has changed in this new age and several new techniques such as zero pricing, algorithmic pricing, surge pricing, etc., have emerged. Several questions remain unanswered, and both competition regimes must answer these questions to preserve and maintain robust competition in the market. It would, however, be interesting to note how the two competition regimes in these two countries counter the challenges of predatory pricing in the age of artificial intelligence where pricing is based on real-time comparative dynamic algorithms and software designed by companies in all sectors and industries.

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51 See Meru Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. (Case No. 96 of 2015); also see Spirit Airlines Inc. v. Northwest Airlines Inc. 431 D.3d 917 (2005) 431; also see Delhi Yapper Mahasangh v. Flipkart Internet Pvt. Ltd.& Anr. (Case No. 40 of 2019).

52 Christopher R. Leslie, supra note 45 at 97.

53 Qual Li, Miels Philipsen & C. Cauffman, AI-Enabled Price Discrimination as an Abuse of Dominance: A Law and Economics Analysis, SPRINGER (Apr. 27, 2023), China-EU Law Journal, https://link.springer.com/article/10.1007/s12689-023-00099-z.

Analogy between Indian Bilateral Investment Treaties and Other forms of International Investment Agreements

Dr. Sanya Yadav*

ABSTRACT

In the era of globalization, the Model BIT is expressing their opinion based on their past experiences. For example, the treaty includes the provision of a National Treatment Clause in which the host state must have to treat foreign investors and domestic industries on an equal platform. Sometimes foreign investor seeks more protection to invest in the territory of the host state, it would be logical to grant that protection, and, in a few situations, the MFN is also granted to one foreign territory and another country interpreted in a different sense and claim on the basis to extend the more protection to one state, therefore it is reasonable to exclude the MFN from the Model law. Therefore, the Model BIT reflects an important step towards developing a fabled image of it in international investment law. Consequently, India must hold the present situation in investment protection across the globe and attract foreign investment.

Since liberalization, India rapidly signed their BITs to develop their cross-border transactions of investment. In the initial years when the BITs were signed for the first time in India with U.K in 1994, it remained one BIT till 1995 then moving forward the map inclined in the middle of 2008 till 2013 there were around seventy-two BITs which were enforced and fourteen were negotiated but did not enforce. A BIT is made between two countries in which each country approves to give a minimum level of protection to investment made within its territory by foreign investors. India is a developing country, which must give investment protection to foreign investors and provide them with complete certainty and predictability so that they can invest their money. The developing nation must provide a healthy environment in which foreign investor will be attracted and negotiate their BITs. Foreign investors believe that foreign investments always require a state that provides them with better policies, and fewer restrictions for the inflow and establishment of the investment in the host state. In the post-liberalization era, India was continuously trying to develop an environment in their territory that would promote foreign investment. In the last few decades, India's jurisprudence has increased its trends in signing their BITs.[1]

In the past era, the BITs were framed only from the perspective of nationalization by the state, but in the present situation, the BITs are framed in a manner that protects the rights of foreign investors in the territory of the host state. In the last few years, India faced many challenges when few claims were filed for the breach and failures of the BIT's provisions regarding the protection of foreign investors. On the other side, it is acceptable that in the last decades, foreign investment has rapidly grown among countries all around the world. The most important thing, those who are involved in foreign investment transactions have different interests and rights for example the main interest of investors is the profit in these transactions. On the other hand, the host state aims to develop its economy. A growing number of BITs contain the obligations to liberalize the investment flow and emphasize more and more.

In the present scenario, BITs increasing their prominence in the globalized world and raised their importance for the developed and developing countries. BIT is explained differently in their treaties, which states that "protect investments by investors in the territory of another state by articulating substantive rules governing the host state's treatment of investment and by establishing dispute resolution mechanisms applicable to alleged violations of those rules."[2]

INTRODUCTION

REFLECTION OF THE ISDS CLAIMS IN INDIA'S BITS

India started its BIT negotiation in the early nineties, it was part of overall economic development and liberalization and in 1991 for the first time, India started focusing on clear objectives to fascinate foreign investment. In India, the BIT negotiations and policies are governed by the Ministry of Finance which states that "As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the government of India was liberalized and negotiations undertaken with many countries to enter into Bilateral Investment Promotion and Protection Agreement (BIPA) to promote and protect on reciprocal basis investment of the investors."[3]

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1 Yadav Sanya, The Enlarging Bit: A Commentary on Indian Bits and Their Legal Ramification, 1(2) COLLOQUIUM OPUS LAW JOURNAL 31, 35 (2014).

2 Vandevelde J. Kenneth, The Economics of Bilateral Investment Treaties, 41 HARVARD. INTERNATIONAL LAW. JOURNAL 469, 469-470(2000).

3 Ministry of Finance, Government of India Compendiums on BIPAs.

The Ministry adopted the provision of liberal economic policies in 1991 and after that India started entering BITs intended to assure foreign investors which boosted the attraction towards foreign investment. For instance, the press release issued by the ministry on India-China BIT settings that "the agreement will increase investment between India and China". In India-Brunei BIT ministry released that "the Agreement, which seeks to promote and protect investments from either country in the territory of the other country with the ultimate objective of increasing bilateral investment flow"[4] After signing the first BIT with the U.K., India started signing its investment agreements with other Southeast Asian Countries.[5] Indian BITs mostly resemble the UK BITs which are developed in a manner to protect the developing states.

Therefore, the practice is not explicitly involved in the development which will go beyond the scope of the investment protection under BITs. Indian BITs are one of the basic treaty laws that provided clarity on the provision of settlement of disputes and Indian BIT jurisprudence also emphasized the serious concern that was related to public problems such as human, animal, and plant life and safety, and protection of the environment.

Even though India negotiated many BITs but did not attract much attention till November 2011 due to the less involvement in the disputes. Before 2011, nine major disputes came but still, it did not hamper the dignity of the India BITs jurisprudence because they all were related to one project i.e., Dabhol Power Project. As per the facts in this case an investment was made in India by the subsidiary of Dutch to construct a power plant to sell the power energy in India. The procedures used by the government were found unreasonable and invoked by the Dutch government under the treaty and thereafter they rescinded the treaty on the same ground. The government of India paid a huge sum of money as a compensation amount to the foreign investor and settled the disputes. But in all the claims the challenges did not reach the ISDS arbitral award therefore that was the major reason why India never received any attention in the globalized world. This lack of consideration or attention started gaining its importance when the participation of ISDS provisions was increased in November 2011 when the ISDS tribunal award came against India.

The tribunal award against India in the case of White Industries Australia Ltd v. Republic of India.[6] The tribunal upheld the claim which was raised by White Industries that the government of India failed to provide effective means to the Australian investors. The Coal Industry which was the respondent in this dispute attempted to set aside the foreign award in Indian courts. In 2011, the government of India was found guilty of the breach of Australia - India BIT. This case is always considered a landmark judgment in Indian history. In the BIT jurisprudence of India, this judgment developed new guidelines and standards such as the introduction of "effective means" If there is a denial of it then it would create the right of foreign investors to seek the protection of investment in the host state under the BIT.

The White Industries had an issue regarding the enforcement of the ICC award in India which was in favor of foreign investors. The attempt failed for approximately ten years due to the delay of the Indian judiciary. The arbitral tribunal established that justice delayed justice denied, and they amounted to the denial of effective means of justice as well as the denial of providing MFN treatment under India -Australia BIT. The Republic of India provided an effective means in the India - Kuwait BIT and failed to provide in the India - Australia BIT therefore, the foreign investor was challenged on the grounds of MFN provisions. The White Industries award lures attention to the fact that BIT provisions like the MFN clause are often vague and broad. This facilitated White Industries' decisions to arrive at a result that India did not even anticipate such as the birth of Model BIT which departed many provisions out of earlier Model law and the termination of fifty-eight BITs. Many countries forwarded arbitration notices after this decision. Many authors have expressed their opinion on this issue and expressed their opinion to reexamine the structure of Indian BIT.

Pandora's box was opened when the countries challenged the provision of "effective means". In "Waste Management v. United Mexican States" challenged on the same ground and contended that their treaty failed to provide the FET was also considered a denial of justice, if the treaty is harmful to the complainant in this case or to foreign investors and favorable to the home state "arbitrary, grossly unfair, idiosyncratic, is discriminatory…as might be the case with manifest failure of natural justice in judicial proceedings or complete lack of transparency and candor in an administrative process."[7]

The denial of justice was followed in the case of "Mondev International v. USA":[8]

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4 Ministry of Finance Press Release, "A Bilateral Investment Promotion and Protection Agreement" India-Brunei BIT.

5 Agreement on Investment under the Framework on Comprehensive Economic Cooperation Agreement between the Association of Southeast Asian Nations and the Republic of India.

6 White Industries Australia Limited v The Republic of India, November 30, 2011 UNCITRAL (White Industries case). "Agreement between the Government of the Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Feb. 26, 1999, entered into force May 4, 2000."

7 CaseNo.ARB(AF)/00/3).

8 Case No.ARB(AF)/99/2,127.

"In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."

This situation is again followed in the case of "Chevron Corporation v. Ecuador" they also tested the fair and equitable provisions "particularly serious shortcoming and an egregious conduct, that shocks or at least surprises, a sense of judicial propriety."[9] In this situation, an effective means was easy to establish and prove. In the dispute of White Industries, the arbitral tribunal concept of effective means was taken from the India - Kuwait BIT and they incorporated in India - Australia BIT following the provision of MFN. The delay of justice is not even considered due to effective means it is due to the overburdened judiciary system of India. The delay of ten years for setting aside the disputes does not mean there is a denial of effective means.

An effective means is summarized in this case and the arbitral tribunal stated that an effective means is always easy to prove in the eyes of the law due to some reasons:

i. It is a lexspecialis and therefore less demanding than denial of justice.

ii. the standard requires that a host State establish a proper system of law and that the system work effectively in the given case.

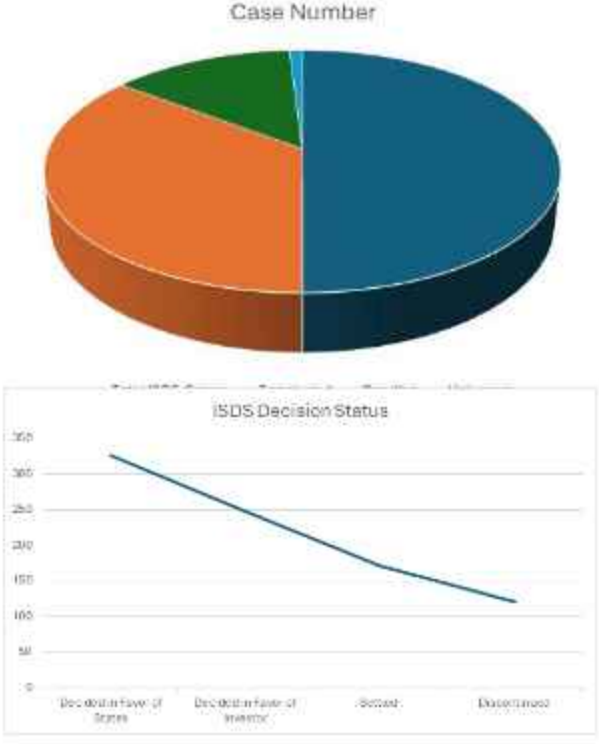
iii. there is no need to show an interference by the host State to establish a breach and an indefinite delay by the host State's court system will amount to a breach, such delay will be measured based on the facts of each case.

iv. the standard is an objective international standard; and

v. while there is no need to show exhaustion of local remedies by the claimant the claimant needs to show that it adequately utilized available means.

At the end of the twentieth century, the number of ISDS cases rise from the zero level. Until 31 December 2023, 1257, known ISDS claims have been filed, of which 890 had been concluded, 343 pending cases, and 24 cases still unknown. Out of a total of 327 disputes, these claims have been decided in favor of the State, whereas 249 have been decided in favor of the investor and 171 cases have been settled. In India, the first ISDS case was filed 30 years ago and less than 50 cases had been filed before the year 2000, making the rise in the cases. At present, India is represented in 29 cases as a respondent and in 11 cases as a claimant.[10]

The ISDS system has experienced difficulties since it has existed, the tool has been protested by NGOs, left-wing activists, and others. The Investment Policy Monitor, issued by UNCTAD on 4 July 2023, confirmed that last year states have been active in implementing investment policy measures. It reports that twenty-two states took thirty-two investment policy measures before February 2023--an increase of 29% and the highest record of policy changes since 2023. It is also clear that the ISDS reform is extremely topical, as the nations and international intergovernmental organizations are actively changing their policies and approaches. There is evidence that UNCTAD's report on the development of investment has been significantly influential for investment policymakers. Presently, India has successfully renegotiated BITs with Brazil (Signed, not in force)[11] Taiwan[12] and Belarus[13] as per Model BIT. India also signed three treaties with investment provisions with Australia(ECTA 2022), the United Arab Emirates(CEPA 2022), and Mauritius (CECPA



[9] Partial Award on Merits, March 30, 2010.

[10] Investor state dispute navigator on Investment Policy hub available at http://investmentpolicyhub.unctad .org/ISDS? Status = 1000

[11] Brazil - India BIT, Signed, but not in force, 25, January 2020.

[12] India-Taiwan BIT, "Cabinet approves signing of Bilateral Investment Agreement between India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India."(October 24, 2018).

[13] India-Belarus BIT, September 24, 2018.

2021)after the new Model Law.

The line is drawn which is subjective in nature and relies upon the contentions of the disputes, it depends on the country-to-country judicial system. If the country lowers the standard of provisions, it also allows the state to breach its obligation by excluding the provisions under future BITs. Therefore, the White Industries disputes were important in various ways. The decision presents a clear image that if India tries to expropriate foreign investment and denial of justice happens in which India is party, the foreign investors have precedent to prove their contentions. This decision can harm foreign investment in the country. The repercussion of the White Industries Disputes is that the Indian Ministry recommended that India should avoid adopting these restrictive measures which fall the ration of foreign investment and India should exclude the investor-state arbitration process in future BITs. India must negotiate less strictly to settle their disputes without any denials and cordially. India must draw an adequate procedure while negotiating with different countries regarding the protection of their rights and interests. India also makes sure that foreign investors will consider India as the safest jurisdiction for foreign investment which provides complete protection to them. Therefore, the burden lies on the Indian economy to draw a fine line that balances equity, justice, and investment in the country.

When India contracts with other countries based on foreign investments, it can no longer remain negligent about its organizational, administrative, and legal systems of both countries. This is possible to provide much relief and a sense of security to foreign investors who must deal with the Indian political and judicial system at each level. The major objective of the Indian government is to balance BITs and ensure that India must exercise in a manner that is not disproportionate because India must adopt such policies that do not negatively impact the system and the system serve the interest of society. This modification and revision will rebalance the system and ensure that foreign investment is protected in the host state without infringing the rights of the public interest of the host state.

In the jurisprudence of BITs in India, the Model law plays a vital role which almost changed the outlook of the investment treaties in India. The Model law contains 38 articles which are distributed in seven chapters. It is a departure from the old general provisions of the BITs because Model BIT 2003 shows the broad provisions of investment protection and restrictive provisions for the rights of host states. On the other side, the Model BIT contains different features as compared to the earlier one in all perspectives such as settlement of disputes process, structure, content, and increasing regulatory power of the host state. Therefore, in 2016, only one BIT was signed by India with Cambodia, and is in the process of re-negotiating new BITs it is also engaging in expressing explanatory statements on the existing BITs and IIAs.

India has commenced a series of actions to assess and modify its BITs, aiming to incorporate provisions that establish a more fair and balanced equilibrium between the protection of investors and the preservation of national interests. Furthermore, India has underscored the significance of alternative mechanisms for resolving conflicts, such as mediation and conciliation, as alternatives to the traditional ISDS arbitration. India's 2016 Model BIT reconciles between safeguarding investments and the right of the host state to regulate. Indian authorities pursued a realistic approach to find a "middle path" between investment protection standards and the legitimate right of governments to regulate economic activity in the public interest.[14] Unlike other countries like South Africa and other Latin American countries, India has demonstrated its continued involvement with the ISDS system by adopting a new Model BIT that still allows foreign investors to challenge India's regulatory measures under BIT. India, however, has materially changed the conditions of this engagement. The Preamble of Indian Model 2016-BIT is as follows:

"The Government of the Republic of India and the Government of the Republic of (hereinafter referred to as the "Party" individually or the "Parties" collectively); Desiring to promote bilateral cooperation between the Parties to foreign investments; and recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and the promotion of sustainable development, reaffirming the right of Parties to regulate investments in their territory under their law and policy objectives."

The Model BIT, by referring to the concept of "promotion of sustainable development", which is a goal that is not focused on economic aspects, aligns itself with a current trend in the practice of BITs that is being referred to as "next generation treaties". These treaties incorporate elements that are oriented towards sustainable development, intending to safeguard the regulatory autonomy of states and restrict unwarranted interpretations of the treaty.[15]

The importance of Model BIT 2016 for Indian companies can be assessed by looking at three recent examples. First,

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14 Prabhash Ranjan and Pushkar Anand, The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction, 38 Nw. J. Int'l L. & Bus. (2017)

15 Mahdev Mohan "Asian Perspectives on Investment Agreements and Arbitration: An Evolving Marcottage"[2016]

under the terms of the India-Poland BIT, an Indian investor by the name of Flemingo Duty-free Shop Private Limited (FDF) was able to successfully sue Poland and was awarded euros 17.9 million as compensation. The tribunal concluded that FDF's investment was taken away by Poland and refused fair and equitable treatment by forcibly terminating several lease agreements that FDF's indirect Polish subsidiary had been benefiting from.[16] Second, under the terms of the India-Indonesia BIT, Indian Metals & Ferro Alloys Ltd. (IMFA), an Indian mining company, filed a case against Indonesia at the Permanent Court of Arbitration in The Hague. $599 million in damages is sought in the lawsuit for alleged regulatory violations involving the claimant's coal mining permits.[17] Last but not least, a recent issue concerns an Indian investor who is suing Macedonia under the terms of the India-Macedonia BIT, claiming that the Indian investor's mining concessions have been taken away.[18]

INTERNATIONAL RULES OF FOREIGN INVESTMENT IN INDIA

Apart from the international trade policies in India, there were no detailed policies and drafts before the year 2003 for the promotion and protection of foreign investment in India. Many international organizations adopted rules and regulations for the protection of investment in the host countries. The result came when India adopted their Model law on BIT and presented their policies in India although it is these policies were redrafted as per the requirement of the state in 2016. Before the adoption of these policies, the last effort was taken by the OECD Model, which developed the Multilateral Agreement on Investment (MAI). This MAI introduced all the concepts of settlement of disputes for the liberalization of Investment. When India adopted its first IIAs with the U.K. they were not guided by any policies. The few matters regarding investment were resolved by the WTO agreements:

i. The TRIMS agreement prevents WTO member countries from applying restrictive investment measures that are inconsistent with National Treatment obligations (such as performance requirements) under the GATT.

ii. The GATS includes investment liberalization provisions related to trade in services; and

iii. The Agreement on Subsidies and Countervailing Measures and the Government Procurement Agreement deal indirectly with investment by including several investment incentives in its definition of subsidies and public procurement services, respectively.[19]

Therefore, these were the rules which were followed by the countries to provide them protection in the country. The agreements of TRIMS, and GATS did not completely include this aspect, but a few parts embraced the settlement of issues by the liberalization of investment.

REVIEW OF OTHER COUNTRIES' IIAS IN ANALOGY WITH INDIAN IIAS

The divergent adopted in the different countries were developed to adopt different measures with the concern of merits and demerits of the international investment regime. As a result, every country developed its policies in the form of investment agreements that protect the interest of public policies and the interest of foreign entities. The IIAs include three different approaches firstly evolution of the protection of foreign investors, secondly different approaches of ISDS, and thirdly addition of all the obligations of foreign investors.

Japan

The BIT structure of Japan was influenced by the OECD draft Convention 1967 which was based on the protection of foreign investment. After ten years of inspiration, Japan first signed the BIT with Egypt in 1977 which was based upon this convention. After these negotiations, many other IIAs were framed. Till 2002 eighty other BITs were signed with different nations. In 2002 this template was stopped and underwent an essential renovation.

In the earlier one Japan was doing liberalization of market access in them by giving them MFN and National Treatment to the foreign investors. It was provided temporarily, and they prohibited the working environment for foreign investors in the host state. Japan was flexible while giving the additional flexibilities in their BITs provisions. The provisions after 2002 came up with tweaking which provided sagacious financial regulations along with exceptions of public policies.

Spain

Spain first negotiated its BIT in 1989, at present it signed approximately 90 BITs out of which 32 treaties were signed

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16 Flemingo Duty-free Shop Private Limited v. the Republic of Poland, UNCITRAL, Award,942 (Aug. 12, 2016)

17 Indian Metals & Ferro Alloys Limited (India) v. the Government of the Republic of Indonesia, PCA Case No. 2015-40

18 Allison Ross, Indian Couple Threatens Claim Against Macedonia, GLOBAL ARB. REV. (Nov. 11, 2016), <http://globalarbitrationreview.com/article/1073304/indian-couple-threatens- claim-against-Macedonia>

19 Gugler Phillipe and Tomsik Vladimir, A Comparison of the Provisions Affecting Investment in the Existing WTO Obligations, SWISS NATIONAL CENTER OF COMPETENCE IN RESEARCH (2006).

in English language. The Spain Model law on BITs was overhauled in 1995-96 if the comparison made before 1996 and after that the treaties are more attractive in the current scenario. Earlier, the Spain BITs concluded that just to protect the foreign investment it does not even bother to include the provision of non-discrimination into the treaties. Spain rationalized and reinforced its investment protection clause after 1996 by providing FPS, a prohibition against arbitrary or discriminatory measures, FET as well as an umbrella clause in its protection article.

Finland

Finland is a country that actively participated in negotiating the IIAs globally and signed the first BIT with Egypt in the year 1980 after those 75 treaties were established by the Finland government. From the era of 1980 till today, the treaty zone of Finland was developed in two pathways which formed two remarkable periods. Firstly, during the era of 1985 to 1990 and the second era was from 1990 to 2000. The Finland government merged two pre-established dimensions which extended to the National Treatment and MFN.

ANALYSIS OF EU- CANADA CETA 2016

The EC introduced the CETA as the first agreement which provided high protection to preserve the rights of EU and Canada. It also provides lawful objectives to protect the environment safety and health which regulate the public policy of the country. For the settlement of disputes in the present situation, CETA offers a powerful, progressive, and clear vision for the same. It consists of two broad dimensions for the settlement of disputes:

i. Clearer and more precise investment protection standards; and

ii. Clear rules on the conduct of procedures in investment arbitrations.[20]

As the process of ISDS was highly criticized by many authors which EC has drawn consideration due to the revolutions of CETA was announced. In the investment chapter of CETA they are more analogous, CETA introduced the concept of ad hoc investment tribunal they are not inspired by using domestic courts in international disputes. CETA also provides an appeal mechanism for the betterment of awards.[21]

Recently, the EU pronounced that the CETA will influence the future IIAs, and the European Parliament stated that "new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where private interests cannot undermine public policy objectives." CETA ensures the consistency and predictability of the judicial system i.e., the main reason it will influence the IIAs in the future. EU is adopting many divergent policies for the negotiations of new agreements. CETA is less radical than it appears so, the text of CETA is not vague or comprehensive the text includes the analytical declaration that clarifies the scope and nature of investment provisions in the agreement. The CETA also preserves the rights of the state which is regulatory power to reduce the option of investment tribunals.

The CETA follows the transparency clause which is mentioned in UNCITRAL rules. These rules are applicable for all disputes which are related to investment:

"Article X.33 of the CETA investment chapter requires documents in addition to those listed in Article 3 of the UNCITRAL Transparency Rules to be disclosed and provides that hearings must be open to the public. Where concerns regarding confidential information arise, Article X.33 makes the tribunal responsible for making appropriate arrangements to address these concerns."

The definition of investment which is used by CETA is asset-based. The investment chapter of CETA, art. X.3 deals with the definition part. The definition of investment reflects the definition of the 2012 US Model BIT. However, "it includes an additional characteristic of an investment, namely a certain duration." About the definition of investor, to qualify for protection under CETA, an investor must have substantial business activities in the territory of one of the parties. The definition seeks to preclude 'shell' or 'mailbox' companies from relying on CETA to submit claims to the ISDS mechanism established thereunder. As per the agreement between the EU and Canada, CETA cannot repeal the measures which were adopted by the parliament of Canada. They have added the provision that the party who will lose the dispute will be considered the unsuccessful party. The unsuccessful party must bear all the costs of arbitration as well as all the reasonable costs will be borne by that party.[22]

The focus of CETA was to provide proper or reliable methods for the settlement of disputes so that countries would be free to rely on the host state for investment protection. Further, the EU adopted a few policies and regulations for the implementation of financial costs for claims that are related to investment. This urge was felt when Lisbon signed their treaty in 2009. In July 2014, it was initiated that:

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20. Investment Provisions, EU- Canada FTA (CETA) 26 September 2014.
21. Hindelang Steffen and Sassenrath Carl Philipp, The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective, 112 (2015).
22. Article X 36, CETA.

i. "the EU will bear the financial costs of investment claims where the claim brought by the investor concerns a measure taken by an EU institution, body, or agency;

ii. the EU member state concerned will bear the costs where the claim brought concerns a measure taken by the member state itself; and

iii. where a measure is taken by a member state on the basis that it is required by EU law, the EU will be responsible for financial costs associated with a claim based on such a measure."

Therefore, the chapter on investment in CETA deals with the removal of all the obstacles in foreign investment and permits the foreign investors of the EU to transfer their funds to Canada and vice versa. The whole transaction must be transparent and predictable which stabilizes the investment regime from an international perspective. The CETA also provides guarantees to the foreign investor they will be treated fairly by the government of the host state.

STUDY OF BRAZIL CFIAS

The Cooperation and Facilitation Investment Agreements (CFIAs) are signed by Brazil with many countries. The inclination of Brazil towards an investment regime is low which can be visible when it signed the first investment treaty with Belgium in 1995 and the last it was signed in 1999. In Brazil, fourteen BITs were negotiated and none of them were ratified.[23] A few BITs were submitted to the government, but they out rightly rejected due to their inclusive provisions such as indirect expropriation and ISDS provision which was contrary to the Constitution of Brazil.

The provisions under the treaty were restricted in nature and they do not adopt the policies for the welfare of the host state which is very important for every country. However, the rejections of Brazilian IIAs were not the reason for the fascination of foreign investment. In South America Brazil is a country that is considered as the largest heir of foreign investment.

The new approach which was given by Brazil on foreign investment was to give direct protection to foreign investors as compared to the traditional IIAs. The Foreign Trade Secretariat stated that Brazil's Model law contains an innovative alteration to the traditional IIAs such as:

"Recognizes the role of governments in fostering a positive environment for investment, takes into full consideration the interests of private investors, retains policy space for pursuing the development needs of the parties, and adopts a constructive and proactive view aimed at bridging potential differences between investors and the host country."[24]

The major aspects of the CFIA model come under three pillars, firstly for investment cooperation and expedition use the confined agendas, secondly for dispute settlement and balance the risk they need to establish one mechanism, and thirdly enhance the institutional governance by establishing committees and basic points. These are the points that will promote negotiation the foreign investors and host states for the promotion of investor investor-friendly environment in the host state. The committees are designed to develop in a manner that provides a chance for mutual investment, execution of agreements, and anticipation of disputes to provide them the solutions in an amicable manner. The committee contains the representatives of both the sides host state as well as foreign investors. In which they will get an opportunity to develop their working groups to resolve or dispute the basic issues and they can invite other private entities as well for further discussions and negotiations on the issues. Confined agendas are those which encourage and promote a friendly environment in the host state. This agenda will cover many issues that must be related to the investment and related to the parties to the disputes. The confined agendas also include Corporate Social Responsibility (CSR), technical regulations, and environmental regulations. The CFIA when signed between Brazil and Angola included the concept of the Umbrella Clause even though this clause is not entertained by many countries in their investment regime. CFIAs do not include the provision of FET and do not even ensure the protection of foreign investors and investment in the host country.

CONCLUSION

The complete idea behind the adoption of IIAs is to improve the climate of investment to fascinate foreign investment in host states. Renegotiations are done or going on to enhance the capacity to balance, protect, and promote the foreign investor in the territory of host nations. Renegotiations do not mean IIAs can be changed instantaneously, it will take years and years for the changes. The renegotiations of IIAs in India with all the other countries is not a cakewalk. Therefore, it can only be done by some joint explanation and interpretation of the specific provision. For instance, the ISDS provisions which are overburdened with the list of disputes. The explanations and interpretation of specific provisions will clear the position of the meaning of vague terms in IIAs across the globe.

[23] Brazil has signed (but not ratified) BITs with the Belgium- Luxembourg Economic Union (1999), Chile (1994), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Germany (1995), Italy (1995), Korea (1995), Netherlands (1998), Portugal (1994), Switzerland (1994), U.K (1994), and Venezuela (1995).

[24] Godinho Daniel, Investing in Sustainable development, UNCTAD WORLD INVESTMENT FORUM (2014).

If a balance of regulatory power is present in BITs, then it would also help the country insight into foreign investors. Thereafter, it would be easy to do investment transactions in India and foreign investors could rely on the promise made under the treaty to safeguard their investment. India is presuming that the goal can be achieved only when the alternative formulation is present. The comparison in the last chapter between Indian IIAs with other forms of IIAs presents the status of the Model BIT of India and how it will perform better in future negotiations. In India, the scope of the term investment is very limited, it simply focuses on the enterprise-based definition and no other form of IIAs is limiting the definition of investment under their treaty.

Indian Constitution and the Understanding of 'Child': An Armoured Perspective Towards 'Childhood'

Udit Raj Sharma[1]

ABSTRACT

The Constitution of India, 1950 established the model of constitutional governance which could facilitate the operation of a welfare state, with social justice and concern for the vulnerable at the heart of its functioning. As a result, one witnesses an elaborate scheme of aspirations (some enforceable as in Part III in the form of fundamental rights and some non-enforceable yet fundamental to the governance as in Part IV in the form of Directive Principles of State Policy) within the Indian constitution. One such vulnerable group of society is children who were exposed to various kinds of menace and challenges such as child labour, inter alia. 'Childhood' and its vulnerability were sincerely appreciated by the makers of the Constitution and an armoured perspective was created towards 'childhood' which was extremely sensitive and protective of the 'childhood'. The research explores this perspective.

Keywords: Childhood, welfare state, social justice, DPSPs.

Introduction

The research paper attempts to understand the idea of 'child' manifested by the Indian Constitution and the idea of 'childhood' or perhaps of 'ideal childhood'. To do so, the research provides for the various provisions of the Constitution of India, primarily Part III and Part IV which shape the envisaged image of the 'child' and 'childhood' within the Indian Constitutional governance. Such image and understanding of children do not align with the harsh reality of India having the menace of child labour and the plight of working children in India. The research attempts to understand and analyse the idea of 'child' and 'childhood' within the constitutional governance of India.

Constitution of India and the conception of 'child'

The Constitution of India is a great charter not only for the statecraft it presents by providing for the manner of governance in this country but also as a charter of rights (fundamental rights, most of which are the recognised human rights) for the people of this country (and the people do include the children of the country who form a large part of the population of India). The Constitution of India is solicitous of children's well-being, development and their rights. Indian Constitution makers realised the need for putting curbs on child labour and thus it carries important expression of the government policies against the abuse of child labour in India. It is notable that among the drafts prepared by Dr Ambedkar, Dr. K. M. Munshi and Sri K T Shah, the draft of Dr Munshi had a provision which prohibited child labour in all forms which was requested and reformulated into what is presently Article 24 of the Constitution of India.[2] 'How does the Constitution of India conceive a child' is a question which needs to be addressed with great sincerity before approaching to make policies/legislations for the children and claiming their constitutionality. The idea of the welfare state was emphasized by the framers of the Indian Constitution and therefore the governance which considered all sections of the society including the weaker sections in its development objective was chosen as the ideal form of governance as per the constitutional mandate. The very fact that children are a vulnerable category of human beings was considered by the makers of the Constitution and provisions were inserted which could prevent childhood from getting exploited. Could the children who have exhausted their initial years of life working in a factory (sometimes under deplorable conditions) or who have spent the initial years of life begging on streets or in some other manner where he/she had the onus of earning money as a matter of necessity for the survival of his/her family or for supplementing to the meagre income of the family be except to be a productive and responsible member of the civilised society and polity? Could these children who have staked their physical, mental, psychological and spiritual well-being and are mostly denied the perks of childhood be expected to be active participants in the progress and development of the nation? Could those children who have been caught by the vicious cycle of poverty and disadvantageous life be expected to grow up as individuals who could not only develop their personalities but uplift the personalities of others in need of help? The constitution makers perceived this situation and particularly at times of independence when there was widespread poverty and misery in the country, they foresaw that unless children born are not provided with the roots to grow into individuals which

[1] Upendra Baxi, "Unconstitutional Politics and Child Labour" 31(47) Mainstream 17 (Oct 1993).

[2] Soumitra Kumar Chatterjee, "Indian Constitution and the Protection of Child Labour: A Study 35(415) Labour & Industrial Cases 178 (July 2002).

include proper physical, mental and educational development, they cannot be expected to grow into nation-builders and ones who contribute to the glory of the country. The Constitution makers, therefore, reflected the sense of concern towards the children, from the rights granted to them under Part III and also through protective provisions under the Directive Principles of State Policy. Dr B R Ambedkar is reported to have said that "the deprivation of these rights has a deleterious effect on the efficacy of the democracy and the rule of law."[3] The further part of the research describes the conception of a child under the Constitution and the approach of the Constitution towards 'childhood'.

Although Article 15 of the Indian Constitution provides for the Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth which is a declaration completely under the mandate of Article 14[4] of the Constitution which envisages equality before the law but still the protective approach of the State is reflected from provisions such as article 15(3) which provide for making any special provision for women and children.[5] This presents before us a protective and interventionist role of the State where the concerns of the less privileged, downtrodden and vulnerable sections including that of children have been given emphasis.

While enlisting the provisions in the Constitution about child labour, mention of few provisions can be made which directly deal with the 'restrictions on the employment of children' while there are several provisions within reflect towards the spirit and context and therefore point towards the welfare of children and amelioration of their condition from the state of exploitation and abuse, they face in their daily lives as child labour.

Article 21[6] which provides for the 'Protection of life and personal liberty' and declares that no person shall be deprived of his life and personal liberty often referred to as the 'most significant' provision and also the 'heart and soul' of Part III of the Constitution is immensely significant even from the perspective of child welfare since the term 'life' under this provision is not the opposite of death but has a wider understanding and has wide dimensions attached to it than mere survival.[7] This is the reason why Article 21 has become a repository of rights and many rights have been implicitly recognised by the Supreme Court of India under the head of 'life and personal liberty'. Even in the dimension of labour welfare in general and child welfare in particular, jurisprudence has been developed by the Apex Court under this provision. The right of a person not to be subjected to 'bonded labour'[8], right not to be subjected to any other unfair conditions of labour[9], the right to be rehabilitated after being rescued from bonded labour[10] and the right to livelihood[11] are all interpreted to be within the dimension of 'life' envisaged under Article 21. It is not hard to imagine that several children working in difficult situations (sometimes abusive) are not able to live the life with dignity of a human being envisaged under the provision and when forced into work due to coercion or difficult situations of life, by sacrificing their childhood, they are denied 'personal liberty' of remaining a child.

The other significant provisions in the Constitution of India which aim at protecting children from exploitation including that from the menace of child labour itself are Articles 23 and 24 of the Indian Constitution. The most significant provision in this regard is Article 24 of the Indian Constitution which falls under the head of 'Rights against exploitation' of Part III and is a part of fundamental rights under the Constitution. It provides that:

Prohibition of employment of children in factories, etc. - No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

The is the explicit provision in the Constitution which without mentioning the term 'child labour' attacks on the menace with great force and puts a strict restriction on employment of children in the mentioned category of employment considering the unfavourable effect on the children. This shows that the Constitution makers considered the menace of child labour as a serious problem to be addressed for which they did not depend on the 'government to be' but rather provided explicit

3 AIR 1997 SC at Page 2220.

4 Article 14 provides for Equality before law- The State shall not deny to any person equality before law and equal protection of the laws within the territory of India.

5 Article 15(3) provides that nothing in this article shall prevent the State from making any special provision for women and children.

6 Article 21 provides for the Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

7 'Life' means something more than just physical survival, not merely the right to continuance of a person's animal existence (State of Maharashtra v. Chandrabhan AIR 1983 SC 803); it would include the right to live with human dignity (Francis v Union Territory AIR 1981 SC 746); It includes all those aspects which go to make a man's life meaningful, complete and worth living (Maneka Gandhi v. Union of India AIR 1978 SC 597); the word 'protection of life' implies the right to live consistently with human dignity and decency (Sunil v. Delhi Administration AIR 1978 SC 1675).

8 Bandhua Mukti Morcha v. Union of India AIR 1984 SC 802

9 Peoples Union for Democratic Rights v. Union of India AIR 1982 SC 1473

10 Neerja Choudhary v. State of Madhya Pradesh AIR 1984 SC 1099

11 Olga Tellis v. Bombay Corporation AIR 1986 SC 180.

instructions in the Constitution itself so that no government in power can deny accountability and responsibility towards the little ones to protect them from exploitation.

The Constitution also provides for the Prohibition of traffic in human beings and forced labour under Article 23[12] which legitimates and prohibits traffic in human beings[13] and forced labour and also makes it a punishable offence. India, which faces the problem of bonded labour and also the problem of bonded child labour, needed such a provision to put an end to the sale and purchase of human beings and also to allow the working of human generation for a person as a part of the satisfaction of debt etc. and the makers of the Constitution stood up to the occasion by not only incorporating this provision under Part III of the Constitution but also declaring these practices to be offence and make them punishable. Article 21 A[14] of the Constitution, inserted under Part III by the Eighty-Sixth Amendment in 2002 made the 'right to education' for children a fundamental right in India and made it obligatory for the State to provide free and compulsory education to all children of the age of six to fourteen years. This has been a remarkable step not only towards eliminating illiteracy in the country but also towards eliminating the menace of child labour since many parents who did not have the resources to educate their children due to economic considerations can now throw this economic burden on the State since it has been made duty bound for the State to provide free and compulsory education and education of children has the potential of destroying the vicious cycle of poverty and illiteracy pervading over generations.

The Directive Principles of State Policy, which are the fundamental norms in the governance of the country[15] also provide provisions which expect the government in power to not only be protective towards the child but also sensitive towards the child and to check any possibility of abuse of childhood. It has been provided explicitly in the Constitution of India under article 39 (e)[16] that the tender age of children is not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and to ensure that the growth and development of the child in all dimension is not hindered, article 39 (f)[17] provides that children are given opportunities and facilities to develop healthily and also to ensure that childhood is not subject to any exploitation or abuse, the same provision further provides that childhood and youth are protected against exploitation and moral and material abandonment. The provision 39(f) appears to be inspired by Article 41 of the Constitution of the ILO.[18] Article 41[19] of the Indian Constitution provides significant directive for the State to secure the right to education and it is intended that the State within its limits of economic capacity and development, make effective provision for the right to education which is a beneficial part of law for the children in India because there existed massive illiteracy then in 1950. Article 45[20] makes Provision for early childhood care and education to children below the age of six years and the age under this provision was fourteen years before the eighty-sixth amendment made in 2010. The aim behind this provision was also towards the eradication of illiteracy and the empowerment of children through education. Article 46[21] of the Indian Constitution directs the State to promote with special care the educational and economic interests of the weaker sections of the society and to protect them from social injustice and all forms of exploitation and since the sizable number of child labourers in India are found among the classes and

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12 Article 23 provides for the Prohibition of traffic in human beings and forced labour- (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited, and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste, or class or any of them.

13 'Traffic in human beings' generally means to deal with men, women and children just like goods. It also covers slavery through not expressly mentioned.

14 21A provides for the Right to Education – The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

15 Article 37 provides that the provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

16 Article 39(e) provides that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

17 39(f) provides that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

18 Soumitra Kumar Chatterjee, "Indian Constitution and the Protection of Child Labour: A Study 35(415) Labour & Industrial Cases 178 (July 2002) at 181.

19 Article 41 provides that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.

20 The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

21 Article 46 provides for the Promotion of education and economic interests of Schedule Castes, Schedule Tribes and other weaker sections- The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Schedule Castes and Schedule Tribes, and shall protect them from social injustice and all forms of exploitation.

sections of the society, this provision creates a scope of upliftment. Empowering these sections would be facilitative in curbing child labour to an extent that by economic or social circumstances, the people would not be compelled to make the children work like adults. Article 47[22] which makes the State duty-bound to 'raise the level of nutrition and the standard of living and to improve public health' also brings into the forefront the lives of millions of children from the nutrition in food and standard of life is a faraway dream.

Part IV A which was incorporated by the Forty-Second Amendment Act, 1976 contains provision 51A (k)[23] which was incorporated by the Eighty-Sixth Amendment Act 2002 and which provides for the duty of the parent or the guardian of the child to provide the opportunities for education to the child which is imperative since the contribution of parents or guardian towards educating children rather than employing children in the initial ages of life is immensely important to curb the menace of child labour. If this fundamental duty is lived up to by the people, it would be a great step towards the elimination of child labour in India. One more provision which is needed to be mentioned is 51A (h) which makes it a duty of every citizen to develop a scientific temper, humanism and the spirit of inquiry and reform, this is important because India has old notions of caste-based employment (that a cobbler's son should be a cobbler etc.), restricting the girls to household chores rather than giving them equal opportunities than that to boys (which is a factor responsible for girl child labour), believing that children are the gift of god and go on producing children and therefore not appreciating the catastrophes and nightmares due to the continuing population explosion (which is a great factor responsible for poverty in this country and thereby child labour in this country) and many more things. There is a great need among the citizens of India to develop a spirit of inquiry and reform, to develop a scientific temper, and to throw away the rotten and absurd notions which have not allowed this country to develop, and which have compelled it to remain a poor country.

Concluding remarks

It is imperative to make mention of the provision which according to the father of the Indian Constitution is the 'heart and soul of the Constitution' and which guarantees the enforcement of the rights contained in Part III of the Constitution (the fundamental rights) to be enforced before the Apex Court of the Country as a matter of right. The importance of legal representation in cases of violation of fundamental rights of the citizens has also facilitated the Apex Court in India to bring forth the concept of 'Public Interest Litigation' diluting the concept of 'Locus Standi' for this category of cases. Article 32[24] has been the way through which the plight of various disadvantaged groups and classes, including the child labourers, has reached the doors of the Apex Court of this country, and this has been the doorway to the taking of cognizance over the abuse and exploitation faced by the working children of this country by the Supreme Court of the country which has responded to their plight in several celebrated cases. Had Article 32 not paved the way to the Supreme Court with such accessibility, the child labourers suffering in different parts of the country, because of their unawareness, illiteracy, and inaccessibility to various other reasons, never have been able to represent their plight before the Apex Court of this huge country. Having said that, there is still a long way for the Indian governance to realise the ideal envisaged for the 'child' and 'childhood'.

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22 Article 47 provides for the duty of the State to raise the level of nutrition and the standard of living and to improve public health – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and....

23 Article 51A(k) provides for one who is a parent or guardian to provide opportunities for education to his child, or as the case may be, ward between the age of six and fourteen years.

24 Article 32 provides for the remedies for enforcement of rights conferred by this Part – (1) the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

Exploring the need for Gender-Neutral Laws in Addressing marital rape: A Glimpse into the current Discourse

Mehak Rai Sethi*
Dhawal Shankar Srivastava**

ABSTRACT

Marital rape inflicts severe harm on women, impacting their well-being, identity, and dignity, with lasting psychological scars. In India, the absence of legal provisions perpetuates the misconception that marriage implies consent, blurring the line between consensual and non-consensual intercourse. Removing Exception 2 from the Indian Penal Code, advocated by feminists and legal experts, raises concerns about expanding its scope. Sexual assaults beyond traditional norms are more prevalent than acknowledged, yet India's laws adhere to a limited definition of rape. Recent court cases underscore the urgency of addressing marital rape, recognizing the challenges of measurement, and reporting due to stigma and underreporting. The landmark Supreme Court decision acknowledged marital rape as rape and highlighted intimate partner violence. A comprehensive solution involves a separate law focusing on sexual violence in marital relationships, irrespective of gender, prioritizing victims. This approach transcends singular perspectives, safeguarding the rights and dignity of all individuals. By recognizing the complexities of sexual violence within marriages and promoting a gender-neutral legal framework, India can progress in protecting its citizens' autonomy. This paper proposes a balanced approach to rethinking marital rape laws, prioritizing equal protection and societal advancement.

Keywords: Marital Rape, Indian Penal Code, Gender-Neutrality, Rape, Sexual Violence, Sexual Offences

Introduction

Marriage and forced sex within it are seen legally and culturally through the prism of the philosophy of perpetual, irrevocable consent, which is implicit in the institution of marriage. Sex is viewed as a sine qua non in a conjugal relation, but in reality, this 'absolute need' casts light over its roots penetrated in patriarchy that represents a hovering gizmo of societal control over a woman's body[1]. How marital rape is now legalized differs widely, and the power dynamics that shape rape are perilous?

The concept of 'will' is often overshadowed by the general, flawed interpretation of 'consent' by spouses/partners in romantic relationships. The autonomy of an individual over his/her body is the essence of individual liberty, but this blotched and often faded line between 'consent' and 'will' renders the determination of the difference between rape and consensual sex, a serious conundrum. The efforts at the determination of the truth become doubly baffling when the same is to be ascertained in the context of 'Marital sex'.

As old as the institution of marriage itself is the history of sexual violence in marriage. However, for millennia, marital rape, like other types of sexual assault, was not seen as an issue for the larger segment of the population, rather it was viewed as purely a private issue that should be shut behind the closed curtains of the marital relationship between spouses.

With this paper, the researchers aim to unveil the harsh realities of the dark underbelly of a seemingly simplistic spousal relationship. It is to emphasize the fact that it is pertinent to gain an insight into the operation of the Indian legal system which views rape laws as 'gender-specific' while disregarding the not-so-gender-specific notion of pleasure.

Marriage: A Sacrament or License to Rape?

"We must distinguish between marriage and sexual activity. Human relationships must be based on respect, autonomy, and love" [2].

No statute or law in India specifically defines marital rape. According to Section 375 of the Indian Penal Code (IPC), a man commits rape if he engages in sexual activity with a woman without her consent or if she is a minor. However, Exception 2 to Section 375 states that "sexual intercourse by a man with his wife, when the wife is not under the age of fifteen, is not rape."

Nonetheless, the Supreme Court of India ruled in a momentous judgment[3] in 2018 that having intercourse

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1. Kersti Yllo, "Marital rape in a global context: from 17th century to today" , Oxford University Press, 2017
2. Vrinda Grover, a Human Rights lawyers, quoted in a debate regarding raising the age of consent from 16 years to 18 years, available at https://agentsofishq.com/post/quotes-courts-women-right-consent (last visited on August 30, 2022)
3. Independent Thought vs. Union of India and Anr. [(2017) 10 SCC 800]

with your wife when she is between the ages of 15 and 18 years shall be regarded as rape. This exemption effectively grants a marital right to a "husband," who may use it to engage in consensual or non-consensual sex with his "wife" with the support of the law. The constitutionality of this exception has been questioned because it violates a woman's right to informed consent depending on her marital status.

In this ruling, the Hon'ble Supreme Court dealt with the issue of whether sexual activity between spouses where the girl's age falls within the range of fifteen and eighteen years constitute rape. While the POCSO Act, 2012[4] and Exception 2 appended to Section 375 of the Indian Penal Code, 1860 conflicted, the Court narrowed down the limit of the exception and resolved it by raising the "age of consent" for "marital sexual intercourse" to eighteen years to safeguard the interests of the child who is married. The Court applied a purposive and cynical strategy and ruled out the application of Exception 2 to Section 375, IPC in such cases. The Court found that the Exception under impugnity does not agree with the letter and spirit of Art 14 and 15 and, therefore, the said exception is violative. It created an artificial and unnecessary distinction between married and unmarried girls that had no rational connection to the Section's goal. The Court also noted that the Exception ran counter to the framework created by other pro-child laws, such as POCSO, which would take precedence because they were special laws [5].

This provision not only discriminates between a married woman and an unmarried one but also classifies that the consent of a married woman below the age of 15 is far more valuable than the consent of a woman above the same age.

Presently, married women (over 18 years of age) in India only have two legal routes to take for raising their voices against forced or non-consensual sex by their spouses: a civil route under the Protection of Women from Domestic Violence Act, 2005[6] or a criminal route that includes filing a complaint of an offense under Section 498-A of the IPC on cruelty to a wife by a husband or a husband's relatives[7].

The Chimera of Consent

The immunity of marital rape is not a novel trope for many post-colonial common law nations. It has been dealt with, by these countries for years now. The history of sexual violence in marriage is as old as the institution of marriage itself. Some countries chose to criminalize it, some chose to keep mum, while others specifically granted immunity in these cases. India falls under the third category, as it has been emphasized in several cases that 'marital rape is not rape'.

India, a megadiverse country, stands on the pillars of secularity, sovereignty, and democracy, but most importantly, it guarantees to the people of India - a life of dignity and respect. Despite this, there are still certain strings of outmoded and atavistic policies that keep pulling us back. Our policy regarding the issue of extending immunity to the persons committing 'marital rape' is one such moss-backed stance of the legislature. The line of difference in the approach of treating 'consent' as fading upon crossing the turnpike of marriage is implausible.

The immunity extended to Marital Rape is predicated essentially upon two premises:

(I) "Consent is Perpetual", i.e., 'permission held by the spouse for all time'. This is the idea that a woman gives her husband her irrevocable consent at marriage. The archaic notion that a woman is a man's property is the source of this term in colonial-era jurisprudence.

(ii) "Sex is Expected": This is the idea that a woman is required or required to perform sexual duties in a marriage since the goal of marriage is reproduction. The clause suggests that a woman cannot reject sex since the husband has a reasonable expectation of it during a marriage.

These premises clearly reflect the Indian stand to incline much towards the views of Justice Hale, as observed by him in History of the Pleas of the Crown, where he wrote:[8]

"The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract...."

Hale's doctrine was one of the first attempts at dealing with the issue of 'Marital Rape', however, it does not mirror the reflection of a democratic and individualistic society. The 'absence of a right of choice or will' seems to make this approach highly defective.

Women can Be Perpetrators too

Since the sexual revolution, Western nations have seen a significant cultural and social shift of sexuality [9]. Sexual

4 Protection of Children from Sexual Offences Act, 2012

5 Independent Thought vs. Union of India and Anr. [(2017) 10 SCC 800], available at https://privacylibrary.ccgnlud.org/case/independent-thought-vs-union-of-india-and-ors (last visited on Sept. 24, 2022)

6 Act 43 of 2006

7 Nandini Sharma, "Marital Rape: Can Marriage be taken as a license to Rape?", Outlook India, Mar. 6, 2021

8 L.W. Siegel, "The Marital Rape Exemption: Evolution to Extinction", 43(2) Cleveland State Law Review 353 (1995).

9 Volkmar Sigusch, "On Cultural Transformations of Sexuality and Gender in recent decades", German Medical Science (2004), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2703209/ (last visited on Sept. 21, 2022)

behavior appears to have undergone significant change in the modern age, including changes in people's tastes, methods of engaging in these behaviours, and intensity. There is a drastic change in the ways we perceive sex now. For our previous generations, sex was merely viewed as a necessity to ensure procreation and continuity of lineage, but today, it is viewed more as exploring the realms of pleasure. Physical desires and urges are no more consciously restrained like they were in ancient Europe or China, much less subtly subdued like they were in ancient India[10].

A major digression from the ancient perception of the sexual drive being more in men than women has been disproved by several sociological and psychological studies that brought to light that "Men's and Women's sexual desire levels are more similar than different"[11]. Studies also suggest that "Both men's and women's sexual attraction is influenced by several variables, including situation as well as biology, age, and medication usage".[12]

Thus, to generalize the notion that only men can commit sexual assault or rape is blatantly frivolous and flawed. An intriguing illustration of this is the recent Gayle Newland case that was witnessed in the UK. While posing as a man named Kye Newman, Newland met a female student online. They got along well and eventually met in person. The pupil was made to wear a blindfold the whole time because Newland maintained that she had suffered terrible wounds for which she was ashamed. Newland started using a prosthetic penis and a body suit when they started indulging in sexual intercourse. They had intercourse for a few months until the student at one time tore off her blindfold during sex. Newland received an eight-year jail term after being found guilty on three charges of assault by penetration.[13]

Such instances, however, are not limited to the UK only. In 2007, the Indian government conducted research on child sexual abuse and discovered that, of the children who reported experiencing serious sexual abuse, including rape or sodomy, 57.3% were males and 42.7% were girls. More recently, the Delhi-based Centre for Civil Society discovered that around 18% of the adult men in India who were polled said they had been forced or pressured into having sex. 16% of those claimed a female offender, and 2% a male.[14]

Charges under Section 377 of the IPC, India's recently reintroduced anti-sodomy statute, have at times been the sole means of bringing any sort of justice to these male survivors. Problematically, however, this legislation does not distinguish between consensual and non-consensual sexual actions between two adult males and does not treat "sodomy" as an actual rape; its conviction numbers tell us zilch. Even this option is unavailable to those who were violated in non-penile ways. Therefore, it is necessary to reconsider, re-evaluate and re-draft our rape laws and other types of sexual assault.

Criminalizing Marital Rape: Bull in a China Shop

Removal of the Exception Would Expand the Provision of the Law

In the case of *RIT Foundation v UOI* [15], filed before the Delhi High Court the petitioner contended that exception 2 (hereinafter referred to as the Exception) appended to S. 375 of the Indian Penal Code needs removal as the exception under impunity is unconstitutional[16]. However, the respondents, in this case, have stated a very valid point that as soon as the court ventures into the removal of exception, an automatic after-effect would be broadening and expanding of the provision, consequently bringing into its ambit people who, hitherto have been protected through the exception. It is submitted that the courts should not venture into the creation of new crimes which is the sole prerogative of the legislation. Not only such an exercise would be detrimental to the already established principles of interpretation concerning criminal law, also it would be in contravention of the established principles of separation of powers[17].

The Existence of a Legal Framework Protecting the Interest of a Married Woman

One of the arguments that is forwarded concerning the deletion of the exception is a seemingly uninformed view that there is no legislative framework that talks about the criminalization of spousal sexual violence. If we look at the scheme of the IPC[18], we will find that there are separate

10 Ibid.
11 Gina Shaw, "Sex Drive: How do Men and Women Compare?", WebMD, Jun. 27, 2022, available at https://www.webmd.com/sex/features/sex-drive-how-do-men-women-compare (last visited on Sept. 21, 2022)
12 Ibid.
13 Simon Hattenstone, "I was pretending to be a boy for a variety of reasons: the strange case of Gayle Newland", The Guardian, Jul. 15, 2017, available at: https://web.archive.org/web/20210927133556/https://www.theguardian.com/uk-news/2017/jul/15/gayle-newland-retrial (last visited on Sept. 21, 2022)
14 Centre for Civil Society, "India's law should recognize that men can be raped too", CCS, available at https://ccs.in/indias-law-should-recognise-men-can-be-raped-too (last visited on Sept. 22, 2022)
15 W.P.(C) 5858/2017
16 Ibid.
17 M.P. Jain, Indian Constitutional Law 257 (Lexis Nexis, New Delhi, 6th edn., 2010).
18 The Indian Penal Code (Act No. 45 of 1860)

portions earmarked for sexual offenses and offenses of marriage. The legislative intent is clear in this regard that there is a difference between rape and spousal sexual violence. If we read together the definition of cruelty given under Section 498A of the IPC[19] and couple it with the definition given under Section 3 of the Domestic Violence Act,[20] then we will understand that spousal sexual violence has not been brushed under the carpet. Things become clearer when we look at section 376B of the IPC, which makes sexual intercourse culpable when the husband has sex with his wife against her will, during judicial separation. The distinction here is well crafted based upon practical necessity as the factum of marriage envelops not just a variety of things but a certain kind of intimacy that presumes the presence of consent on both the husband and wife. Whereas rape, on the other hand, negates intimacy which is by marriage; hence, removal of the exception would render S.376B otiose.

One more interesting thing that one can infer by a bare perusal of S.375 is that the act of 'sexual intercourse' per se becomes illegal when the act falls in one of the seven situations mentioned thereunder. Further, combining these seven circumstances along with S.376B makes it crystal clear that for the ascertainment of rape, consent is not the only guiding factor. Further, if we investigate S.198B of the CrPC [21], we can see that the court can take cognizance only if the wife makes or files a complaint against the husband. Further S.114A of the Indian Evidence Act, of 1872[22] presumes the absence of consent on the part of the wife. Thus, we can see that there is a legislative framework that protects the interest of a married woman if she is subjected to sexual violence by her husband.

Hanging Damocles Sword

As said earlier the distinction is made because of the nature of marriage and the kind of intimacy attached to it, equating, and treating both the subject matter on the same footing is only going to create chaos. Thus, the distinction is based on an intelligible differentia and, therefore, aligns with Art 14, 15, 19, and 21 of the Constitution[23]. Deletion of the exception is only going to open a can of worms in the lives of married people. A man will always be under apprehension of an impending danger post an act of sexual intercourse; a constant Damocles sword hanging over the head with a thin thread is certainly not good for a healthy marriage. Marriage is a very complex arrangement and couples involved in marriage bow towards each other for a variety of reasons and similarly accede to the demand of each other in sexual matters as well for a catena of considerations. It is impractical, illogical, and inconclusive to always investigate the question of consent in an arrangement like marriage. If every other instance of sexual intercourse could be clothed as rape, then men would have no choice but to draw up a detailed agreement containing the essentials to be taken care of concerning dating, companionship, and coitus. In the worst-case scenario, a man would have no choice but to keep a detailed account of acts of intimacy as evidence and such abysmal practices would be an anathema and would fly right into the face of a healthy marriage.

Changing Contours of Morality

Post Navtej Singh Johars's case[24], one evident thing is that notions of morality cannot be unilateral, and neither is there any golden scale to judge them. Society remains in a state of flux, it develops new notions of morality, contests old notions, adds and deletes new vistas and the whole process is very organic. The same society which considered homosexuality as a crime once upon a time, strongly championed the cause of homosexual people. After the decriminalization of homosexuality as an offense there are now demands that sexual relationships between the consenting couples be given the same stature concerning marriage, inheritance, and cohabitation as the people with heterosexual orientation enjoy. The complexities weaved by society desire novel tweaking of the law itself. The day is not far when the marriage between homosexual couples will be legally recognized in India just like it is being recognized in different parts of the world. With marriage, there will be a scope for divorce as well and so will be a scope for domestic violence. In the light of these developments to look at the factum of marriage where only a man can be abusive, and a woman would be passive is myopic and impractical. It is, therefore, necessary that law about sexual violence between married couples should be kept out from the definition of rape, further sexual violence amongst the spouse should be gender neutral in nature, bringing parity for both the partners.

Chances of Abuse

One of the factors associated with over-criminalization is the potential and actual abuse of the law. We have seen those laws of sedition, laws against prevention of terrorist activities, etc have been used at the whims and caprice of

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19 Ibid.
20 Supra note 8
21 Code of Criminal Procedure, 1973 (Act No. 2 of 1974)
22 Act No. 1 of 1872
23 The Constitution of India, 1950
24 Navtej Singh Johar v. U.O.I, (2018) 10 SCC 1.
25 Supra note 8

the authorities. The reverse burden of proof associated with these legislations provides immunity from the court's scrutiny thus resulting in a manifold increase in usage by the police. It is no wonder that already the Domestic Violence Act[25] is being misused at a large scale[26]. As per a few studies, there is a greater prevalence of sexual violence against men in India in comparison to what is being faced by men in the United States of America, the UK or Canada[27]. The notion that a woman is only at the receiving end is an archetypal effort to consolidate a vestigial stereotype. This gendered stereotype does not allow men facing such abuse to come out and speak as it is expected from a man to face violence in a 'manly' way. This ingrained masochism has led to the development of severe psychological distress among the male victims[28]. The fear of being ridiculed further stunts and muzzles the voice of male victims. It is, therefore, submitted that over over-criminalization of a law that is already disproportionately inclined against the interest of men is only going to be misused more. The already growing number of false rape cases against men has shown how a law can be a tool of oppression[29].

Reliance on *Independent Thought v. Union of India*[30].

Before the outcome of the case, as per exception 2 of S.375, coitus between spouses would not be rape provided the wife is not below the age of 15. Supreme Court in this case raised the age of consent for a woman to 18 years as the court found the distinction artificial and unconstitutional. It is, therefore, argued that in the same manner, the exception can be removed altogether. It is submitted that the court adopted the right approach of interpretation by reading down the exception and thus bringing the definition in alignment with the POCSO Act[31]. As per S.2(1)(d) of the POCSO Act child is a person below the age of 18 years. If we look at S.42 A of the POCSO Act, we will see that this is a special legislation, and the definition of sexual assault given under this act is like what is there in S.375 of the IPC. The rule of statutory interpretation states that when there is a conflict between a special legislation and a general legislation then the special legislation shall override the general legislation[32]. Thus, the Supreme Court cured the anomalous situation by reading down the exception. The court itself made it clear in the judgment that the issue of the legality of exception 2 of S.375 is not discussed as such.

Sexual Liberation and The Misguided Notion of Considering Women as Subservient

This is the time when both genders do not get shy to discover their sexuality. They experimented with the stuff that was considered immoral sexual practices once. People explore more now, in the form of BDSM (Bondage and Discipline, dominance and submission, and sadism and masochism), role play, and kink sex, platforms on Tumblr, Twitter, and Tok now openly host discussion forums aimed at providing unmonitored space to people across the globe where they can discuss sexual interests[33]. We can see a veritable shift in the mood of society whereby sex as a subject is no longer considered as restrictive, both men and women now consider sex as a healthy expression of sexuality which gives them an actual self-determination over their body[34]. BDSM is no longer considered a tool to subjugate women, rather it is some sort of a political stand now against patriarchy that a woman should not be considered a passive agent when it comes to making sexually informed decisions about herself[35]. Even as a consumer one can witness that a woman is engaging in making informed choices about herself when it comes to buying sex toys[36]. Therefore, to consider that only a man is capable of sexual violence in a marital setup is a misguided and oversimplification of a very complex arrangement.

Conclusion

Cutting The Gordian Knot

"By viewing sex as something men always want but women must be protected from, we are more likely to view sex as something for men; men are sexual agents and women's sexuality is important only insofar as men want to have sex with them. This feeds into other harmful sexual stereotypes, such as that men are or should be

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26 J.S. Malik and A. Nadda, "A Cross Section Study of Gender - Based Violence Against Men in the Rural Area of Haryana, India" 44(1) Indian J Comm Med 35 (2019).

27 Ibid.

28 Sanjay Deshpande, "Sociocultural and Legal Aspects of Violence Against Men" 1(3-4) Journal of Psychosexual Health 246-249 (2019).

29 Soibam Rocky Singh, "Delhi High Court expresses worry over the alarming increase of false rape cases" The Hindu Aug 22nd, 2021, available at https://www.thehindu.com/news/national/delhi-high-court-expresses-worry-over-alarming-increase-of-false-rape-cases/article36042093.ece (last visited September 25, 2022).

30 (2017) 10 SCC 800.

31 Protection of Children from Sexual Offences Act, 2012.

32 G P Singh, Principles of Statutory Interpretation (Wadhwa & Company, New Delhi, 9th ed., 2004)

33 Lisa Rivoli, "Liberation Through Domination: BDSM Culture and Submissive- Role Women" Student Publications 318, available at: https://cupola.gettysburg.edu/student_scholarship/318 (last visited on Sept. 24, 2022)

34 Ibid.

35 Ibid.

36 Cornelia Mayr, "Beyond Plug and play: The Acquisition and meaning of Vibrators in Heterosexual Relationships" 45(1) International Journal of Consumer Studies 28-37 (2021). Available at: https://doi.org/10.1111/ijcs.12601 (last visited on Sept. 25, 2022)

sexually dominant and women are or should be sexually submissive" [37].

It is long due for the legislature to recognize this flaw in the law, repeal Section 375 (Exception) of the IPC and put marital rape within the rape laws. Women will be more protected from violent spouses if this law is repealed. They may protect themselves against domestic violence and sexual assault by getting the support they need to recover from marital rape. Indian women should be treated equally, and no one, not even a spouse, should be allowed to violate another person's human rights. Legally outlawing marital rape must be complemented by a shift in the mindset of prosecutors, police, and society at large.

There is no one mold of marital intercourse within which we can place the perpetual consent of a spouse and seal it with the lid labelled 'married'. There are several other compartments and varying tones and dimensions of sexual violence that need to be accommodated into the legal system and brought under the umbrella of rape laws. Section 375 is followed by varied such dimensions of rape/sexual violence. One such dimension like non-consensual BDSM activities behind the curtains of conjugal relations should also be given place under the law. The acts that may be erotic for one spouse may seem erratic to the other spouse. The engagement of both, with an equal amount of willingness, is what may be equated with consensual sex. If the weightage of consent is so heavy before the connection of two people before marriage, then how is that value outweighed just by the label of marriage, is unfathomable.

The IPC, 1860 provides for a provision where non-consensual sex during judicial separation is treated as rape, albeit there is no such provision in cases where both parties are bound to live under the same roof in the name of 'cooling-off' during the pendency of their divorce proceedings. Who is to provide a guarantee that any intercourse during this time would be consensual? If non-consensual, shouldn't it be termed as rape too?

Another unexplored area in the dark accosts of our legal system is the flawed presumption that man, ergo in a marriage- a husband, is the flagrant violator. It would be specious to believe that only a man can be the perpetrator of sexual offenses. The legislature has often disregarded the fact that even a woman can commit rape or sexual violence, the Gayle Newland case[38], being just one of the many such instances.

The kind of cases about violence against men aptly suggest that to presume only men can be aggressors is akin to ignoring the calls by Cassandra[39]. The high-profile defamation case of *Johnny Depp v. Amber Heard*[40] has opened the eyes of the world to the unpopular fact that it takes two to tango. To put it simply, in the absence of gender-neutral laws, the whole paradigm of gender justice would be facing an impending quicksand. If a similar situation befalls a simpleton living in an ordinary conservative Indian hamlet, the same may not be the fate of that unfortunate fellow. Long before the declaration of the actual verdict of the Court, a man is often declared guilty and forced to face the societally conferred titles like wife-beater, emasculate, impuissant, unmanly, sadist, etc.

In the Indian context, it goes against the cultural ideal of masculinity or the "macho image" that society wants men to project. The society does not permit or encourage male "victims" to share or disclose their experiences of sexual harassment. This reinforces a societal stereotype that has been around for a century and portrays men as sexual predators and women as sexual victims. Another reason to avoid disclosing such instances is the risk that doing so may make the victim, who is usually a man, the focus of derision among his peers. The fact is that men are barely protected by Indian laws against sexual harassment. The laws in place, which were created based on equality and fairness, do nothing to shield males from workplace/domestic sexual harassment by female co-workers/spouses/partners. While there is no information on sexual harassment of males in India because most of such incidents go unreported, the Equal Employment Opportunity Commission in the US reports that men make up around 16.5% of the annual complaints it gets[41].

The non-existence of marital rape law in India is a violation of the right to choose and the right to live with dignity, guaranteed under Article 21 of the Constitution. This right to choose and live a life with dignity has not merely been guaranteed to women, but rather to people belonging to all categories of gender. Thus, it seems a bit perplexing as to how a general constitutional guarantee loses its hold in the criminal laws of the country, where this right is vested only in one gender. It is a clear violation of another constitutional guarantee, i.e., the Right to Equality[42] . The categorization is palpably unreasonable and unjust.

Therefore, it is a desideratum to step into this area of legal darkness and behold the flickering lamps of Justice.

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37 Natasha McKeever, "Can a Woman Rape a Man and Why does it matter", 13 Criminal Law and Philosophy 614 (2019), available at: https://doi.org/10.1007/s11572-018-9485-6 (last visited on Sept. 24, 2022)

38 Supra note 14

39 Editors of Encyclopaedia Britannica, "Cassandra", Encyclopaedia Britannica, available at https://www.britannica.com/topic/Cassandra-Greek-mythology (last visited on Sept. 26, 2022)

40 Depp v. Heard, No. CL-2019-2911 (Va. Cir. Ct. Jul. 25, 2019)

41 Seema Sundd, et. al., "India: Gender Neutrality & Sexual Harassment Laws in India: An Overview", Monday, available at: https://www.mondaq.com/india/employee-rights-labour-relations/988146/gender-neutrality-sexual-harassment-laws-in-india-an-overview (last visited on Sept. 26, 2022)

42 Article 14, The Constitution of India, 1950

An Overview of the Uniform Civil Code concerning The State of Nagaland

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ABSTRACT

In this article, an overview of the Uniform Civil Code will be discussed, including its history, the Supreme Court's landmark decision, the advantages, and disadvantages of the Uniform Civil Code, and with special reference to the state of Nagaland on its nature as an autonomous governing system under Article 371 (A) and the challenges to implementing the Uniform Civil Code while preserving cultural and traditional customary law practices.

Keywords: Uniform Civil Code, Customary Rights, Article 371(A),

Introduction

The Uniform Civil Code (UCC) has long been a source of challenge and discussion in India's legal system. A UCC's fundamental goal is to develop a standard set of regulations addressing personal issues like marriage, divorce, inheritance, and property for all persons, regardless of religious beliefs or community affiliations. In essence, it calls for the unification of personal laws that are now disparate across India's numerous religious communities, including Hindus, Muslims, Christians, and others.

The UCC's relevance in India stems from the country's diverse religious and cultural backgrounds. India is a secular democracy that values equality and fairness for all citizens, regardless of religion or ethnicity. However, this diversity has resulted in the creation of unique personal laws for various religious groups, which frequently results in differences in legal rights, particularly in family problems. The significance of the UCC in India cannot be overemphasized.

It is an ongoing constitutional and societal debate aimed at striking a balance between uniformity and diversity, individual and collective rights, tradition, and modernization.

Historical Background of the Uniform Civil Code (UCC) in India

In 1840, the British government adopted universal rules for crimes, evidence, and contracts based on the Lex Loci report, but they purposely excluded Hindu and Muslim personal laws. In contrast, the British India Judiciary permitted British justices to enforce Hindu, Muslim, and English laws. At the same time, reformers advocated for laws to protect women from religious discrimination, such as Sati.

In 1946, Independent India formed a Constituent Assembly to draft our Constitution, which was made up of two types of members: those who wanted to reform society by adopting the Uniform Civil Code, such as Dr. B. R Ambedkar, and others who were primarily Muslim legislators who supported personal laws. In addition, minority groups in the Constituent Assembly opposed the Uniform Civil Code. As a result, only one line is added to the Constitution: Article 44 in Part IV of the Directive Principle State Policy.

It states that "The State shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India".

Because it is incorporated in the DPSP, it is not enforceable in court, nor can any political issue be settled because a minority, particularly Muslims, believe it contradicts or repeals their laws. Then a series of Bills were passed to codify Hindu laws in the form of the Hindu Marriage Act, of 1955, the Hindu Succession Act, of 1956, the Hindu Minority and Guardianship Act, of 1956, and the Hindu Adoption and Maintenance Act, of 1956, collectively known as the Hindu Code Bill (covers Buddhists, Sikhs, Jains, and different religious denominations of Hindus), which allows women the right to divorce and inheritance, made caste irrelevant to marriage, and abolished bigamy[1]

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[1] Jagran Josh, what is Uniform Civil Code? https://www.jagranjosh.com/general-knowledge/why-uniform-civil-code-is-necessary-for-india-1477037384-1

Constitutional Provisions and Legal Cases Related to Personal Laws and the UCC:

The Indian Constitution contains several sections that are relevant to the issue of personal law, particularly considering the Uniform Civil Code. These regulations contain Articles 44, 25, and 26[2].

i) Article 44

Article 44 of the Indian Constitution is a Directive Principle of State Policy that states,

"The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."

This article proposes a UCC to replace the current personal laws that differ by religion and location, to promote consistent norms governing many aspects of personal life, such as marriage, divorce, adoption, and inheritance, regardless of an individual's religion. The Directive Principles are not legally binding, but they serve as guiding principles for the government[3].

ii) Article 25 (Freedom of religion)

Article 25 guarantees freedom of conscience and the right to freely profess, practice, and promote religion. However, it must respect public order, morality, health, and other fundamental rights.

1. Article 25 protects individuals' religious freedom and allows for personal laws based on religion.
2. The state can control religious practices that violate public order, morals, or health.

iii) Article 26 (Freedom to Manage Religious Affairs)

Article 26 gives religious denominations the authority to administer their religious affairs, including creating institutions for religious and charitable reasons.

Article 26 allows religious organizations to conduct their operations independently, although it does not grant complete autonomy. These institutions can be governed by the state to ensure public order, morality, and other fundamental rights.

The Supreme Court has addressed the topic of a Uniform Civil Code in various cases. As a result, the Supreme Court has produced several notable rulings and opinions that have significantly influenced the debate over the UCC. Some of them include.

iv) Mohd. Ahmed Khan vs Shah Bano Begum (1985)[4]

In this case, the Supreme Court ruled that Muslim women are entitled to maintenance beyond the iddat period under Section 125 of the Criminal Procedure Code. It was discovered that a UCC would help to reduce contradictions based on distinct religious concepts.

v) Sarla Mudgal v. Union of India (1995)[5]

In this case, the Supreme Court ruled that a Hindu husband who converts to Islam cannot remarry without dissolving his previous marriage. The court underlined the relevance of the Uniform Civil Code (UCC) in achieving gender justice and equality.

vi) Shayara Bano v. Union of India (2017)[6]

In this case, the Supreme Court deemed triple talaq unlawful, ruling that it infringed Muslim women's fundamental rights. The decision emphasized the importance of implementing a UCC to combat gender discrimination and guarantee uniform laws governing marriage and divorce.

vii) Joseph Shine vs. Union of India (2018)[7]

In this case, the Supreme Court decided that Section 497 of the IPC, which dealt with adultery, violated Articles 14, 15, and 21 of the Constitution. The court underlined the necessity of gender-neutral laws and advocated the establishment of a Uniform Civil Code to overcome discrepancies in personal laws.

viii) Indian Young Lawyers Association vs. The State of Kerala (2018)[8]

In this case, the Supreme Court addressed the ban on women of menstrual age entering the Sabarimala temple in Kerala. The decision emphasized the importance of a United Nations Convention on the Rights of the Child (UCC) to reconcile competing rights and ensure gender equality across religions.

Nagaland in the context of the Uniform Civil Code

Nagaland, a state in Northeastern India, is a unique entity with its rich cultural heritage, diverse tribal communities, and distinctive legal framework. The state's geographical location, bordering Myanmar, adds to its strategic importance. Nagaland is known for its beautiful scenery and vibrant festivals, and it is home to 17 major tribes, each with unique customs, traditions, and languages.

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2 The Society for Constitutional Law Discussion Uniform Civil Code: A Critical Analysis https://www.tscld.com/uniform-civil-code-a-critical-analysis

3 Cleartax: What is Uniform Civil Code Under Article 44? Meaning, Purpose, Importance, Pros & Cons https://cleartax.in/s/uniform-civil-code

4 NEXT IAS Content Team Uniform Civil Code (UCC): Meaning, Constitutional Provisions, Debates, Judgments & More https://www.nextias.com/blog/uniform-civil-code-ucc/

5 Drishtiias: Just (Uniform) Civil Code https://www.drishtiias.com/daily-updates/daily-news-editorials/just-uniform-civil-code

6 Uniform Civil Code (UCC) in India: An overview https://www.orfonline.org/expert-speak/uniform-civil-code-ucc-in-india-an-overview

7 NEXT IAS Content Team Uniform Civil Code (UCC): Meaning, Constitutional Provisions, Debates, Judgments & More https://www.nextias.com/blog/uniform-civil-code-ucc/

8 Ibid.

One of the most significant aspects of Nagaland is its distinct constitutional standing under Article 371(A) of the Indian Constitution. This section grants the state extensive autonomy, particularly in the areas of religious and social customs, Naga customary law and procedure, civil and criminal justice administration based on Naga customary law rulings, and property ownership and transfer. These measures aim to maintain the Naga people's distinct identity and traditions.

Nagaland's customary laws are deeply embedded in its people's daily lives, governing personal matters including marriage, divorce, inheritance, and land ownership. These regulations are required to protect the Naga tribes' social fabric and cultural heritage. As a result, implementing a Uniform Civil Code (UCC) in India presents a significant challenge in Nagaland, where uniform laws may be interpreted as a threat to the tribes' traditional and cultural autonomy.

The UCC discussion in India has raged for decades, with opinions focusing on national integration, gender justice, and legal equality. However, in states like Nagaland, the implementation of a UCC must strike a delicate balance between national objectives and the preservation of cultural diversity and traditional practices. As we analyze the potential and problems of adopting a UCC throughout India, we must consider Nagaland's specific situation. Understanding the state's cultural backdrop, legal framework, and people's attitudes is critical to any discussion of the UCC. This article will go into these issues, providing a full analysis of how Nagaland's unique qualities influence the larger topic of India's Uniform Civil Code[9].

Main Features of Article 371(A) and Its Special Provisions about the Uniform Civil Code.

Article 371(A) of the Indian Constitution recognizes Nagaland's distinct cultural, social, and legal customs. This article has significance in the debate over introducing a Uniform Civil Code (UCC) in India because it details safeguards that preserve the preservation of Naga customary laws. The following are the key characteristics and unique provisions of Article 371(A) with specific reference to the UCC [10].

i) Exemption from Central Laws

According to Article 371(A)(1)(a), Nagaland is exempt from any Act of Parliament about:

'The Nagas' religious or social practices

Naga Customary Law and Procedure

Administration of civil and criminal justice involving decisions based on Naga customary law

Ownership and transfer of land and resources"

This exemption means that central legislation, including a possible UCC, does not automatically apply to Nagaland until the state's Legislative Assembly chooses otherwise via resolution. This clause is critical for ensuring the state's autonomy and cultural character.

ii) Preservation of Customary Law

One of the primary goals of Article 371(A) is to maintain Naga customary laws. These laws govern important areas of personal life, including marriage, divorce, inheritance, and property ownership. In the framework of the UCC, which seeks to standardize personal laws across the country, this provision assures that Naga traditions and customs are not harmed unless willingly approved by the state assembly.

iii) Autonomy in the Administration of Justice

Article 371(A)(1)(b) and (c) grant Nagaland autonomy in the administration of civil and criminal justice, especially when decisions are founded on Naga customary law. This means that the state's judicial system can function outside of national guidelines in certain areas, resulting in a framework that is culturally sensitive and community-focused. To avoid conflicts with existing Naga legal norms, the adoption of a UCC must carefully navigate this autonomy.

iv) Control of Land and Resources

Article 371(A)(1)(d) gives Nagaland control over the ownership and transfer of land and resources. This provision is important since land ownership is intricately linked to Nagaland's social identity and economic practices. A UCC that does not adhere to these customary rules may face severe opposition and be interpreted as an infringement on traditional rights.

v) Legislative flexibility

Article 371(A) allows the Nagaland Legislative Assembly to accept or reject the application of central laws in specific regions. This legislative flexibility is crucial when adopting the UCC since it enables Nagaland to selectively incorporate favorable features of the UCC while preserving the integrity of its customary laws.

The Challenge of Implementing the Uniform Civil Code in Nagaland

The unique provisions of Article 371(A) highlight the

[9] ETLegal world. Com Customary laws, constitutional provisions negate need for UCC, say NE parties https://legal.economictimes.indiatimes.com/news/law-policy/customary-laws-constitutional-provisions-negate-need-for-ucc-say-ne-parties/101617995

[10] The morungexpress. Article 371A: Scope, Limitations and Challenges https://morungexpress.com/article-371a-scope-limitations-and-challenges

difficulty of establishing a UCC in India. The UCC attempts to unite and standardize personal laws to ensure equality, but Nagaland's particular situation necessitates a more nuanced approach[11].

i) Cultural Diversity: The UCC must respect and accommodate the many cultural practices and legal traditions of different populations, especially those protected by constitutional provisions such as Article 371(A). The preservation of Naga customary laws is central to the identity and social structure of the Naga tribes. These laws govern critical aspects of personal life, such as marriage, inheritance, divorce, and land ownership. The imposition of a UCC, which aims to standardize these personal laws across India, would undermine these traditional practices, causing social and cultural disruption.

ii) Legal Pluralism: Any attempt to apply to the UCC must strike a balance between the goal of uniformity and the principles of legal pluralism, which acknowledge the legitimacy of customary laws in the states of Nagaland. India's strength resides in its cultural and legal variety. Imposing a UCC without considering the different traditions and practices of states such as Nagaland would undermine this pluralism. Respecting the varied legal systems of different states is critical for preserving national unity while appreciating diversity.

iii) Inclusive Implementation: Interaction with local stakeholders, such as tribal leaders and the Legislative Assembly, is critical for the successful implementation of UCC principles. The process should be progressive and inclusive, regarding local customs and practices. The Naga people's strong sense of cultural identity and sovereignty is vital to their way of life. Their customary laws represent traditional government and community-based dispute resolution systems. A UCC may be regarded as an external imposition, undermining autonomy, and even resulting in resistance and conflict.

iv) Legal Autonomy: Article 371(A) of the Indian Constitution grants Nagaland unique protections, ensuring that central laws governing religious or social activities, Naga customary law, and property ownership are not applicable until the state legislature votes differently. This constitutional provision recognizes Nagaland's distinctiveness and respects its legal autonomy. Implementing the UCC in Nagaland would contravene this constitutional guarantee and upend the legal system intended to maintain the state's distinct identity.

v) Land Ownership: Land ownership in Nagaland, governed by customary rules, is critical to the community's economic practices and social structure. The UCC's standardized approach to personal rules may disrupt these patterns, resulting in economic instability and dissatisfaction among the Naga people.

To summarize, the application of a Uniform Civil Code in Nagaland faces significant hurdles due to the state's distinct cultural and legal context, which is safeguarded by constitutional restrictions. A one-size-fits-all approach by the UCC could result in social discontent, cultural disruption, and a violation of constitutional safeguards. As a result, any move towards a UCC must be inclusive, deliberative, and sensitive to India's several cultural landscapes, while also respecting and preserving the sovereignty and uniqueness of states such as Nagaland.

Advantage of the implementation of a Uniform Civil Code in India

i) Secularism and National Integration.

Implementing a UCC is consistent with the Indian Constitution's secularism and fosters national integration. It would promote the idea of a secular state in which all inhabitants are treated equally, regardless of religious beliefs. A UCC may also enhance national cohesion by bridging religious divides and instilling a sense of unity and shared identity.

ii) Equality and Social Justice

One of the primary arguments for passing a UCC is that it would promote equality and social justice by creating a consistent legal framework for all citizens, regardless of religious affiliation. Personal laws frequently foster gender inequality and prejudice. A UCC could help to eliminate discriminatory practices in Muslim personal law, such as triple talaq (rapid divorce) and unequal inheritance rights for women.

iii) Legal Certainty and Simplification

Having many personal laws might cause confusion and complexity in the system of law. Implementing a UCC will increase legal certainty and expedite the legal system by establishing a uniform set of laws that apply to all citizens. This would remove ambiguity and promote access to justice, particularly for underprivileged populations who may struggle to navigate complex legal systems.

iv) Women's Empowerment

[11] The morungexpress. 'Implementation of UCC will result in direct infringement of Article (371) A' https://morungexpress.com/implementation-of-ucc-will-result-in-direct-infringement-of-article-371-a

Personal laws throughout India have been challenged for discriminating against women in matters such as marriage, divorce, and inheritance. A UCC could promote gender balance and women's empowerment by eliminating discriminatory practices and ensuring equal rights and protections for all citizens.

Disadvantage of the implementation of a Uniform Civil Code in India

i) Threat to Minority Rights

Opponents of a UCC believe that it would harm religious minorities' rights by imposing a uniform set of laws on varied faith communities. India's cultural and religious variety is an important part of its character, and others fear that a UCC will undermine such diversity and violate minority communities' rights to practice their faith and rituals.

ii) Cultural Sensitivity and Identity

India's social fabric is intricately woven with diverse cultural practices and traditions, many of which are intimately related to religion. Implementing a UCC may be considered as a threat to cultural sensitivity and individual identity since it may force individuals to conform to a uniform legal framework that contradicts their cultural practices and beliefs.

iii) Implementation Challenges

Given India's large population and variety, implementing a UCC would be difficult. Religious and political opposition, a lack of consensus on crucial matters, and probable logistical challenges would complicate and lengthen the implementation process.

iv) Potential for Social Unrest

Given India's deep religious and cultural sensitivities, the implementation of a UCC has the potential to spark social unrest and conflict. Opponents believe that attempts to impose a standard set of regulations could be interpreted as an infringement on religious freedom, resulting in polarization and communal conflicts[17].

Conclusion

The implementation of a Uniform Civil Code in India is a complex and tough process. A UCC has the potential to promote equality, social justice, and national integration; nevertheless, it may also jeopardize minority rights, and cultural sensitivity, and cause social unrest. Any endeavor to establish a UCC should include active participation, consensus-building, and a commitment to safeguarding secularism, diversity, and individual liberty. Applicability of UCC in the state of Nagaland is very difficult because it clashes with the special rights and customary rights of Schedule tribes of Nagaland. Finally, striking a balance between uniformity and diversity is crucial for real advancement in India's legal system toward more justice and inclusion.

References

- **Cleartax:** What is the Uniform Civil Code Under Article 44? Meaning, Purpose, Importance, Pros & Cons https://cleartax.in/s/uniform-civil-code
- **Drishtiias:** Just (Uniform) Civil Code https://www.drishtiias.com/daily-updates/daily-news-editorials/just-uniform-civil-code
- ETLegal world. Com Customary laws, constitutional provisions negate the need for UCC, say NE parties https://legal.economictimes.indiatimes.com/news/law-policy/customary-laws-.constitutional-provisions-negate-need-for-ucc-say-ne-parties/101617995.
- Jagran Josh, what is the Uniform Civil Code? https://www.jagranjosh.com/general-knowledge/why-uniform-civil-code-is-necessary-for-india-1477037384-1
- NEXT IAS Content Team Uniform Civil Code (UCC): Meaning, Constitutional Provisions, Debates, Judgments & More https://www.nextias.com/blog/uniform-civil-code-ucc/
- NEXT IAS Content Team Uniform Civil Code (UCC): Meaning, Constitutional Provisions, Debates, Judgments & More https://www.nextias.com/blog/uniform-civil-code-ucc/
- The morungexpress. Article 371A: Scope, Limitations, and Challenges https://morungexpress.com/article-371a-scope-limitations-and-challenges
- The morungexpress. 'Implementation of UCC will result in direct infringement of Article (371) A' https://morungexpress.com/implementation-of-ucc-will-result-in-direct-infringement-of-article-371-a
- The Society for Constitutional Law Discussion Uniform Civil Code: A Critical Analysis https://www.tscld.com/uniform-civil-code-a-critical-analysis
- The Uniform Civil Code (UCC) in India: A Boon or Bane? https://www.legalserviceindia.com/legal/article-12620-the-uniform-civil-code-ucc-in-india-a-boon-or-bane-.html
- Uniform Civil Code (UCC) in India: An overview https://www.orfonline.org/expert-speak/uniform-civil-code-ucc-in-india-an-overview

[17] The Uniform Civil Code (UCC) in India: A Boon or Bane? https://www.legalserviceindia.com/legal/article-12620-the-uniform-civil-code-ucc-in-india-a-boon-or-bane-.html

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Annexure I

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IN FOOTNOTE:

Jassa Singh v. State of Haryana, (2002) 2 SCC 481

The full citation should be provided in the footnote even if the case name has been mentioned in full in the main body.

Government to be written in full.

Example: Kesavananda Bharati v. State of Kerala ; M.C. Mehta v. Union of India.

SHORTENED FORM

If the same case is going to be cited subsequently, the full citation used the first time should be followed by the shortened form by which the case will be referred to subsequently, in inverted commas, and in square brackets.

Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [Taj Trapezium case] Subsequent references

Taj Trapezium case, [1997] 2 SCC 353

The shortened form should be used every time after the first time a case is cited.

QUOTES FROM CASES

Per Subba Rao J., "a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution". (Footnote original citation of case or shortened form as per rules stated above)

Single Judge:

S.H. Kapadia J.

Chief Justice of India

Thakkur C.J.I.

More than one Judges

K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.)

UNPUBLISHED DECISIONS

Name of the parties, Filing No of Year, Decided on date (Name of Judges) (Name of Court) **Example:**

> BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

INTERNATIONAL DECISIONS

Case name, (Party names) Judgement, Year, Publisher, Page No (Court Name) Example:

Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

LEGISLATIVE MATERIALS

When citing Constitution, it should be in Capital letters while other Statutes it should be First letter of the word in Uppercase followed by lower cases.

CONSTITUTION

Art. 21, THE CONSTITUTION OF INDIA, 1950.

OTHER STATUTES

Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

- Question by N.G. Iyengar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).
- Statement of V. Narayanaswamy, LOK SABHA DEBATES 5 (March 10,2010).

BOOKS

TEXTBOOKS

Name of the Author, NAME OF THE BOOK, Volume (Issue), Page (Publisher, Edition, Year)

Example:

H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 3, 121 (Universal Law Publishing Co. Pvt. Ltd.,4[th]Edn., 2015)

- In the case of a single author,
  M.P.Jain, INDIAN CONSTITUTIONAL LAW, 98 (Kamal Law House, 5th Edn., 1998)
- If there is more than one author and up to two authors,
  M.P.Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)
- If there are more than two authors,
  D.J. Harris et al, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).
- If there is no author then the citation would begin from the Title of the Book.
- If the title of the book includes the author's name then the book should be cited as an author less book.

Example:

Chitty on Contracts, Vol. 2, 209 (H.G. Beale ed., 28th edn., 1999).

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Name of Editor/s (Ed.) NAME OF BOOK, page no./s (Publisher Name, Year of Publication)

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COLLECTION OF ESSAYS

Name of Author, Name of Article in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, India's Nuclear Deterrence in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. Sondhi Edn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

TITLE, Chapter/ Surar Verse (if applicable)

Example:

THE BHAGAVAD GITA, Chapter 1 Verse46

ARTICLES

Name of Author, Name of Article, Volume (Issue) NAME WHERE ARTICLE IS PUBLISHED page no (Year of Publication)

LAW REVIEW ARTICLES

A.M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

MAGAZINE ARTICLES

- **Articles in print versions of magazines**
  Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).
- **Articles published in a magazine arranged by volume**
  A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).
- **Articles in print versions of newspapers**
  Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

Name of Author, Name of Article, NAME WHERE ARTICLE IS PUBLISHED (Date of issue)

available at link where it is published (date of last visit)

It is mandatory to use exact link where the article of published removing the hyperlink

- **Articles in online versions of newspapers**

  Mehboob Jeelani, Politics stretches list of Smart Cities from 100 to 109, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

- **Articles in online versions on magazines**

  Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK (11 June 2016), available at http://www.outlookindia.com/magazine/story/jack-of-clubs-and-the-cardsharps/297427(Last visited on July 2, 2016).

REPORTS

LAW COMMISSION REPORTS

243rdReport of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, Lamy outlines "cocktail approach" in moving Doha forward, (2010), available at http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July12, 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

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- Capitalisation – The start of every sentence should be in capitals. In titles, do not capitalise articles, conjunctions or prepositions if they comprise of less than four letters.
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- Add "s" to the short form for the plural form.

FOOTNOTES

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Connectors–

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- The format for referring to the immediately prior footnote shall be one of the following:
- When the page number(s) being referred to are the same as in the previous footnote
- Id.
- When the page number(s) being referred to are different from the previous footnote
- Id., at 77-78.
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- No introductory signal to be used when the footnote directly provides the proposition.
- The signal 'See' shall be used when the cited authority clearly supports the proposition.
- All footnotes must not end in a period (fullstop).

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