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**“THE IMPACT OF THE MEDIATION ACT- 2023,
ON ACCESS TO JUSTICE IN INDIA”**

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ABSTRACT

Since 2023, the Indian judicial system has witnessed constant issues throughout many states, resulting in a serious lack of judicial time occurring throughout multiple levels of the court systems located across India; hence, over five crore open cases remain open for all levels. Since this issue has caused the executive branch to violate the Constitution of India, for millions of litigants, the right to access justice as found in Articles 14, 21, and 39A requires an adequate and effective means of resolving disputes – a requirement that has not yet been met as a result of the unfinished nature of the current statutory and caselaw system of resolution under section 89 of the Code of Civil Procedure, 1908 and the Commercial Courts Act, 2015.

The Mediation Act establishing an independent mediation system includes a requirement for pre-court mediation, which may limit access to courts for less fortunate individuals, in addition to the possibility of greater access by creating opportunities for resolving disputes without attending court. Therefore, this study will look at three areas: (1) the legislative text; (2) the effect of the legislation against constitutional guarantees; and (3) whether it democratises access to civil dispute resolution.

Keywords: *Mediation Act 2023, Access to Justice, Pre-litigation Mediation, Alternative Dispute Resolution, Mediation Council of India, Singapore Convention.*

INTRODUCTION

Accessing justice is not only a procedural right, but it is also a substantive constitutional guarantee under Articles 14, 21 and 39A of the Constitution of India. The Supreme Court of India has confirmed in Anita Kushwaha v Pushap Sudan that the right to access a court of law is an essential part of the fundamental right to life set out in Article 21. [1] However, due to an ongoing pendency crisis that has plagued the Indian judicial system for decades and has resulted

in more than 5 crore cases pending in 2023, this guarantee has been rendered meaningless for countless litigants.[\[2\]](#)

As a result of this situation, the Government passed the Mediation Act, 2023, which was given Presidential assent on September 14, 2023. [\[3\]](#) The Act establishes a stand-alone statutory framework that builds on Section 89 of the CPC, 1908 and the Commercial Courts Act, 2015, which previously existed. The most important changes included in this Act are: making mediation a mandatory pre-litigation step, creating the Mediation Council of India to act as a permanent regulatory authority and providing a basis for India to adhere to the Singapore Convention on Mediation.[\[4\]](#)

The paper looks at how the Mediation Act of 2023 affects access to justice in India. The author analyses the statute, its provisions, as well as other weaknesses of the institution compared to the guarantees of equality and international models. The author concludes that, although progressive, achieving the Act's goal of making access to dispute resolution more democratic will depend on developing an inclusive approach through the establishment and implementation of effective processes and systems.

1. STATEMENT OF PROBLEM

Although the Law Commission Report (1988) [\[5\]](#) and Supreme Court ruling, *Salem Advocate Bar Association*, have supported the concept of “mediation”[\[6\]](#), until the passage of the “Mediation Law 2023” there has been no formal legal framework to facilitate this concept, mediation has historically been performed in reliance upon Section 89 of the CPC (1908), which allows for the Court to refer matters to mediation. However, there are no prescribed procedures, no means to hold Mediation Practitioners accountable or for enforcing mediation settlements, shortcomings that were eloquently highlighted by the Supreme Court in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.*[\[7\]](#)

This paper identifies a research gap in the lack of critical scholarship assessing whether the Mediation Act 2023 is genuinely promoting or restricting access to justice for disadvantaged litigants through the Act's mandatory pre-litigation mediation provision. Additionally, with more than five crore pending cases and the judiciary having less than one-half of the international judge-to-population ratio, both the Mediation Act's purpose and implementation will have significant ramifications with respect to the constitutional protections provided for in Articles 14 and 21.

LITERATURE REVIEW

Nadja Alexander, International and Comparative Mediation: Legal Perspectives (2009)

In her article, Alexander explores the different legal and regulatory frameworks related to mediation throughout the European Union, the United States and Singapore, including considerations of confidentiality, enforceability and how mediators are regulated in each jurisdiction. [\[8\]](#) She finds that the efficacy of mediation in terms of being able to deliver justice is largely dependent on there being clear statutory provisions and institutional support for mediation, and hence “where there is no legislative support for mediation, the results are inconsistent, and parties lose confidence in the mediation process”.

Alexander's major conclusion, that jurisdictions with specific mediation statutes as well as professional regulatory bodies achieve better outcomes (i.e., higher levels of settlement) and greater party satisfaction than those jurisdictions without such laws and regulations, is well supported by empirical comparisons between various EU and UNCITRAL legislative materials providing a high degree of credibility and transferability of this information to the context of India. This article provides the benchmark for this study, as India's Mediation Act (2023), specifically about the Mediation Council of India and the enforceability of mediated settlement agreements, is being evaluated through Alexander's framework. As such, her framework provides support for the assertion that the institutional design of India's Mediation Act broadly meets the criteria of international best standards (simultaneously highlighting implementation gaps), resulting in the reduced ability of the Act as a vehicle for access-to-justice.

Sriram Panchu, Mediation Practice and Law (2nd edn, 2015)

Panchu's treatise is an Indian legal text that serves as the foremost authority on mediation and its practice within the context of laws governing mediation. [9]He discusses the theory behind what mediation is, the procedural process for mediation as governed under the Code of Civil Procedure (CPC), and its relationship and interactions with proceedings within the courts and draws heavily upon the Supreme Court cases as well as Law Commission Reports and International Best Practices.

As it relates to this paper, Panchu's key finding was that without a statutory framework for mediating cases in India, there has been inconsistent application and implementation of court-annexed mediation, and the resulting low rates of settlement are a direct result of how Section 89 of the CPC imposes a patchwork system of mediation. These findings confirm that there was a pre-existing legal vacuum before the enactment of the Mediation Act, 2023.

Panchu's work is relevant to Research Question 1 of this paper's doctrinal analysis on the institutional framework created by the Mediation Act, 2023. The structural deficiencies identified by Panchu for court-annexed mediation serve as the normative baseline from which to evaluate the innovations launched by the Act, especially the Mediation Council and the provisions for enforcement of mediation agreements.

Hazel Genn, Judging Civil Justice (2010)

Genn provides a compelling argument against compulsory Alternative Dispute Resolution (ADR) from an access-to-justice standpoint – based on a body of data from civil justice surveys in England and Wales. [10]She claims that parties are sometimes coerced into mediating when they should have the right to have their case heard by a Court, particularly when there are issues of unequal negotiating power, such as when one party is not legally represented or is economically dependent on the other party.

Genn shows through her application of empirical and methodological rigour that mandatory mediation programs without adequate safeguards or publicly funded legal assistance usually result in an advantage for the more powerful and sophisticated party. The data she uses is based on both the Official Civil Justice and independent survey statistics, both of which are well-known and have been used in many comparative studies.

Genn's research forms an essential component of the current paper's critical analysis of the mandatory mediation requirement before litigation under Section 5 of the Act (Research Question 2). Genn's framework provides the empirical and theoretical basis for assessing whether the mandatory mediation experience in India may mirror some of the access to justice issues that she identifies in England and Wales.

Sanjay T R, 'Mandatory Pre-litigation Mediation: Boon or Bane?' (2023)

Sanjay T R offer the most up-to-date analysis of the Mediation Act, 2023, in terms of contemporary Indian scholarship. He focuses on the mandatory pre-litigation mediation provision of the new act and uses a range of sources from the historical experience in implementing Section 12A of the Commercial Courts Act, 2015, including Parliamentary Debates, Statement of Objects and Reasons for the Mediation Act, and a comparative assessment of the Mediation Act with the Commercial Courts Act, 2015 record.[\[11\]](#)

Sanjay T R conclude that the history of BPL litigants under the Mediation Act and the Commercial Courts Act demonstrates that both acts have lacked adequate legislative guidance for the recognition of free legal aid-supported mediation, and that the Section 12A implementation experience further exemplifies a lack of willingness to fund additional infrastructure necessary for the expansion of mandatory mediation programmes with their supporting infrastructure. Both findings are attained through the analysis of official legislative proceedings (Parliamentary Proceedings) and government reports. Thus, his methodology has been demonstrated to be very robust, and their conclusions are sufficiently credible.

The research and conclusions offer the best contribution to Research Question 2 and Research Question 4 of this paper. In addition, Sanjay T R's Identification of an access to justice gap for BPL litigants and the working relationship between the Mediation Act and the Legal Services Authorities Act, 1987, present the most important and pressing subject matter for consideration within the framework of Reform Recommendations made by this paper.

RESEARCH QUESTIONS

The objective of this article is to explore four important research questions, all of the Mediation Act of 2023

1. Is the institutional framework established by the Mediation Act of 2023 coherent and inclusive, thereby promoting access to justice in India?
2. Does the Mediation Act of 2023 limit or expand access to justice for vulnerable groups in society by requiring pre-litigation mediation for all cases?
3. How does the Mediation Act of 2023 provide for the enforcement of mediation settlement agreements and support India's alignment with international standards for mediation?
4. What legislative and policy changes need to be made to fully implement the access to justice potential of the Mediation Act of 2023?

1. Research Methodology

A doctrinal research approach is taken in this paper by means of thorough research of primary legal texts, which include the Mediation Act of 2023, the Code of Civil Procedure (1908), the Commercial Courts Act (2015), and decisions or case law issued by the Supreme and High Courts, as well as secondary material, including Law Commission Reports, debates from Parliament, journal articles and plans for future reform from a global perspective; for example, the Singapore Convention on Mediation and the Mediation Directive by the European Union.

The use of a doctrinal approach is fitting because this paper will be focusing on an analysis, interpretation and critique of the statutory provisions and their effect on the constitutional right of access to justice and not on data collection using empirical methods as would be the case with a purely empirical approach. By providing other countries' experiences as a way to measure against the established law in India, a better understanding of the Nigerian structure's normative limitations is provided, and possible paths for reform are identified. There are no surveys or interviews involved in this case study.

1. **MAIN BODY**

1. **Pre-Legislative Landscape: The Inadequacy of Existing Frameworks**

Before the Mediation Act of 2023, mediation in India worked within a fragmented legal framework. Under section 89 of the CPC (Civil Procedure Code) (Amendment) Act of 1999, courts were able to refer parties to mediation, among other forms of alternative dispute resolution (ADR). However, the Supreme Court of India in *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co.* provided clarity on the very limited scope of section 89, and its limitations due to a lack of enforcement mechanisms, no standards for mediators and no centralised body to oversee mediators' activities. [\[12\]](#)

The introduction of compulsory pre-institution mediation on specified commercial disputes through the Commercial Courts Act of 2015 (section 12A of the Act)[\[13\]](#) provided a further step toward the passage of the new Mediation Act. However, the Commercial Courts Act only provided a means for compulsory pre-institution mediation on specified types of commercial disputes, thereby failing to address the deficiencies in the area of mediation. Likewise, although there were no uniform standards for mediation or quality of mediators, there was also little to no compliance with the act and minimal distribution of mediation services outside of major metropolitan areas. [\[14\]](#) In contrast, the purpose of the 2023 act is to rectify the deficiencies described above and provide a single framework with universal application that encompasses both civil and commercial disputes.

Structure and Key Provisions of the Mediation Act, 2023

The Mediation Act, 2023, comprises 64 sections in ten chapters. Its core provisions are as follows:

Mandatory Mediation Before Going to Court

According to Section 5 of the Act, before someone can file a civil or commercial lawsuit, they are required to attempt mediation unless one of the exceptions from Section 6 applies. In particular, the exceptions apply to cases where a party requires urgent relief, mediation will affect parties not present at the mediation session, or there is a limitation period is approaching

its expiration. This creates a structure so that there is an incentive to settle disputes before court intervention and to reduce congestion in courts.^[15]

Establishment of the Mediation Council of India

The Mediation Council of India has been established as a regulatory authority to oversee the implementation of mediation across India under Chapter VIII of the Act. The Mediation Council will have the authority to recognise mediation service providers and the ability to grade and credential mediators, establish qualification and training standards as outlined in Section 8, and foster a culture of mediation. This marks a significant departure from the previous court-based, ad hoc mediation services model, by establishing an institutional framework similar to the Bar Council of India established for the legal profession.^[16]

The enforceability of mediated settlement agreements

Section 20-22 of the act provides that an authenticated mediated settlement agreement is binding and can be enforced directly as a court decree.^[17] In the past, mediated settlements had the legal effect of a contract and could only become a court decree if the parties agreed to convert the mediated settlement into a consent decree through additional court proceedings. This result caused additional cost and delay to the mediation process, which negated the benefits of using mediation. The ability to directly enforce a mediated settlement agreement as a court decree will greatly enhance the value of mediation in the eyes of ordinary litigants.

Online Mediation and Community Mediation

Until now, mediation was believed to have reached its limit with face-to-face mediation; therefore, Section 30 of the act expressly provides for legally effective online mediation conducted via electronic means, allowing India to participate in the worldwide movement toward online dispute resolution (ODR).^[18] In addition, the act also provides for community mediation in disputes that could potentially affect the peace, harmony, and tranquillity of a community, allowing a social justice component to develop as part of the statutory framework.

International Mediation & The Singapore Convention

The Act provides a framework for International Mediation through Statute. This is the domestic legislation of how the Singapore Convention will apply in India, where India is one of its Signatories. As such, the Act provides clarity and certainty to aid the recognition and enforcement of mediated settlement agreements across borders by establishing a streamlined process to do so.^[19] The alignment of these provisions with those of the Singapore Convention is key to India achieving its strategic goal to establish itself as an International Commercial Dispute Resolution hub.

Findings and Analysis: Answers to the Research Questions

The following sub-sections present the analytical findings of this study, organised around each of the four research questions.

Research Question 1: Does the Act create a coherent and inclusive institutional framework that advances access to justice?

Finding: The new legislation provides a number of structural options for mediations, although some have yet to be fully developed or included in ordinary mediation processes.

The new Mediator Council of India is the primary result of the Act's provisions. The Mediator Council has been created by the Indian legislature to establish a new infrastructure for the resolution of disputes via mediation. The intention is for the Mediator Council to provide formal recognition (i.e., licensure) of mediators and mediation providers, credential mediators, and to set standardisation in practice for mediators in the mediation field. The establishment of the Mediator Council serves to indicate that the Indian legislature intends mediation to be recognised as a professional, organised, and regulated process of resolution of disputes, as opposed to being viewed as a random, disorganized and informal method of resolution of disputes, as may be done traditionally through the courts.[\[20\]](#)

Although the Mediator Council Framework can be considered as including all potential users, the inclusiveness of that Framework is materially limited. As previously stated, there is no statutory requirement in Mediator Act for phased geographical expansion of mediation centres, likely to be critically important given that the pre-institution mandatory mediation in accordance with Section 12A of the Commercial Courts Act, 2015, has a history of failure in implementation and was not available in most cities until years after the passage of the legislation creating that option. While the Mediation Act provides a much broader basis for mandatory mediation as well, there is no statutory requirement for the infrastructure necessary to provide for the implementation of mandatory mediation in smaller cities and rural areas.[\[21\]](#)

The Mediation Act's promise cannot be fully realised without sufficient qualified mediators across the country. To provide legal access to mediation for litigants in India, tens of thousands of qualified and credentialed Mediators will need to be identified, trained, credentialed, and deployed, and there is currently a lack of qualified Mediators who can meet these criteria. While the Mediator Council can create training and credentialing programs to try and fill that gap on a regional basis under the Act, there are no provisions within the Act for a time frame or any funding to enable this effort to commence. Without some level of mandate, the organisation's structural framework would be in a coherent state on paper, but incoherent in terms of reality; thus, the organisation would never achieve its purpose.

Research Question 2: Does the mandatory pre-litigation mediation requirement enhance or restrict access to justice for vulnerable sections?

Finding: The requirement has dual and contradictory effects — promising for court decongestion but potentially exclusionary for vulnerable litigants.

Many practitioners have viewed the legislation's provision for pre-litigation mediation as the most innovative but also the most hotly debated aspect of this legislation. This section was intended to allow the resolution of disputes without the need to resort to a court system that is overwhelmed with litigation (over five crore cases waiting in line), by facilitating agreements that are made before litigation is commenced between the parties in dispute. Chief Justice D Y Chandrachud, Supreme Court of India, notes that, in his opinion, mediation provides litigants with a "street corner" access to justice (National Mediation Day).[\[22\]](#)

An example of how the lack of an appropriate procedural safeguard at mandatory mediation can result in a denial of justice (when one litigant is at a structural disadvantage) comes from Genn's empirical study on the operation of mandatory ADR. In that respect, all civil litigants in India are clearly impacted by structural disparities resulting from the socio-economic positions of the parties within their respective civil litigious proceedings, therefore, for instance, if there are a shortage of financial resources available to pay for a professional, highly qualified mediator to conduct a mediation pursuant to the section 8 mediator qualification framework, this will result in a two-tiered mediation system (where there are good quality mediators for parties with substantial resources, but poor quality mediators for ordinary average people involved with civil litigation).^[23]

Not allowing free or subsidised mediation for marginalised litigants means this legislation is not progressive and provides no examples. The Legal Services Authorities Act 1987 created a framework to provide legal assistance, but its relationship with the Mandatory Mediation provision in the 2023 Act remains unclear. ^[24]Sanjay T. R. noted that this flaw is the most significant impediment to providing access to Justice as designed by the legislation. Marginalised litigants will remain in Mediation Limbo until they can afford the cost of a private mediator, whereupon the Court will enter the Proceedings if the law requires them to have mediations before bringing a civil action against a responsible person or entity.

The relationship between the statute's gender equality exception found in section 6 and issues surrounding domestic violence, sexual harassment, etc., will also present a significant issue for women accessing justice through this act. ^[25]The Supreme Court Case National Legal Services Authority v Union of India reaffirmed that the State has a responsibility to protect marginalised groups throughout the Justice process. The legislation does not adequately protect all marginalised groups' access to services under this Act, and does not contain any additional exclusions specific to allowing marginalised women's access.^[26]

Under the provisions found in Section 29 of the Act relating to online mediation, all parties, including those living in rural and semi-rural areas, will have an equal opportunity to achieve justice via online dispute resolution (ODR), just as metropolitan litigants do. Additionally, the integration of ODR with the legal aid provisions included in the Legal Aid Act of 1987 will also create a theoretical opportunity for all parties that have access to any form of electronic device to use ODR to resolve their disputes; thus, providing them with an equal opportunity to have success in relation to their actual situation.

Research Question 3: How does the Act address the enforceability of mediated settlement agreements and align India with international standards?

Finding: The Act introduces transformative enforceability provisions and creates the legislative platform for alignment with the Singapore Convention.

Sections 20–22 set out the regime for the enforceability of mediated settlement agreements, that is, the Act's clearest positive contribution to dispute resolution in India. Basically, by awarding the same legal status as a court-decreed settlement, the Act does away with the expensive and lengthy process of obtaining a consent decree after a mediated settlement has been reached – a particularly vexing issue for parties with limited resources.

Before this new legislation was introduced, mediated settlement agreements had all of the characteristics of a contract and could only be enforced through new civil proceedings for breach or the consent decree process. The new regime, therefore, provides a separate, complete and independent mechanism for the enforcement of a mediated agreement. The comparative analysis by Alexander confirms that the direct enforcement of mediated agreements is the hallmark of mature mediation frameworks around the world, and thus brings India on par with the European Union's Mediation Directive and Singapore's mediation legislation in this area.^[27]

India intends to become a leader in global commercial mediation by establishing a national law to allow for the enforcement of mediated settlement agreements under the Singapore Convention, as established by the Mediation Act, 2023. The Act has the same effect as the New York Convention does for arbitral awards in that it treats mediated settlement agreements as final and binding, enforceable as court decrees, allowing India to be positioned as a leader in the field. In addition to setting out a framework for the enforcement of mediated settlement agreements, adherence to the international standards created by the Act provides further evidence of India's potential to become an international business hub, as mediation has an increasing role in the development of India's dispute resolution system at the international level.

Research Question 4: What legislative and policy reforms are necessary to realise the Act's access-to-justice potential?

Finding: Targeted reforms are needed to ensure equal access to justice results from implementation of the Act's legislative intent.

The Mediation Act 2023 was demonstrated in the first four sections as a necessary condition for expanding access-to-justice in India, but insufficient in its own right. Therefore, the legislation must be amended in five areas.

The Mediation Council of India must establish mediation centres at the taluka level on a prescriptive timetable and provide funding to support this effort, with the available services prioritising those that have previously been underserved in India, and we do not want the unintended consequence of not having Section 12A of the Commercial Court Act of 2015 going unfulfilled again in this regard.

The Mediation Council of India will establish mediation centres in the taluka as per the request. The appropriate statutes for creating these centres will have to be placed within an appropriate time frame. Priority funding will be given first to the areas/districts with no services to establish mediation centres and to create mediation centres. Section 12A of the Commercial Courts Act, 2015, will be implemented only on a smaller scale than before, so that conditions do not exist again for not being able to build these centres.

Mediation is a compulsory part of the curriculum of all law school training programs, as well as the training programs of judicial and civil service professionals. A structural change to the training of mediators is essential if there is going to be an appropriate number of trained mediators and an appropriate cultural environment for trained mediators to work in, in the context of the judicial system within some countries.

Fourthly, Section 6 contains examples where exceptions will apply; however, those exceptions need to be clarified by means of an appropriate piece of legislation or subordinate regulation, so any issues arising from domestic violence; child custody; sexual harassment; and inequalities between employers and employees must be excluded from being eligible for compulsory mediation before litigation unless the party who has been abused (i.e., the vulnerable party) has knowingly given their written consent to do so after being made fully aware of the nature involved in doing so. In addition to the state's constitutional responsibilities under Article 14, Article 21, and Article 39A, the order made by the Supreme Court in NALSA further supports the necessity for this to be addressed by legislation or regulation, too.

The accession of India to the Singapore Convention on Mediation should be accelerated so that India will have a greater commitment to international standards, facilitate the growth of cross-border business and elevate its status as a centre for dispute resolution.

VII. Conclusion and Suggestions

The enactment of the Mediation Act 2023 is an outstanding example of a positive change to the laws on mediation in India. The structure and function of the Mediation Council of India, the ability to enforce settlement agreements reached through mediation through court orders, recognition of online mediation, and the establishment of an alignment with the Singapore Convention provide a comprehensive set of laws which had been long overdue for our country and are well in line with international standards as established by Alexander.

Nevertheless, there is no assurance that the Mediation Act will increase access to justice through mediation. Although the requirement for parties to attempt mediation before they commence litigation is generally helpful, this requirement can be difficult for parties who are economically disadvantaged because there are no provisions within the Mediation Act for free legal representation during mediation, an extensive geographical infrastructure to support parties seeking mediation, and there are no requirements within the Mediation Act to provide for a sufficient supply of trained, certified, and low-cost mediators to support parties seeking mediation, all of which are addressed in a very vague manner in the current text of the legislation. Thus, the long-term success of the Mediation Act will depend on implementation rather than on what is written in the law.

Here are various possibilities for maximising access to justice through the Act:

1. Parliament should amend the Act to establish free mediation for parties entitled to legal aid under the Legal Services Authorities Act 1987, and to provide the appropriate funding and statutory framework for the two acts to work together.
2. The Mediation Council should create mediation centres at the taluka level within five years, with a phased approach based upon the most disadvantaged districts.
3. Mediation should be made a compulsory component in all law degrees and judicial education programs to ensure that long-term skills and culture are created in mediation practice and process
4. Exceptions under section 6 should be clarified to include that domestic violence, custody of children, and a power imbalance between an employer and an employee will

not require a party to undertake pre-litigation mediation unless the weaker party actively consents.

5. India should accede to the Singapore Convention without delay to demonstrate its commitment to assist in international commercial mediation and encourage international businesses to resolve cross-border disputes through mediation in India.

In summary, the Mediation Act of 2023 creates a pathway to access justice. The responsibility lies with the Government to make sure that any individual can access justice, no matter how poor or rich, where they live or how vulnerable they are.

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- [16] The Mediation Act, 2023, § 8, No. 32, Acts of Parliament, 2023 (India).
- [17] The Mediation Act, 2023, § 20–22, No. 32, Acts of Parliament, 2023 (India).
- [18] The Mediation Act, 2023, ch. 7, § 30, No. 32, Acts of Parliament, 2023 (India).
- [19] The Mediation Act, 2023, § 3(g), 27, No. 32, Acts of Parliament, 2023 (India).

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[26] Nat'l Legal Servs. Auth. v. Union of India (2014) 5 SCC 438.

[27] Alexander, *supra* note 8.

