ISSN 1119-9261

THE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

Vol. 12 July 2024

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To be cited as: (2024) J.I.C.L Vol. 12

A Publication of the Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin.

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The Editor
The Journal of International & Comparative Law
Department of Jurisprudence & International Law, University of Ilorin.
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University of Ilorin
P.M.B. 1515
Ilorin.

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MEDICO-LEGAL ANALYSIS OF BIOMEDICAL WASTE MANAGEMENT: INTEGRATING HUMAN RIGHTS AND ENVIRONMENTAL POLICIES IN SAARC

Nishikant C. Mendhapurkar*

Abstract

The growing volume of biomedical waste (BMW) generated by healthcare systems threatens environmental sustainability and human rights. This paper highlights the need for integrating environmental policies with human rights to establish sustainable BMW practices. Inadequate handling and disposal of biomedical waste result in environmental pollution, the spread of infectious diseases, and public health risks, particularly for vulnerable communities.

The research examines the environmental and health impacts of BMW practices in SAARC countries, revealing the consequences of poor waste management and the need for a holistic approach that combines strict regulations with human rights protections. It advocates for equitable policies that align with international standards while safeguarding marginalized groups. Additionally, ECOWAS countries can benefit from these experiences by adopting similar frameworks to address their own waste management challenges, ensuring the protection of public health and the environment across regions.

The paper emphasizes the importance of global cooperation and the development of integrated frameworks for sustainable BMW management. Insights from SAARC countries offer valuable lessons for policymakers worldwide.

Keywords: Biomedical Waste Management (BMW), Environment, Human Rights, SAARC Countries, Policy Frameworks

1.0 Introduction:

The Biomedical Waste Management herein after BMW is an urgent global concern that significantly affects health care systems.[1] The waste generated includes discarded medical instruments, laboratory waste, and biological materials, all of which are inherently hazardous. This necessitates stringent handling and disposal measures to prevent harm to both the environment and public health.[2]

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[1] Himani S Bansod, Prasad Deshmukh, Biomedical Waste Management and Its Importance: A Systematic Review , National Library of Medicine, National Centre for Biotechnology Information , https://pmc.ncbi.nlm.nih.gov/articles/PMC9981497/pdf/cureus-0015-00000034589.pdf , accessed Oct. 19, 2024 12:30 PM

[2] World Health Organisation, Health-care waste , https://www.who.int/news-room/fact-sheets/detail/health-care-waste, accessed Oct, 19 2024 1:10 PM

Biomedical Waste Management herein after BMW is not just an environmental issue but also a human rights concern. The hazardous nature of BMW means that improper disposal can lead to severe environmental contamination, affecting soil, water, and air quality. This, in turn, has dire public health implications, particularly in areas where regulatory frameworks and infrastructure are inadequate. The link between BMW management and human rights is evident, as improper disposal practices can lead to significant health risks and environmental degradation, impacting the well-being and rights of individuals, especially vulnerable and marginalized communities.[3]

The problem is particularly pronounced in the Economic Community of West African States herein after ECOWAS and South Asian Association for Regional Cooperation herein after SAARC countries. These nations often struggle with lagging infrastructure and regulatory frameworks compared to more developed regions. This disparity exacerbates the challenges of managing biomedical waste effectively. The burgeoning volume of waste generated by the global health care sector adds to the pressure on these already strained systems, posing severe threats to environmental sustainability and public health in these regions.[4]

Inadequate handling and disposal of biomedical waste lead to environmental contamination. This contamination affects the soil, water, and air, creating a cascade of public health risks. The spread of infectious diseases is a significant concern; as improper waste management can facilitate the transmission of pathogens. The impact is especially severe in vulnerable and marginalized communities, which often lack the resources and political power to advocate for better waste management practices. These communities bear the brunt of environmental degradation and health inequities, highlighting the critical need for improved BMW management.

Addressing the management of biomedical waste is crucial not only for environmental reasons but also as a matter of human rights. Ensuring that waste is handled and disposed of properly is essential to protect the environment and safeguard public health. Effective management of biomedical waste is thus a dual imperative, demanding both environmental stewardship and the protection of human rights.

[3] Priya Datta, Gursimran Kaur Mohi, Jagdish Chander, Biomedical waste management in India: Critical appraisal, Journal of Laboratory Physician, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5784295/, accessed July 10, 2024, 10:04 AM

[4] WHO, (62) Global analysis of healthcare waste in the context of COVID-19: status, impacts and recommendations,62 (ISBN 978-92-4-003961-2 (electronic version) World Health Organization 2022)

It underscores the interconnectedness of environmental sustainability and human rights in the context of biomedical waste management. The challenges faced by SAARC countries highlight the urgent need for stringent handling and disposal measures, robust infrastructure, and regulatory frameworks. Addressing these issues is critical to mitigate the severe threats posed by biomedical waste and to ensure the protection of both the environment and human health.

The ECOWAS and SAARC region, encompassing diverse countries with varying levels of economic development and healthcare infrastructure, provides a unique lens through which to examine the challenges and opportunities in biomedical waste management. The paper draws on case studies from these countries to illustrate the multifaceted impacts of BMW mismanagement and to propose policy recommendations that align with international environmental standards and human rights principles.[5]

This paper explores the urgent need to integrate human rights considerations into environmental policies for sustainable biomedical waste management in SAARC countries. By examining the environmental and public health impacts of current BMW practices, this study highlights the dire consequences of improper waste management, such as environmental pollution and health hazards. The research underscores the necessity of a holistic approach that combines rigorous environmental regulations with the protection of human rights to create sustainable and equitable solutions.

This paper also discusses international law related to BMW, highlighting key frameworks like the Basel Convention, which regulates the transboundary movement of hazardous waste, and WHO guidelines promoting safe healthcare waste management. These international instruments emphasize environmental protection, public health, and global cooperation. In addition, the paper briefly examines the ECOWAS treaty, which, though not specifically addressing BMW, encourages regional collaboration on environmental sustainability and public health. Leveraging ECOWAS frameworks, member states can develop harmonized policies for managing biomedical waste, drawing lessons from international standards and regional approaches, such as those implemented by SAARC countries.

[5] Safe Environment, Waste management in SAARC countries: Priorities and Corporations, https://safeenvironment.in/waste-management-in-saarc-countries-priorities-and-cooperation/, accessed July 10, 2024, 11:30 AM

2.0 Comprehending Biomedical Waste

According to the World Health Organization herein after WHO, *"biomedical waste"* encompasses a wide array of materials produced by health care activities, including used needles and syringes, soiled dressings, body parts, diagnostic samples, blood, chemicals, pharmaceuticals, medical devices, and radioactive substances.[6]

The term "*health-care waste*" refers to all waste produced within health-care facilities, research centers, and laboratories as a result of medical procedures. This definition extends to similar types of waste originating from smaller and scattered sources, such as waste generated during home health care activities e.g., home dialysis, self-administration of insulin, and recuperative care.

According to the WHO, between 75% and 90% of the waste generated by health-care providers is comparable to domestic waste. This type of waste is generally referred to as "non-hazardous" or "general health-care waste." It predominantly arises from non-medical activities within health-care facilities, including administrative tasks, kitchen operations, and housekeeping functions. This category also encompasses packaging materials and waste produced during the maintenance of health-care buildings.

Despite being non-hazardous, the effective management of this general health-care waste is essential to maintain a clean and safe environment within health-care facilities. Proper disposal and recycling practices can help minimize the environmental impact and reduce the burden on waste management systems.

The remaining 10% to 25% of health-care waste, however, is classified as "hazardous."[7] This portion of the waste stream includes materials that may pose significant environmental and health risks. Hazardous health-care waste comprises infectious waste (such as contaminated dressings and surgical gloves), pathological waste (including human tissues and body parts), sharps (like used needles and scalpels), chemicals (including disinfectants and solvents), pharmaceuticals (such as expired or unused medications), and radioactive materials (used in certain diagnostic and treatment procedures).

[6] World Health Organization, WHO on Health Care, http://www.who.int/topics/medical_waste/en/, accessed July 11, 2024, 1:30 PM

[7] World Health Organization, Health-care waste, https://www.who.int/news-room/fact-sheets/detail/health-care-waste#:~:text=Key%20facts,be%20infectious%2C%20toxic%20or%20radioactive, accessed Oct. 19, 2024 11:20 AM

The hazardous nature of this waste necessitates stringent handling, treatment, and disposal protocols to prevent potential harm to health-care workers, waste handlers, patients, and the general public. Effective hazardous waste management practices are crucial to mitigate risks, prevent the spread of infections, and protect environmental quality[8].

Health-care waste encompasses a broad spectrum of materials generated by medical and non-medical activities within health-care settings. While the majority of this waste is non-hazardous and similar to household waste, a significant portion is hazardous and requires specialized management to ensure safety and environmental protection.

3.0 Concept of Biomedical Waste Management:

The concept of BMW management involves the systematic control of the generation, collection, storage, treatment, and disposal of waste produced by healthcare activities. This process is critical to preventing the adverse effects of hazardous waste on human health and the environment. Effective BMW management encompasses several key practices, such as waste segregation at the source, the use of appropriate containers, safe transportation, and the application of suitable treatment methods like incineration, autoclaving, or chemical disinfection.[9]

The BMW management is closely tied to environmental protection and human health. By adopting sustainable practices, SAARC countries can substantially reduce the environmental footprint of healthcare facilities. In the context of SAARC countries, where infrastructure and regulatory frameworks may be less developed, implementing these practices presents significant challenges. However, adopting comprehensive BMW management strategies is essential to mitigate health risks and environmental pollution, thereby ensuring safer and more sustainable healthcare systems. This includes minimizing waste generation through efficient resource use, promoting recycling and reuse of materials, and ensuring the safe disposal of hazardous waste to prevent soil, water, and air contamination. Moreover, sustainable BMW management upholds human rights by protecting healthcare workers, waste handlers, and surrounding communities from exposure to harmful substances and infectious agents. Prioritizing sustainability allows SAARC countries to achieve long-term benefits that support public health, environmental conservation, and social

[8] World Health Organization, Safe management of wastes from health-care activities, 3(2nd ed., 2014)

[9] INCLEN Program Evaluation Network (IPEN) study group, Bio-medical waste management: situational analysis & predictors of performances in 25 districts across 20 Indian States, Journal Of Laboratory Physician, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3994730/#, accessed July 10, 2024, 11:04 AM

equity. This holistic approach contributes to the overall well-being and development of the region, fostering a healthier and more resilient society. Enhanced governmental policies, public awareness, and international cooperation are crucial for advancing sustainable BMW management practices across the SAARC nations.[10]

4.0 Improper Management of Biomedical Waste Management as a Violation of Environment Policies and Human Rights:

Improper management of biomedical waste is a significant violation of human rights. This issue affects multiple facets of human rights, including the right to a healthy environment, the right to health, and the right to a safe working environment. These rights are enshrined in international human rights laws and conventions, and their violation due to mismanagement of medical waste is a grave concern that needs urgent attention.[11]

Firstly, the right to a healthy environment is fundamentally compromised by poor medical waste management practices. Biomedical waste, if not properly disposed of, contaminates air, water, and soil, leading to widespread environmental pollution.[12] Open dumping and burning of medical waste are common practices in many regions, particularly in developing countries, leading to the release of toxic substances, including dioxins and mercury, into the environment. These pollutants pose severe health risks to nearby communities, as they can lead to respiratory problems, cancers, and other serious health conditions.

The right to health is also directly impacted by the improper handling and disposal of biomedical waste. Healthcare facilities generate waste that includes sharps, infectious materials, and hazardous chemicals, which, if not managed correctly, can cause serious injuries and infections[13].

[10] Priya Datta, Gursimran Kaur Mohi, Jagdish Chander, Biomedical waste Springer, Discovered Applied Sciences, Management in India: Critical appraisal, Journal of Laboratory Physician, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5784295/ accessed July 10, 2024, 10:04 AM

[11] WHO, Office of the United Nations High Commissioner for Human Rights, The Right to Health, FACT SHEET NO. 31, 30 https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf accessed July 1, 2024 11:20 AM

[12] Harpreet Singh, Kamal YT, Arun Kumar Mishra, Mhaveer Singh, Sourav Mohanto, Shruti Ghumra, Anmol Seelan, Amrita Mishra, Arvind Kumar, Janardhan Pallavi, Mohammed Gulzar Ahmed, Jeyabalan Sangeetha & Devarajan Thangadurai, Harnessing the Foundation of Biomedical Waste Management for Fostering Public Health: Strategies and Policies for a Clean and Safer Environment, 3 https://doi.org/10.1007/s42452-024-05735-2 accessed July 2, 2024 12:30 PM

[13] Mashura Shammi, Arvind Behal & Shafi M Tareq, The Escalating Biomedical Waste Management to Control the Environmental Transmission of COVID-19 Pandemic : A Perspective from Two South Asian Countries,

The reuse of medical equipment such as syringes due to improper disposal practices can lead to the spread of infectious diseases like, COVID 19, HIV and hepatitis. Furthermore, the contamination of water sources and the environment exacerbates public health issues, especially in vulnerable communities lacking adequate healthcare infrastructure.[14]

Additionally, the right to a safe working environment is violated for healthcare workers and waste handlers who are routinely exposed to hazardous medical waste without adequate protection or training. Many healthcare facilities, particularly in low-income countries, do not provide proper safety gear or training on handling medical waste. This lack of protective measures exposes workers to needle stick injuries, infections, and long-term health issues due to exposure to toxic chemicals. The unsafe working conditions in medical waste disposal facilities are a testament to the neglect of workers' rights and their health and safety.[15]

The violation of these rights is further compounded by the lack of access to information and inadequate regulatory frameworks. In many regions, there is insufficient public awareness and inadequate training for healthcare workers on the dangers of biomedical waste. The absence of stringent regulations and enforcement mechanisms allows improper waste disposal practices to persist. This regulatory gap highlights the need for comprehensive policies that enforce safe waste management practices and protect human rights.

Hence the improper management of biomedical waste is a clear violation of human rights, affecting environmental health, public health, and occupational safety. Addressing this issue requires a concerted effort to implement and enforce rigorous waste management practices, educate healthcare workers and the public, and ensure that all individuals' rights to a healthy environment, health, and safe working conditions are upheld. Immediate and sustained action is necessary to mitigate the adverse effects of biomedical waste and protect the fundamental human rights of affected communities.

Environmental Science And Technology https://pubs.acs.org/action/showCitFormats?doi=10.1021/acs.est.0c05117&ref=pdf accessed July 2, 2024 2:30 PM

[14] Qaissar Guti Omo & Najmaldin Ezaldin Hassan, Biomedical Waste Management and their Effects on the Environment: A Review, Department of Environmental Sciences, College of Science, University of Zakho, Kurdistan Region, Iraq. World Journal of Advanced Engineering Technology And Sciences, 2024, 11(01), 086–095 https://doi.org/10.30574/wjaets.2024.11.1.0020 accessed July 2, 2024 1:16 PM

[15] WHO, Health-care waste, https://www.who.int/news-room/fact-sheets/detail/health-care-waste accessed July 2, 2024 1:16 PM

5.0 Biomedical Waste Management Policies in ECOWAS and SAARC Countries for the Promotion and Protection of Human Rights and Environment

I. The Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) is made up of fifteen member countries that are located in the Western African region. These countries have both cultural and geopolitical ties and shared common economic interest. [16] ECOWAS countries follow international conventions like the Basel and Bamako Conventions to regulate biomedical waste management. However, challenges such as weak enforcement, inadequate infrastructure, and limited awareness affect effective implementation across the region.

ECOWAS member states, including Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, and The Gambia, align their biomedical waste management (BMW) practices with international frameworks like the Basel and Bamako Conventions. Countries like Ghana and Nigeria have implemented national regulations such as the Hazardous and Electronic Waste Control and Management Act, 2016 (Act 917)[17] and the NESREA Act, 2007[18], focusing on waste segregation, treatment, and disposal. However, many nations face challenges, including weak enforcement, limited infrastructure, and resource constraints, especially in rural and remote areas.

While countries like Guinea, Mali, and Senegal have integrated BMW management into public health policies, political instability and inadequate facilities continue to hinder effective implementation. Togo, Liberia, and Guinea Bissau also struggle with public awareness and infrastructure issues, making sustainable biomedical waste practices difficult to achieve. Efforts in Côte d'Ivoire and The Gambia reflect a commitment to reducing hazardous waste imports and complying with WHO protocols, but these initiatives need further strengthening.[19]

In response, ECOWAS countries are working towards harmonizing laws and adopting best practices from international frameworks to address common challenges. Collaborative regional efforts, combined with low-cost technologies and sustainable strategies, are essential for promoting environmental sustainability and protecting public health. Creating a circular economy

[16] Ecowas Cedeao, Member States, https://www.ecowas.int/member-states/ accessed Oct 20. 2024 10 AM

[17] Hazardous And Electronic Waste Control And .Management Act, 2016, https://faolex.fao.org/docs/pdf/gha205550.pdf accessed Oct 19 , 2024 11:00 AM

[18] Federal Republic Of Nigeria Official Gazette, National Environmental Standards And Regulations Enforcement Agency (Establishment) Act, 2007 https://www.nesrea.gov.ng/wp-content/uploads/2020/04/NESREA-ACT.pdf accessed Oct 19 , 2024 11:00 AM

[19] Ecowas Regional Climate Strategy (RCS) and Action Plan (2022-2030). https://leap.unep.org/en/countries/national-legislation/ecowas-regional-climate-strategy-rcs-and-action-plan-2022-2030 accessed Oct 20 , 2024 11:20 AM

through these initiatives will not only enhance waste management systems but also generate socio-economic benefits for the region.

II. The South Asian Association for Regional Cooperation (SAARC)

The SAARC stands as a testament to the shared aspirations and collaborative efforts of eight South Asian countries. These nations, each with their unique cultures and histories, have united to create a platform for regional cooperation, aiming to address common challenges and pursue collective development. The SAARC region includes Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.[20] This coalition seeks to enhance the quality of life for its populations by promoting economic growth, social progress, and cultural development, while also strengthening collective self-reliance.

Exploring the functions, objectives, and significance of this pivotal alliance reveals its commitment to fostering regional integration and development. Notably, one of SAARC's key initiatives is the Biomedical Waste Management Scheme, which seeks to harmonize waste management practices across member states. This scheme is crucial in tackling the environmental and public health challenges posed by biomedical waste, emphasizing the need for sustainable and effective management strategies throughout the region. By implementing standardized protocols and encouraging collaboration among member countries, SAARC aims to mitigate the risks associated with biomedical waste, thereby safeguarding both the environment and public health. This initiative highlights the organization's broader mission of addressing pressing regional issues through cooperative and integrated approaches.

The following are the country wise Biomedical Waste Management Handling rules and their effects:

A. India

The Indian legal framework for preserving the environment and safeguarding human rights through biomedical waste management comprises various laws, regulations, and guidelines designed to manage biomedical waste effectively while ensuring environmental protection and human rights.

The management and handling of biomedical waste in India are guided by constitutional principles, emphasizing fundamental rights and duties, environmental protection, and public

[20] Madhavi Gaur, SAARC Countries 2023, List, Names, Map, Members, Comprehensive Study, ONLYIAS , https://pwonlyias.com/saarc-countries-2023/ accessed July 22, 2024 1:16 PM

health. Article 21 Constitution of India guarantees the right to life, making safe biomedical waste disposal essential to uphold this right. While not explicitly stated, the right to a clean and healthy environment is recognized by Indian courts as integral to the right to life. The Directive Principles of State Policy in Articles 48-A and 51-A(g)[21] stress environmental protection, aligning with proper biomedical waste management.

The state bears the responsibility for environmental protection, including biomedical waste, as emphasized in Article 47. Additionally, citizens have a duty under Article 51-A to safeguard the environment, which extends to responsible waste disposal. These constitutional foundations inform India's laws, such as the Bio-Medical Waste (Management and Handling) Rules, ensuring safe waste management in line with constitutional imperatives to protect life, the environment, and public health.[22]

i. The Bio-Medical Waste (Management and Handling) Rules, 1998

Establishing the Foundation for Bio-Medical Waste Management The Indian Government introduced these regulations on July 20, 1998, under the authority granted by Sections 5, 8, and 25 of the 1986 Environmental Act. These regulations apply to individuals involved in collecting, receiving, and storing biomedical waste. Significant provisions include imposing responsibility on healthcare establishment operators to manage biomedical waste in a manner that safeguards health. The treatment of such waste must follow the procedures outlined in Schedule V of the regulations. Healthcare establishments must maintain waste treatment systems like incinerators and microwave systems for managing biomedical waste. The regulations also emphasize preventing the mixing of biomedical waste with other types and require its separate storage in distinct bags and containers. Specific authorities, including State Pollution Control Boards (SPCB) and Pollution Control Committees, oversee the enforcement of these rules, supervised by the respective state and union territory governments[23]. These authorities can review, grant, or revoke authorizations for handling biomedical waste and are required to collect annual waste management reports from operators by January 31, which are then submitted to the Central Pollution Control Board. However, the regulations lack provisions for penalizing non-compliance and do not specify safety measures for

[21] INDIA CONST Art. 48-A, 51-A(g)

[22] INDIA CONST Art.21.

[23] The Bio-medical Waste (Management and Handling) Rules, 1998, Ministry of Environment & Forests, https://jspcb.nic.in/upload/uploadfiles/files/BMW_Notification_1998.pdf accessed July 6, 2024 10:30 PM

workers involved in the collection, disposal, and transportation of biomedical waste, nor do they address the cleaning of storage devices or their separation from hospital functional units.

ii. Enhancements to Bio-Medical Waste Management, to the 2000 Rule Amendments

The amendments to the Bio-Medical Waste Management Rules in 2000 introduced several changes. Clause 6 assigned municipal bodies the responsibility of collecting non-biomedical waste and treated biomedical waste from nursing homes, depositing them in designated municipal sites. Rule 8 was modified to empower authorizing agencies to set compliance conditions for biomedical waste handlers. Sharps were reclassified as solid waste under Rule 9(v). Additionally, occupiers treating over 1,000 patients per month were required to seek authorization for waste management. However, involving municipal bodies in collecting waste from nursing homes raised concerns about potential contamination.[24] The focus on occupiers with patient numbers over 1,000 overlooked the significant impact smaller facilities could have on the environment through biomedical waste production.

iii. The Bio-Medical Waste (Management & Handling) Rules, 2011

The Biomedical Waste (Management and Handling) Rules, 2011, enacted by the Government of India under the Environment (Protection) Act, 1986, are a comprehensive set of regulations designed to govern the safe and environmentally responsible management of biomedical waste from healthcare facilities. These rules aim to safeguard human health and the environment by ensuring proper handling of biomedical waste. They categorize biomedical waste into various types, each identified by a specific color-coded bag or container, and mandate segregation at the source.[25] The rules prescribe methods for collection, storage, and transportation, emphasizing the importance of treatment and disposal to render the waste non-infectious and safe. Healthcare establishments must obtain authorization and register with the appropriate authorities, with training and awareness programs being essential components of compliance. Record-keeping, reporting, and punitive measures for non-compliance are also stipulated. Staying updated with any

[24] Bio-Medical Waste Management (Amendment) Rules, 2000, Ministry of Environment & Forests https://jspcb.nic.in/upload/uploadfiles/files/BMW_Notification_1998.pdf accessed July 6, 2024 11:30 PM

[25] The Bio-medical Waste Management (Amendment) Rules, 2018, Ministry of Environment, Forests and Climate Change,https://cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/BMW_Amended_10.05.2019.pdf%20changes%20in%202019 accessed July 6, 2024 1:30 PM

potential amendments to these rules is crucial, as they play a significant role in preventing contamination, disease transmission, and environmental harm associated with biomedical waste.

iv. Bio-Medical Waste Management (Amendment) Rules, 2016

The Ministry of Environment, Forest & Climate Change introduced amendments to the BMW Rules in 2016, encompassing a range of adjustments. The rules ceased to apply to radioactive waste, regulated by the Atomic Energy Act of 1962, and hazardous chemicals, governed by the Hazardous Waste Rules of 1989. They also excluded solid wastes under the Municipal Solid Waste Rules of 2000, lead and acidic batteries, e-wastes, genetically engineered microorganisms, and other hazardous wastes. Conversely, the rules expanded their scope to include pharmaceutical units, dispensaries, blood donation camps, forensic labs, and even school first aid rooms. Occupiers' responsibilities were broadened to ensure the clean, safe, and ventilated storage of biomedical waste, proper segregation in colored and sealed bags, and appropriate transportation to common biomedical treatment facilities to prevent wildlife dispersal and secondary waste handling. Following the rules' notification, all hospital establishments, nursing homes, and blood banks were required to discontinue the use of chlorinated bags, gloves, plastic bags, and blood bags within two years to reduce dioxin and furan emissions. The rules also mandated the immunization of health workers and other biomedical waste handlers under the National Immunization Policy or the Ministry of Health and Family Welfare, safeguarding them against diseases like tetanus and Hepatitis B. Additionally, the rules introduced barcoding for bags and containers carrying biomedical waste, facilitating tracking of waste generators. However, these changes posed challenges for small hospitals and clinics, as the two-year period for eliminating chlorinated bags and blood bags proved insufficient, and implementing barcoding demanded substantial infrastructure investments.

v. Bio-Medical Wastes Management (Amendment) Rules 2018

The 2018 amendment brought further changes to the existing rules. These included the mandatory publication of annual reports on biomedical waste disposal on the websites of all healthcare establishments to increase transparency. Restrictions on chlorinated bags and adherence to the barcoding mechanism were also made more strictly enforceable.[26]

[26] The Bio-medical Waste Management (Amendment) Rules, 2018, Ministry of Environment, Forests and Climate Change, https://cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/BMW_Amended_10.05.2019.pdf%20changes%20in%202019 accessed July 10, 2024 1:30 PM

vi. The Bio-Medical Waste Management (Amendment) Rules, 2019

The Ministry of Environment, Forest and Climate Change issued amendments to the Bio-Medical Waste Management Rules, 2016, under the authority of the Environment (Protection) Act, 1986. These amendments, titled the Bio-Medical Waste Management (Amendment) Rules, 2019, come into force upon their publication in the Official Gazette. Changes include requirements for bedded healthcare units to maintain and update biomedical waste management registers and to display monthly records on their websites. Annual reports for all bedded healthcare facilities must be available on their websites within two years from the publication of the Bio-Medical Waste Management (Amendment) Rules, 2018. The amendments also specify compliance deadlines for healthcare facilities with fewer than ten beds regarding liquid waste discharge standards. Adjustments were made to inspection and monitoring protocols for various healthcare facilities, including those onboard ships and submarines and in field hospitals operated by the Director General, Armed Forces Medical Services.[27]

vii. Guidelines for Handling, Treatment and Disposal of Waste Generated during Treatment/Diagnosis/ Quarantine of COVID-19 Patients

The Central Pollution Control Board (CPCB) issued specific guidelines for the handling, treatment, and disposal of waste generated during the treatment, diagnosis, and quarantine of COVID-19 patients. These guidelines were implemented to streamline the segregation, collection, transport, and disposal of COVID-19 waste, involving various stakeholders such as healthcare facilities, sample collection centers, laboratories, and quarantine centers. Additionally, a mobile application named 'COVID19BWM' was developed to monitor the generation and treatment of COVID-19 biomedical waste on a daily basis[28]

These amendments aim to enhance the management of biomedical waste and ensure regulatory compliance.

[27] The Bio-Medical Waste Management (Amendment) Rules, 2019, Ministry Of Environment, Forest And Climate Change Notification, New Delhi, the 19th February, 2019 https://cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/BMW_Amended_19.02.2019.pdf , accessed July 28, 1:00 PM

[28] Central Pollution Control Board (Ministry of Environment, Forest & Climate Change), Guidelines for Handling, Treatment and Disposal of Waste Generated During Treatment/Diagnosis/ Quarantine Of Covid-19 Patients, 26 April , 2022, https://cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/BMW-GUIDELINES-COVID_2.pdf accessed July 12, 2024 12:30 PM

B. Afghanistan

The Comprehensive Health Care Waste Management Plan (HCWMP) for Afghanistan aims to create an environmentally sound, technically feasible, economically viable, and socially acceptable framework for managing healthcare waste. It includes planning, procurement, construction, staff training, and proper use of tools and pharmaceuticals to ensure hospital hygiene and safety for healthcare workers and the community. Effective HCWM is essential for controlling nosocomial diseases, reducing community exposure to drug-resistant bacteria, and preventing the spread of infections like HIV/AIDS and hepatitis. It also helps prevent the illegal resale of contaminated needles and protects the environment from long-term toxic effects.[29]

a. Background of HCWM in Afghanistan

Since 2002, the Afghan Government has focused on reducing maternal and child mortality through the Basic Package of Health Services (BPHS) and Essential Package of Hospital Services (EPHS). The SEHAT project, supported by IDA, ARTF, and the EU, aims to sustain and improve these services, enhance MoPH's[30] capacity, reform public hospitals, and regulate healthcare providers while also strengthening health promotion, financing models, human resource management, procurement, and evaluation systems.

b. Policies, Legislation, and Regulation

The HCWM framework in Afghanistan is guided by various policies and regulations, including the Constitution of Afghanistan, the Environmental Protection Act 2007, the National Environmental Impact Assessment Policy 2007, the MoPH Strategic Plan 2011, the National Infection Prevention Control Policy 2005, World Bank Safeguard Policies, and IAEA Safety Standards. These regulations emphasize environmental protection, waste management, infection control, and the creation of healthy environments through comprehensive guidelines. [31]

c. Current HCWM Practices in Afghanistan

Currently, waste generation in Afghanistan's healthcare facilities is poorly monitored due to inadequate collection and segregation. Waste is often mixed, needle-cutters are rarely used, and

[29] Islamic Republic of Afghanistan Ministry of Public Health, Comprehensive Health Care Waste Management Plan (Hcwmp) for The System Enhancement for Health Action in Transition (Sehat) Project https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdocuments1.worldbank.org%2Fcurated%2Fru%2F278931467992809991%2FE40730V10REVIS0Box385390B00PUBLIC0.docx&wdOrigin= accessed July 12, 2024 12:30 PM

[30] Ibid

[31] Afghanistan's Environment (2008), Executive Summary (NEPA)

inconsistent color coding leads to improper waste management. Waste transportation is manual, with no proper secondary system. There is limited training, no formal committees, insufficient storage provisions, and unclear treatment policies. Low-level technology, partial PPE use, and no compliance monitoring exacerbate the situation. Additionally, there is no M&E mechanism, comprehensive plan, separate budget, or public-private partnerships for HCWM.[32]

C. Bangladesh

Current legislation in Bangladesh for medical waste management is governed by the Medical Waste (Management and Processing) Rules, 2008. Enacted by the Government of Bangladesh, this rule addresses the processing and management of medical waste nationwide. Before this, the Environmental Conservation Act of 1995 and the Environmental Conservation Rules of 1997 did not specifically cover medical waste management. [33]

The rule defines medical waste as any liquid, solid, or radioactive substance harmful to the environment. It mandates the use of colored bins and symbols for proper segregation and handling during transportation, setting standards for treatment methods like incineration, autoclaving, deep burial, and radioactive waste management. Six different colored bins are required for waste segregation, ensuring proper handling. The 2008 rule provides a regulatory framework for defining, segregating, and treating medical waste to mitigate environmental and public health impacts, but gaps in policy and implementation remain, requiring further improvements.

D. Bhutan

The Waste Prevention and Management Regulation, 2012,[34] effective from April 18, 2012, in Bhutan, is a comprehensive framework for waste minimization and management. It establishes various agencies and monitoring authorities for its implementation and applies to all sources of waste. The National Environment Commission (NEC) is the apex monitoring body responsible for coordinating and overseeing the performance of designated implementing agencies, with assistance from the Royal Bhutan Police to ensure full compliance. This regulation aims to address the existing waste disposal and management challenges in Bhutan.

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[32] Afghanistan Provincial Health Profile-Situational Analysis of Provincial Health Services (MoPH HMIS DEPTT.)

[33] Afia Rahman, Byomkesh Talukder & Mohammad Rezaul Karim, Healthcare Waste Management in Bangladesh: Practices and Future Pathways, Elsevier, https://doi.org/10.1016/B978-0-323-85698-0.00008-3, July 1, 2024 11:00 AM

[34] The Waste Prevention and Management Regulation, 2012, Faolex, https://www.fao.org/faolex/results/details/en/c/LEX-FAOC097796/ , accessed July 16, 2024 11:20 PM

The Ministry of Health and the Ministry of Agriculture and Forests monitor implementing agencies, including health clinics, hospitals, BHUs, the Department of Livestock, Bhutan Narcotic Control Agency, and Drug Regulatory Authority. Medical wastes are classified into general, pathological, infectious, sharps, pharmaceutical, chemical, radioactive, and pressurized containers. The regulation provides comprehensive guidelines for the prevention and management of each waste category.[35]

E. Maldives

The National Healthcare Waste Management Policy (HCWMP) for the Maldives, endorsed on April 25, 2016, addresses the critical issue of healthcare waste management, emphasizing safe and sustainable practices to protect public health and the environment. Given the Maldives' unique challenges, such as dispersed islands and high water tables, the policy calls for multi-sectorial cooperation, a robust legal framework, comprehensive training, and public awareness.[36]

Guided by international treaties and national regulations, the Ministry of Health (MoH), supported by the Ministry of Environment and Energy (MoEE) and the Environmental Protection Agency (EPA), is responsible for implementing and monitoring the policy. These agencies collaborate to develop regulations, provide capacity building, and ensure compliance with waste management standards. Healthcare facilities must segregate waste using color-coded bins, follow safe disposal practices, and undergo regular training, integrating sustainable practices and continuous improvement through monitoring and evaluation.

F. Nepal

Nepal's biomedical waste management framework aims to ensure environmental and public health safety through comprehensive rules and regulations. These include the Environment Protection Act 1997, the Solid Waste Management Act 2011, and the Nepal Health Care Waste Management Guidelines 2014.[37] The regulations standardize the handling, segregation, treatment, and disposal of various waste categories such as general, pathological, infectious, sharps, pharmaceutical, chemical, radioactive, and pressurized containers. Key practices include using color-coded bins

[35] Waste Management Policy In Bhutan, https://www.cseindia.org/waste-management-policy-in-bhutan-4584, July 16, 2024 11:20 PM

[36] lruthisham Adam, National Healthcare Waste Management Policy Maldives, No: Policy/23-MoH/2016/01 https://faolex.fao.org/docs/pdf/mdv205059.pdf accessed July 16, 2024 11:20 PM

[37] N. Chaudhary, Biomedical Waste Management in Nepal: A Review, file:///C:/Users/hp/Downloads/BMWMJUCMS2014.pdf accessed July 13, 2024 12 PM

for waste segregation and adhering to established treatment methods like incineration, autoclaving, and deep burial.

The Ministry of Health and the Ministry of Agriculture and Forests oversee implementation, ensuring compliance across healthcare facilities. Despite these regulations, challenges in enforcement and practical application persist, necessitating continuous improvement and capacity building.

G. Pakistan:

In Pakistan, biomedical waste management is primarily governed by the Hospital Waste Management Rules 2005, which mandate segregation, safe storage, transportation, and disposal of medical waste. These rules are supported by the Pakistan Environmental Protection Act (PEPA) 1997 and the National Environmental Quality Standards (NEQS), ensuring environmental protection. Enforcement is carried out by federal and provincial Environmental Protection Agencies (EPAs). Despite these regulations, effective implementation and adherence remain key challenges to improving waste management practices.[38]

Hospital waste management in Pakistan is inadequate, with improper disposal methods and non-functional incinerators leading to poor practices, especially in Sindh and Balochistan. Key issues include poor segregation, lack of training, and weak enforcement of regulations, requiring comprehensive training and stricter adherence to guidelines.

H. Sri Lanka:

The National Policy for Health-Care Waste Management in Sri Lanka sets the framework for managing medical waste to prevent infectious diseases and environmental harm. It mandates that medical institutions create specific waste management plans in line with the National Environmental Act No. 47 of 1980 and Amendment Act No. 53 of 2000. These laws require proper handling, segregation, transportation, treatment, and disposal of waste. The policy includes comprehensive training for health workers, involves the private sector and civil society, and establishes monitoring and evaluation mechanisms to ensure compliance and effective implementation.[39]

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[38] Qurat ul Ain, Hospital Waste Management Practices in Pakistan: A Systematic Review, file:///C:/Users/hp/Downloads/HospitalWasteManagementPracticesinPakistan_ASystematicReview.pdf accessed July 16 2024 11:20 PM

[39] Democratic Socialist Republic of Sri Lanka Ministry of Health and Indigenous Medicine, Health-care waste management National Policy ,

From this The SAARC Biomedical Waste Management Scheme harmonizes waste management practices across member states to address environmental and public health challenges. Each country has specific regulations to manage biomedical waste effectively. For example, India follows the Bio-Medical Waste (Management and Handling) Rules, while Pakistan adheres to the Hospital Waste Management Rules 2005. Sri Lanka's policy aligns with the National Environmental Act No. 47 of 1980 and other member states. These regulations emphasize proper segregation, handling, treatment, and disposal of waste, supported by comprehensive training and enforcement mechanisms to protect human rights and the environment.

6.0 Conclusion

Biomedical waste management in both SAARC and ECOWAS countries is essential for protecting the environment, public health, and human rights. SAARC, comprising Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka, has made significant strides in harmonizing waste management practices. Each country implements specific regulations, such as India's Bio-Medical Waste (Management and Handling) Rules, Pakistan's Hospital Waste Management Rules 2005, and Sri Lanka's alignment with the National Environmental Act No. 47 of 1980. These frameworks emphasize proper segregation, handling, treatment, and disposal, supported by training programs and enforcement mechanisms. However, challenges persist in both regions, including inadequate infrastructure, poor enforcement, and limited public awareness. Similarly, the ECOWAS Regional Climate Strategy highlights waste management as a critical focus. ECOWAS countries, including Ghana, Nigeria, and Senegal, align their biomedical waste policies with international frameworks such as the Basel and Bamako Conventions. Regulations such as Nigeria's NESREA Act, 2007, and Ghana's Hazardous and Electronic Waste Control and Management Act, 2016 (Act 917), promote sustainable waste practices, though enforcement and infrastructure gaps remain in many areas, particularly rural regions. Both SAARC and ECOWAS emphasize the importance of integrating human rights into environmental policies to create sustainable biomedical waste management systems. Handling and disposing of biomedical waste is not just an environmental responsibility but also a fundamental human rights issue. Protecting healthcare workers, waste handlers, and vulnerable communities from hazardous waste is crucial for promoting environmental sustainability and safeguarding public health. To address ongoing

https://documents1.worldbank.org/curated/ar/800381468116042886/pdf/multi0page.pdf accessed July 16 2024 12:00 Noon

challenges, both regions must strengthen regulatory frameworks, invest in modern waste management infrastructure, and develop training programs for healthcare workers and waste handlers. Public awareness campaigns are vital to inform communities about the risks of improper waste disposal and the need for sustainable practices. Fostering regional cooperation will enable both SAARC and ECOWAS countries to share best practices, technologies, and resources. Monitoring and evaluation systems are essential to track compliance and identify areas for improvement, while research and development efforts can generate innovative waste management solutions tailored to regional needs. Moreover, private sector engagement through partnerships and incentives can mobilize expertise and resources, and contingency plans for health emergencies, such as pandemics, will ensure the safe and efficient disposal of biomedical waste. Engaging international organizations and donors will further secure technical and financial support, enabling both regions to implement advanced waste management practices.

By fostering regional cooperation and aligning with global standards, SAARC and ECOWAS countries can mitigate the threats posed by biomedical waste. This collaborative approach underscores the interconnectedness of environmental sustainability and human rights, emphasizing the need for a holistic response to these pressing regional challenges.

DECOLONIZING LEGAL EDUCATION: A COMPARATIVE STUDY OF NIGERIA AND INDIA'S QUEST FOR JURISPRUDENTIAL AUTONOMY

Sourabh V. C. Ubale, Ph.D*

Abstract

The legacy of colonialism continues to shape legal education in many post-colonial nations, with Nigeria and India exemplifying systems where Western legal philosophies dominate curricula. This paper explores how colonial histories have influenced the legal educational frameworks in both countries and examines the emerging movements aimed at reclaiming indigenous jurisprudential thought. Despite constitutional independence, the persistence of Eurocentric legal doctrines has created a disconnect between legal education and the lived realities, cultures, and customary norms of local populations. The study employs a comparative doctrinal methodology, supported by historical analysis and qualitative review of curriculum reforms, policy documents, and academic discourse from both jurisdictions. Through this comparative lens, the paper identifies shared challenges, including overreliance on foreign legal texts, underrepresentation of customary and indigenous laws, and limited space for socio-legal and contextual approaches in teaching. Findings reveal that while there is growing advocacy for decolonizing legal education in both Nigeria and India, concrete institutional changes remain limited and uneven. Initiatives led by scholars, bar councils, and universities are slowly pushing for curricular transformation, emphasizing local jurisprudence, legal pluralism, and cultural relevance. The paper concludes by recommending a structured, participatory reform process grounded in interdisciplinary approaches and indigenous epistemologies. It advocates for stronger academic collaboration between the Global South to collectively challenge the dominance of colonial legal narratives and nurture a more autonomous and reflective legal education system.

Keywords: Legal Education, Decolonization, Jurisprudential Autonomy, Nigeria, India

1.0 Introduction

"Ìlú tí kò sí òfin, kò sí èṣin." [1] (Yoruba Proverb)
"A town without laws is a town without sin (or shame)."

This highlights the centrality of community-grounded laws and social norms in Yoruba jurisprudence. It implies that without a normative legal structure, the concept of justice or transgression becomes meaningless—a concept akin to jurisprudential positivism but locally embedded in culture.

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[1] Yoruba proverb, cited in Aderemi Raji-Oyelade, *African Legal Heritage and Culture* (Ibadan University Press 2012).

> "Dandānītiḥ śāstramūlam dharmasya ca vyavasthāpakaḥ rājā bhavati."[2] (*Arthashastra*)
>
> "*The root of wealth is activity, the root of activity is government, the root of government is control, and the root of control is law*."

This quote written in Arthashastra by Kautilya (Chanakya) in 4th century BCE emphasizes the centrality of law in governance, justice, and statecraft—rooted not in imported ideals but in the indigenous logic of administration and ethical rule. These culturally-rooted statements reveal that long before colonial interventions, both Nigeria and India nurtured rich legal philosophies that governed their societies through norms of balance, duty, and justice.

Legal education in postcolonial societies such as Nigeria and India is a product not only of domestic evolution but also of external imposition. Colonial rule introduced a framework of legal training that was deeply rooted in British jurisprudence, often side-lining or outright erasing indigenous legal systems and epistemologies. The model of legal education transplanted during British rule prioritised common law doctrines, adversarial court procedures, and Eurocentric principles of justice, with little regard for customary norms or local dispute resolution mechanisms. Legal professionals were trained not to interpret or apply law within local socio-cultural contexts, but rather to replicate British legal traditions.[3]

This legacy has persisted long after political independence. In both Nigeria and India, law curricula remain largely committed to Western legal thought. The materials used, the language of instruction, the methods of assessment, and the pedagogical orientation continue to reflect colonial imprints.[4] As a result, legal education in these jurisdictions frequently fails to address the lived realities and socio-legal challenges of their populations, contributing to a disjuncture between law as taught in the classroom and law as experienced in society. Critics argue that the dominance of colonial legal thought has led to what Santos terms "epistemicide" – the erasure of local knowledge systems in favour of Western epistemologies.[5] This concern is particularly pressing in legal education, which not only shapes legal professionals but also determines how justice is

[2] Kautilya (Chanakya), *Arthashastra*, 4th century BCE, Book 1, Chapter 3
[3] Olakunle Akinseye-George, *Legal Education in Nigeria: Challenges and Reforms* (Malthouse Press 2013) 22.
[4] Rajeev Dhavan, *Legal Profession and Legal Education* (N.M. Tripathi 1987) 67.
[5] Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2014) 92.

conceptualised and delivered. The growing discourse around decolonisation in education thus urges a re-examination of legal curricula, pedagogies, and institutional practices.

1.1 Rationale for a Comparative Study of Nigeria and India

Nigeria and India offer fertile ground for comparative analysis due to their shared colonial histories and parallel trajectories in legal development. Both were integral parts of the British Empire, with legal systems that evolved under colonial administration and have since struggled to reconcile inherited structures with indigenous norms. The similarities in their colonial experiences allow for meaningful comparison, while their unique post-independence reforms and socio-legal contexts provide valuable contrasts. India, for instance, has seen a rise in alternative legal discourses through socio-legal movements, interdisciplinary approaches in national law universities, and recent calls to integrate Indian knowledge systems.[6] Nigeria, on the other hand, has engaged in debates around pluralism, customary law, and the local relevance of legal training, albeit facing challenges of regional disparities and institutional capacity.[7] A comparative approach enables a deeper understanding of how colonial legacies manifest differently in legal education systems, and how countries with similar pasts can adopt distinct paths in the pursuit of jurisprudential autonomy. It also opens up space for cross-learning, particularly in the Global South, where solidarity in academic reform could serve as a counterweight to continued global legal homogenisation.

1.2 Research Objectives and Key Questions

This study is guided by the central objective of exploring how colonial legacies have shaped legal education in Nigeria and India, and how each country is engaging with the process of decolonisation in legal curricula. The paper seeks to examine the nature and depth of colonial influence, identify emerging reforms, and evaluate their effectiveness in fostering jurisprudential autonomy.

The key research questions are:

a. How did colonial rule shape the structure and content of legal education in Nigeria and India?

[6] Upendra Baxi, 'The Crisis of the Indian Legal System' in *Law and Poverty: Critical Essays* (Tripathi 1982) 34.
[7] Yusuf Danjuma, 'Decolonising Legal Education in Nigeria: Issues and Prospects' (2019) 63 *Journal of African Law* 155.

b. To what extent do contemporary legal curricula in both countries reflect or reject colonial legacies?

c. What are the institutional and pedagogical efforts being made to decolonise legal education in each context?

d. What challenges and opportunities exist in promoting indigenous and locally grounded jurisprudence?

e. How can a South-South comparative framework contribute to reimagining legal education?

These questions serve as the analytical backbone of the study, guiding the examination of primary materials such as curriculum documents, policy reports, and legal education guidelines, as well as secondary literature on de-colonial theory and comparative legal education.

1.3 Scope and Limitations of the Study

This research focuses on the domain of legal education, particularly curriculum content, pedagogical methods, and institutional reforms within Nigeria and India. It does not extend to the broader legal systems of the countries, although references may be made where necessary to understand the context of educational reform. The comparative approach is limited to select institutions and public legal education frameworks, including the Nigerian Law School, the Council of Legal Education (Nigeria), and the Bar Council of India and national law universities in India. Due to constraints of space and accessibility, the study does not exhaustively analyse all law schools in each country. Another limitation is the reliance on available literature and secondary sources, which may not fully capture the on-the-ground realities of legal education reform, especially in rural or less-documented regions. While interviews and fieldwork could enrich the study, this paper remains doctrinal and literature-based. Despite these limitations, the research offers a critical and timely intervention into the discourse on decolonising education by anchoring it in a comparative Global South framework, thereby contributing to the larger movement for epistemic justice and legal pluralism.

The paper delves into the colonial foundations of legal education, tracing how British imperialism shaped legal training in both countries. It focuses on the Nigerian experience post-independence,

examining legal education policies, curriculum content, and efforts at reform through a de-colonial lens. It turns to the Indian context, analysing colonial continuities and recent initiatives such as the National Education Policy and scholarly interest in indigenous legal traditions. It presents a comparative analysis of the Nigerian and Indian cases, drawing out thematic overlaps and divergences in their reform trajectories. Paper also proposes pathways towards achieving jurisprudential autonomy, emphasising indigenous knowledge systems, interdisciplinary learning, and South-South academic collaborations. And it concludes the study with a synthesis of key findings and policy recommendations, highlighting the need for sustained and inclusive reform in legal education across postcolonial societies. This structure allows for a layered and nuanced analysis of both the historical and contemporary dimensions of the subject, culminating in forward-looking recommendations grounded in comparative insights.

2.0 Colonial Foundations of Legal Education

The foundations of legal education in many postcolonial societies, including Nigeria and India, were laid not with the intent of fostering local jurisprudence but to serve the administrative needs of colonial powers. Law became a tool of governance, control, and cultural assimilation, often detached from the lived experiences and normative systems of native populations. The transplantation of British legal institutions and curricula was less about education in its holistic sense and more about creating a class of legal intermediaries loyal to the colonial state. This section traces the early architecture of legal education under colonial rule, examining how institutions were established, what knowledge was prioritised, and—importantly—what was excluded. It seeks to understand how these early choices created structural gaps in legal identity and continue to influence the postcolonial struggle for a more grounded and culturally resonant legal education system.

2.1 Historical Development of Legal Education in British Colonies

The legal education systems of British colonies were neither organically developed nor locally rooted; rather, they emerged as instruments of administrative control. In both Nigeria and India, legal education began as a by-product of colonial governance, serving the British interest in consolidating power rather than empowering indigenous peoples. The initial aim was not to develop an autonomous legal profession but to produce a class of intermediaries who could assist

in enforcing colonial laws.[8] In India, the Charter Act of 1833 paved the way for formal legal education by establishing the first law faculty at Calcutta.[9] This development coincided with the Anglicist-Orientalist debate, wherein Western-educated elites were favoured for administrative posts. Legal training became a tool for social mobility among the Indian elite, but the content remained entirely derivative of English common law. Similarly, in Nigeria, colonial legal education was shaped around the need to regulate commerce and maintain law and order. There was no initial vision for professional legal education within Nigeria itself; those aspiring to practise law had to travel to England and be called to the Bar at one of the Inns of Court.[10] Thus, the genesis of legal education in these colonies reflected not an intellectual or cultural exchange, but an extension of imperial control. The knowledge imparted through legal education was geographically displaced and culturally foreign, creating a cognitive dissonance between law as learned and law as lived.

2.2 Establishment of Legal Institutions and Transplant of British Legal Systems

The transplant of British legal systems was methodical and deeply structural. It began with the establishment of colonial courts, which functioned on principles alien to local traditions. These courts were centralised, formalistic, and adversarial, in sharp contrast to the more conciliatory and community-based indigenous justice systems.[11] Legal institutions were built to mirror those in Britain. In Nigeria, the Supreme Court was established in Lagos in 1863, adopting English civil and criminal procedures.[12] Similarly, India witnessed the formation of High Courts in Bombay, Calcutta, and Madras in the 1860s, each modelled after the King's Bench in London.[13] These institutions not only applied foreign law but also actively discredited local legal traditions, branding them as 'primitive' or 'unscientific.' One of the most significant consequences of this transplantation was the monopolisation of legal knowledge. The legal profession became a closed elite, whose training and legitimacy were contingent on proximity to English legal culture. In Nigeria, formal legal education only began with the establishment of the Nigerian Law School in

[8] J. N. Aduba, *Legal Education and the Challenges of Development in Nigeria* (Ahmadu Bello University Press 2006) 18.
[9] Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (Cambridge University Press 2014) 24.
[10] T. O. Elias, *The Nigerian Legal System* (Routledge 1963) 74.
[11] Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869.
[12] T. O. Elias, *The Nigerian Legal System* (Routledge 1963) 93.
[13] M. P. Jain, *Outlines of Indian Legal and Constitutional History* (LexisNexis 2014) 152.

1962, long after independence.[14] In India, even though legal education began earlier, it remained steeped in colonial logic, with English case law and statutes dominating the syllabus. What these institutions succeeded in doing was less about ensuring justice and more about imposing a unified system of control. The effect was a gradual erasure of plural legal traditions, and an academic marginalisation of indigenous jurisprudence.

2.3 Early Curricula and the Exclusion of Indigenous Knowledge

The early curricula in both Nigeria and India were constructed with one underlying assumption: that English law was superior and universally applicable. There was little or no room for the study of indigenous legal traditions, whether they be Islamic law, customary law in Nigeria, or Hindu and Muslim personal laws in India.[15] In India, even where personal laws were nominally retained, their interpretation was filtered through colonial courts and British legal theories. For instance, Anglo-Hindu and Anglo-Muslim laws were codified and taught, but these bore only a distant resemblance to the original religious and philosophical texts.[16] Legal education, therefore, became a site of distortion, where indigenous law was selectively interpreted to fit colonial administrative needs. In Nigeria, the curriculum introduced after independence mirrored English legal education with minimal integration of Nigerian customary law. The Council of Legal Education Act of 1962 laid the foundation for training law graduates, but it did not significantly depart from the British model.[17] Courses such as 'Nigerian Legal System' were often treated as peripheral rather than foundational. Moreover, legal pedagogy reinforced this exclusion. Case law from England was given precedence over local judgments. Jurisprudence was taught through the lens of legal positivism, utilitarianism, and other Western philosophical doctrines, without engaging with African jurisprudential thought.[18] This academic orientation perpetuated a hierarchy of knowledge, where Western law was viewed as modern and legitimate, while indigenous systems were relegated to folklore or anthropology.

[14] Council of Legal Education Act 1962 (Nigeria), Cap C13, Laws of the Federation 2004.
[15] B. O. Nwabueze, *The Presidential Constitution of Nigeria* (Longman 1982) 46.
[16] Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (Cambridge University Press 2014) 129.
[17] Council of Legal Education Act (n 7).
[18] Upendra Baxi, 'Notes on the Mimic Man: The Legal Education Reforms in India' (1993) 4 *Third World Legal Studies* 19.

2.4 Impact on Post-Independence Legal Identity

The colonial legacy left an indelible mark on how legal identity was constructed in the post-independence era. Legal professionals, trained in British traditions, often continued to see themselves as custodians of an inherited system rather than as agents of transformation. This phenomenon, described by scholars as "internalised colonisation," led to a professional culture that valued British legal norms over local innovations.[19] In Nigeria, post-independence legal education retained its colonial foundations, with reform attempts often stymied by institutional inertia and a lack of political will. The dominance of English case law and the prestige of foreign legal qualifications created a psychological barrier to embracing local jurisprudence. Even the legal language — English — remained a medium that distanced law from the majority population.[20] In India, legal education reform has been more active in recent decades, particularly with the advent of National Law Universities (NLUs). However, even these institutions have faced criticism for reproducing elitist, Western-oriented models of education.[21] While there have been efforts to introduce Indian legal philosophy and vernacular legal histories into curricula, these remain underdeveloped and often optional. The long-term effect of colonial legal education has been the creation of a judiciary and legal academia that often lack epistemic confidence in indigenous legal systems. This impacts not only legal education but also the development of law itself, leading to a dependence on foreign precedent and scholarly validation. Decolonising legal education, therefore, is not merely a curricular exercise — it is a transformative project aimed at redefining legal identity.

3.0 Legal Education in Nigeria – Legacy and Transition

The journey of legal education in Nigeria is marked by a complex interplay of colonial inheritance and post-independence aspirations. While the foundational structure was undeniably shaped by British legal frameworks, Nigeria's postcolonial trajectory has been one of cautious adaptation and gradual reform. Legal education initially mirrored the colonial template, emphasizing English common law and sidelining indigenous norms. However, as the nation matured, so did its legal

[19] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201, 213.
[20] Yusuf Danjuma, 'Decolonising Legal Education in Nigeria: Issues and Prospects' (2019) 63 *Journal of African Law* 155.
[21] Rohit De, 'Indian Legal Education at a Crossroads' (2020) 56 *Economic and Political Weekly* 27.

consciousness—bringing forth efforts to create a system more attuned to local realities. This section explores how Nigeria navigated the path from a transplanted model of legal instruction to an evolving framework that attempts to blend inherited legal doctrines with indigenous values. It reflects on the institutions, ideologies, and reforms that continue to shape the country's pursuit of a more inclusive and representative legal education system.

3.1 Postcolonial Legal Education Frameworks in Nigeria

In the immediate aftermath of independence in 1960, Nigeria faced the daunting challenge of constructing a national legal education framework that could serve the realities of a sovereign and diverse country. The colonial legal structure, based on English common law principles, had produced a generation of legal professionals trained almost entirely in Britain. These early legal minds were well-versed in English statutes and judicial reasoning, but ill-equipped to navigate the complexity of Nigeria's plural legal traditions. In response to this disjunction, Nigerian policymakers took significant steps toward localising legal education. The establishment of faculties of law at universities such as the University of Ife (now Obafemi Awolowo University), University of Lagos, and Ahmadu Bello University marked the beginning of formal legal education within Nigeria.[22] However, while the setting had changed, the content largely remained derivative of British curricula. The syllabi continued to centre around English legal doctrines and foreign case law, offering little insight into Nigeria's own legal cultures.[23] Despite these limitations, the post-independence framework did represent an important shift. It created a domestic legal education system that began to engage, albeit tentatively, with the need to reflect local legal realities. By the 1970s and 1980s, there were increasing calls for curricula that addressed issues such as customary law, Islamic law, and the unique socio-political challenges of postcolonial Nigeria.[24]

3.2 Influence of British Common Law and Legal Positivism

One of the most enduring legacies of colonialism in Nigeria's legal education is the dominance of British common law and the theoretical paradigm of legal positivism. While colonial rule may

[22] O. A. Adekunle, 'Legal Education in Nigeria: Challenges and Prospects' (2018) 2 *Nigerian Law Journal* 33.
[23] B. O. Nwabueze, *The Presidential Constitution of Nigeria* (Longman 1982) 41.
[24] Yusuf Danjuma, 'Decolonising Legal Education in Nigeria: Issues and Prospects' (2019) 63 *Journal of African Law* 160.

have formally ended, the epistemological structure it left behind continued to shape how law was taught and understood. British common law was positioned not merely as a comparative framework, but as the default legal language of modernity and rationality.[25] The doctrine of stare decisis, legal formalism, and the binary logic of 'law versus morality' — all hallmarks of English jurisprudence — became deeply embedded in Nigerian legal thinking. This had two significant consequences. First, it marginalised alternative legal philosophies that drew from Nigeria's rich customary and Islamic legal traditions. Second, it contributed to a hierarchical legal order where only codified, court-based systems were seen as legitimate, while community-based dispute resolution mechanisms were often dismissed as 'informal' or 'non-legal.'[26] The positivist orientation of legal education reinforced this exclusion. Legal theory courses typically drew from thinkers such as Austin, Bentham, and Hart, with minimal reference to African jurisprudential contributions.[27] Even within constitutional law, concepts of separation of powers, rule of law, and judicial independence were framed within Western liberal theory, often without critical engagement with how these ideas translated — or failed to translate — into the Nigerian context. This intellectual dependency on British frameworks impeded the development of an indigenous legal consciousness. It perpetuated a model of legal education that rewarded rote learning of foreign legal doctrines rather than critical thinking rooted in local experiences.

3.3 Role of the Nigerian Law School and Council of Legal Education

The establishment of the Nigerian Law School in 1962 and the formation of the Council of Legal Education (CLE) were landmark developments in the domestication of legal training. These institutions were intended to produce a national bar equipped to serve the legal and developmental needs of Nigeria.[28] The Law School was designed as a practical training ground, focusing on courtroom procedures, legal drafting, and advocacy. It provided a unified professional platform for graduates of Nigerian and foreign law faculties, thereby standardising legal practice in the country. The CLE, as a regulatory body, was tasked with ensuring that legal education across

[25] J. N. Aduba, *Legal Education and the Challenges of Development in Nigeria* (Ahmadu Bello University Press 2006) 23.
[26] Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869.
[27] A. O. Sanni, 'The Place of African Jurisprudence in Legal Education in Nigeria' (2010) 4 *Nigerian Journal of Jurisprudence* 76.
[28] Council of Legal Education Act 1962 (Nigeria), Cap C13, Laws of the Federation 2004.

universities met national standards.[29] However, these institutions inherited several limitations. The curriculum of the Nigerian Law School remained heavily influenced by English legal procedures, especially in areas like civil and criminal litigation, property law, and corporate practice. For instance, students were required to study "Professional Ethics" through the lens of the English Bar, with little attention to the social justice challenges peculiar to Nigeria.[30] Moreover, the CLE's regulatory framework, while robust in maintaining quality, has often been critiqued for stifling curricular innovation. Attempts by some universities to introduce courses in African jurisprudence, alternative dispute resolution (ADR) rooted in customary practice, or legal pluralism have been discouraged or inadequately supported.[31] That said, the Law School has made strides in offering a nationally relevant legal education, particularly in training legal professionals in local procedural contexts. It also played a vital role in breaking the elitist structure of the colonial legal profession by making legal training more accessible to Nigerians from diverse socio-economic backgrounds.[32]

3.4 Efforts at Reform: Inclusion of Customary Law, Legal Aid Clinics, and Pan-African Approaches

Recent decades have witnessed renewed efforts to reform legal education in Nigeria, guided by the realisation that a foreign-oriented curriculum cannot address the country's legal, economic, and cultural complexities. These efforts, though uneven, signal a growing movement toward decolonising legal education. One important reform has been the increased attention to customary law. While previously treated as an elective or marginal topic, some Nigerian universities now require students to study the principles and operation of customary law in depth.[33] This shift acknowledges the reality that a significant proportion of legal interactions in Nigeria occur outside the formal judicial system and are mediated through community norms and traditional institutions. Legal aid clinics have also emerged as crucial pedagogical innovations. These clinics, often situated within law faculties, allow students to engage with underserved communities and offer

[29] Ibid.
[30] Nigerian Law School Curriculum, *Council of Legal Education Handbook* (2022).
[31] O. A. Adekunle, 'Legal Education in Nigeria: Challenges and Prospects' (2018) 2 *Nigerian Law Journal* 35.
[32] T. O. Elias, *The Nigerian Legal System* (Routledge 1963) 102.
[33] Nigerian University Commission, *Benchmark Minimum Academic Standards for Law* (2020).

legal assistance under supervision.[34] Beyond their social justice function, these clinics serve as a platform for students to encounter the law in its lived, pluralistic form. Through such engagements, they begin to appreciate the limitations of a strictly doctrinal legal education and the value of culturally responsive legal practice.

Furthermore, a number of legal scholars and institutions have called for a Pan-African reorientation of legal education. This includes the integration of African legal philosophy, legal history, and case law from other African jurisdictions into the curriculum. The objective is to move beyond Eurocentric paradigms and cultivate a legal identity that is both locally rooted and globally conscious.[35] For instance, courses that explore ubuntu as a jurisprudential concept or the role of traditional authorities in dispute resolution have gained traction in some academic circles.[36] However, structural challenges remain. Institutional inertia, limited funding, and the continued prestige of Western legal models often undermine reform efforts. Additionally, a lack of research in indigenous jurisprudence makes curriculum development in this area difficult. Despite these obstacles, the reform movement continues to gain momentum, driven by a new generation of legal academics and practitioners who view decolonisation not as a nostalgic return to the past, but as a necessary step toward a more just and relevant legal future.

4.0 Legal Education in India – Colonial Continuities and Contemporary Shifts

India's legal education system stands at the crossroads of inherited colonial structures and emerging demands for indigenous jurisprudential thought. Shaped heavily by the British legal framework, early Indian legal education was designed to produce legal professionals who could operate within the imperial system, often at the cost of marginalising India's rich traditions of law and justice. Even after independence, the institutional blueprint and pedagogical priorities largely remained intact, with limited space for indigenous concepts or regional legal diversity. However, in recent decades, India has witnessed a gradual but conscious shift—introducing curriculum reforms, establishing national law universities, and reviving interest in traditional legal philosophies. This section examines how India's legal education continues to negotiate with its

[34] E. I. Chianu, 'Clinical Legal Education in Nigeria: Models, Challenges and Possibilities' (2015) 7 *Nigerian Bar Journal* 18.
[35] Sabelo J. Ndlovu-Gatsheni, *Decolonizing the University in Africa* (Routledge 2020) 89.
[36] Makau Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31.

colonial past while seeking relevance in a dynamic socio-legal landscape that aspires toward both global competence and local rootedness.

4.1 Evolution of Legal Education in Colonial and Postcolonial India

The roots of legal education in India trace back to the establishment of colonial institutions during the British Raj. The formalisation of legal training began with the establishment of the Supreme Court at Calcutta in 1774 and further advanced with the founding of law faculties at institutions like the University of Bombay (1857), University of Calcutta (1857), and University of Madras (1857).[37] These institutions were modelled on English legal education and largely functioned as vehicles for the transmission of British jurisprudence. The aim was not to produce autonomous Indian jurists, but rather a class of legal professionals—largely clerks and interpreters—trained in British law to serve the colonial administration.[38] This colonial vision influenced the form and substance of legal education, with little to no emphasis on India's own jurisprudential traditions. Indigenous legal thought, which had for centuries guided Hindu, Buddhist, and Islamic societies, was systemically excluded from the curriculum.[39] Post-independence, the expectation was that India would reform its legal education system to reflect its plural and democratic ethos. However, colonial continuities remained entrenched. Legal education largely continued along the trajectories laid by the British, with heavy reliance on rote learning, case law, and procedural formalism.[40] Courses focused on constitutional and statutory interpretation were still rooted in British common law traditions, leaving limited space for critical reflection or integration of India's indigenous legal heritage.

4.2 The Common Law Legacy and Its Pedagogical Influence

British common law continues to cast a long shadow on the teaching and practice of law in India. With the codification of numerous colonial statutes—such as the Indian Penal Code (1860), Evidence Act (1872), and the Contract Act (1872)—Indian legal education has remained deeply tied to the study of statutes introduced under British rule.[41] These laws, while structurally sound,

[37] M. Galanter, 'The Aborted Reforms: India's Law and Legal Education, 1835–1882' (1968) 10 *Law & Society Review* 46.
[38] J. D. Derrett, *Religion, Law and the State in India* (Faber & Faber 1968) 24.
[39] N. B. Baxi, *Crisis of the Indian Legal System* (Vikas Publishing 1982) 18.
[40] U. Baxi, 'Notes Towards a Sociology of Indian Legal Profession' (1983) 25 *Indian Journal of Legal Studies* 221.
[41] Indian Penal Code 1860, Indian Evidence Act 1872, Indian Contract Act 1872.

reflect colonial logics of governance, justice, and authority that were alien to India's social fabric. The teaching of these statutes is often doctrinal and text-centric, devoid of interdisciplinary engagement or socio-legal critique. Indian law schools, especially public universities, still follow curricula that prioritise formalistic interpretations of laws over empirical or contextual analysis.[42] Courses in jurisprudence tend to revolve around Western legal philosophers—Austin, Dicey, Hart—while neglecting Indian thinkers such as Manu, Kautilya, Gandhi, or Ambedkar.[43] Moreover, legal pedagogy often mirrors the hierarchical and elitist nature of the colonial education model. Legal education is dominated by lectures, minimal interaction, and the memorisation of precedent rather than the cultivation of legal reasoning or advocacy skills grounded in contemporary Indian realities.[44] This has hindered the development of a critical legal consciousness necessary to address India's diverse legal needs and challenges.

4.3 Institutional Responses and the Role of the Bar Council of India

The Bar Council of India (BCI), established under the Advocates Act, 1961, plays a central role in regulating legal education and the legal profession in India. It lays down standards for legal education, prescribes syllabi, and recognises institutions qualified to impart legal training.[45] While the BCI has made several important interventions—such as introducing the five-year integrated law degree and mandating compulsory subjects—the underlying epistemological framework remains heavily influenced by colonial traditions. In the 1990s, recognising the limitations of existing models, institutions like the National Law School of India University (NLSIU) in Bangalore pioneered a new model of legal education combining interdisciplinary learning, clinical legal education, and policy engagement.[46] This model has been replicated across India through the creation of multiple National Law Universities (NLUs). These institutions have broadened the horizon of legal training and created space for contemporary subjects such as human rights law, environmental law, and international trade law. However, critics argue that even these premier institutions are not immune to colonial hangovers. The emphasis on corporate law, global internships, and Western academic models has often come at the expense of vernacular legal

[42] S. Sivakumar, 'Legal Education in India: Problems and Perspectives' (2014) 3 *NALSAR Law Review* 1.
[43] A. S. Narang, *Indian Political Thinkers: Modern Indian Political Thought* (Gitanjali Publishing 1996) 101.
[44] R. Dhavan, 'Legal Education and Law Teaching in India' (1987) 29 *Journal of Legal Education* 109.
[45] Advocates Act 1961, s 7(h).
[46] B. de Souza, *Transforming Legal Education in India: The NLS Model* (NLSIU Press 2002) 57.

systems, grassroots engagement, and access to justice.[47] The need for a deeper structural transformation that embraces Indian jurisprudential traditions and realigns legal education with local realities remains largely unmet.

4.4 Curriculum Reform and Reclaiming Indigenous Jurisprudence

India's engagement with legal pluralism, both in practice and theory, presents a unique opportunity to challenge colonial epistemologies. Over the past two decades, scholars and activists have advocated for the inclusion of customary laws, tribal justice systems, and religious legal traditions within formal legal education.[48] Such efforts aim to not only democratise legal knowledge but also restore the legitimacy of indigenous jurisprudence. Institutions like the National Academy of Legal Studies and Research (NALSAR) and West Bengal National University of Juridical Sciences (WBNUJS) have experimented with courses on tribal rights, legal anthropology, and law and development.[49] Meanwhile, state universities have attempted to introduce papers on Indian legal philosophy and texts such as the Manusmriti and Arthashastra, exploring their relevance in modern legal theory.[50] There is also a growing call for multilingualism in legal education. Since most legal instruction is in English, it marginalises students from rural and non-English-speaking backgrounds, thereby reinforcing elitist barriers established during colonial times.[51] Integrating regional languages into legal curricula would not only broaden access but also bring legal discourse closer to the lived realities of Indian citizens.

4.5 Decolonisation as Democratic Reclamation

Ultimately, the decolonisation of legal education in India is not merely a pedagogical reform—it is a democratic imperative. A curriculum that remains tethered to colonial ideologies cannot serve a society as diverse and complex as India. The law must reflect and respond to the normative orders that actually govern people's lives, whether they arise from tribal councils, panchayats, or religious bodies. To achieve this, Indian legal education must transcend its colonial origins and embrace pluralism, interdisciplinary, and historical self-reflection. It must empower future lawyers not only

[47] Pratiksha Baxi, 'Access to Justice and the Structure of Legal Education in India' (2012) 6 *International Journal of Law in Context* 67.
[48] A. Sen, 'Customary Law and Legal Pluralism in India' (2016) 10 *Indian Journal of Legal Theory* 44.
[49] WBNUJS Course Curriculum, Legal Anthropology Syllabus (2020).
[50] S. Bhatia, *Decolonizing International Law and Jurisprudence* (OUP 2021) 72.
[51] U. Baxi, 'Notes Towards a Sociology of Indian Legal Profession' (1983) 25 *Indian Journal of Legal Studies* 228.

to argue within courtrooms but also to advocate for systemic change in the face of injustice and exclusion. The transition is already underway, albeit gradually. From curriculum revisions and experiential learning initiatives to scholarly reappraisals of Indian jurisprudence, a decolonial legal education is emerging—not as a rejection of all Western contributions, but as an assertion of epistemic sovereignty and legal agency.

5.0 Comparative Analysis of Nigeria and India

While Nigeria and India emerged from different colonial contexts, both inherited remarkably similar legal education systems rooted in British common law. Yet, their journeys toward redefining legal education have taken nuanced paths shaped by local realities, cultural complexities, and institutional reforms. A comparative lens offers valuable insight into how each country has responded to the challenges of decolonising legal instruction—balancing inherited legal traditions with the need to reflect indigenous jurisprudence. This section explores key similarities and differences in their curricular models, institutional frameworks, and reform efforts. By analysing their parallel struggles and innovations, the aim is to understand not only how colonial legacies endure but also how they are being critically reimagined. This comparison underscores the importance of contextual legal education in postcolonial societies and the possibilities of shared learning between nations striving for jurisprudential autonomy.

5.1 Shared Colonial Heritage and Divergent Postcolonial Paths

Nigeria and India, as former British colonies, inherited legal systems and education structures that were primarily designed to produce subservient legal professionals loyal to colonial administrative interests. Both countries adopted the English common law tradition, codified colonial-era statutes, and structured legal education along British lines. However, their postcolonial trajectories, while overlapping in many respects, also reflect distinct historical, cultural, and political contexts that shaped their legal education systems. In both nations, the colonial legal education system had the effect of marginalising indigenous jurisprudence and epistemologies. Yet, the nature of this marginalisation varied. In India, colonial legal education co-existed with a long history of classical legal texts and religiously derived normative orders. In contrast, Nigeria's indigenous legal traditions were largely oral and community-based, with less written codification or

institutionalisation.[52] This distinction influenced the ways in which legal education evolved after independence. India's early independence period witnessed the continuation of colonial legal institutions, but the gradual emergence of institutions like National Law Schools reflected an internal push for legal modernisation.[53] Nigeria, on the other hand, rapidly adopted the Nigerian Law School model in 1962 as a centralised mechanism to train barristers within a nationally regulated framework.[54] Despite these efforts, both countries have continued to grapple with the dominance of colonial legal frameworks in curricula and teaching practices.

5.2 Common Law Influence and Epistemic Dependence

Both legal systems remain anchored in the doctrines of British common law, including procedural justice, adversarial trial systems, and formal legal reasoning. Indian and Nigerian legal education institutions continue to teach colonial laws such as the Indian Penal Code (1860) and Nigeria's Criminal Code (1916), both rooted in British statutory traditions.[55] The epistemological foundation of legal education is thus marked by continued dependence on foreign jurisprudential canons and Western legal philosophers.

This commonality has created several challenges:

- The internalisation of legal positivism as the dominant framework, with minimal engagement with normative, restorative, or culturally embedded legal traditions;
- A preference for English as the medium of instruction, which disadvantages non-elite, rural, or vernacular-speaking students;
- The privileging of Western legal thought over African or Indian indigenous legal concepts and values.

Epistemic dependence also perpetuates a form of "jurisprudential subordination," where indigenous scholars must constantly validate their work against Western standards.[56] This inhibits

[52] A. Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International and Comparative Law Quarterly* 817.
[53] B. de Souza, *Transforming Legal Education in India: The NLS Model* (NLSIU Press 2002) 57.
[54] C. Okpaluba, 'Legal Education and the Legal Profession in Nigeria' (2003) 47 *Journal of African Law* 1.
[55] Nigerian Criminal Code Act 1916; Indian Penal Code 1860.
[56] O. Oyowe, 'Epistemic Injustice in African Jurisprudence' (2020) 5 *Global Jurist* 32.

the organic development of a critical, locally rooted jurisprudence and stifles intellectual innovation.

5.3 Institutional Innovations and Reform Efforts

Despite the enduring colonial legacies, both Nigeria and India have undertaken institutional reforms aimed at creating more inclusive and locally relevant legal education systems. In Nigeria, the Council of Legal Education and Nigerian Law School have been instrumental in expanding legal education access. Curricular reforms have introduced elements of customary law, Islamic law, and legal aid clinics to bridge the gap between formal legal training and social realities.[57] However, challenges persist in the quality and accessibility of legal education, especially in rural and underserved regions. India's legal education reforms have focused more on academic innovation and institutional diversification. The rise of National Law Universities (NLUs) has created elite centres of legal learning with global aspirations. However, these institutions are often criticised for reproducing class-based hierarchies and overemphasising corporate and international law at the expense of legal aid, grassroots advocacy, and indigenous legal systems.[58] Both countries have also experimented with clinical legal education, public interest lawyering, and interdisciplinary approaches to legal training. Yet, these remain limited in scope and often peripheral to mainstream curricula.

5.4 Challenges in Integrating Indigenous Jurisprudence

The reintegration of indigenous jurisprudence into legal education faces deep structural and ideological challenges in both Nigeria and India. These include:

- Colonial Skepticism: Colonial administrators systematically delegitimised indigenous laws as uncodified, irrational, or incompatible with modern legal systems.[59] This legacy still influences perceptions within legal academia and policymaking.

[57] Nigerian Council of Legal Education, Annual Report 2020.
[58] Pratiksha Baxi, 'Access to Justice and the Structure of Legal Education in India' (2012) 6 *International Journal of Law in Context* 67.
[59] U. Baxi, *Crisis of the Indian Legal System* (Vikas Publishing 1982) 30.

- Fragmentation of Traditions: In Nigeria, the multiplicity of ethnic legal traditions (e.g., Igbo, Yoruba, Hausa) complicates efforts to develop a unified curriculum on customary law. Similarly, in India, Hindu, Islamic, tribal, and regional laws present a complex tapestry that resists simplistic integration.[60]

- Lack of Institutional Support: Few law faculties offer sustained, critical engagement with indigenous jurisprudence as a core component of legal education. Research funding, faculty expertise, and political support for such endeavours remain scarce.

- Globalisation Pressures: Both legal systems are increasingly aligned with global legal standards (e.g., WTO, UNCITRAL, international human rights law), which can inadvertently marginalise local legal frameworks.[61]

Moreover, legal curricula in both countries continue to prioritise formal legal texts and case law over ethnographic, oral, or experiential understandings of law. This hinders the development of a grounded and context-sensitive legal consciousness.

5.5 Toward a Jurisprudence of Decolonisation

A comparative analysis of Nigeria and India's legal education systems reveals a shared need to move beyond formal independence toward epistemological and pedagogical sovereignty. Decolonising legal education in both countries is not simply a matter of adding a few courses on customary law or translating existing textbooks into local languages. It requires a radical rethinking of legal knowledge, pedagogy, and institutional design.

Several pathways emerge from this comparative lens:

- Curricular Diversification: Integrating indigenous philosophies, legal history, and comparative jurisprudence can challenge the dominance of Western legal theories. For instance, Indian

[60] S. S. Misra, 'Tribal Customary Laws and Governance in India' (2019) 7 *Indian Journal of Legal Studies* 102.
[61] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 201.

philosophy's emphasis on *Dharma* or African concepts like *Ubuntu* can offer alternative visions of justice.[62]

- Pedagogical Innovation: Encouraging participatory learning, case-based analysis of local disputes, and field engagement with informal legal institutions can bridge the gap between theory and lived realities.

- Language Inclusion: Multilingual legal education, including the use of vernaculars in legal instruction, can democratise access and reconnect law with local communities. Nigeria's adoption of local languages in customary courts and India's experiments with regional legal glossaries offer promising directions.[63]

- Interdisciplinary and Collaboration: Law schools must collaborate with anthropologists, historians, linguists, and indigenous scholars to craft holistic legal education that reflects complex social realities.

- Policy and Institutional Commitment: Governments and bar councils should actively promote indigenous jurisprudence as a legitimate and necessary part of legal training, including funding for research, faculty development, and curriculum reform.

While the contexts of Nigeria and India differ, their shared colonial legacy and ongoing struggles for legal relevance provide fertile ground for mutual learning. A decolonised legal education is not merely a return to tradition—it is an act of future-making, grounded in cultural self-respect and jurisprudential pluralism.

6.0 Toward Jurisprudential Autonomy

In the long arc of postcolonial recovery, the question of legal education occupies a central yet often neglected space. While the political and economic decolonisation of nations like Nigeria and India has been extensively analysed, the intellectual and pedagogical liberation of legal systems remains incomplete. This section outlines forward-looking strategies to move both countries toward

[62] M. Ramose, 'The Philosophy of Ubuntu and Ubuntu as a Philosophy' (2001) in P. Coetzee and A. Roux (eds), *The African Philosophy Reader* (Routledge 2002) 230.
[63] Government of India, 'Commission for Promotion of Legal Education in Indian Languages' (2022) https://legaledu.gov.in/legal-vernaculars accessed 9 April 2025.

jurisprudential autonomy—a state where legal education is reflective of indigenous realities, responsive to regional needs, and untethered from colonial epistemic frameworks.

6.1 Need for Embedding Indigenous Legal Traditions in Mainstream Education

The relegation of indigenous legal traditions to peripheral status in legal curricula is one of the most profound manifestations of colonial legacy. In both Nigeria and India, these systems have often been treated as relics of a bygone era rather than as living, evolving sources of law. To reclaim jurisprudential autonomy, indigenous legal traditions must be integrated not as add-ons or electives but as foundational components of legal education. In Nigeria, the diverse customary systems—such as Yoruba communal dispute resolution, Igbo clan-based adjudication, and Hausa Islamic jurisprudence—offer rich and complex understandings of justice, equity, and restitution. Similarly, India's jurisprudential traditions—*Dharmaśāstra*, *Nyāya*, *Manusmriti*, and Buddhist legal reasoning—provide centuries-old normative structures grounded in ethics and duty. Embedding these into law schools fosters respect for pluralism and enhances legal literacy across cultures.[64] This requires rethinking course design. For instance, a module on constitutional law could explore the Indian Constitution's interface with *Dharma* or the Nigerian Constitution's accommodation of Sharia and customary courts. Likewise, jurisprudence courses can study thinkers such as Kautilya and Obafemi Awolowo alongside H.L.A. Hart. Such inclusion not only affirms the legitimacy of indigenous systems but also challenges the assumption that Western legal theories are universal.[65]

6.2 Strengthening Regional and South-South Collaborations

Decolonisation is not a solitary endeavour. It gains strength through collaboration—particularly among countries of the Global South who share similar colonial histories and structural challenges. Nigeria and India, while separated by geography, are linked by their shared experience of British imperialism and their parallel quests to decolonise knowledge. Building platforms for South-South academic partnerships—through student and faculty exchanges, joint conferences, and collaborative research—can amplify voices that are often marginalised in Western-centric

[64] A. Oba, 'The Future of Customary Law in Nigeria' (2002) 12 *Griffith Law Review* 34.
[65] J Derrett, *Religion, Law and the State in India* (Faber & Faber 1968) 142.

discourses.[66] Initiatives such as the African-Asian Legal Dialogues and the BRICS Law Institutes have opened such channels, but their scope remains limited. Strengthening these networks can produce new knowledge systems and pedagogical methods rooted in shared socio-legal contexts. These collaborations can also address common challenges such as informal justice systems, legal pluralism, caste and ethnic marginalisation, and gender-based legal exclusions. A Nigerian-Indian academic consortium, for instance, could facilitate comparative studies on customary courts, legal empowerment, or constitutional federalism—offering legal scholars an opportunity to break free from the Western gaze and engage in mutual learning. Beyond academia, such partnerships can influence regional policymaking. Coordinated efforts at legal harmonisation (where appropriate), cross-border recognition of indigenous laws, and transnational indigenous legal forums can help reassert the sovereignty of traditional knowledge in formal legal systems.[67]

6.3 Promoting Interdisciplinary and Multilingual Legal Learning

The colonial model of legal education tends to compartmentalise law as an abstract science, detached from culture, history, and language. To build jurisprudential autonomy, law must be re-situated within its broader intellectual and social context. Interdisciplinary education enables students to understand law as part of a complex web of societal relations, while multilingual learning ensures that the law speaks the language of the people. Interdisciplinary allows for richer engagement with issues such as land rights, environmental justice, customary governance, and social inequality. Legal education should therefore draw on history, anthropology, sociology, and philosophy—not as peripheral subjects but as integral to legal understanding.[68] For example, a course on environmental law in India could incorporate tribal ecological knowledge and Gandhian philosophies, while Nigerian students studying land tenure could examine both statutory and clan-based systems in parallel. Simultaneously, language plays a powerful role in shaping thought. The dominance of English in legal pedagogy alienates vast populations and reinforces class divides. Law schools must invest in the vernacularisation of legal education, including the translation of key texts, development of local glossaries, and training of multilingual legal faculty. India has

[66] A Anghie, 'Legal Education and Post-colonialism: South-South Dialogues' (2016) 5 *Asian Journal of Comparative Law* 111.
[67] T Akinola, 'Reclaiming Africa's Legal Traditions: A Transnational Agenda' (2021) 27 *African Human Rights Law Journal* 229.
[68] U Baxi, *The Crisis of the Indian Legal System* (Vikas 1982) 78.

made recent strides in this direction, with the Bar Council of India and UGC promoting legal learning in Hindi and regional languages.[69] Nigeria could adopt similar initiatives by developing bilingual legal training in English and major indigenous languages like Yoruba, Hausa, and Igbo. The benefits are twofold: access to legal education expands, and legal reasoning becomes grounded in culturally resonant epistemologies. This multilingual, interdisciplinary approach is central to a legal education that is both accessible and contextually meaningful.

6.4 Institutional and Policy-Level Recommendations

For these shifts to be sustainable, they must be institutionalised through policy reform and curricular restructuring. The transformation of legal education must move beyond rhetorical commitments and be embedded into the frameworks that govern law schools, bar associations, and accreditation bodies. In Nigeria, the Council of Legal Education must mandate the inclusion of customary and comparative African law in the core curriculum. Legal pedagogy should prioritise experiential learning through customary court internships, community-based legal aid, and oral history projects. The Nigerian Law School must expand its scope to assess candidates not only on legal theory but also on contextual reasoning, mediation, and socio-legal impact.[70] Similarly, in India, regulatory bodies such as the Bar Council of India and National Legal Education Reform Committees should create space for classical Indian jurisprudence, regional legal systems, and comparative postcolonial legal analysis in the syllabi. Policy think tanks and law commissions can initiate white papers on the role of indigenous systems in modern governance. Law entrance exams and judicial service tests should reward knowledge of local legal contexts, not just rote learning of case law. At a broader level, universities must establish centres for decolonial legal research, develop open-access repositories of indigenous legal texts, and provide grants for doctoral research in non-Western legal systems.[71] Institutional partnerships with traditional leaders, tribal councils, and community organisations can provide valuable data and insights for curriculum development.

Lastly, public awareness campaigns should be launched to legitimise indigenous law among students and practitioners, dispelling the myth that customary systems are backward or

[69] Bar Council of India, 'Vision Document on Legal Education in Regional Languages' (BCI 2023) https://barcouncilofindia.org/ accessed 10 April 2025.
[70] Council of Legal Education (Nigeria), 'Revised Legal Education Curriculum' (2022) para 3.2.
[71] M Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

incompatible with constitutional principles. Jurisprudential autonomy is not the erasure of colonial law but the reassertion of epistemic equality. Nigeria and India, with their vibrant legal traditions, have the intellectual and cultural resources to reimagine legal education. What is needed is the political will, academic courage, and institutional innovation to move from mimicry to self-definition. By embedding indigenous jurisprudence, strengthening regional cooperation, promoting multilingual and interdisciplinary approaches, and institutionalising policy reform, both nations can lead a global shift toward a more plural, equitable, and authentic legal education system.

7.0 Conclusion and Recommendations

7.1 Conclusion

The evolution of legal education in Nigeria and India reflects the enduring imprint of colonialism—not only in institutional structures and curricula but also in the epistemological orientations that shape the legal consciousness of law graduates. While both nations have gained formal independence, their legal systems remain largely tethered to colonial blueprints. As this comparative analysis has illustrated, the transplantation of British common law displaced or subordinated indigenous jurisprudence, created legal elitism, and embedded legal positivism as the dominant mode of reasoning. This colonial residue continues to influence the way law is taught, interpreted, and practised. The legacy is most evident in curricula that remain largely detached from local realities and social needs. Students are trained to analyse legal codes and precedents within a framework imported from a foreign context, often with little regard for the lived experiences, customary practices, and community-based dispute resolution mechanisms that continue to shape justice in both countries. Legal education, thus, produces professionals who are often alienated from the pluralistic and culturally diverse legal landscapes in which they are expected to operate. Moreover, the dominance of English as the medium of instruction, the marginalisation of vernacular legal texts, and the absence of comparative jurisprudential approaches contribute to a form of intellectual colonisation. Indigenous philosophies—be it *Dharma*, *Nyaya*, *Ubuntu*, or the Nigerian conceptions of restorative and communal justice—are rarely central to classroom discussion or doctrinal training. This limits the scope for context-sensitive legal innovation and undermines the potential for legal systems in both countries to

become truly emancipatory and socially responsive. Yet, amid these challenges, there are signs of transformation. Nigeria's inclusion of customary law in its curriculum and legal aid clinics, and India's emergence of National Law Schools and interdisciplinary legal centres, suggest an evolving recognition of the need for reform. However, these efforts remain fragmentary and require deeper ideological and structural shifts to truly decolonise legal education.

7.2 Recommendations

The decolonisation of legal education demands more than superficial curricular adjustments—it necessitates a reorientation of legal thought, pedagogy, and institutional practice. Based on the comparative insights drawn from Nigeria and India, the following recommendations are proposed:

7.2.1 Integrate Indigenous Jurisprudence into Core Curricula

Indigenous legal concepts should not be confined to elective courses or marginalised modules. Instead, they must form a core part of legal training from the first year of study. In Nigeria, this could mean embedding customary law as a primary subject of study, with comparative analysis across different ethnic systems (e.g., Igbo, Yoruba, Hausa). In India, classical jurisprudential schools such as *Mimamsa*, *Nyaya*, and Buddhist legal reasoning should be integrated into foundational courses on legal theory and constitutional law. Law faculties should also invest in the development of indigenous legal textbooks and research publications that explore, codify, and critically analyse local jurisprudence in a manner that is accessible to students and practitioners alike.[72]

7.2.2 Multilingual Legal Education and Accessibility

The continued reliance on English as the sole language of legal instruction reinforces social exclusion and epistemic dependence. Both India and Nigeria should develop robust frameworks for teaching law in regional and indigenous languages. This includes translating core legal texts, judgments, and statutes into local languages, training faculty in multilingual instruction, and encouraging vernacular moot courts and debates. In India, this effort has already been initiated through government bodies such as the Bharatiya Bhasha Samiti and UGC-led initiatives for legal

[72] A. Oba, 'Indigenous Legal Systems and the Search for Relevance in Legal Education in Nigeria' (2010) 2 *African Journal of Legal Studies* 23.

education in Indian languages.[73] Nigeria can adopt a similar path by supporting legal education in Hausa, Yoruba, and Igbo—especially in universities serving majority local populations.

7.2.3 Revise Pedagogy and Embrace Contextual Legal Education

Legal education should prioritise critical thinking, context-based learning, and social engagement. Case studies of indigenous dispute resolution systems, community-based paralegal practices, and localised constitutional challenges can make legal education more relevant and dynamic. Clinical legal education, community immersion programmes, and internships with traditional dispute resolution bodies must be institutionalised as mandatory components of legal training.[74] These experiences not only bridge the theory-practice divide but also expose students to diverse legal worldviews. Additionally, law teachers must be trained in culturally sensitive pedagogy, incorporating storytelling, dialogue, and oral traditions into teaching methods. This can democratise the classroom and restore indigenous modes of knowledge transmission.

7.2.4 Promote Interdisciplinary and Comparative Legal Studies

Legal education should not operate in isolation from the broader social sciences and humanities. Understanding law in its social, historical, and philosophical contexts is essential to decolonisation. Universities should establish collaborative programmes that combine law with anthropology, history, political science, and indigenous studies.[75] Courses in comparative jurisprudence should expose students to non-Western legal systems—including African customary law, Islamic jurisprudence, Buddhist ethics, and indigenous justice models from the Americas and Oceania. This will help dismantle the Eurocentric framing of law and legal knowledge.

7.2.5 Institutionalise Research and Policy on Decolonisation

Law schools and regulatory bodies such as the Nigerian Council of Legal Education and the Bar Council of India must commission studies on the status of indigenous legal systems, pedagogical practices, and postcolonial reforms. Dedicated research centres on decolonial jurisprudence and

[73] University Grants Commission (India), 'Policy Framework for Legal Education in Indian Languages' (UGC 2022) https://www.ugc.ac.in/legal-in-languages accessed 10 April 2025.
[74] K. C. Nwosu, 'Legal Aid and Clinical Legal Education in Nigeria: Bridging the Gap' (2017) 11 *Journal of African Law and Society* 102.
[75] U. Baxi, *Towards a Sociology of Indian Law* (Satvahan Publications 1986) 45.

epistemology can be created to support long-term scholarly engagement. Policy interventions should incentivise law schools to design and deliver courses on legal pluralism, sponsor faculty exchanges between indigenous law scholars and mainstream law schools, and support doctoral research on decolonial legal themes.[76] International collaborations between universities in the Global South—such as joint programmes between Nigerian and Indian law schools—can also facilitate knowledge sharing and the emergence of alternative legal paradigms.

7.2.6 Reconfigure Legal Professionalism and Bar Examinations

Bar Councils and Legal Education Councils play a crucial role in shaping legal education and practice. They must reconfigure bar syllabi to include components of customary law, indigenous ethics, and community justice. Additionally, the criteria for evaluating law graduates must shift from rote memorisation to critical reasoning, contextual understanding, and problem-solving in diverse legal settings. Ethics education must be reframed to align with the values of communal responsibility, social justice, and human dignity found in local traditions, rather than merely reflecting British legal codes of conduct.

7.3 Concluding Reflections: Jurisprudence as Cultural Sovereignty

The project of decolonising legal education in Nigeria and India is not simply about revisiting the past; it is about reclaiming the future. It is a call to dismantle epistemic hierarchies, democratise access to legal knowledge, and nurture jurists who are not only legally competent but also socially grounded and culturally conscious. This comparative study demonstrates that while the scars of colonialism run deep, so too does the resilience of indigenous legal traditions. Through sustained commitment, critical pedagogy, and collaborative innovation, Nigeria and India can build legal education systems that reflect the complexities of their societies, uphold the dignity of their people, and advance a jurisprudence that is both rooted and revolutionary.

> **“Bí a kò bá gbin ogún, a ò le kọ́ ilé**.”[77] (Yoruba Proverb)
> *"If we do not plant heritage, we cannot build a home."*

[76] Nigerian Council of Legal Education, ‘Report on Legal Education and Curriculum Review’ (2020) 19.
[77] Yoruba proverb, cited in Wande Abimbola, *Ifa Will Mend Our Broken World: Thoughts on Yoruba Culture and Civilization* (AIM Books 1997).

This proverb stresses the importance of cultural heritage—including legal traditions—as a foundation for building a functional, just society. It encourages investment in indigenous systems to truly establish autonomy and identity.

> **"Vidya tu aviniteasya na shobhā na cha śāśvatī."**[78] (Manusmriti)
> *"Education without humility and rootedness does not shine, nor does it endure."*

This verse underscores that true education must be grounded in ethical and cultural tradition (*vinaya*), or else it becomes meaningless and unsustainable—heritage gives context and longevity to learning.

[78] Manusmriti 2.118

EXAMINATION OF THE SOCIO-LEGAL INVIGORATION OF FEMALE GENITAL MUTILATION / CUTTING IN INDIA AS HUMANE RIGHT OF WOMEN

By

Sonia B Nagarale, Ph.D[1]

Abstract

The world population of women forced this practice for the sake of sheer male dominant and gender biased medieval ideologies. The deeper roots of this agonizing practice lies in the traditional belief to control a girl's sexuality and ensure her virginity until marriage, or to prepare her for marriage. The FGM/C refers to the ritualistic practice of removing, altering, or damaging the female genitalia for non-medical reasons. Despite a significant contribution from United Nations, International institutions and National legal regime to regulate the laws and regulations against FGM/C, the practise still continues.

In India, FGM/C is still practised among the Dawoodi Bohra Community, and a conversation about FGM/C has been avoided for a long time. Many critics have condemned the activity, claiming that it violates human rights, while others have defended FGM/C by claiming that it is their traditional/cultural rights. This continuing controversy has encouraged the writing of this research paper to explore the occurrence of Female Genital Mutilation / Cutting in India, analyzing its socio-cultural context, legal framework, impact on women's rights, and efforts to address and eliminate the practice.

Keywords: Female Genital Mutation/Cutting, United Nations, Right to health, World Health Organisation, Dawoodi Bohra, Constitution of India.

1.0 Introduction

Perhaps the most underrated specialty of human rights is the term 'human' itself is gender neutral. This neutrality per se pervades the notion that, gender cannot be a barrier while seeking the protection under Human rights. Across the globe, vulnerability of womanhood towards various forms of patriarchal social tendencies is quite evident. Such vulnerability can be witnessed through preponderance of evil practices against women. One of such incessantly prevailing practices is the

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evil act of 'Female Genital Mutilation/Cutting' herein after FGM/C. Across the globe the practice of the FGM/C has been prevailing on pancontinental level. Certain age-old rituals and practises are profoundly ingrained in Indian culture, and certain segments of the population continue to struggle as a result. FGM/C is an ancient ritual that involves cutting the clitoral hood or extracting certain portions of a woman's genital for the sake of traditional, spiritual, or religious values. To combat this practise various International, State, Governmental, and Non-governmental bodies, as well as agencies, have set up programmes. The United Nations General Assembly proclaimed 6 February 2012 as the International Day of Zero Tolerance for Female Genital Mutilation/Cutting, with the intention of boosting awareness about the problem and urging meaningful action against it.

The contemporary era of human rights has seen the evolution of mankind into more civilized human beings; nevertheless, the hostilities against the gender discrimination and depraved impacts on the womanhood have remained a veracity of today's times. Moreover, not merely the social, cultural and religious factors responsible for FGM/C but, their blatant justification is also the Achilles heel on entire humanity. This socio-religious complex nature of FGM/C often creates enormous barriers in the objective assessment of this practice and thereby manoeuvres the regime of human rights.

However, many countries across the world dealing with FGM/C have held the practice serious violation of the human rights. This has opened a widespread debate on many international platforms and ultimately, mainstream human rights regime has taken the cognizance of it. Nevertheless, merely considering the FGM/C against the human rights won't suffice the purpose, as a substantially reciprocal support from the municipal jurisdictions is utmost warranted in this regard.

1.1 Concept of Female Genital Mutilation / Cutting

The concept of Female Genital Mutilation / Cutting refers to the all procedures involving partial or total removal of the external genitalia or other injury to the female genital organs for non-medical reason. In nutshell, worldwide the cutting of the skin on the genital part of a woman for various reasons has been referred as FGM/C. The practice is mostly carried out by traditional

circumcisers, who often play other central roles in communities, such as attending childbirths.[2] The underpinnings of this practice can be found in various social, cultural and religious influences. Its more pertinent to note that, the female genital cutting was earlier regarded as the female 'circumcision' which has now been regarded as the 'mutilation' to denote the cruelty and inhuman treatment to the womanhood.[3]

In the absence of exhaustive definition of FGM/C, the term has been largely interpreted by many organizations to assimilate the severity of the practice and thereby reveal the hardships forcefully imposed on the women and girls. Prominently the WHO has defined FGM/C as, "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons."[4] FGM/C includes procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons.

The World Health Organisation has classified Female Genital Mutilation/Cutting into four types[5]:

Type 1: Often referred to as **clitoridectomy**, this is the 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). Type 1 is also called as *Sunna* which is considered as the mildest form of FGM/C.[6];

Type 2: Often referred to as **excision**, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).[7];

[2] WHO, Female Genital Mutilation, 3 February 2020, Key Facts, https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed June 4, 2024 12:03 PM

[3] Jewel Llamas, Female Circumcision: The History, the Current Prevalence and the Approach to a Patient, April 2017, Female Circumcision, University of Virginia School of Medicines, https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Jewel-Llamas-Paper-KT3.pdf accessed June 5, 2024 10:00 AM

[4] World Health Organisation, Female Genital Mutilation, https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed June 10, 2024 1:20 PM

[5] WHO, Sexual and Reproductive Health and Research (SRH) Types of female genital mutilation , https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/female-genital-mutilation/types-of-female-genital-mutilation accessed July 4, 2024 11:10 PM

[6]Ibid

[7]WHO, Sexual and Reproductive Health and Research (SRH) Types of female genital mutilation , https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/female-genital-mutilation/types-of-female-genital-mutilation accessed July 4, 2024 11:10 PM

Type 3: Often referred to as **infibulation**, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy); **Type 4:** This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.[8]

2.0 Human Rights Perspectives

Perhaps, if one has to trace the human regime which hold the evils of FGM/C as inhuman the list can be traced back to the 1948 when the Universal Declaration of Human Rights primarily recognized the rights of the humans. Due to the preponderance of many socio-cultural and religious biases and influences the FGM/C remained hanging in between customary practice and criminally liable bodily offence against an individual. This dilemma made many legal systems across the world quite trembling, until the United Nations itself clarified it. From 1966 till today, the UN has directly or indirectly condemned the practice of FGM/C from time to time.

Various rights enshrined under the CEDAW[9] have aimed to eliminate all forms of discrimination against the women, while the right to life and physical integrity and dignity was also recognized.[10]. Many regional organizations have also contributed by declaring the FGM/C as inhuman act, viz., General Recommendation Nos. 14, 19 and 24 from the Committee on the Elimination of Discrimination against Women (CEDAW).[11] In furtherance to this, the UN has consistently declared the FGM/C as a serious violation of the human rights through its various instruments.[12]

Further, the barrier of customary and socio-religious nature of FGM/C has also been removed by the UN[13]which clarified the states not to avoid their obligation to eliminate the violence against

[8]Ibid

[9] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Overview of the Convention, https://www.un.org/womenwatch/daw/cedaw/ accessed June 27, 2024 10:00 PM

[10] CEDAW, General recommendations made by the Committee on the Elimination of Discrimination against Women, https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm accessed June 27, 2024 11:00 PM

[11] CEDAW, Harmful Traditional Practices Affecting the Health of Women and Children, FACT SHEET NO.23 https://www.ohchr.org/documents/publications/factsheet23en.pdf accessed June 27, 2024 1:00 PM

[12] UN Women, Work of the General Assembly on violence against women https://www.ohchr.org/documents/publications/factsheet23en.pdf accessed June 27, 2024 1:10 PM

[13] General Assembly, Resolution adopted by the General Assembly on 19 December 2006, A/RES/61/143, https://undocs.org/A/RES/61/143 and

the women in the garb of such aforesaid grounds. Amongst many prominent efforts against elimination of FGM/C, the Maputo protocol[14] is significant, as under its Article 5 the FGM/C has been regarded as the harmful practice. Moreover, to strengthen the voice against FGM/C, many African as well as European Human Rights Organizations[15] lead the march. Based on such collective efforts of Africa the UN has addressed the issue of FGM/C in its global forefront, and On December 20, 2012,[16] the United Nations General Assembly passed a unanimous resolution condemning FGM/C, the resolution urges all countries to condemn the practice of FGM/C, to implement and enforce legislation banning FGM/C, and to establish programs raising awareness about FGM/C. Even the UN Treaty Monitoring Committee has issued several statements to address FGM/C as violating the human rights. The United Nations and the European Union have started a global multiyear initiative focused on eliminating all forms of violence against women and girls. This effort, titled "The Spotlight Initiative," brings attention to violence against women and girls in order to achieve gender equality and women's empowerment and is in line with the 2030 Agenda for Sustainable Development[17].

The incessant regime against the FGM/C has yielded certain fruits as the UNFPA estimates that at least 59 countries have passed laws against FGM/C.[18] More recently the USA has enacted law against FGM/C.[19] In 2012, the UN General Assembly designated February 6th as the International Day of Zero Tolerance for FGM/C.[20] This backdrop also reveals the

https://www.ohchr.org/documents/publications/factsheet23en.pdf accessed June 27, 2024 2:00 PM

[14] M. EVANS & R. MURRAY, The African Charter On Human and Peoples' Rights: The System in Practice 1986–2006 (Cambridge: Cambridge University Press, 2017)

[15] Banjul Declaration 1998, Ouagadougou Declaration 1999, Cairo Declaration 2003, the Council of Europe Resolution 1247 on FGM 2001, EUROPEAN PARLIAMENT RESOLUTION- 2001, 2004, 2009, 2010, 2012

[16] United Nations General Assembly, Intensifying global efforts for the elimination of female genital mutilations, A/RES/67/146 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/487/36/PDF/N1248736.pdf?OpenElement accessed June 27, 2024 1:00 PM

[17] United Nations General Assembly, Res. 70/1, UN Doc. A/RES/70/1 (2015) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf accessed June 27, 2024 1:00 PM

[18] Equality Now, FGM And The Law Around The World https://www.equalitynow.org/the_law_and_fgm#:~:text=The%20UNFPA%20estimates%20that%20at,26%20have%20laws%20prohibiting%20FGM. accessed June 27, 2024 1:00 PM

[19] On 15 December, 2020, the U.S. Senate passed the Stop FGM Act of 2020. The bill was then sent to the President, who signed it into law on 5 January, 2021.

[20] United Nation, International Day of Zero Tolerance for Female Genital Mutilation, 6 February https://www.un.org/en/observances/female-genital-mutilation-day accessed June 2, 2024 11:00 PM

challenges before world fraternity as it required the struggle of many years to channelize the world opinion for the condemnation of the FGM/C.

3.0Female Genital Mutilation / Cutting within Dawoodi Bohra Community in India

FGM/C is referred to as Khatna, Khafd, or Khafz by Dawoodi Bohras, who belong to the Shia sect of the Muslim community, in India. In the Bohra community, young girls usually between the ages of 5 to 7 are taken to a '*Dai*' or an '*Aaya*' or a family barber/traditional cutter who cut the hood of the clitoris[21] with sharp objects. Bohra's are mostly traders or exporters by profession[22] due to which they have to travel a lot. In the old days there was a belief that cutting the clitoris will control the sexual urges of a woman and they will remain loyal to their partners.

The Bohras practice Type-I FGM/C as referred by WHO which involves the partial or complete removal of the clitoris or clitoral hood.[23] Syedna Mufaddal Saifuddin, the spiritual leader of the Dawoodi Bohra Community issued a statement concerning the practice of Khafz which said -

> *"Male and female circumcision are religious rites that have been practised by Dawoodi Bohras throughout history. Religious books, written over a thousand years ago, specify the requirements for both males and females as acts of religious purity. This religious obligation finds an echo in many other Muslim communities, particularly those following the Sunni Shafi'i school of thought."*[24]

4.0 Female Genital Mutilation / Cutting in India

In India, there is no explicit legislation which exclusively deals with the practice of FGM/C. Nevertheless, existing legal discourse contains provisions that implicitly discourage the practise. FGM/C is an extreme method of gender-based violence[25] and hampers Human Rights and is profoundly engrained in gender inequality and discrimination.[26] This violates the basic notion of

[21]Sunita Tiwari v. Union of India, WP(C)No.286/17, 2018. (INDIA)

[22]Ibid.

[23]Laxmi Anantnarayan et al., The Clitoral Hood A Contested Site, Khafd or Female Genital Mutilation/Cutting (FGM/C) in India, Wespeakout And Nari Samata Munch, Maharashtra Foundation And Amplify Change, http://wespeakout.org/site/assets/files/1439/fgmc_study_results_jan_2018.pdf accessed June 27, 2024 1:00 PM

[24]DNA Correspondent, Syedna Mufaddal for female circumcision, DNA INDIA, https://www.dnaindia.com/mumbai/report-syedna-mufaddal-for-female-circumcision-2221411 accessed June 27, 2024 1:00 PM

[25] EIGE, Estimation of Girls at Risk of female Genital Mutilation on the European Union- Report, EUROPEAN INSTITUTE FOR GENDER EQUALITY, https://eige.europa.eu/publications/estimation-girls-risk-female-genital-mutilation-european-union-report-0 accessed June 30, 2024 1:20 PM

[26]End FGM, EQUALITY NOW, https://www.equalitynow.org/stop_fgm_campaign accessed June 27, 2024 1:25 PM

the fundamental rights guaranteed under Article 14[27] and Article 15[28] of the Constitution of India which calls for equality for all and prohibition of discrimination on the basis of religion, race, and caste, place of birth or sex. FGM/C also leads to severe pain, excessive bleeding, shock, genital tissue swelling, HIV, infections, prenatal risk, psychological problems.[29] It has been linked to both short- and long-term health threats for women, according to the WHO. There have been occasions when the practise of FGM/C resulted in the victim's miscarriage, thus infringing on her reproductive rights.

Violation of reproductive rights of a woman amounts to violation of her Personal Liberty and the same is protected under Article 21 of the Constitution of India. In the case of *Suchita Srivastava vs. Chandigarh Administration*,[30] it was held that Reproductive rights include a woman's freedom to bear a pregnancy to term, give birth, and rear children; and that these rights are an integral part of a woman's right to privacy, independence, and physical autonomy.[31] Article 25[32] of Constitution of India ensures freedom of religion and Article 26[33] of the same guarantees freedom to manage the religious affairs. The practice of FGM/C as a religious obligation is matter of debate mainly because the practice of FGM/C is nowhere mentioned in the 'Holy Quran'; it is only mentioned in the Hadiths and the validity of the Hadiths are disputed. Even if it is accepted that FGM/Cis a religious practice yet it cannot be protected under Article 25 or Article 26 abovementioned because the freedoms guaranteed under these Articles are not absolute but in fact they are subjected to reasonable restrictions limitations i.e. public order, morality, health and other provision with

[27] INDIA CONST. Art.14

[28]INDIA CONST. Art. 15 – (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1)The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

[29] WHO, Sexual And Reproductive Health, Health Risks Of Female Genital Mutilation (FGM) https://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/ accessed June 27, 2024 1:25 PM

[30]Suchita Srivastava & Anr. v. Chandigarh Administration on (2009) CIVIL APPEAL NO.5845 OF 2009 (India).

[31] Arjeet Ghosh & Nitika Khaitan, A Womb of One's Own: Privacy and Reproductive Rights, //www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights?0=ip_login_no_cache%3D08d0dda36ac114923540af40a0392f75 accessed June 27, 2024 1:25 PM

[32]INDIA CONST. Art. 25 (Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion)

[33]INDIA CONST. Art. 26 (Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right
(b) to manage its own affairs in matters of religion;

respect to fundamental rights. FGM/C has such serious implications that it infringes on human rights secured by Articles 14, 15, and 21.

It is to be noted that The Hon'ble Supreme Court of India had held in *Javed vs. State of Haryana*[34] and in *Khurshed Ahmed Khan vs. State of UP*[35], that "what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality"[36]. In the Public Interest Litigation of Sunita Tiwari vs. Union of India[37], which is still under judgment, has noted that a religious practice, claimed to be an essential part of the doctrine of that faith, must also satisfy the test of constitutional morality to be entitled to the protection of Article 25.[38]

FGM/C is not expressly covered by Statute, but it is a felony under the new Bharat Nyaya Sanhita (BNS) which has come into force on 1st July 2024.[39] Section 320 of the IPC, 1860, which has been replaced with sections 116,[40] 117[41] and 118[42] of the BNS, 2023, and is operative from July 1, 2024,

[34]Javed v. State of Haryana, (2003) SC Writ Petition (Civil) 302 of 2001, (India)

[35]Khursheed Ahmed Khan v. State of UP (2015), S.C.C. Civil Appeal No.1662 of 2015, (India)

[36] Ibid.

[37]Sunita Tiwari v. Union of India, (2018), WP(C)No.286/17, (India).

[38]Mehal Jain, Female Genital Mutilation [FGM] May Not Be Life Threatening, But A Permanent Mental, Emotional And Physical Scarring At A Woman: Chandrachud J, https://www.livelaw.in/female-genital-mutilation-fgm-may-not-be-life-threatening-but-a-permanent-mental-emotional-and-physical-scarring-at-a-womanchandrachud-j/. accessed June 16, 2024 11:25 PM

[39] The Bharatiya Nyaya Sanhita, 2024, PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/the-bharatiya-nyaya-sanhita-2024, last visited May 27, 2024.

[40]The Bharatiya Nyaya Sanhita, 2024 Section 116 - The following kinds of hurt only are designated as "grievous", namely:— (a) Emasculation; (b) Permanent privation of the sight of either eye; (c) Permanent privation of the hearing of either ear; (d) Privation of any member or joint; (e) Destruction or permanent impairing of the powers of any member or joint; (f) Permanent disfiguration of the head or face; (g) Fracture or dislocation of a bone or tooth; (h) Any hurt which endangers life or which causes the sufferer to be during the space of fifteen days in severe bodily pain, or unable to follow his ordinary pursuits.

[41] The Bharatiya Nyaya Sanhita, 2024 Section 117 - (1) Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

(2) Whoever, except in the case provided for by sub-section (2) of section 122, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. (3) Whoever commits an offence under sub-section (1) and in the course of such commission causes any hurt to a person which causes that person to be in permanent disability or in persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life. (4) When a group of five or more persons acting in concert, causes grievous hurt to a person on the ground of his race, caste or community, sex, place of birth, language, personal belief or any other similar ground, each member of such group shall be guilty of the offence of causing grievous hurt, and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[42] The Bharatiya Nyaya Sanhita, 2024 Section 118 - (1) Whoever, except in the case provided for by sub-section (1) of section 122, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall

states that grievous hurt typically refers to severe bodily harm or injury. These sections listed various specific forms of harm that qualify as grievous, such as emasculation that endangers life or causes severe pain for a certain duration.

These sections do not explicitly mention FGM/C. However, FGM/C falls under the broader category of grievous hurt or severe bodily harm, especially considering its permanent and irreparable consequences. While not specifically mentioned, FGM would be considered a form of grievous hurt within the legal framework described in the paragraph, given its severe and lasting impact on the victim's health and well-being. Another legislation having scope to prevent FGM/C is the Protection of Children from Sexual Offences (POCSO) Act, 2012[43] which objects to shield children from sexual offences and safeguard their rights in order to provide them safety as well as security. Though in *Sunita Tiwari vs. Union of India***,** the matter is still pending before the Court, but the Supreme Court bench has observed that FGM/C is an offense under POCSO.[44] Section 3 (b) of the POCSO Act, 2012 defines penetrative sexual assault as a person is said to commit penetrative sexual assault if- 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 or any other person'[45]. performing FGM/C sharp objects are used to cut some flesh from the vaginal

be punished with imprisonment of either description for a term which may extend to three years, or with fine which may extend to twenty thousand rupees, or with both. (2) Whoever, except in the case provided for by sub-section (2) of section 122, voluntarily causes grievous hurt by any means referred to in sub–section (1), shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than one year but which may extend to ten years, and shall also be liable to fine.

[43] National Institute of Public Cooperation and Child Development, Training Manual on Protection of Children from Sexual Offences (POCSO) Act & Rules, 2012, for Judicial Officers, http://nipccd.nic.in/reports/posco/jud.pdf accessed June 16, 2024 11:25 PM

[44]Bhadra Sinha, Female genital mutilation violates privacy, a crime under POCSO: Supreme Court, HINDUSTAN TIMES, https://www.hindustantimes.com/india-news/femalegenitalmutilationviolatesprivacyacrimeunderpocsosupremecourt/story27crDBKvhZnkatR49FbiLO.html accessed June 16, 2024 11:25 PM

[45]The Protection of Children from Sexual Offences (POCSO) Act, No. 32 of 2012, § 3, cl. (b) 'penetrative sexual assault- A person is said to penetrative commit sexual assault if- 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 or any other person'.

area so FGM/C is a crime under this Act. Under Section 9(e)[46] , 9 (i)[47], 9 (j)(i)[48] (aggravated sexual assault) of the POCSO Act, 2012 doctors, nurses or any such hospital staffs that performs FGM/C is punishable for the same under Section 10[49] of the POCSO Act.

The Juvenile Justice (Care and Protection of Children) Act, 2015, specifically addresses the broader category of cruelty to children in Section 75, which may relate to the practice of FGM/C. According to this clause, anyone in actual charge of or control over a kid who intentionally neglects, abuses, abandons, or assaults the child will be held accountable. According to this clause, FGM/C performed on a minor is punishable by law since it is considered physical abuse and results in the child's serious suffering. The punishments consist of a fine and a maximum three-year sentence of jail. Section 75, which implies FGM/C as a form of cruelty, reinforces the state's commitment to protecting children's rights and well-being by giving parents a legal foundation to shield their children from harmful practices and ensuring that those who conduct them are held accountable.

Also under the Rights of Persons with Disabilities Act, 2016 (Section 2 (s)) defines persons with disability as 'a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;'[50] In the Project conducted by Lakshmi Anantnarayan, Shabana Diler and Natasha Menon- titled 'The Clitoral Hood A contested Site' many woman shared their experience about khatna and how it affected their sexual life. Thus, FGM/C is responsible for causing deformity to the body of woman and is punishable under the Rights of Persons with Disabilities Act, 2016. In the Goa Children's Act, 2003 under Section 2(y)(i) defines Sexual assault as

[46]The Protection of Children from Sexual Offences (POCSO) Act, No. 32 of 2012, § 9 cl.(e) (whoever being on the management or staff of a hospital, whether Government or institution, commits sexual assault on a child in that hospital).

[47]The Protection of Children from Sexual Offences (POCSO) Act, No. 32 of 2012, § 9 cl. (i) ('Whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child')

[48]The Protection of Children from Sexual Offences (POCSO) Act, No. 32 of 2012, § 9 cl. 9 (j) sub. cl. (i) (Whoever commits sexual assault on a child, which- physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently').

[49]Punishment For Aggravated Sexual Assault, http://childlineindia.org.in/pdf/POCSO-ACT-Gazette.pdf accessed June 16, 2024 11:25 PM

[50]The Rights of Persons with Disabilities Act, No. 46 of 2016, § 2, cl. (s)

purposely causing injury to sexual organ of Child amounts to sexual assault.[51] FGM/C depending on facts and circumstances may fall to be prosecuted under any one of these provisions. [52]

The National Policy for Children in 2013 upholds that: "the State is committed to taking affirmative measures - legislative, policy or otherwise - to promote and safeguard the right of all children to live and grow with equity, dignity, security and freedom, especially those marginalised or disadvantaged; to ensure that all children have equal opportunities; and that no custom, tradition, cultural or religious practice is allowed to violate or restrict or prevent children from enjoying their rights."[53] Integrated Child Protection Scheme (ICPS), acknowledges that 'Failure to protect children from issues such as violence in schools, child labour, harmful traditional practices, child marriage, child abuse, the absence of parental care and commercial sexual exploitation, amongst others, means failure in fulfilling both the Constitutional and International commitments towards children'.[54]In its guiding principles states that 'Children's right to privacy and confidentiality should be protected through all the stages of service delivery.'[55]

In its chapter 4, ICPS visualizes setting up of State Child Protection Society (SCPC) in every State/UT as the fundamental unit for the implementation of the scheme. One of the functions of SCPC is 'to Contribute to the effective implementation of child protection legislation, schemes and achievement of child protection goals laid out in the National Plan of Action for Children.'[56]

5.0 **Social Implication of FGM/C in India:**

The effects of FGM/C include physical, psychological and social in nature[57]. According to WHO, females that have undergone through FGM/C may suffer long-term or short-term health and psychological complications depending upon the type of FGM/C.[58] The victims after immediate

[51]The Goa Children's Act, No. 18 of 2003, § 2 cl. (y)sub cl. (i)-(different types of intercourse; vaginal or oral or anal, use of objects with children ", and "deliberately causing injury to the sexual organs of children.)

[52]Jaising…, above.

[53] The National Policy for Children, 16-1/2012-CW-1, 2013, (India).

[54]Revised Integrated Child Protection Scheme (ICPS), Ministry of Woman & Child Development, Government of India.

[55]Ibid.

[56]Revised Integrated Child Protection Scheme (ICPS), Ministry of Woman & Child Development, Government of India.

[57] Mihir Garg & Rashi Jain, Female Genital Mutilation: A Socio Legal Context, International Journal of Law And Legal Jurisprudence and Studies [IJLLJS], 4, 279, 281, http://ijlljs.in/wp-content/uploads/2017/08/Female_Genital_Mutilation.pdf accessed June 20, 2024 11:25 PM

[58]Sexual and Reproductive Health, (note 4 above).

performance of FGM/C experiences excessive bleeding, extreme pain, urinating problems, genital tissue swelling or damages tissues around the genital area, shock etc.[59] Usually FGM/C is performed in an insanitary environment and the objects are often not sterilized thus the victim becomes susceptible to pelvic infection, urinary infection and HIV-AIDS.[60] It also damages the sexual organs of the dupe which can result in infertility, childbirth complications as well as physiological trauma, development of cysts, abscesses, genital ulcers,[61] menstrual problems and even death.[62] Women who undergo FGM/C not only bear physical scars but also endure significant mental trauma which comes along with it.

After the verdict given by the Supreme Court of New South Wales in an FGM/C related case and the PIL filed by Sunita Tiwari at the Hon'ble Supreme Court of India to put a ban on the practice of Khatna; many activists, social organisations came forward to remonstrate FGM/C. Union government of India has also taken into consideration issue of FGM/C.

In the year 2012, An Indian female director named Priya Goswami filmed a National award-winning documentary film titled *'A Pinch of Skin'* to highlight the practice of FGM/C.[63] She interviewed 20 females while making the documentary who have undergone the practice of Khafd.[64] The film for the first time in India threw light on the 'secretive' practice of Khatna and proved as an eye opener to the society.

Masooma Ranalvi, an Indian advocate from the Bohra culture, has been outspoken about the practise of FGM/C, sharing her thoughts and personal knowledge of Khatna on a variety of forums in order to raise awareness and eradicate the practise of FGM/C from its roots. Together with 15 other women, she initiated an online campaign called 'We Speak Out' where they started an online petition to end FGM/C. They have written an open letter to Hon'ble Indian Prime Minister and urged him 'to issue a statement to all concerned, especially the leaders of the community who protect and promote this tradition, that the Government of India, as a progressive democracy in

[59]Female Genital Mutilation, Key facts, (note 8 above).

[60]Sexual and Reproductive Health, (note 4 above).

[61]What is FGM?,END FGM EUROPEAN NETWORK, http://www.endfgm.eu/female-genital-mutilation/what-is-fgm/ accessed June 16, 2024 11:25 PM

[62]Ibid

[63] Priya Goswami, A Pinch of Skin, https://www.platform-mag.com/film/a-pinch-of-skin.html accessed July 23rd, 2024 11:00 AM

[64]Sunita Tiwari v. Union of India &ors. WP(C)No.286/17, 2018 (India)

the world, will not tolerate FGM/C/khatna, and that it is illegal under the existing laws in India.'[65] Collaborating with Advocate Indira Jaising and the team from the 'Lawyers Collective Women's Rights Initiative' wrote a paper and drafted a legal framework for an anti FGM/C Law which was published in March 2017.[66] We Speak Out collaborated with another such online social organisation named 'Sahiyo' and pioneered another campaign named 'Each one Reach one' on 6th February 2016 to raise awareness about FGM/C and reduce stigma related to these discussions.[67] Sahiyo also conducted a series of seminars for members of the media to educate writers and editors how to be compassionate to victims while reporting on FGM/C incidents.[68]

6.0 Judicial Approach towards Female Genital Mutilation /Cutting

The Australian case in 2014 titled *R v. A2 (mother), R v. Magennis (midwife), R v. Vaziri (Dawoodi Bohra community leader)*[69] was narrowly observed by the Indians where for subjecting two young girls to FGM/C, the mother, nurse, and Bohra priest were sentenced to 15 months in prison. It sparked outrage among feminists who came out to condemn the ritual of FGM/C.

In the case of United States of America, *Plaintiff, V. D-1, Jumana Nagarwala, And D-2, Fakhruddin Attar*[70], Justice Friedman ruled that a 1996 federal law that bans FGM/C was unconstitutional because Congress lacked the power to regulate the behavior in the first place. He also dismissed the mutilation charges and removed four defendants from the case.

Whereas in India, the Writ petition named *Sunita Tiwari vs. Union of India & ors.*[71] is preferred under Article 32 of the Constitution of India for the purpose of banning the practice of Khatna/Khafd or FGM/C. It is to be noted that on June 27, 2018, The Ministry of Woman and Child Development released a report on its official governmental website where it stated that

[65]Open letter to Honourable Indian Prime Minister, WE SPEAK OUT, http://www.wespeakout.org/posts/openlettertonarendramodi/ accessed June 16, 2024 11:25 AM

[66]Speak out on FGM drafts a legal framework for an anti-FGM law in India with the lawyer's collective, WESPEAKOUT, http://www.wespeakout.org/posts/speak-out-drafts-a-legal-outline-for-an-anti-fgm-law-in-india-with-the-lawyers-collective/ accessed June 16, 2024 11:25 PM

[67]Each one Reach one, Mar. 9, 2016, WESPEAKOUT, (June 16, 2024 11:25 PM) http://www.wespeakout.org/posts/each-one-reach-one/

[68]Community Outreach, SACHIYO UNITED AGAINST FEMALE GENITAL CUTTING, https://sahiyo.com/community-outreach/ accessed June 26, 2024 10:30 PM

[69]Sunita Tiwari v. Union of India &ors., WP(C)No.286/17, 2018 (Inida)

[70] 438 F. Supp. 3d 821 (E.D. Mich. 2020) (India)

[71]Sunita Tiwari v. Union of India & ors. WP(C) No.286/17, (India)

'Female Genital Mutilation/Cutting is not practiced in India.'[72] The PIL filed by Sunita Tiwari[73] gave hope to many activists and protestants that FGM/C would be criminalized in the near future. The Petitioner in this PIL expanded on the specifics of the Khatna practise, pointing out that the practise was outlawed by the United Nations General Assembly in 2012 by a special resolution, and that 27 African countries followed suit, but India, which is a signatory to the convention on child welfare and human rights, has paid no attention to the topic so far. The nature of the case, and the impact on the religious sector and many other concomitant factors this case got transferred before Larger bench Hon'ble Supreme Court of India. [74]The matter is subjudice before the Supreme Court.

7.0 Conclusion

A complete eradication of the FGM/C is still a milestone yet to be achieved. The picture in many countries is yet not much hopeful as customs and practices are maneuvering and defying the human rights regime. On the one hand women empowerment has been triumphant across the globe, nevertheless the struggle of women for the legal succour against the lacerations of the FGM/C narrates a different tale of the womanhood.

Ultimately, the FGM/C is not just a symbol of male chauvinism but it's a weapon to suppress the womanhood from its optimal development; to that effect, humane treatment to the women is not just their right, but it's an obligation to treat them as a human. As of today, there is no exclusive Law in India which solely deals with the issue of FGM/C. However, there are sure Constitutional and legal arrangements which can be evoked while managing cases identified with FGM/C. FGM/C remains discussed issue till date. There are different purposes behind it; first, practice of FGM/C isn't uniform. There are various kinds of FGM/C rehearsed diversely at different places. Because of this alterable nature of FGM/C different issues emerged like segregation, basic freedoms and right to wellbeing. Because of which sexual, maternal and regenerative wellbeing

[72]Recent poll by a Foundation on the world's most dangerous countries for women 2018 is not based on data but on perception of unknown persons ,PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF WOMEN AND CHILD DEVELOPMENT, http://pib.nic.in/newsite/PrintRelease.aspx?relid=180249 accessed June 16, 2024 11:25 PM

[73]Ibid.

[74]Debayan Roy, SC Issues Notice to Centre in Female Genital Mutilation Case, May 8, 2017, http://www.news18.com/news/india/sc-issues-notice-to-centre-in-female-genital-mutilation-case-1395091.htmlaccessed, accessed June 6, 2024 1:00 PM

gets seriously influenced and reproductive health gets severely affected and risks arose in terms of public health of girl child.

Besides, countries of origin and countries of migration battle against the universally characterized principle of FGM/C. Whereas, countries where prevalence of FGM/C is higher it looked as a social norm while countries having low prevalence treat FGM/C as an evil, due to which the effective implementation of universal Anti- FGM/C policies became an obstacle. All things considered at long last, the FGM/C fight in India like each and every other country where FGM/C is practiced is a fight against a centuries-old practice that quite often is attached to a "strict personality" in the mainstream creative mind. When truth be told; FGM/C is an old practice, as most other antiquated male centric practices, exclusively concocted with the purpose to control ladies' novel ability to recreate.

CRITIQUE OF THE PROSPECT OF EXPANDING THE DETERMINANTS OF CHILD MAINTENANCE UNDER THE SHARIAH VIS-A-VIS THE CONTEMPORARY REALITIES IN KWARA STATE

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Abstract

This paper explores the concept of child maintenance under the Shariah with specific focus on the need to expand the existing determinants of child maintenance in light of contemporary realities in Kwara State. Child maintenance is an important aspect of Shariah designed to ensure the welfare and protect the best interest of the children following a separation or divorce. The Shariah imposes a clear obligation on parents, particularly fathers to maintain their children. Based on that, this paper examines the existing determinants of child maintenance under the Shariah, identifying the challenges and contemporary realities that affects the sufficiency or otherwise of those determinants. By analysing these challenges, this research argues that the adequacy of the existing determinants of Shariah has been compromised due to the current economic situation of Kwara State and addresses the need to re-access and potentially expand the determinants of child maintenance to better reflect the socio-economic conditions in Kwara State. To achieve this, the paper adopts a qualitative research methodology that allows for an in-depth exploration of the concept of child maintenance under the Shariah while focusing on the existing determinants available under the Shariah. This paper concludes with a firm recommendation that there is a need to expand the existing determinants of child maintenance under the Shariah in order for it to suit the contemporary realities of Kwara State.

Keywords: Child Maintenance, Determinants of Child Maintenance, Shariah, Kwara State

1.0 Introduction

A divorce although discouraged in Islam, is permissible and likely to happen at any stage of the marriage. When it does, some subsequent post-divorce responsibilities and actions need to be addressed, including child maintenance. Child maintenance under the Shariah is a fundamental aspect of Islamic family law that addresses the welfare of the children following the dissolution of the marriage.[1] The concept of child maintenance reflects the comprehensive and all-embracing

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objectives of Shariah to safeguard the well-being of the children who are likely to be affected by the dissolved marriage.[2]

The determinants of child maintenance are guided by a set of rules and principles of Shariah that aim at prioritising the interest of the child. After the divorce, the divorced couples are under the obligation to conclude the arrangement of maintenance of the children through mutual consent.[3] They must agree on the amount and other things attached to maintenance which must be done with the consideration of the interest of the child.[4] Also, if they are unable to reach a reasonable conclusion, either of the parties may approach the court.[5] The obligation to determine maintenance then shifts to the judge who, upon considering the existing determinants, awards a certain reasonable amount for the child's maintenance.[6] However, the emerging contemporary complexities such as health care costs, economic challenges, rising cost of living, and so on, have made the existing determinants inadequate and hereby detrimental to the best interest of the child which is the main objective of Shariah as regards child maintenance.

Considering these concerns, the question of how best or how possible it is to expand the determinants to better reflect contemporary reality has become increasingly pressing. This paper embarks on a comprehensive analysis of the concept of child maintenance under Shariah, meticulously scrutinising the existing determinants, their applicability, and how those determinants can be expanded to suit contemporary realities.

1.1 Nature of Child Maintenance under Islamic Law

The definition of child maintenance can be understood from the Arabic word *"Nafaqah",* and its literal interpretation refers to the act of spending.[7] In the context of Islamic law, *Nafaqah* refers to the obligatory duty of spending and providing sustenance for those who are dependents, which includes providing the basic needs of the children. It can also be seen as something issued by a

[1] Zaidi N, 'Human Rights of Children in Islam*'*(2021) 2 International Journal of Criminal, Common and Statutory 61
[2] Ibid.
[3] Doi A, *Shariah: The Islamic Law* (Al-Yassar Publishers, Nigeria 2007), pp 204-211
[4] Ibid.
[5] Varshney H, 'Aspect of Maintenance of Children under Muslim Law', <https://blog.ipleaders.in/aspects-of-maintenance-of-children-under-muslim-law/> accessed on 01 June 2024
[6] Kadir R. et al 'Child Maintenance in Malaysia: Are the Amounts Sufficient?' *(*2023) 19 Geografia-Malaysia Journal of Society and Space 80
[7] Samina B. et al, 'An Analysis of the Literature on Children's Maintenance Rights under the Islamic Law and Shariah'p.81

person to his family members, especially the wife and children.[8] This provision includes the provision of food, clothing, shelter, education, healthcare, and others necessary for the easy growth of the child.[9] Child maintenance is an important concept under the Shariah as it emphasises the responsibility of providing for the needs of the child. It is the right of one's children to get food, clothing, residence, other essential services, and medicine[10]

Children are the responsibility of their parents and should be taken care of. By nature, it is mandatory and not at the discretion of the parents especially the father to provide maintenance for the children. The maintenance by the father is a duty deeply rooted in Islamic principles that emphasises the welfare and best interest of a child.[11] The duration and extent of child maintenance as prescribed by the Shariah is influenced by various factors such as the gender of the child, age, circumstances, and lots more. However, maintenance typically continues until the child reaches the age of maturity. Maturity age and what determines maturity as regards maintenance differs between both genders. The maintenance of a male child continues to be on the father until he attains puberty and can provide for himself. As for the maintenance of a female child, the maintenance must continue until she is married and the marriage has been consummated after which maintenance obligation shifts from her father to her husband.[12] The maintenance obligation of the female child however falls back on the father in a situation where the female child, a minor gets divorced.[13]

In cases of a dissolved marriage, the parents after the divorce could conclude the arrangement of maintenance of the children through mutual consent.[14] They could agree on the amount and other things attached to maintenance and that should be done with the consideration of the interest of the child.[39] In cases where the father fails to fulfil this duty or they are unable to reach a reasonable conclusion, the matter can be brought before the court. The court has the authority to enforce this obligation of the father and by implication, the right of the children will be enforced.[15]

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[8] Ibn Abidin M.A*, Raad al- Muktar ala ad-Durr ala Mukhtar* (2nd ed, Daar Al- Kutubal-llmiyah, Beurut 2003)
[9] Ibid.
[10] Sabiq S.*, Fiqh al-Sunnah*, Vol. 7 p. 85
[11] Ambali M.A, *The Practice of Muslim Family Law in Nigeria,* (Nigeria: Tamaza Publishing, 1998) p.233
[12] Doi A, *Shari'ah: The Islamic Law*…(n.3 above) p. 209
[13] Ambali M.A, *The Practice of Muslim Family…* (n.11 above) p.233
[14] Ibid [39]
[15] Varshney H, 'Aspect of Maintenance of Children under Muslim Law', <https://blog.ipleaders.in/aspects-of-maintenance-of-children-under-muslim-law/> accessed on 01 June 2024

The nature of child maintenance under the Shariah is such that the dissolution of the marriage of the parents does not invalidate the right to maintenance of the children. This is because under Islamic law the primary responsibility for the maintenance of the child is on the father, based on the principle that he is the provider and protector of the family and as a result, his lineage is assigned to the child. This responsibility is considered a sacred duty and is not contingent upon the marital status of the parents. This is to ensure that the welfare of the children and standard of living is maintained regardless of the marital status of the parents.

The Qur'an emphasises this importance in a plethora of verses particularly, Suratul Baqarah, Verse 233 (Q2:233);

> *The mother shall give to their children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No person shall be treated unfairly on account of her child, nor the father on account of his child. And on the (father's) heirs is incumbent the like of that (which was incumbent on the father). If they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. And if you decide on a foster suckling mother for your children, there is no sin for you, provided you pay (the mother) what you agreed (to give her) on a reasonable basis. And fear Allah and know that Allah is All-seer of what you do.*

This Surah explains the maintenance of the child before and after the dissolution of the marriage. It further ascribes the lineage of the child to the father and by implication, he is under the obligation to maintain the child. Also, the maintenance of the child is such that, unlike the maintenance of the wife, it does not end because of the dissolution of the marriage. This is evidenced by the part of the verse that explains that, if the husband divorces his wife, with whom he had a child, and she suckles that child, he is required to provide for the mother's expenses.[16] It can also be inferred from this verse that, a mother with custody of the children has the right to request for the maintenance of those children in cases where the father falls short of his obligation.

1.2 Legal Basis for Child Maintenance under the Shariah

The concept of child maintenance is deeply embedded in the principles of Shariah, which are derived from the Qur'an and Sunnah. The legal foundation for the maintenance of a child under

[16] Jalal-ud-din M & Jalal-ud-din S, *Tafsir Al-Jalalayn (*Dar Al Manarah, Egypt 2010)

the Shariah, reflects the Islamic commitment to the welfare and protection of the child, ensuring that their needs are met regardless of the marital status of their parents.

There are various provisions of the Holy Qur'an and Sunnah on the maintenance of the child. One of which is Suratul Al-An'am verse 151;

> *……. And to parents, good treatment, and do not kill your children out of poverty; we will provide for you and them. ……..*

This verse clearly state that parent should not kill their children for fear of becoming poor in the future. This verse emphasizes Allah's promise to provide sustenance for both parent and children, removing any justification for killing children due to financial constraints. This implies that parents are responsible for providing for their children's needs and from the provisions of Qur'an 2:233 stated above, the responsibility is the fathers.

Also, Allah said in Suratul Talaq verse 6;

> *Let the women live (in iddat) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry life in their wombs, then spend (your substance) on them until they deliver their burden: and if they suckle your offspring, give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf.*

This verse emphasized that, fathers must provide for their children without causing harm or difficulties. The importance of maintenance of the children is greatly shown in this verse when Allah (SWT) instructed the fathers to provide maintenance for even the children in the womb of the mother by providing maintenance for the mother. Also, the fact that Allah mentioned that, if the mother is unable to breastfeed, a foster mother can do that on behalf of the father and not even the mother shows how important this obligation is for the father.

Apart from the provisions in the Qur'an, there are various Hadiths and Sunnah of the prophet (S.A.W) that reinforces the Qur'an injunctions concerning child maintenance. In a Hadith narrated by Ibn Abbas that the Messenger of Allah (ﷺ) said:

> *There is no man whose two daughters reach the age of puberty and he treats them kindly for the time they are together, but they will gain him admittance to Paradise.*[17]

[17] Sunan Ibn Majah 3670 (Classified as authenthic in Darussalam)

The simple interpretation of this Hadith is that a man has the obligation to take care of his female children until they get married. Also, Uqbah bin Amir said, I heard the Messenger of Allah (S.A.W) say:

> *Whoever has three daughters and is patient towards them, and feeds them, gives them to drink, and clothes them from his wealth; they will be a shield for him from the Fire on the Day of Resurrection.*[18]

In furtherance, Aisha (May Allah be pleased with her) said: Hind, the wife of Abu Sufyan, said to the Prophet (ﷺ):

> *Abu Sufyan is a niggardly man and does not give me and my children adequate provisions for maintenance unless I take something from his possession without his knowledge. The Prophet (ﷺ) said to her, "Take from his possessions on a reasonable basis that much which may suffice for you and your children.*[19]

This Hadith evidences the fact that, a mother has the right to ask for maintenance on behalf of the Children and in cases where the father has refused to fulfill this duty, and the mother has access to his properties, she can take from it to cater for her children.

1.3 Significance of Child Maintenance under the Shariah

The great importance attached to child maintenance under the Shariah is best known by its establishment in the Qur'an and teachings of the Prophet (S.A.W). It is stated in the Qur'an (Suratul Baqarah: 233), that the father of the child shall bear the cost of the child's basic needs such as food, clothing, and health care on a reasonable basis. The teaching of the Prophet also underscores this duty. It has been stated in numerous Hadiths that, the Prophet emphasised the obligation of providing for one's dependant especially the children and on one occasion, the Prophet was reported by Abd Allah bin Amr to have said; "It is a sufficient sin for a man that he neglects him, whom he maintains."[20]

The great importance attached to child maintenance under the Shariah may be understood from this Hadith. It shows that, neglecting children without proper maintenance by the man is indeed a disapproved act under the Shariah.

Furthermore, the Prophet has emphatically underscored the importance of this duty in a Hadith narrated by Abdullah bin Umar, when he said that, the Prophet (S.A.W) said;

[18] Sunan Ibn Majah 3669 (Classified as authentic in Darussalam)
[19] Riyad as-Salihin 1535 (Classified as authentic by Bukhari & Muslim)
[20] Sunnan Abu Dawud 1692 (Classified as authentic by Al-bani)

> *Surely, every one of you is a Shepherd and is responsible for his flock: The Imam of the people is a guardian and is responsible for his subjects; a man is the guardian of his family (household) and is responsible for his subjects…"*[21]
> *This indicates that, every man is responsible for his household and he is accountable for how he treats them.*[22]

All these indicate the degree of importance with which maintenance is endowed under the Shariah. The provision of maintenance for the child is not merely a social or legal obligation but a very important religious duty to the extent that, when a man ensures proper maintenance of his children, he is said to have fulfilled his responsibility not only towards his children but also towards Allah.[23] The Shariah safeguards the welfare and rights of the child through child maintenance, ensuring that they are shielded from the adverse consequences of their parents' separation. As a result, the child is protected from undue suffering caused by family discord. Also, the child is usually placed under the care and custody of the mother after a divorce. However, even in such circumstance, when the father dutifully fulfills his obligations particularly in providing financial support and maintenance for the children, the bond between he and the children remains intact. This preservation of the family bonds and the child's connection to both parents while also protecting the interest and welfare of the child is a fundamental principle upheld by the Shariah.

1.4 Principles and Factors Guiding the Determination of Child Maintenance under the Shariah

Child maintenance like every other aspect of the Shariah is grounded in Islamic legal principles derived from the Qur'an, Hadith, and consensus of Islamic Jurists over the centuries. These guiding principles and factors are important and serve as guidelines for the determination of the quantum of maintenance within an Islamic framework. These Principles and factors include:

1.4.1 Best Interest of the Child

The well-being and best interests of the child are paramount in the determination of child maintenance under the Shariah. To ensure that the children are properly fed, clothed, and looked after, the Holy Qur'an laid down rules in respect of *Rada* (Suckling).[24] These rules are meant to safeguard the interests of the child both when the marriage between the parents continues and

[21] Sahih Bukhari 7138
[22] Al-Adab Al-Mufrad 206 (Classified as authentic by Al-bani)
[23] Wani M.A, *The Islamic Law on Maintenance of Women, Children, Parents& Other Relatives* (Qazi Publisher & Distributors, New Delhi 1995) p. 227
[24] Doi A., *Shari'ah: The Islamic Law…* (n.3 above) p. 210

when such marriages ends in divorce.[25] It is the responsibility of the parents to look after their children and not neglect them as they are incapable of taking care of themselves.[26] Ahas seen in the provision of Suratul Baqarah verse 233.

The principle of prioritising the best interest of a child is deeply embedded in the provisions as it is a paramount concern in Islam, and ensuring that the needs of the child are adequately met is considered an act of worship and obedience to Allah as evidenced by the Hadith of the Prophet;

> *Whoever has three daughters and is patient towards them, and feeds them, gives them to drink, and clothes them from his wealth; they will be a shield for him from the Fire on the Day of Resurrection.*[27]

Moreover, the best interest of a child under the Shariah extends beyond mere survival. It encompasses education, health care, and general welfare, ensuring that children have the opportunity to develop their potential fully. [28]

1.4.2 Father's Financial Capacity /Capability

Under the Shariah, the financial capacity of the father is a critical factor in determining the rate of child maintenance. This is because Islamic law puts the burden of maintenance of both male and female children on the shoulders of their fathers.[29] Allah assigns the responsibility of maintenance of the child to the father while emphasising on not overburdening the father.[30] Neither the mother nor the father should be treated unfairly on account of their child. [31] All these signify that, the child must not be left without proper maintenance by the parents especially, the father, however, the father must not be overburdened as Allah as said in Suratul Baqarah v. 286

> *On no soul doth Allah place a burden than it can bear. It gets good that it earns and it suffers every ill that it earns. (pray:) "Our lord! Condemn us not if forget or fall into error; our lord! Lay not on us a burden like that which thou didst lay on those before us; Our Lord! Lay not on us a burden greater than we have strength to bear. Blot out our sins, and grant us forgiveness. Have mercy on us. Thou art our protector; Help us against those who stand against faith.*

[25] Ibid.
[26] Ibid.
[27] Sunan Ibn Majah 3669 (Classified as authentic by Al-bani)
[28] Ambali M.A, *The Practice of Muslim Family…* (n.11 above) p. 233
[29] Ibid.
[30] Jalal-ud-din M & Jalal-ud-din S, *Tafsir Al-Jalalayn* p. 135
[31] Ibid.

Therefore, although, the best interest of the child is prioritised under the Shariah, the financial capacity of the father must also be put into great consideration to avoid overburdening him. In the contemporary world, Shariah courts are expected to assess the father's financial capacity by examining his income, assets, liabilities, and overall financial obligations. This assessment ensures that the quantum of the maintenance is equitable, considering the father's ability to pay as well as the best interest of the child. An example of this is the case of, *Ibrahim Yusuf vs. AbdulRauf Wuleimat Ibrahim.*[32]In that case, the Shariah court held that the case should be reheard by the trial court because evidence as to the father's capacity was not well presented by the plaintiff nor considered by the trial court. This case evidences the fact that the financial capacity of the father is an essential factor that influences the determination of child maintenance under the Shariah.

1.4.3 Fairness and Justice

The principle of fairness and justice is well entrenched under the Shariah.[33] This emphasis on justice and fairness in all aspects of life has been made clear in various provisions of the Qur'an.[34] Allah said in Suratul Nahl v. 90**;**

> *Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.*

Also, in Suratul Maaida v. 8, Allah said;

> *O ye who believe! Stand out firmly for Allah as witness to fair dealing and let not the hatred of others make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well acquainted with all that ye do.*

Furthermore, the importance of the principle of fairness and justice has been emphasized by the prophet. An example is a Hadith narrated on the authority of Abdullahi b. Umarthat the prophet (may peace be upon him) said:

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[32] Ibrahim Yusuf vs. AbdulRauf Wuleimat Ibrahim (Unreported: Suit No: KWA/CA/AP/IL/93/2023)
[33] Sirait S, 'The Concept of Justice in Islam According to Majid Khadduri' (2022) 5(1) International Journal of Islamic Studies and Humanites 50
[34] Aliyu Y, ' The Position of Islam on Injustice and Fairness' <https://www.researchgate.net/profile/Yunusa-Aliyu/publication/361749389_THE_POSITION_OF_ISLAM_ON_INJUSTICE_AND_FAIRNESS/links/62c35662412e4c2aaeab1a12/THE-POSITION-OF-ISLAM-ON-INJUSTICE-AND-FAIRNESS.pdf> accessed on 21 July 2024

> *Behold the Dispensers of justice will be seated on the pulpit of light beside God, on the right side of the Merciful, Exalted, and Glorious. Either side of the Being is the right side both being equally meritorious. (The dispenser of justice are) those who do justice in their rules, in matters relating to their families, and in all that they undertake to do.*

All these show that the Shariah approach to justice is comprehensive and all-embracing, and any path that leads to justice is deemed to be in harmony with Islamic law.[35] Therefore, all means, procedures, and methods that facilitate, refine, and advance the cause of justice, and do not violate the rules of the Shariah are valid.[36]

Fairness and justice as principles guiding the determination of child maintenance under the Shariah reflect a comprehensive approach to ensuring the best interest and well-being of the child while also respecting the financial capacities of the parents. That is, the principle of *(mizan)* balance should be applied to ensure that the maintenance is neither excessive nor inadequate relative to the financial situation of the parent. This is evidenced in the words of Allah under Suratul Baqarah : 233.

2.0 Challenges of Effective Implementation of the Existing Determinants of Child Maintenance

Child maintenance under the Shariah, although not explicitly defined, is guided and influenced by certain principles and factors aimed at protecting the best interest of the child.[37] The Shariah emphasises the welfare of the child, ensuring that they receive the necessary support and resources for their growth and development. These guiding principles and factors form the basis upon which decisions are made, focusing on creating a fair and just system for both the father and the children. However, while the principles and factors guiding the determination of child maintenance under Shariah are clear in their intent, the practical application often encounters several obstacles and challenges. These challenges can hinder the effective realisation of the intended benefits and

[35] Aliyu Y, ' The position of Islam on injustice and fairness' <https://www.researchgate.net/profile/Yunusa-Aliyu/publication/361749389_THE_POSITION_OF_ISLAM_ON_INJUSTICE_AND_FAIRNESS/links/62c35662412e4c2aaeab1a12/THE-POSITION-OF-ISLAM-ON-INJUSTICE-AND-FAIRNESS.pdf> accessed on 21 July 2024

[36] Chirkawi S.A, ' The concept of Justice in Islam' <http://islam.ru/en/content/story/concept-justice-islam> accessed on 21 July 2024

[37] Varshney H, 'Aspect of maintenance of Children under Muslim Law', <https://blog.ipleaders.in/aspects-of-maintenance-of-children-under-muslim-law/> accessed on 25 June 2024

protections for the children. This is because the effective implementation of the existing determinants of child maintenance under Shariah is crucial for ensuring the best interest of a child.

2.1 Lack of Strong Enforcement Mechanisms

Enforcement mechanisms are essential for ensuring that legal provisions and court orders are adhered to.[38] Enforcement mechanisms can either be positive or negative.[39] Positive enforcement mechanisms encourage compliance with an agreement by providing rewards or "incentives" while negative enforcement mechanisms encourage compliance by threat (and the use of) punishments and disincentives.[40] Choosing the right enforcement mechanism (whether positive or negative), depends on the situation and appropriate scope of mechanisms available.[102]

In the context of child maintenance, enforcement mechanisms are the steps necessary to compel the payment of financial support as ordered by the court.[41]Due to lack of a strong enforcement mechanism, the father of a child might fail to pay his monthly commitment, which will then lead to arrears of the child maintenance.[42] This would affect the child's well-being, because if such arrears continue, it will bring difficulties to the child.[43]

Therefore, despite the clear directives provided by Shariah regarding child maintenance, the practical enforcement of these directives is often inadequate. It is on this note that people looked at the weakness of enforcement of these determinants as the weakness of the Shariah Court as the agency for implementing justice and thus undermining the position of the Shariah.[44] This perceived weakness can lead to lack of confidence in the court's credibility and overall perception of Shariah as a system of justice.[45]

2.2 Economic Constraints

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[38] Nghia N.V, 'Mechanisms to secure effective enforcement of courts' civil judgments and rulings' <https://vietnamlawmagazine.vn/mechanisms-to-secure-effective-enforcement-of-courts-civiljudgements-and-rulings-71591.html> accessed on 25 July 2024

[39] Ouellet J, 'Enforcement Mechanism' <https://www.beyondintractability.org/essy/enforcementmechanism#:~:text=Positive%20mechanisms%20encourage%20compliance,approaches%20have %20strengths%20and%20weakness> accessed on 27 July 2024

[40] Ibid. [102]Ibid.

[41] Administration for Children and Families, 'Enforcement of Support Obligation' (Project 4, July 2021)

[42] Ismail M.H et al, 'Resolving Arrears Maintenance for Children: Penang Case Study Year 2018' (Paper presented at the International Conference on Humanities, Europe 2019) pg. 705

[43] Ibid.

[44] Hashim N. et al, 'Mechanism of Enforcement and Execution of Muslim Maintenance Order: Court-Based System' (2013) 21 International Islamic University Malaysia Journal 183

[45] Ibid.

One of the most formidable challenges of the effective implementation of the existing determinants of child maintenance is the economic constraints that permeate the society. Economic constraints in relation to child maintenance refer to financial limitations or restrictions that impact on the father's ability to provide consistent financial support for their children.[46] These constraints include factors such as irregular income, unemployment, limited resources, and other economic challenges that affect the parent's capacity to meet the child maintenance obligations.[47] Under the Shariah, the father, who is vested with the obligation to maintain the children must not be overburdened.

The cumulative effect of this is that constraints such as irregular income, unemployment, limited resources, and other economic challenges can affect the effective implementation of child maintenance under Shariah as they make it difficult for fathers to fulfill the maintenance responsibility appropriately and consistently as decided by the Court.

2.3 Judicial Discretion

Under the Shariah, the divorced couples are under the obligation to conclude on the arrangement of the children and if they are unable to, either of them may approach the court[48]. The implication of this is that the determination of the appropriate quantum for maintenance will then be left to the discretion of the judge[49].

Judicial discretion, although an essential component of the legal system, presents a significant challenge to the effective implementation of child maintenance under Shariah. The flexibility and interpretative latitude granted to judges can lead to inconsistencies and unpredictability in the adjudication of child maintenance cases[50]. This is because, although Shariah laid down principles and rules that will guide the judge in determining the maintenance, the application of these

[46] Madhavan S et al, 'Father's Financial Support of Children in a Low Income Community in South Africa' (2014) Journal of Family and Economic Issues 454

[47] Surviving Economic Abuse, 'Child Maintenance' <https://survivingeconomicabuse.org/what-we-do/policy-influencing/child-maintenance/> accessed on 30 July 2024

[48] Varshney H, 'Aspect of Maintenance of Children under Muslim Law', <https://blog.ipleaders.in/aspects-of-maintenance-of-children-under-muslim-law/> accessed on 31 July 2024

[49] Kadir R. et al 'Child maintenance in Malaysia: Are the amounts sufficient?' (2023) 19 Geografia-Malaysia Journal of Society and Space 80

[50] Johnson J.L, 'The Best Interest Standard: A Review of How Broad Judicial Decision and Influence of Social and Political Suggestions Have Led to an Abandonment of the Rule's Primary Purpose In Child Custody Decisions' <https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2218&content=ex presso> accessed on 31 July

principles is subject to judicial discretion.[51] This discretion is influenced by factors such as the judge's legal training, personal beliefs, and the prevailing cultural and social norms. As a result, different judges may arrive at different decisions even when presented with similar cases, leading to a lack of uniformity in the application of the guidelines.

One of the primary issues with judicial discretion in the context of child maintenance under Shariah is the lack of standardised guidelines. While the Quran and Hadith provide general principles regarding the responsibility of parents to support their children, they do not specify detailed criteria for determining the amount and duration of child maintenance. The absence of detailed guidelines necessitates reliance on judicial interpretation, which can vary widely. For example, some judges may place greater emphasis on the financial capacity of the father, while others might prioritise the needs of the child.[52] This variability can result in significanZ3t disparities in maintenance awards, which can be perceived as unfair and undermine the credibility context within which judicial discretion is exercised can also impact the effective implementation of the determinants of child maintenance under Shariah.[53]

3.0 Contemporary Realities Militating Against the Implementation of Child Maintenance under the Shariah

The concept of child maintenance reflects the comprehensive and all-embracing objectives of Shariah to safeguard the well-being of the children who are likely to be affected by the dissolved marriage.[54]Under the Shariah, the obligation to maintain the children is not merely a legal obligation but a moral and ethical duty that reflects the Islamic principles of justice, compassion, and responsibility towards one's family.[55] Due to this, the Qur'an and Hadith provide clear directives on the importance of caring for and supporting the children, highlighting the role of parents in nurturing and providing for their children.

However, in Kwara State like many other states, contemporary realities significantly impact the implementation of these principles. Issues such as underemployment, rising costs of living, and

[51] Ibid.

[52] Hahim N. et al, 'The Best Interest of the Child: An Analysis of the Judicial Approaches in Assessing Child Maintenance Applications in Shariah Courts' (2016) 2 Journal for Contemporary Islamic Studies 40

[53] Ibid.

[54] Ibid.

[55] Zaidi N, 'Human Rights of Children in Islam' (2021) International Journal of Criminal, Common and Statutory Law 61

economic instability among others, pose substantial barriers to fulfilling child maintenance obligations.

3.1 Economic Instability

Economic instability, also referred to as income instability or economic insecurity can be described as a drop in the family income from which families may or may not recover.[56] Economic instability occurs when the factors that influence an economy are out of balance, leading to decrease in money (inflation).[57]

One of the primary ways in which economic instability affects child maintenance is through its impact on employment. This is because periods of economic instability often lead to higher rates of unemployment and underemployment.[58] When the economy is unstable, businesses may be reluctant to hire new employees or may lay off existing staff to cut costs.[59] This directly affects the father's ability to secure stable and sufficient income, which is crucial for fulfilling the child's maintenance obligations. Moreover, economic instability often leads to inflation,[60] further complicating the ability of parents to fulfill their maintenance obligations.

In Kwara State, many parents rely on incomes tied to agriculture, trade, or small businesses,[61] which are particularly vulnerable to economic fluctuations.[62] When market conditions are unstable, the income from these sources can be highly variable, making it difficult for parents, especially the father to ensure a steady flow of maintenance for their children. This unpredictability undermines the ability to fulfill expenses relating to education, health, and the overall best interest of the children.

3.2 Rising Cost of Living

[56] Sandstorm H, 'The Negative Effects of Instability on Child Development' <https://www.urban.org/sites/default/files/publication/32721/412908-the-negative-effects-ofinstability-on-child-development-fact-sheet.pdf> accessed on 04 August 2024

[57] Washmuth D et al, ' Economic Instability: Examples, Causes & Effects' <https://study.com/learn/lesson/economic-instability-causes-examples-what-is-economicinstability.html> accessed on 04 August 2024

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Olokundun M et al, 'Agro Business as a Remedy for Youth Unemployment Towards the Achievement of Sustainable Development in Nigeria: Comparative Perspectives from the Kwara State Agro Business Economy' (2014) 5(3) Journal of Economics and Sustainable Development 48

[62] Ibid.

The rising cost of living, like other contemporary realities, militates against the implementation of child maintenance in Kwara State. In Kwara State, as in many parts of Nigeria, inflation has led to a steady increase in essential goods and services.[63] Basic amenities such as food, housing, health care, and education have become increasingly expensive, eroding the purchasing power of families.[64]According to a Business Day analysis of the latest consumer price index report, Kwara State is among the top five (5)states that recorded the highest food
inflation in the year 2023.[6566]

Also, for parents already struggling with limited financial resources due to unemployment and underemployment, the rising cost of living exacerbates their economic challenges and as the economic pressures intensify, families struggle to meet their basic needs.[67] This makes it difficult to fulfill the child maintenance obligation.

3.3 Unemployment and Underemployment

Unemployment and underemployment have become one of the world's major problems [68] Unemployment occurs where individuals who are willing and able to work are unable to find employment.[69] Unemployment is a continuing concern within contemporary societies and it is usually measured by the unemployment rate, which is the percentage of the total labour force that is unemployed but actively seeking employment and willing to work.[70] Underemployment on the other hand refers to a situation where individuals are employed but their job does not fully utilise their skills, experience, or availability.[71] It includes people working part-time who desire full-time

[63] Otto G et al, 'Inflation in Nigeria: Possible Determinants and Remedies to Tackle it in Nigeria' <https://www.researchgate.net/publication/311336635_Inflation_in_Nigeria_Possible_determinants_and_remedies_to_tackle_it_in_Nigeria> accessed on 03 August 2024
[64] Ibid.
[65] Folake Balogun, 'Why Kogi, Kwara Lead States with Highest Food Prices in 2023' BusinessDay Newspaper (Nigeria 30 January 2024)
<https://businessday.ng/news/article/why-kogi-kwara-lead-states-with-highest-food-prices-in-
[66] /?amp> accessed on 03 August 2024
[67] Aldous J et al, ' Families and Inflation: Who Was Hurt in the Last High Inflation' (1991) 53 Journal of Marriage and Family 125
[68] Lauterbach A, 'Employment, Unemployment and Underemployment: A Conceptual Examination' (1977) 4 American Journal of Economics and Sociology 284
[69] Ndzwayiba A, 'What is Unemployment'
<https://www.researchgate.net/publication/344641992_What_Is_Unemployment>accessed on 02 August 2024
[70] Cullen A.M, 'Unemployment: Its Meaning and Impact in Contemporary Society' (PhD Thesis, Massey University 1999)
[71] Chen J, 'Underemployment: Definition, Causes, and Example'
<https://www.investopedia.com/terms/u/underemployment.asp> accessed on 02 August 2024

positions and those employed in roles that do not match their skill level or pay significantly lesser than their qualifications warrant.[72]

The fourth-quarter labour force statistics released by the NBS in the year 2020, put the unemployment rate in Kwara State at 42.5 percent.[73] In 2019, the unemployment rate released was 21.13 percent.[74] The significant rise of 21.37 percent in 2020 highlights the growing economic challenges faced by the state. This will definitely have a huge impact on various aspects in which child maintenance is one of the aspects.

The impact of unemployment and underemployment on child maintenance is profound. Fathers, under the Shariah, are vested with the responsibility to provide for their children but as much as they may be willing to do so, fathers who are unemployed and lack a steady source of income will find it very challenging to meet the financial demands of their children. This financial challenge is exacerbated by the rising cost of living and economic instability. Therefore, without stable employment, fathers may struggle to provide adequate maintenance for the children, leading to adverse effects on the well-being and best interest of the children.

4.0 The Necessity to Expand the Existing Determinants of Child Maintenance in Kwara State

The determinants of child maintenance under the Shariah are primarily designed to protect the best interests of children, reflecting the core principles of justice, compassion, and welfare inherent under the Shariah. These determinants, which include considerations such as the father's financial capacity, the child's age, and the child's needs based on customary standards, have historically been adequate in ensuring that children's basic needs are met. However, due to certain challenges and contemporary realities, such as the escalating costs of education and health care, the increasing recognition of children's rights, economic instability as well as unemployment and underemployment, the adequacy of these existing determinants has been compromised. These factors have created a gap between the existing determinants framework and the current needs of children, making the existing determinants insufficient in fulfilling the primary aim of Shariah, which is to ensure and safeguard the best interest of the child.

[72] Ibid.

[73] Amata D, '2023 Elections: Performance Appraisal Time for States and their Governors- Kwara State' <https://www.dataphye.com/latest-reports/governance/2023-elections-performance-appraisaltime-for-states-and-their-governors-kwara-state/?amp_markup=1> accessed on 02 August 2024

[74] Ibid.

Therefore, expanding these determinants is essential. This expansion will not only align with the objectives of Shariah, which seek to protect and promote the welfare of the children in a just and equitable manner but also ensure that life is easier for all parties involved, which is the father and the mother. By incorporating considerations such as the costs associated with modern education and health care, the psychological and emotional needs of children, and the impact of the current economic situation, the expanded determinants will provide a more comprehensive and inclusive approach to child maintenance.

This will also help protect and safeguard the best interests of the child, ensuring that they have access to the necessary resources and support for their overall development and well-being. In doing so, the expanded determinants will uphold the principles of justice, equity, and compassion that underpin Shariah, thereby promoting a more effective approach to child maintenance that is responsive to the realities of contemporary society.

5.0 Conclusion

The main intent of the Shariah as regards child maintenance is to protect the best interest of the child and that the responsibility of maintenance falls solely on the father. After divorce, the father and mother are expected and under the obligation to determine the quantum of maintenance. However, if they are unable to reach a reasonable conclusion, they can approach the court. The obligation to determine the adequate quantum of maintenance will then shift to the judges who after careful application of the principles and factors guiding child maintenance under the Shariah, decide a reasonable quantum. The implication of this is that the court has a very huge discretion in determining the amount for child maintenance. The existing determinants of child maintenance under the Shariah have historically been adequate. However, due to contemporary realities such as the rising cost of living and economic instability in Kwara State, the adequacy of these determinants has been compromised. This necessitates the need for an expansion of the existing determinants.

To ensure child maintenance orders remain effective, it is recommended that a periodic review to adjust amounts according to inflation and economic changes. A detailed guideline should assess fathers' income, including assets and investments. Stronger enforcement mechanisms, stricter penalties for non-compliance, and regular court checks, whether annually or quarterly, are also suggested. Additionally, researching how economic factors impact child maintenance orders could lead to improved solutions.