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FOREWORD

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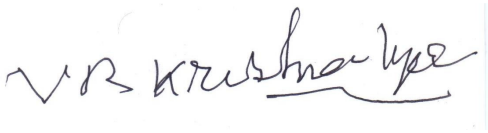
The NUALS is a fine juristic institution with high standards of legal education. Its publication will be an asset to law students, legislatures and judiciary. The study of law requires a lofty level of academic value. The Editorial Board of this Law Journal deserves admiration for their excellence. I deeply appreciate the editors of the NUALS Law Journal. This series will substantially encourage the interest of students in their higher studies in Law and Justice.



EDITORIAL COMMENT

It is with overwhelming joy and pride that the Editorial Board of 2012 brings out the sixth edition of the NUALS Law Journal. The encouragement and accolades garnered by the previous editions of NUALS Law Journal have gone a long way in setting a benchmark for the succeeding issues. The Journal is committed to providing its readership scholarly works of quality in the field of law and it is our sincere hope that we have fulfilled this duty bestowed upon us. The Editorial Board would like to express its appreciation to the authors whose works are included in this issue. It is indeed a privilege to receive the finest of contributions from distinguished personalities towards our Journal. The Editorial Board is grateful to the Editorial Advisory Board for their wholehearted support and cooperation. We acknowledge the help and encouragement of Dr. N.K. Jayakumar, our Vice Chancellor. We are thankful for the relentless support and guidance of our faculty advisor, Dr. Anil R. Nair, without whose help this publication would not have seen the light of the day. The sixth edition of NUALS Law Journal is a continuation of the efforts of the previous editorial boards and the coordination of the present Editorial Board. We genuinely expect the good work to continue in the years to come.

Compulsory Licensing Provisions to deal with Access to Patented Medicines in India

Dr. Raju KD[1]

Abstract

The paper seeks to study the scheme of compulsory licensing in its current framework with respect to its international provisions under the TRIPs Agreement and other laws. The objective of this study is to examine the Indian provisions on CL in the Indian patent law and to prove that there is enough scope for India to grant CL to pharmaceutical products, especially lifesaving medicines, under the present laws itself. Compulsory Licensing, although an effective tool for equitable healthcare is not seen much in practice in nations as a result of the strong lobby of multi-national pharmaceutical companies against it. The author suggests ways to reform the system so as to give compulsory licensing stronger implementation under national and international laws.

Introduction

On March 9th 2012, India invoked the compulsory licensing (CL) provision in its patent law for the first time to manufacture a generic version of the patented drug Nexavar, for treating cancer. The order is against the German Manufacturer Bayer and NatcoPharma Ltd. is going to manufacture the generic version which will bring down the price of the drug to 97% less than the patented version.[2]The CL provisions have been a highly-debated (a contentious) topic in developing countries after the

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[2]The Economic Times Daily Online on 9th March 2012, available on http://articles.economictimes.indiatimes.com/2012-03 13/news/31159811_1_patent-owner-compulsory-licensing-patent-law, visited on 18.03.2012.

conclusion of the World Trade Organization (WTO) agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) in 1995.

There is a general agreement that Intellectual Property (IP) Rights protection can stimulate health related research and produce excellent results such as medicines for diseases like HIV Aids. IP protection does to some extent guarantee returns on Research and Development (R&D) and acts as a stimulus for further investment. But these monopoly rights have a higher price component attached with drugs developed after huge investment and time. Such higher priced drugs in the market have negative impact on access to life saving medicines and technologies.

TRIPs came into existence along with other Agreements as a single undertaking by its Members and made it mandatory for every Member to implement the agreement at the domestic level. The agreement "attempts to strike a balance between the long term social objective of providing incentives for future inventions and creation, and the short term objective of allowing people to use existing inventions and creations."[3] Incentives are a pertinent tool for fostering innovation. However, the question is whether a proper balance can be struck between private rights like patent grants and social rights like access to medicines and related technologies.[4] The social and technological benefits out of such inventions are crucial in fighting many serious diseases. Private rights must be able to bring social benefits and only then will the balance between patents and access to technologies happen. Technology dissemination and transfer of such information is necessary to maintain such a balance. The Members cannot discriminate between technologies

[3]Information available at www.wto.org/english/tratop_e/trips_e/factsheet_pharm01_e.htm, visited on 13.05.2011. Article 7 of the Agreement provides that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[4]Article 8(1) of the TRIPs provides that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

in their patent regimes.[5] Compulsory licensing is a tool that strikes at the patent system and an exclusive restriction to patent oligopoly. It also strikes a balance between monopoly patent right and health concerns or societal concerns.

What is Compulsory Licensing?

Compulsory Licensing can be defined as the granting of a license by a government to a third party to use a patent without the authorization of the patent holder. Compulsory Licenses are an essential government instrument to intervene in the market and limit patent and other intellectual property rights in order to correct market failures.[6] A CL is an "involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state…A survey of international intellectual property law reveals that the three most prevalent compulsory licensing provisions are applicable where a dependent patent is being blocked, where a patent is not being worked, or where an invention relates to food or medicine. Additionally, compulsory licensing may be implemented as a remedy in antitrust or misuse situations, where the invention is important to national defence or where the entity acquiring the compulsory license is the sovereign."[7]

The usual grounds for CL are as follows:

- Refusal to enter into a voluntary licensing agreement on reasonable commercial terms
- Public interest (*e.g.* in the Swedish law);
- Public health and nutrition (*e.g.* provisions in the French law where ex-officio licenses may be granted by the responsible Minister "in the event of medicines being made available in insufficient quantity or quality or at abnormally high prices");
- National emergencies or situations of extreme urgency;

[5] Article 27.1 provides that "Members cannot discriminate between different fields of technology in their patent regimes. Nor can they discriminate between the place of invention and whether products are imported or locally produced."

[6] Information available at http://www.cptech.org, visited on 22.05.2010.

[7] Arnold G.J, *International Compulsory Licensing: The Rationales and The Reality*, PTC Research Foundation of the Franklin Pierce Law Center, IDEA: *The Journal of Law and Technology*, 1993.

- Anti-competitive practices on the part of patent holders;
- Dependent patents;
- Insufficient working of the invention in the national territory or not working of the same.

Compulsory Licensing Provisions under the TRIPs Agreement

Article 1 of the TRIPs Agreement provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

The TRIPs agreement provides leeway for the Members to protect this social benefit arising out of inventions by allowing governments to make exceptions to the patent holder's rights in certain situations such as national emergency, anticompetitive practices,[8] right holder not disclosing[9] and using the invention etc.[10]

Article 27 (3) of the TRIPs agreement excludes the following things from patentability:

- Diagnostic, therapeutic and surgical methods for the treatment of humans or animals.
- Plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

Article 30 provides that "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner,

[8] Article 8 and 40 of the TRIPS Agreement provides that "the TRIPS Agreement says governments can also act to prevent patent owners and other holders of intellectual property rights from abusing intellectual property rights, "unreasonably" restraining trade, or hampering the international transfer of technology."

[9] Article 29(1): Details of the invention have to be described in the application and therefore have to be made public. Member governments have to require the patent applicant to disclose details of the invention and they may also require the applicant to reveal the best method for carrying it out.

[10] Article 8(2) provides that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

taking account of the legitimate interests of third parties." Article 30 used to authorize the manufacture, use, export, import of medicines and personal or humanitarian use of medicines. These are subject to paying adequate remuneration to patent owners. The "early working" exception permits the generic drug manufacturers to produce the generic versions much earlier to their expiry. This has a great impact on the price as well as the competition in the market of patented drug.

Article 31 of the TRIPS sets outs the framework for national laws on use without authorization of the patent owner. Compulsory licensing is formally not defined in Article 31 of the TRIPs Agreement. However, it uses the phrase "other use without authorization of the right holder." Article 31 gives countries broad discretion on government use of compulsory licensing. The grant of compulsory license is subject to number of conditions. These include: "national emergencies", "other circumstances of extreme urgency"[11] or "public non-commercial use" (or "government use") or anti-competitive practices, there is no need to try for a voluntary license.[12] Article 31(b) of TRIPS generally permits issuance of compulsory patent licenses only after the country has "made efforts to obtain authorization from the right holder on reasonable commercial terms . . . ." And most importantly, the country must pay adequate remuneration for each use of the license, taking into account the economic value of the authorization.[13] The term "adequate remuneration" or "royalties" has not been defined in the agreement. There is no uniformity in paying remuneration and in different fields, it has been varied. In recent years, a number of countries have issued compulsory licenses on HIV/AIDS related drugs in the pharmaceutical sector. Malaysia set a royalty rate of 4 per cent for such licenses; Mozambique established a 2 per cent royalty; Zambia set a 2.5 per cent royalty; and Indonesia arrived at 0.5 per cent royalty.[14]

[11]Doha Declaration Article 5(b) and (c).
[12]Article 31(b).
[13]Article 31(h).
[14]James Love, "Remuneration Guidelines for non-voluntary use of a Patent on Medical Technologies," Health Economics and Drugs TCM Series No.18, WHO, 2005

For pharmaceutical patents, the flexibility has been enhanced by the Doha Declaration on TRIPs and Public Health.[15] The WTO on 30th August 2003[16] decided to implement the 2002 Doha Declaration on Public Health. The new mechanism under the decision essentially enables the import of cheaper medicines into countries which do not have the resources to manufacture these medicines themselves.

Doha Declaration on Public Health

The Doha Declaration on TRIPs and Public Health recognizes the gravity of health problems faced by the victims of diseases like HIV/AIDS, tuberculosis, malaria and other epidemics.[17] The declaration recognizes that intellectual property protection is important for the creation of new medicines and at the same time it provides that that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. The Declaration stipulates that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

Paragraph 5(b) of the Declaration specifically maintains the right of the WTO Member countries to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted. Each of the member countries has the freedom of determining what constitutes "a national emergency" or "extreme urgency". The interpretation of the declaration is that the requirement in Article 31(b) of the TRIPS Agreement for prior negotiation with patent owners on reasonable commercial terms is waived if there is a public health crisis. Moreover, the Members expressed their concern for those countries which have insufficient or no manufacturing capacity in the pharmaceutical sector. The Doha declaration specifically urged the developed nation's companies to transfer technologies to less developed countries.

[15]Doha Ministerial Declaration of 14 November 2001.
[16]WTO document, WT/L/540 and Corr.1
[17]WTO Document No.WT/MIN(01)/DEC/2, 20th November 2001.

Implementation of paragraph 6 of the Doha Declaration was done through the Decision of the General Council of 30 August 2003.[18]Paragraph 7 of the 2003 decision emphasized about the transfer of technology in the pharmaceutical section. It provides that:

> Members recognize the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector in order to overcome the problem identified in paragraph 6 of the Declaration. To this end, eligible importing Members and exporting Members are encouraged to use the system set out in this Decision in a way which would promote this objective. Members undertake to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector in the work to be undertaken pursuant to Article 66.2 of the TRIPS Agreement, paragraph 7 of the Declaration and any other relevant work of the Council for TRIPS.

This provision attempts to strike a balance between promoting access to existing drugs and promoting research into and development of new drugs. Pharmaceutical companies are opposing this move with the support of developed countries like the US and EU. These companies believe that the developing countries will abuse the compulsory licensing system which will result in lower returns to such companies. Their concerns about incentives for R&D are, however, legitimate as such incentives directly affect further investment in R&D which in turn helps innovation in the pharmaceutical sector.

Restrictions on access to medicines must be made reasonable and there ought not to be situations where entire populations are unable to access to certain new medicines as a result of high pricing. Any trade policy, health policy or intellectual property law should be designed to accomplish public health goals. To this end in 2003, the World Health Assembly passed resolution No.56.27 establishing the Committee on Intellectual Property Rights, Innovation and Public Health. The committee was entrusted with putting forth proposals on funding and incentive mechanisms for the development of products to fight diseases that

[18]WTO General Council Document N0. WT/L/540 and Corr.1.

disproportionately affect developing countries. However, the developing countries led by the US oppose all discussion of R&D treaties at the World Health Organization (WHO).[19] The developing countries led by Brazil propose a global treaty for essential health R&D.

2005 Amendment to the TRIPs Agreement

The General Council amended the TRIPs agreement through a Protocol for implementing the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.[20] The Protocol inserted a new Article *31 bis* in the TRIPs Agreement.[21] The provision stipulates that adequate remuneration may be paid to a patent holder by an exporting member in pursuant to a compulsory licensing taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. The obligation to pay "adequate remuneration" under Article 31(f) cannot be made applicable to a Member where the drugs exported to a least developed country member markets. "Eligible importing member" under this decision is a least developing country Member as notified to the TRIPs Council under Article 31 *bis* to use this system.

The 2005 amendment is made clearly to implement the 2003 decision permitting the developing and least developed countries which do not have any manufacturing facilities for pharmaceutical products to import under this particular Article.

The 2005 Hong Kong Ministerial Declaration[22] reaffirms the importance of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and to an amendment to the TRIPS

[19]Information available at http://www.cptech.org/ip/health/who/igwg.html, visited on 15.05.2011.
[20]General Council Decision No.WT/L/641, 8 December 2005.
[21]Information available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm, visited on 22.05.2011.
[22]Paragraph 40 of Hong Kong Ministerial Conference, WT/MIN(05)/DEC,22 December 2005.

Agreement replacing its provisions the Decision of the General Council of 6 December 2005 on an Amendment of the TRIPS Agreement.[23]

In 2007 the WTO General Council decided to extend the time for acceptance of the Protocol by two thirds of the Members in accordance with paragraph 3 of Article X of the WTO Agreement up to 31 December 2009.[24] However, two thirds of the members did not adopt the Protocol by the time-frame allowed by the General Council. The Council, thus, did not have any other option but to extend the deadline upto 31 December 2011.[25]

Compulsory Licensing under the Indian Patent Law

The misuse of patent rights is a common phenomenon in several nations. To remedy such abuse or misuse of the patent rights, provisions such as compulsory licenses and revocation of the patents have come into existence in most of the countries in the world. India is not only the country that has provisions relating to compulsory licensing in its Patent Act. In fact, all countries which have patent laws have included a compulsory licensing provision within their patent framework.

Indian Patent Act, 1970, a comprehensive legislation enacted after Indian independence provides for a compulsory licensing provision.[26] The Act delivered a clear strategy to eliminate the monopoly of the multinational corporations and remove the bottlenecks in the previous regime which prevented the indigenous firms from producing patented drugs. This was done through a simple process of abolishing

[23] Information available at www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#public_health

[24] Information available at http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm, visited on 22.05.2011.

[25] *Ibid*

[26] Section 24 (c) and Section 84 talks about compulsory licensing. Section 84(1) provides that At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller alleging that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price and praying for the grant of a compulsorylicenseto work the patented invention.

product patent in drugs.[27] Under Section 87 of the Act, any process patent related to pharmaceuticals was to be endorsed with the words "license of right" within three years of the sealing of the patent. In such cases anybody can ask for a licence from the patent owner to use the patented process on mutually agreed terms. However, the compulsory licensing regime was redundant in the old regime.

India constituted its National Pharmaceutical Pricing Authority (NPPA) in 1986 to control prices of a list of drugs to facilitate their access to the poor. It is pertinent to note that government can issue compulsory license when "reasonable requirements of the public are not satisfied and the patented invention is not available to the public at a reasonably affordable price…" however, during the regime of the 1970 patent law, not even a single compulsory license was issued up to 2005 amendment.

The Indian patent law has provided for adequate powers to the Controller of Patents to issue compulsory licenses to deal with the following extreme and/or urgent situations. These are explained from Sections 84 to 92 of the Act.

Section 83 of the Act spells out the philosophy of the Act, directed towards technological development and industrialization of the country. It stipulates that the patents are granted for the promotion of technological innovations, transfer and dissemination of information for the mutual advantage of the producers and uses of technological knowledge. This provision also specifies that the patents granted should not impede public health and nutrition and the patented inventions should be available to the public at reasonable and affordable prices. Under this provision the Central Government can take appropriate action if the drugs are sold by patentees for an excessive price or there is a public health crisis.[28]

Section 84 — The law provides for compulsory license under section 84 of the Indian Patent Act, to prevent patent abuse by the patent holder and commercial exploitation of that invention by an interested

[27]Sudip Chaudhuri, "TRIPs Agreement and Amendment of Patents Act in India," *Economic and Political Weekly,* Vol.37 (32), 2002, p. 3358.

[28]N.R. Subbaram, *Patent Law Practices and Procedures,* Wadhwa: Nagpur, p. 315.

person. Under this section, any person can make an application for the grant of a compulsory licence for a patent after three years, from the date of the grant of that patent, on any of the following grounds:

- The reasonable requirements of the public with respect to the patented invention have not been satisfied;
- The patented invention is not available to the public at a reasonably affordable price.
- The patented invention is not worked in the territory of India.

If the above conditions are met, the Controller can order for a compulsory license in favour of any applicant for the license. Moreover, Section 89 specifies and explains the general purposes of granting compulsory license under Section 84 as:

> (i) That the patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable;
>
> (ii) That the interests of any person for the time being working or developing an invention in the territory of India under the protection of a patent is not unfairly prejudiced.

Further, the subsection 6 of Section 84 elaborates that the Controller shall take into account the following factors while considering the application under section 84:

> (1) The nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or licensee to make full use of the invention;
>
> (2) The ability of the applicant to work the invention to the public advantage;
>
> (3) The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted;
>
> (4) As to whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period

as the Controller may deem fit. The reasonable period should not exceed more than six months.[29]

The reasonable requirements of the public shall be deemed not to have been satisfied under the following grounds:

- By refusal of the patentee to grant a licence on reasonable terms;
- An existing trade or industry in India, the establishment of any new trade or industry in India or person trading or manufacturing in India prejudicially affected;
- The demand for patented article has not been met to an adequate extent or on reasonable terms;
- The establishment or development of commercial activities in India is prejudiced.
- If the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention of challenges to the validity of patent or coercive package licensing;
- The patented invention is not being worked in India on a commercial scale to an adequate extent.
- The working of the patented invention was hindered by the importation from abroad by the patentee or persons directly or indirectly purchasing from him or other persons against whom the patentee is not taking or has not taken proceedings from infringement.

The term "adequate extent" is flexible and can be interpreted according to the circumstance of each case. The term "reasonable terms" is also interpreted according to demand of the patented product.

Under Section 85, a compulsory license can be issued after two years from the date of order of first compulsory license, revoking the patent on the ground that the patented invention has not been worked in the territory of India or the reasonable requirements of the public with respect to the patented invention has not been satisfied and not available to the public at a reasonably affordable price. It means that the Controller can revoke the patent if it is not available to the public at an affordable price. The price charged by the multinational companies for drugs for diseases like HIV/AIDS are exorbitant and is not affordable to the poor patients in

[29]Inserted by the 2005 Amendment.

developing countries. In such circumstances, this provision can be used against the companies charging unreasonable prices for life saving drugs.

Notably, Section 90 of the Act also empowers the controllers to settle the terms and conditions for compulsory licenses. These conditions are not applicable in case of national emergency or other circumstance of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee.

Sections 92 (1) and 92 (3)—Both these sections enable the Central Government and the Controller, respectively, to deal with circumstances of national emergency or circumstance of extreme urgency or non-commercial use related to public health crises by granting relevant compulsory licences. Section 92 specifically spells out that what constitute public health crisis like, HIV/AIDS, Tuberculosis, malaria or other epidemics.

The Patent (Amendment) Act, 2005, provides for process as well as product patents. In the amended law, a new section was inserted: Section 92A provides for compulsory license for export of patented pharmaceutical products in certain exceptional circumstances.[30] This provision was included in the amended Act according to the Doha Declaration on Public Health. India can grant compulsory licensing on the following grounds:

- The drug is not available in adequate quantities in India.
- The drug is not reasonably priced.
- The drug is not manufactured in India.
- The drug was being manufactured prior to 2005 by a generic company.

[30] 92A. *(1)*of the Patent (Amendment) Act, 2005provides that "Compulsory license shall be available for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India."

Many argue that the compulsory licensing provision in the new Act has no teeth.[31] The Act allows pre-grant and post grant oppositions and a challenge to patent applications, but the process will take a long time. That is sufficient for the "tying arrangements" to make money from the market in a short period of time. Additionally, compulsory licensing provisions are vague which make them difficult to use against the multinational companies effectively.[32] This can be evinced from the fact that India has rarely used the provision. The cumbersome process and litigations is another hurdle in the path of compulsory licensing process. The Third World activists propound public health as the total welfare goal.[33] The Doha Declaration works towards that end. It is highly doubtful to what extent the compulsory licensing provision in the new Act has helped India acquire new technologies in the healthcare sector. The technology gap between the south and the north is historically wide, but this gap has been closed due to increased protection of patent in developing countries.[34]

Compulsory Licensing Requests in India

In 2008, two Indian companies requested for granting CL for life saving drugs.[35] NATCO Pharma Ltd., has requested the government to grant it compulsory license for two high cost drugs: Sutent, a cancer drug of Pfizer Incorporated, and Swiss drug maker, Hoffman-La-Rocha's lung

[31]India/Africa: Threat to Generic Drugs, Africa Focus Bull., March 7, 2005; information available at www.africafocus.org/docs05/ind0503.php., visited on 12.03.2012.

[32]Katharine W. Sands, Prescription Drugs: India Values Their Compulsory Licensing Provision-should the United States Follow in India's Footsteps? *Houston Journal of International Law,* vlo.29:1, 2006-07, p. 214.

[33]WHO, International Conference on Primary Health Care, Almata: Twenty-fifth Anniversary Provisional 1, 2003.Information available at www.who.int/chronic_conditions/primary_health_care/en/wha56_27_eng.pdf, visited on 15.05.2011.

[34]J. Bradford DeLong, "Slouching Towards Utopia?: The Economic History of the Twentieth Century," 1997, information available at www.j-bradford-delong.net/TECH/Slouch_divergence5.html, visited on 15.05.2011.

[35]Information available at http//:www.livemint.com; 29 January 2008.

cancer medication. Cipla Ltd. has also requested the grant of compulsory license for the production of life saving drugs Tarceva, a lung cancer drug. Both the requests are made under the implementation of the para.6 of the Doha Declaration and 2003 decision to export these drugs to Nepal. However, Roche has opposed this application under post grant opposition. India amended its patent law to implement the 2003 decision.

Section 92A reads as below:

"(1) Compulsory license shall be available for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India.

(2) The Controller, shall on receipt of an application in the prescribed manner, grant a compulsory license solely for the manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him."

This provision doesn't spell out what would be the amount of royalty rather it gives the power to the Controller to "fix the conditions and terms." Roche dragged Cipla to the Delhi High court, alleging that Cipla infringed their patent rights over Tarceva, an anti-cancer drug. This suit against Natco was filed by Roche in December 2009. There are two other suits alleging infringement of the same patent, against Glenmark and Dr. Reddy's. The Central government recently asked Cipla and Ranbaxy Laboratories to produce unlicensed Tamiflue generics.[36] However, nothing has happened concretely so far other than asking proposals from these companies.

These cases have been languishing in the Delhi High Court for many years and it appears that NATCO has withdrawn its CL application and the Cipla case has not reached anywhere. It means that no lifesaving drug will be available for any country that immediately requires the medicine.

[36]Information available at www.fiercepharma.com, visited 09.06.2011.

National courts are also not showing much interest in delivering judgments in these cases immediately.

In a landmark decision of the Indian Patent Office dated 9th March 2012, an Indian company, NATCO Pharma Limited's application on CL to manufacture Sorafenib, a generic version of multinational company Bayer's patented drug Nexavar, a drug used to treat kidney and liver cancer, has been allowed. It will reduce the price of the drug from Rs. 2.8 Lakh per month for 120 capsules to Rs.8880/- per month, almost 97% less than the patented version.[37] Under the order, Bayer is eligible for 6 per cent royalty and the license is up to the balance life of the patent, 2020. This is the first time India has successfully used the CL provisions in its patent law. The Controller of Patents found that the company supplied the medicine only to 2 per cent of the patient population and the price charged was unaffordable and the company not sufficiently "works" the patent in India.[38]This decision is going to open a number of cases of CL and a stepping stone for other developing countries to take the same route of CL.

Threats and Gaps

Compulsory licensing is an ideal provision to implement the developing country agenda of providing affordable medicine to patients in these countries. Every country's patent law provides for CL. However, so far, only few countries have used this provision under the TRIPs agreement. It is interesting to note the reason these countries are not making use of this provision is mainly because of the pressure from multinational companies through their governments in other areas of trade. For example; Thailand has been put under Special 301 watch list by the United States Trade Representative (USTR) a number of times.[39] Even

[37]The Times Of India, E-Paper, Accessed on 13th March, 2012

[38]Section 83 of the Patents Act makes clear that patents are not granted only for the purpose of "importation" of the patented product. In fact, the Act uses the terms "working" and "importation" quite distinctly throughout the Act, making it evident that "working" as used in the Act cannot include "importation".

[39]If a country is failed to enforce IP rights at the domestic level according to the view of USTR, it will put that particular country under Special 301 priority watch list which may lead to cancellation of many concessions from the US.

Canada was put under the priority watch list by the US in 2009 for lack of IP enforcement.[40] India also found a place in the US list in 2009 even though it complied with all TRIPs obligations. The report observes that "The US continues to urge India to improve its IPR regime by providing stronger protection for copyrights and patents, as well as effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products." It is a direct pointer to the Indian generic industry and a threat to the Indian government in any CL of drugs for any other country like Nepal under the Doha Declaration. This should be read in conjunction with the recent EU action on Indian generic medicines passing through their territorial waters to other countries like Brazil by labeling the consignments as "spurious drugs" or IP violated drugs.[41] The 2009 "301" priority watch list continues with other countries like Pakistan, Indonesia and Thailand. All these show the coercive trade diplomacy used by the developed countries on behalf of their pharmaceutical giants.

The Doha declaration on public health was seen as a breath of fresh air for the developing countries. But it hasn't yet worked in favour of developing countries and those nations without any manufacturing facilities for medicines.

It is also pertinent to analyze the remuneration provisions and policies of developing countries in case of a CL. The developing countries will be deprived of new medicines in fighting many diseases. Some Western authors feel that the CL is not going to provide any incentives to the pharmaceutical companies to invest more in R&D and thus it will dissuade companies from investing in the generation of new medicines.[42]

[40]Information available at www.ustr.gov/sites/default/files/Priority%20Watch%20List.pdf, 08.06.2011.

[41]Diane E. Harper, "EU customs Blockade of India's Generic Medicines," *The Student Appeal Law Journal,* 2011 available at www.hks.harvard.edu/mrcbg/.../T.../EU_Customs_Blockade.pdf, *visited on 18.03.2012.*

[42]Richard Taylor, "Europe Unveils Compulsory Licensing Rules," *Journal of Managing Intellectual Property,* 2005.

Conclusion and Policy Suggestions

The CL provisions and its uses are important for India in the background of increased population and increasing number of patients of diseases such as Cancer, HIV/AIDS, TB etc. The Indian Health Policy 2002 recognizes the role of intellectual property protection under the TRIPs agreement and its impacts like increased costs and consequent non accessibility of medicines to vulnerable section of the society.[43] But no strategies were mentioned to counter these exigencies in the policy. The CL of platform technologies to make life saving drugs will depend upon many criteria. It includes sufficient policy framework and legal backup along with the political will for implementation of the policy at the domestic level.

The compulsory licensing provisions contain a number of vague terms which results in a issuing of CL with subsisting confusion and uncertainty as to its extent and power. Lack of clarity on what constitute public emergency under the TRIPs Agreement creates confusion which ultimately erodes the practical applicability of CL at the domestic level. Declaration of CL without proper definition facilitates the companies producing patented drug to approach national courts and prolonged legal battles which often affect the accessibility of newly invented medicines.

The Doha Declaration and Hong Kong Declaration allowed the countries which do not have manufacturing capabilities to import drugs from other WTO Member countries. This provision has not helped any country to acquire more access to any new drug nor have patented technologies helped in fighting pandemics such as Cancer, HIV/AIDS etc.
The 2003 WTO decision to some extent and the threat of imposing CL compelled some companies to reduce their prices and allowed royalty free licenses.[44]

[43]National Health Policy, 2002, para. 2.26.

[44]Roger Bate, Threats to Patents, Threats to Health, *TCS Daily* (Jul. 21, 2005). Information available at http://www.techcentralstation.com/072105H.html, visited on 1.07.2011.

Policy Suggestions

1. Redefine the provisions in the 2003 WTO decision and give clear guidelines for the use of CL by every country in need without political pressure from developed countries.
2. Develop a common list of diseases that are a threat to public health and are recognized by the WHO which will be an integral part of CL provisions eligible for automatic CL.
3. The exhaustion of patent rights should be clarified and generic drugs should not be stopped *en route* to destination countries.
4. The existing CL provisions and its implementation for a considerable period of time proves that it has not helped in providing equal access of public health to developing and least developed countries.
5. Access to medicines should be made a human right under international human rights conventions.
6. The excessive pricing of any drug has to be curtailed by a national pricing authority constituted under relevant laws which work on the basis of scientific and economic calculations.
7. Parallel importation should be allowed in case of a public health crisis.
8. Article 31(f) of the TRIPs agreement stipulates that the production should be used for local consumption only, but this provision is not applicable in case of CL granted for anti-competitive practices of the patent holder.
9. The TRIPs flexibilities like the CL, governmental use, bolar provision, parallel imports and least developing country freedoms should be strongly implemented.
10. The recent trend of curtailing TRIPs flexibilities through bilateral and regional trade agreements should be stopped.
11. The domestic law provisions should be implemented without any interference from multinational companies or their governments.

Need for Legislations to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy

Khan Shahrukh[1]

Abstract

The author deals with Assisted Reproductive Technology and the lack of a legal framework in this area. It covers the Guidelines issued by the Indian Council of Medical Research in 2005, which are unenforceable as laws and usually not adhered to. The note further expounds on the various shortcomings that need to be addressed in order to provide a greater control over the sector.

Introduction

The word 'surrogate' is derived from the Latin '*subrogare*' which means 'to substitute'. Surrogate pregnancy, which is generally referred to as a form of assisted conception, and is defined as the practice whereby one woman (*the surrogate mother*) carries a child for another person(s) (*the commissioning couple*) as the result of an agreement prior to conception that, the child should be handed over to that person after birth[2]. As per the legal definition of surrogacy, it is a relationship in which one woman bears and gives birth to a child for a person or a couple who then adopt or take legal custody of the child. It is also called mothering by proxy. According to Black's Law Dictionary, "Surrogacy means the process of carrying and delivering a child for another person."

[1] Second year Student, Nirma University, Institute of Law

[2] Department of Health, *Brazier Report on Surrogacy Published* (Department of Health Press Office: London, 1998)

Since 1978, when the world's second and India's first IVF (In-vitro Fertilization) baby was born in Kolkata (then known as Calcutta), the field of assisted reproduction has grown rapidly. Although newer techniques have helped spread its use, it has been clear that particular care needs to be taken to protect the rights of the female subjects of research as well as the users of such techniques.

Assisted Reproductive Technology (ART) is a term used to refer to advanced and innovative medical interventions that help people realize their dream of giving birth to a child. It includes a number of scientific techniques that assist reproduction, for example, artificial insemination (AI), In-vitro Fertilization (IVF) etc. There are no laws now to regulate the use of ART (Assisted Reproductive Technology) in the country, which has an estimated 2,00,000 IVF clinics. In the absence of a legal and punitive framework, none of the ART/IVF clinics are licensed, and anecdotal evidence abounds about the exploitation of patients by quacks as well as concerns about social and ethical issues surrounding surrogate parenthood. India, surreptitiously, has become a booming centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Rs. 25,000 crores today, clinically called "Assisted Reproductive Technology" (ART).

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued national guidelines in 2005 to check the malpractices of Assisted Reproductive Technology (ART). These national guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 are non-statutory, have no legal sanctity and are not binding. Silent on major issues, they lack teeth and are often violated. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant and go on undeterred and surrogate mothers are misused with impunity. Surrogacy in UK, USA and Australia costs more than US Dollars 50,000 whereas advertisements on websites in India give varying costs around US Dollar 10,000

offering egg donors and surrogate mothers. It is a free trading market, flourishing and thriving in the business of babies. [3]

India, surreptitiously, has become a booming centre of a fertility market, in the recent decision of the Supreme Court on September 29 in *Baby Manji Yamada* v. *Union of India & others*[4], it was observed that "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms". It is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. However, the changing face of law is now going to usher in a new rent-a-womb law as India is set to be the only country in the world to legalize commercial surrogacy.

In India , according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act 2004 is similar to that of India.[5]

A seminar on "Surrogacy – Bane or Boon" was held at the India International Centre on 13 February 2009. The discussion focused on the aforesaid draft Bill and Rules. Certain lacunae were noted in the Bill. It was noted that the Bill neither creates nor designates, or authorizes any court or quasi - judicial forum for adjudication of disputes arising out of surrogacy, ART and surrogacy agreements. Disputes may, *inter alia*, relate to parentage, nationality, issuance of passport, grant of visa. There is already a

[3]Anil & Ranjit Malhotra, "*Commercial Surrogacy - Bane or boon in India"*
[4]AIR 2009 SC 84
[5]Malathy Iyer, TNN, "*Draft law tightens surrogacy norms"* information available at http:// articles.timesofindia.indiatimes.com

conflict on adoption and guardianship as non – Hindus cannot adopt in India. Such disputes need to be resolved before the child is removed from India to a foreign country.

There are several points which are serious causes for concern regarding the surrogacy agreement. For example; there are no provisions for the biological parents to obtain the exclusive legal custody of surrogate children of which the possible remedy could be the Indian Contract Act which would apply and thereafter the enforceability of any such agreement would be within the domain of section 9 of the Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child.

A legislation aiming at regulating the growing number of clinics offering assisted reproductive technologies (ARTs) has been drafted and will be placed before Parliament soon. The Draft Bill lacks the creation of a specialist legal authority for adjudication and determination of legal rights of parties by a judicial verdict and falls in conflict with the existing laws. These pitfalls need to be examined closely before enacting the legislation. Although the Indian Council of Medical Research (ICMR), under the auspices of the Indian Ministry of Health, issued voluntary guidelines for ART clinics in 2002 and updated them in 2005, these guidelines are not binding.[6] Vagueness on key issues such as surrogates' rights, surrogates' minimum age, contract specifics, informed consent, and requirements regarding adoption have made the voluntary guidelines a target of considerable criticism in India.[7]

[6]*National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India.* 2005. Indian Council of Medical Research, New Delhi.

[7]Sarojini, N.B., and Aastha Sharma, "Guidelines not enough, enact surrogacy laws." *Hindustan Times* (August 7, 2008).

The main party in the surrogate agreement, the surrogate mother's position also needs to be cleared in the provisions so that there is no ambiguity in performing the contract and discharging of duties. It is not specified anywhere how the rights of the surrogate mother can be waived completely in the agreement and what its implications would be on the performance.[8] Similarly the other party in the surrogacy agreement, the biological parents also need to have clarity in their rights and obligations because there is no indication of the status of divorced biological parents in respect of the custody of a surrogate child and also, if the biological parents could be considered the legal parents of the surrogate child. These ambiguities need to be addressed in order to avoid future discrepancies.

Arguments against commercial surrogacy assume that because the transaction involves money and a contract, the surrogate mother is coerced and her autonomy is compromised. The legislation does not cover the possibility that altruistic arrangements may involve exploitation too. Legislatures have been reticent to extend the criminal law to surrogacy agreements in which financial payment is not made, seeming to assume that women should be free to enter surrogacy arrangements for family members or friends.

While concluding, the guidelines attempt to incorporate some issues related to social justice and gender inequality, but they still fall short on many fronts. The ethical guidelines should go beyond technicalities and build effective safeguards so that the unequal power relationship between the providers and users of new technology is minimized. Also, the guidelines and legislations should keep in mind the unequal gender balance and ensure that the rights of women users of these technologies are not compromised in any manner.

[8] 228th Report of Law Commission of India

Title to Goods – Inadequacy of the Air Carriage Act, 1972

Juhi Sanjiv Mathur[1]

Abstract

The Indian Sale of Goods Act, 1930 has since inception been applied to sale through land and sea. Though air travel has been in existence for a long time now, business which involves sale through air carriers has been around only for the last two decades. With the increase in complexities of conditions, always proportionate to the dynamicity of society, the Air Carriage Act is hazy or sometimes res integra in a number of situations. One of these is the negotiability of an Air way bill and the accompanying title to goods that the bill holds temporarily in possession. Often goods in transit are redirected by the consignee[2], or a mis-delivery raises the question of in whom the title of goods is then possessed and where the liability under the contract then passes. This note addresses all three, and the possible remedy in law that is available.

An Air Way Bill – Document Of Title?

Section 2(4) of the India Sale of Goods Act, 1930 defines the 'document of title to goods' *as*:
"includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;"

[1] Third year Student, BLS LLB, Government Law College Mumbai
[2] Article 12 (1) – Right to Disposition of Cargo, Carriage by Air Act, 1972

The definition in s. 4 is a little wider than that adopted by s. 62 of the English Sale of Goods Act. The words used in the ordinary course of business' and the words which follow to the end of the sub section are all important, and govern the whole sub-section, which results that all the documents mentioned in it must be such as in the ordinary course of business represent the goods.[3] It appears that the legislature did not intend to use the term 'title' in the expression 'documents of title to goods' in the wider sense of the ownership of goods, but used in the limited sense of a right to receive or take delivery of goods.[4] The test to determine whether a document is a document of title is whether the document in question is used in the ordinary course of business as proof of possession or control of goods, or authorizing or purporting to authorize either by endorsement or delivery the possessor of the documents to transfer or receive the goods thereby represented.[5] It is a document relating to goods, the transfer of which operates as a transfer of the constructive possession of the goods and may operate as a transfer of the property in them.[6] Similarly an Air way bill is a proof of receipt of goods for shipment and serves as a guide for handling, dispatch and delivery of consignment. It's only a proof of control of goods for the purpose of shipment. Hence it does not give the consignee title to the goods.

Sale Complete – Transfer of Title

The Supreme Court has held that according to the law, both of England and India, in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it must be supported by money considerations, that as a result of transaction, the property must actually pass in the goods.[7] Right, title

[3] *Ramdas Vithaldas v. Amarchand & Co*. 43 IA 164
[4] *Ibrahim Isapbhai v. Union of India* AIR 1966 Guj 6, p 11;
Ramdas Vithaldas v. S. Amarchand & Co. AIR 1916 PC 7, p 9.
[5] *Tata Iron & Steel Co. Ltd Bombay v. SR Sarkar & Ors* AIR (1961) SC 65.
[6] Benjamin, SALE OF GOODS, (1977) p 989, para 18.005
[7] *State of Madras v. Gannon Dunkerley & Co.(Madras) Ltd* AIR 1958 SC 560.
Hindustan Aeronautics Ltd v. State of Karnataka AIR 1984 SC 744, p 750.

and interest in a movable property can pass by delivery of possessions and upon paying of the consideration in view of the provisions of the Act. In the case of *National Insurance Co. Ltd v. Sky Germs*[8], the facts of which are:

The Respondent exported two parcels of precious stones to London through the Foreign Post Office. However, the consignment did not reach the consignee and was believed to have been either stolen or lost in transit. The respondent had taken two insurance policies from the appellant. The postal authorities admitted their liability in respect of the two policies obtained from the appellant to which the respondent preferred a claim and the appellant agreed to settle the same. The respondent claimed from the appellant that the payments be made in Pounds, the latter resisted the claim and contended that it was not liable to pay the respondent in Pounds Sterling. It was also contended that as the title in the goods had not passed to the consignee, on account of non-collection of documents from the remitting bank and subsequent non-payment for the stones by the consignees, the respondent continued to be the owner of the goods and, therefore, the payment could be effected only in India currency.

The Supreme Court of India ruled in favour of the Appellant and stated that if the consignee did not have the necessary documents of title endorsed in his favour and did not pay up the value of the goods, the title to the goods had not passed to the consignee and the seller remained the owner. Thus a contract of sale becomes a sale only when the property in the goods is transferred to the buyer under the terms of the contract itself.[9] Thus in the event of mis-delivery of goods or disposition by the consignee, the right and title to the goods continue to vest with the consignee. The consignor cannot be held to make good the contract in the event that the goods have not reached him along with the requisite documents bestowing the ultimate title to the goods.

[8] [2002] 2 SCC 273

[9] *Popatlal Shah v. State of Madras* AIR 1953 SC 274

However on the other hand it will be seen that, it is an essential part of the contract that the seller should tender the documents. If he does not do so, he fails to perform his contract and cannot enforce it.[10] But if he does do so, the buyer's obligation is to take them up and, on his taking them up, he is bound to pay the price according to the terms of the contract; and he is not discharged from his obligation by the fact that the goods are lost or for some other reason cannot be delivered, or that he has not had an opportunity of examining them.[11] The seller is under a negative duty not to prevent the goods from being delivered to the buyer at the destination by ordering the carrier not to deliver them or by diverting them elsewhere. This he ensures by performing his part of the bargain by tendering the documents.[12]

Condition or Warranty?

Contracts are made up of various terms, differing in character and importance. The parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where a term is broken, the approach of the Courts has been to discover, from the tenor of the contract, the expressed intention of the parties, or the consequence of the breach, whether it was vital to the contract or not. One approach, which is reflected in the Indian Sale of Goods Act 1930[13], the term is classified at the time the contract is made as either a condition or a warranty. If the parties regard the term as essential to the contract, it is classified as *condition*, any breach of a condition gives the innocent party the option of being discharged from further performance of the contract

[10] *Orient Co. v. Brekke & Howlid* [1913] 1 KB 531; Also See *Happe v. Manasseh* [1915] 32 TLR 112(CA); *Bendit v. Prudhomme*[1924] 48 Mad 538, pp 546, 551, 87 IC 681, AIR 925 Mad 626

[11] *Weis & Co Ltd v. Credit Colonial et Commercial (Antwerp)* [1916] 1 KB 356; Also See *Manbre Saccharine Co v. Corn Products Co* [1991] 1 KB 198; *Mohanlal Kashinath v. Krishna Premji & Co*. [1928] 30 Bom LR 415, 109 IC 470, AIR 1928 Bom 170

[12] *Gaitol International Inc v. Tradax Petroleum Ltd* (The Rio Sun) [1985] 1 Lloyd's Rep 350; *Empresa(Exportadore) de Azucar v. Industria Azucarera National SA* (The Playa Larga) [1983] 2 Llyod's Rep 171 (CA)

[13] Indian Sale of Goods Act, 1930

and additionally to claim damages for the non-performance of the condition. Additionally the parties, if they wish, may put the contents of any particular statement or promise which passes between them on the same footing as the description of the thing contracted for, so that if it is not made good by the party undertaking it, the failure is deemed to be a total failure of performance, and the other is atleast wholly discharged, and may in addition recover damages for such failure of performance.[14] This would in the proper sense constitute a condition as defined in S 12 (2) of the Indian Sale of Goods Act, 1930.

However if the parties did not regard the term as essential, but as subsidiary or collateral, it is classified as a *warranty,* its failure does not entitle the innocent party to treat the contract as repudiated, but only to claim damages[15] Whether or not the words 'condition' or 'warranty' are employed in their technical sense must, therefore, depend upon the intention of the parties to be ascertained from their agreement and from the subject–matter to which it relates. Whether conditions with the probability of being defaulted on, such as mode of travel, remitting bank, time of delivery are a condition or warranty, will depend on the intention of the parties, and will subsequently also determine the remedy in law.

Legal Remedy

Section 55 of the Indian Sale of Goods Act states:
Suit for price - (1) *Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.*

Thus the seller can only sue for the price of the goods when the property has passed. Thus from the law above it can be noted, that if the passing of property (and not mere delivery) depends on the fulfillment of some condition and that condition is not fulfilled, the seller cannot sue for the

[14] *Venkateswara Minerals & Anr v. Jugakishore Chitranjitlal* AIR 1986 Kar 14, p. 19
[15] J. Beatson, ANSON'S LAW OF CONTRACTS, (2002), 4 p 134.

price, even if the non – fulfillment of the condition is due to the default of the buyer (For instance if he refuses to tender the price of the goods); he can only bring a claim for damages under Section 56 of the Act. On the other hand if the property has passed and the payment of price depends upon the fulfillment of some condition, and that condition is not fulfilled owing to the default of the buyer, then the seller may sue for the price of the contract, and that too event if by the terms of the contract the non – fulfillment of the condition re-vests the property in the seller.[16]

A bench is to deliberate upon whether the property has passed to the seller or not, subsequently whether the seller can sue for the price of the goods or only damages. However it is clear that property does not pass until the documents have been taken by the buyer,[17]and the seller therefore can only claim damages for breach of contract and not the price if the buyer refuses to take them up.[18] Additionally until the seller reserves the right to disposal, mere delivery will not result in passing of property of goods.[19] However if there is the slighted deviation from the terms of the contract, the party not in default will be entitled to say that the contract has not been performed, will be entitled to sue for damages for breach, and, in certain cases, to elect to be discharged[20]. Only if the deviation is 'microscopic' will the contract be taken to have been correctly performed, for *de minimis non curatlex.*

The Montreal Convention of 1999 ("Montreal Convention") was ratified by India[21], thereby revising the Carriage by Air Act, 1972 (the "Act") with the Carriage by Air (Amendment) Act, 2009. However none of these

[16]*Mackay v. Dick* [1881] 6 App Cas 302
[17]*The Miramichi* [1951] P 71
[18]*Stein Forber& Co. v. Country Tailoring Co*. 155 LT 215;*MohanlalKashinath v. Krishna Premji & Co*. [1928] 30 Bom LR 415, 109 IC 470; *Girdhari Lal v Schales & Adams Ltd* AIR 1937 Lah 173, p 177; The dictum of Broadway J, in *Bal Kishan - Basheshkar Nath v. Fazal Elahi* [1927] 8 Lah 173, that 'taken as a broad proposition in the case of CIF contracts, the property in the goods may be said to pass as soon as they are shipped' can scarcely be supported.
[19]Section 23(2) of the Sale of Goods Act, 1930
[20]*Re Moore & Co. and Landauer & Co,* [1921] 2 K. B. 519
[21]w.e.f. June 30, 2009

conventions or the Indian Acts, deal with in detail certain technical issues for which the Indian Sale of Goods act is not enough. However Indian Courts have been applying the customs and logic used by water carriers for commercial air carriers as well. Nevertheless, finer issues regarding the procedure for disposition or mis-delivery of goods, needs to be far more exhaustively prescribed, so as to avoid ambiguity regarding liability or title of goods.

The Role of Arbitration Agreement in International Commercial Arbitration: An Analysis of its Elements and Requisites

Sanjay Gupta[1]

Abstract

This essay deals with the applicability of the Arbitration and Conciliation Act to Commercial Arbitrations taking place outside India. It elaborates on the Arbitration Agreements and its essential ingredients. It has further discussed the addition of Section 11 in the Arbitration and Conciliation Act 1996, which was absent in the 1940 Act.

Introduction

The provisions pertaining to International Commercial Arbitration is a new term given and used by Arbitration and Conciliation Act, 1996 (herein called as 'the Act'). The old Arbitration Act of 1940 has no corresponding provision. The definition of International Commercial Arbitration is important on account of several reasons. In relation to the applicability of the Act to Arbitration; Part I of the Act categorically states that the Act shall apply to all Arbitrations irrespective of whether they are non- international or international commercial arbitration where the place of arbitration is in India.[2] The jurisdiction in the matter of appointment of arbitrators in the case of international commercial arbitration differs from that in non-international commercial arbitration.[3] It may also be noted that the meaning of the expression 'international commercial conciliation' is linked with the meaning of the term

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[2] *See* section 2(2) of the Arbitration and Conciliation Act, 1996.
[3] *See* section 11(4), (6) and (9) of the Arbitration and Conciliation Act, 1996.

'international commercial arbitration' under the Act.[4] The question which was long disputed; 'whether Part I of the Act applies to International Commercial Arbitration where the place of arbitration is outside India?' has been finally settled by the Apex court in the *Bhatia International case*[5] wherein the court held that when the arbitration is held in India, the provisions of Part I would compulsorily apply and the parties are free to deviate from these only to the extent permitted by the provisions in this Part. However, where the arbitration is held outside India, the provisions of Part I would apply unless parties by an agreement, express or implied, exclude any or all of its provisions. In such cases, the laws and rules chosen by the parties would prevail.

The Act defines 'International Commercial Arbitration' as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the laws in force in India and where at least one party is – (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a Foreign Country.[6]

The definition of International Commercial Arbitration has two elements. The first element mandates that one party in international commercial arbitration should be foreigner i.e. foreign national or resident or a foreign company, etc. The second element speaks about legal relationship between the parties i.e. contractual or otherwise, that can be considered as 'commercial' under the laws of India.

The Supreme Court has said that the expression 'commercial' in the definition should be liberally construed.[7] The apex court has already laid down in *Fatechand Himmatlal* v. *State of Maharashtra*[8] that any service

[4] *See* the explanation of section 1(2) of the Act.
[5] Bhatia International v. Bulk Trading SA, AIR 2002 SC 1432
[6] See section 2(f) of the Act.
[7] Koch Navigation Inc. v. Hindustan Petroleum Co. Ltd, AIR 1989 SC 2198
[8] AIR 1977 SC 1825

or activity in which the modern complexities of business would be considered to be a lubricant for the wheels of commerce is 'commercial'.

The Model Arbitration Law (MAL) made by the United Nations Commission on International Trade Law (UNCITRAL) while defining International Commercial Arbitration explains that the relationship of a commercial nature include, but are not limited to, the following transactions: a) any trade transaction for the supply or exchange of goods or services; b) distribution agreement; c) commercial representation or agency; d) factoring; e) leasing; f) engineering; g) licensing; etc

The role of an Arbitration Agreement in international commercial arbitration has, thus, become most important in light of the propositions and principles discussed above. It is the arbitration agreement which determines the applicability of Part I of the Act in the case of international commercial arbitration where the arbitration is held outside India.

Arbitration Agreement- Definition

An agreement for arbitration is the very foundation on which the jurisdiction of the arbitration to act rests. Existing, as well as, future disputes may form the subject of an arbitration agreement. Where the arbitration agreement relates to present dispute it will generally amount to a reference, but where it provides for any future dispute, it is an arbitration clause.

The expression 'arbitration agreement' is defined by section 2(1) (b) of the Act to mean an agreement referred to in section 7. According to section 7, it means a written agreement between the parties to submit to arbitration, all or certain existing or future disputes arising between them in respect of a defined legal relationship whether contractual or not.[9] An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[10] It is also provided that

[9] *See* section 7(1) of the Act.
[10] *See* section 7(2) of the Act.

the reference in a contract to a document may also constitute an arbitration agreement if: - i) the contract containing the reference is in writing and ii) the reference is such as to make that arbitration clause part of the contract, and iii) the document to which reference is made contains an arbitration clause.

The status of an arbitration clause in a contract should be judged in the light of the provisions of section 16(1) of the Act wherein it is provided that:-

- An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and
- A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Thus, an arbitration clause in the arbitration agreement stands apart from the rest of the clauses in the contract and gives rise to collateral obligation. Since it constitutes an agreement *sui generis* (on its own force) it is not automatically affected by the fate of the main contract of which it forms a component part[11].

Essential Ingredients of Arbitration Agreement:

In order that an arbitration agreement be regarded as valid in law, it must comply with the special statute on Arbitration, and like all contracts it must be legally valid under the law of contract. The essentials of a valid contract under the provisions of Chapter II of the Indian Contract Act, 1872 can be briefly stated as under:-

- *Contractual Capability*- Parties must be legally competent to enter into a contract under sections 11 and 12 of the Contract Act respectively.

[11] AIR 1959 SC 1362

- *Free mutual consent*- Free consent not tainted by coercion, fraud, undue influence, etc, as provided by sections 13 to 22 of the Contract Act. The parties to the agreement must be *ad idem*. There should be consensus between the parties i.e. they must agree upon the same thing in the same sense.
- *Lawful Object and Consideration*- The subject or the class of subject to which the dispute relates must be lawful under sections 23 to 27 and 30 of the Contract Act.
- *Certainty*- There should be no uncertainty in the agreement. The meaning of the agreement must be certain or capable of being made certain as required by section 29 of the Contract Act.

The essential ingredients of an arbitration agreement as provided by section 2(b) read with section 7 of the Arbitration Act 1996 can be enumerated as under:-

- *Written Agreement*: - There should be a valid and binding agreement in writing to submit to arbitration.[12] The parties to it must be legally competent to contract. The arbitration agreement shall be deemed to be in writing if it contained in- a) a document signed by both the parties; b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or c) an exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. In order to constitute a valid arbitration agreement in writing, it is not necessary that it should be stated in a particular form or be signed by the parties.
- *Intention to submit to arbitration*- The contracting parties must agree to the same thing in the same sense, they must have the same intention and *consensus ad idem* should not be a matter of mere conjecture. It is the intention of the parties and not form that is material.
- *Disputes*- Arbitration Agreement means an agreement by the parties to submit to arbitration on all or certain disputes which have arisen or which may arise between them in respect of a

[12] *See* section 7(3) of the Act.

defined legal relationship, whether contractual or not. A dispute entails a positive element. It is analogous to a cause of action before a civil court. A dispute means an assertion of a right by one party and repudiation thereof by another.

The definition of arbitration agreement is wide as it combines within itself two concepts, namely i) a bare agreement between the parties that dispute between them should be resolved through arbitration and ii) an actual reference of a particular dispute or disputes to a named arbitrator or arbitrators. The dispute must be between parties to the arbitration agreement. It must be in respect of a defined legal relationship. This relationship is generally defined either in a legal document or in law. For example, dispute arising out of relationship like those arising out of social, family, etc are beyond the pale of arbitration law.

- *Parties to an arbitration agreement* - As an agreement to submit to arbitration is a contract the parties must be legally competent to contract. Capacity of a person to submit to arbitration is co-extensive with capacity to contract. Parties will include parties in a representative character as for example, Karta of a Joint Hindu Family, Directors of a Company, etc.

Arbitration Agreement and Section 11

The provision of section 11 of the Arbitration and Conciliation Act, 1996 is a new provision which was not there under the old Act of 1940. This provision has also deleted the concept of 'Umpire' under the old Act. The provision gives power to the Chief Justice of India (International Commercial Arbitration) and to Chief Justice of a High Court (in any other case) to appoint independent arbitrators if parties fail to comply with the rules laid down in their arbitration agreement for appointment of Arbitrators or their agreement does not contain any provision for appointment of arbitrators. However, this power can only be exercised on the request of a party to an arbitration agreement.

The Supreme Court in *Food Corporation of India* v. *Indian Council of Arbitration*[13] has held that the Arbitration Act of 1996 was created to minimize the supervisory role of courts in the arbitral process and nominate/appoint the arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself.

The Chief Justice must see that there exists a valid arbitration agreement and a valid claim. It cannot go into the merit of the dispute that has arisen in terms of the arbitration agreement.

Conclusion

As we have seen that arbitration agreement is the basis for the authority of Arbitrators, the ingredients of such agreement should be strictly followed. However, seeing the present system of Arbitration in the Country, it seems that even the method of arbitration does not serve any purpose for speedy justice as the entire arbitration takes almost 3-5 years to complete. Thereafter, the aggrieved party may challenge the award of Arbitrator under section 34 of the Act before competent court which again takes its own time given the scenario of current judicial system which is already bearing the burden of a backlog of cases.

[13] (2003) 6 SCC 564

Ambiguity in "Nature of Marriage": Rendering Domestic Violence Act spineless?

Abhijith Krishnan, Agnes K. Varkeychan & Sachin Sathyarajan[1]

Abstract

The article seeks to analyze the implications of The Domestic Violence Act 2005 vis a vis live-in relationships. A narrow reading by the judiciary into the phrase "nature of marriage" in The Domestic Violence Act 2005 has given way to undue hardship to thousands of women who had indulged in such relationships. This runs against the object and purpose of the legislation which aims at benefiting women.

Domestic violence is widely prevalent but has remained largely invisible in the public domain. However, a controversial ambiguity is corroding the teeth of this historic legislation of 2005. Earlier, when a woman was subjected to cruelty by her husband or her relatives, it was only an offence under section 498A of the IPC. The civil law does not address this issue in its entirety. Therefore, a proposal was put forward to enact a law keeping in view the rights guaranteed under Art. 14, 15 and 21 of the Constitution, to provide for a remedy under the civil law which is intended to protect women from being victims of domestic violence and to prevent occurrence of domestic violence in the society.

The very object of the Domestic Violence Act 2005 is to "provide for more effective protection of the rights of women guaranteed

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under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto". Furthermore, the term 'aggrieved person' refers to any woman who is or has been in a domestic relation with the respondent and who alleges to have been subjected to any kind of domestic violence by the respondent. It has been specifically stated in the Act that domestic relationships include relationships in the nature of marriage where two persons lived or have lived at any point of time together, in a shared household. In *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors*[2], the Apex Court categorically laid down that the legislature does not use any word unnecessarily. Every word or expression used in a statute has a meaning, a reason and it cannot be devoid of reason. Thus, interpreting the statute without reason underlying it would be like "a body without a soul". The Domestic Violence Act comes with a broader object of protecting the rights of women; hence the amplitude of the terms should be widened to suit modern times as seen in the *Chanmuniya*[3] decision.

In *D. Velusamy v. D. Patchaiammal*[4], the Hon'ble Supreme Court laid down the criteria for differentiating a marriage and a relationship in the nature of marriage in Para 33 of the judgment as:

"In our opinion a `relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

[2] AIR 2003 SC 511
[3] (2011) 1 SCC 141
[4] (2010) 10 SCC 469

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In addition the parties must have lived together in a `shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a `domestic relationship'."

In the analysis of these criteria, we understand that the scope of the term 'relationship in the nature of marriage' has been narrowed down significantly that there is hardly anything to distinguish it from 'marriage'. Such a narrow and short sighted interpretation goes against the very object of the Act which aims at protecting the weaker sex in Indian society from all sorts of exploitation and abuse. If such a restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman in relation to marriages. India, being a signatory to the UN Convention to Protect the Dignity of Women, should respect the rights of all women regardless of whether the woman in question is in a marital or live-in relationship. The man should not be allowed to benefit from the legal loopholes by enjoying the advantages of a *de facto* marriage without undertaking the duties and obligations[5] that come with it. A man shies away from his duties and responsibilities by indulging in a live-in relationship with another woman and there is no law which makes live-in relationships illegal, as was stated in *Payal Sharma v. Superintendent, Nari Niketan*[6]. It is ironical that when the rights of a woman in such relationships are violated or when she is abused in her shared household, the law turns a blind eye to her. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.[7]In another recent division bench decision comprising of

[5]*Chanmuniya v. Virendra Kumar Singh Kushwaha* , (2011) 1 SCC 141
[6] AIR 2001 All. 254
[7]*Mohinder Pal v. State of HP* , 15 (36) FB

J. Singhvi and J. Ganguly in 7 October 2010[8] it was summed up that:

"*Most significantly, the Act gives a very wide interpretation to the term `domestic relationship' as to take it outside the confines of a marital relationship, and even includes live-in relationships in the nature of marriage within the definition of `domestic relationship' under Section 2(f) of the Act. Therefore, women in live-in relationships are also entitled to all the reliefs given in the said Act*."

None of these judgments define in precise terms what a live-in relationship is. In the present Indian scenario, live-in relationships are a reality in urban cosmopolitan environment. Through this decision, Supreme Court has denied justice to thousands of women who had indulged in such relationships and has turned a blind eye to their miseries and grievances. Interestingly, the learned judge in the *Velusamy case*[9]has also cited Wikipedia for the definition of common law marriage. In *M/S. Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow*[10], the Hon'ble Supreme Court has commented that Wikipedia as all other external aids to construction like dictionaries etc. are not authentic sources. Citation of an inherently unstable source such as Wikipedia can undermine the foundation, not only of the present judicial opinions, but also of the future decisions and opinions which in turn, use that judicial opinion as an authority. It is to be understood that the public is not yet prepared to accept Wikipedia as a conclusive authority and judges should not cite it for legal terms. In India, common law marriage is not an established norm and hence such a term need not be explored as it has no relevance. The judgment was in the eye of the storm by women's groups for referring to women with derogatory terms like "keep" and "one night stand".

[8] *Supra n. 4*
[9] (2010) 10 SCC 469
[10] 2008 8 SCC 369

In *Mohabbat Ali Khan v. Muhammad Ibrahim Khan and Ors*[11]the Privy Council has laid down that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years. Furthermore in *Madan Mohan Singh and Ors v. Rajni Kant and Anr*[12]it was held that "live-in relationship if continued for such a long time, cannot be termed as "walk in and walk out" relationship and there is a presumption of marriage between them". Thus, a long term cohabitation should be the litmus test for the nature of marriage.

Several factors were considered in arriving at a conclusion on whether or not a relationship can be deemed to be a relationship in the nature of marriage between the parties, in a catena of foreign as well as Indian decisions such as *Ethel Robinson Women's Legal Centre Trust v. Richard Gordon Volkasetc*[13], *Badri Prasad v. Dy. Director of Consolidation*[14], *Sumitra Devi v. Bhikan Choudhuri*[15] which are to be analyzed and applied on a case by case basis. The Committee on Reforms of Criminal Justice System, headed by Dr. Justice V.S. Malimath, in its report of 2003 opined that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties. In *S.P.S. Balasubramanyam v. Suruttayan Andali Padayachi & Ors*[16], the Court held that if a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate. Moreover, in *Bharatha Matha & Anr v. R. Vijaya Ranganathan & Ors.*[17], it has been asserted by the court that a presumption of marriage could be drawn in a live-in relationship

[11]AIR 1929 PC 135
[12](2010)9 SCC 209
[13]Case no 7178/03, in the High Court of South Africa, Cape Province Division.
[14]AIR 1978 SC 1557
[15](1985) 1 SCC 637
[16]AIR 1992 SC 756
[17]C.A No. 7108 of 2003; decided on 17-5-2010

and the children born out of live-in relationship were entitled to inherit the property of the male partner.

The law simply aims at providing protection from violence to all women whether they are sisters, mothers, wives or partners living together in a shared household. To the extent of providing protection, the law should not differentiate between married and unmarried women. The law, however, does not state anywhere that an invalid marriage is valid. It provides protection from violence, the right to reside in the shared household, temporary custody of children, etc. With this background the recent judgment of the Supreme Court which has narrowly interpreted the benefits arising out of the Domestic Violence Act in the absence of precise statutory interpretation shook the conscience of law abiders and protectors. The judgment in *Vineeta Devi v. Bablu Thakur and the State of Jharkhand*[18] throws light on the fact that, ever since the enactment of the legislation in 2005, none of the judgments given by the courts in India were able to come out with an inclusive definition on the nature of marriage. It was given that, "the Bench of the Apex Court referred the matter before the Chief Justice to be decided by the Larger Bench formulating certain questions and the final verdict of the Larger Bench of the Apex Court is yet to come on the interpretation of 'live-in' relationship." Even when the position of live-in relationships remained unattended, the court came up with a very narrow conclusion that: "No evidence could be adduced in support of valid marriage between the parties and that the concept of 'live-in' relationship in the background of Indian culture and society, sanction of such relationship is yet to be interpreted by the Larger Bench of the Apex Court. In view of that matter, the statutory provision, by which "wife" has been defined in terms of Section 125 of the Code of Criminal Procedure, cannot be liberalized. The statute sanctions that an illegitimate child from the father is entitled for maintenance but such sanction of maintenance has not been provided under law in respect to a woman not lawfully married with a person."

[18] Cr. Rev. No. 444 of 200

Live-in relationships have evolved to be a social reality in cosmopolitan societies whether it is accepted or not. The purpose of this welfare legislation will only bear fruit if the protection of this newly emerged class of women is adequately addressed. Our land boasts of a rich heritage of worshipping women as goddesses and in this same country, denying justice to the same women. This is an embarrassment to our culture. Thus, it is high time that the legislators come up with an amendment to the Domestic Violence Act 2005, specifically addressing the criteria for nature of marriage. However, for succession to the property of a male partner or in deciding the legitimacy of children, the general law of the land or the personal laws of the parties will have to be relied upon.

The Incongruity in the Age of Marriage among Various Legislations of the Country

Srinidhi Ganeshan[1]

Abstract

There are various personal laws and uniform laws in India which govern marriage and the minimum age of marriage. These legislations display a discrepancy, among themselves, in the minimum age for marriage, with some having ridiculously low ages as the legal age. Even the specified ages are rendered as mere advice as they can be flouted with impunity. There is a huge chasm between the minimum legal age of marriage, and the age for which the marriage is rendered illegal, and its proprietors punished. Thus, a new uniform legislation regarding the minimum age of marriage needs to be implemented whose breach shall be strictly punishable, and which shall override all the existing uniform and personal laws on the subject.

Introduction

Child Marriage has for centuries been a much debated topic all across the world, more so in our country. Efforts have been made throughout by enlightened individuals to rid the country of this evil. With a view to do the same, a plethora of laws, both personal and uniform were enacted over the past century. While the intention of these laws was noble, their effect was weak. Fearing political and social backlash, the various statutes propagated certain laws which just stated that child marriage was illegal, but had no provisions to implement the same. That is, such

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marriages were not supposed to happen as per law, but once they were solemnized, no law had the power to declare them void. Thus**,** there was no punishment for the effective implementation of the provisions. The very idea of punishment is to serve as a reformation for the culprit and as a deterrent for others. When this basic necessity to obey the law was absent, so was the need for people to obey the same. Some acts did have provisions for awarding punishment, but the complaint had to come from the affected party, which happened rarely, as it cannot be expected of a child bride to go against her whole family. Certain laws also had provisions for the minor to rescind the marriage on attaining majority etc. but these too would be useful only to those who were aware of it and had social support to go through with it.

This article aims at a critical analysis of the concept of child marriage, with respect to the concept of 'Age of Marriage' prescribed by the various personal laws, uniform laws and penal laws present in the country. This article has not dwelt on the medical, social complications arising in the child due to an under-age marriage, as the author feels that that area has been sufficiently explored by many others.

Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006 (PCMA), hereinafter referred to as the Act, came into force in November, 2007, and replaced the Child Marriage Restraint Act, 1929.[2]

Age of Marriage

Section 2 of the Act- Definitions : (a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

[2]Section 21 of Prohibition of Child Marriage Act- .Repeal and savings. - (1) The Child Marriage Restraint Act, 1929 is hereby repealed.

This Act thus regards any marriage in which the bride is below 18 years of age, and/or the groom is below the age of 21 years to be a 'child marriage'.

Validity of Child Marriage

Section 3(1) of this Act makes all child marriages voidable at the instance of the party who was a child when the marriage was solemnized.[3] This petition for annulment of the marriage can only be filed by a party to the marriage[4], who was a child during the marriage, i.e. none but the affected party can file for annulment.

But section 3(2) states that if at the time of filing the petition the party is still a minor i.e. a girl below 18 or a groom below 21 years of age, then their petition can be filed by a parent or a friend along with the Child Marriage Prohibition Officer.[5]

Time of Filing of Petition

Section 3(3) of the Act allows for the petition to be filed only till within two years of the contracting party attaining majority.[6]

[3]Child marriages to be voidable at the option of contracting party being a child.
(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.
(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.
(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

[4] Section 2 (c) "contracting party", in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnized.

[5]*Supra* note 2

[6]*Ibid*

This means that a female can repudiate the marriage till the time she attains the age of 20, while a male can do so till he attains the age of 23, as the ages of majority of females and males are 18 and 21 respectively.

Punishment for Violation of the Provisions of the Act:

This Act seeks to punish three classes of people for the **occurrence** of Child Marriage -

1. A male adult marrying a child.[7]

2. Solemnizer of the marriage.[8]

3. Promoter or Permitter of Child Marriages.[9]

Male Adult Marrying a Child

[7] Section 9- Punishment for male adult marrying a child.- Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

[8] Section 10- Punishment for solemnising a child marriage.- Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

[9] Section 11- Punishment for promoting or permitting solemnisation of child marriages –
(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment.
(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised.

Section 9 of the Act clearly states that if a male 'adult' i.e. a person above the age of 18 years contracts a child marriage, he shall be punishable with rigorous imprisonment which may extend to 2 years and/or a fine of up to 1 lakh rupees.[10] There is no reason as to why the same should not apply to adult females marrying a child male. (no authority to prove the same sounds unnecessary)

An inherent flaw in this provision is that this section regards a male above 18 years of age to be an adult, while section 2 of the Act classifies a male below 21 years of age to be a child[11].

Solemnizer Of The Marriage

Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.[12]

Promoter or Permitter of Child Marriages

Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment.[13]

[10] *Supra* note 6
[11] Section 2. Definitions.- In this Act, unless the context otherwise requires,- (a)"child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;
[12] Section 10
[13] Section 11(1)

It therefore appears that, this section, by not making 'knowledge of the marriage being a child marriage' an essential for conviction, seeks to unfairly punish people.

Moreover, by excluding women from imprisonment, the provision is -

- Being derogatory to women, by not considering them as equal to men;
- Suffering from the archaic notions of women being incapable of commission of such crimes;
- Unequivocally articulating the legislature's lack of commitment for prohibiting of child marriages.

The third point is of utmost importance as this loophole can very well be exploited by women and their family- who may blame any woman entirely, for the marriage, and thus escape punishment.

It shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised.[14]

This section fails to foresee circumstances in which the minor child runs away and gets married without the parent's knowledge. It is rather insensitive to hold the guardians guilty in such a case, for as they would already be grief-ridden.

Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 (HMA), applies to a marriage between two Hindus, Jains, Buddhists and Sikhs.[15]

[14] Section 11(2)

[15] Section 2, Hindu Marriage Act, 1954- Application of Act.- (1) This Act applies
(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or AryaSamam.
(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

Section 5 of the Act talks about the necessary conditions for a valid marriage under this Act, and sub-section (iii)[16] states that minimum age of marriage for the girl is 18 years and for the boy is 21years.[17] But it is pertinent to note that even though the respective ages have been given under the necessary conditions of a valid marriage, breach of this requisite neither renders the marriage void nor voidable.[18] Even judicial decisions have over the years held that marriage in contravention of the ages specified in the Act will not render it void or voidable.[19] In *V Mallikarjunaiah v HC Gowramma*[20], the Court observed that having a

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.
Explanation.-The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-
(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.
(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

[16]Section 5(iii), Hindu Marriage Act, 1955.

[17]*Ibid*, 5(iii) 'the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage'

[18]Section 11, 12 of Hindu Marriage Act, 1954.

[19]P Venkataramana v State of Andhra Pradesh, AIR 1977, AP 43 (FB); V Mallikarjunaiah v HC Gowramma, AIR 1997 Kant 77; Gajar Narain v. Kanbi Parbat, AIR 1997 Guj 185; Ravi Kumar v. State, (2005) DLT 124; National Commission for Women v Govt of NCT, Cr Misc Petition No 2735 of 2006, order dated 27 March 2006.

[20] AIR 1997 Kant 77

regard as to the strata in which such marriages take place, the legislature did not want the women in the marriages to end up destitute or virtually unmarried and in such situation (that is when the marriage is violative of the age requirements) the only security that the woman/girl has is in the marriage, and that is why this clause was excluded from the purview of section 11 and 12 for if the marriage could be easily undone, it would result in disastrous social consequences.

This observation of the court, while giving sufficient consideration to the widespread social reaction towards women and children of void/voidable marriages, fails to recognize the implication of premature marriages on the mental, physical, and psychological health of young children. But the court did state that in order to prevent such marriages in the first place harsher penalties have to be given to those who are responsible for such marriages.

The general view of all the courts in such cases has been that such marriages should not take place, but once taken place, they should not be easy to dissolve.

Even without the above judicial decisions, the intention of the legislature, regarding the validity of such marriages, is very clear through the language of section 13(2) (iv) of the Act[21], which states that the wife can file for divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years, if she has repudiated the marriage after attaining that age but before attaining the age of 18 years.[22]

Presenting of the petition by the appellant in itself amounts to repudiation of marriage, especially since no other way of repudiation is given in the

[21] Section 13 (2)(iv)- A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining the age but before attaining the age of eighteen years.

[22] Luxmi Devi v. Ajit Singh, 1995 (2) HLR 299 (P&H); Reena Devi v. Mohinder Singh, 2001 (2) HLR 343 (P&H).

statute.[23] It is sufficient if she repudiates the marriage before the completion of 18 years and it is not necessary that she should file a petition under section 13(2)(iv) before that date. She could file it even after that date.[24] Where the wife refused to go to her husband's house before attaining the age of 18 years, it was held that it amounted to repudiation of marriage by conduct.[25]

Through this section it is clear that the legislature never intended to declare such pre-mature marriages as void or voidable, and the absence of this clause from Section 11, 12 was intentional.

Moreover, it is shocking to note that the legislature has provided no refuge in this Act for the children married between the ages of 15-18 and even the one provided to the girls below 15 years of age extends only till they attain majority, especially when this very Act says that the girl has to be *above 18 years* i.e. a major, to get married. Also, even the minute reprieve provided to the girls has not been provided to male children.

These lacunae are somewhat tackled by *Prohibition of Child Marriage Act, 2006*[26], which states that all marriages which were conducted when the girl was below 18 years of age and/or the boy was below 21 years of age are voidable at the instance of the party who was a minor at the time of the marriage, provided they file the petition before the expiry of 2 years after they attain majority.

Punishment for the Offence

The Hindu Marriage Act, through section 18(a) seeks to punish only a party to the marriage, rather than anyone else.[27] This section clearly states

[23]Indira v. Balbir Singh, 1995 (2) HLR 102 (P&H).
[24]Kamlesh v. Chamel Singh, (1986) 2 HLR 464 (P&H)
[25]Seethat Das v. Bijay Kumari, (1988) 2 HLR 359 (P&H)
[26] Section 3
[27] Section 18- Punishment for contravention of certain other conditions for a Hindu Marriage:- Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the condition specified in clauses (iii), (iv) and (v) of section 5 shall be punishable-

that whoever 'procures' a marriage of himself/herself in contravention of the age requirements given in clause 5(iii)[28] will be punished with up to two years rigorous imprisonment or/and a fine of up to rupees one lakh.

The expression 'procures' need not be understood in a restricted sense as the person (bride or bridegroom) who initiates the proposal for the marriage.[29] Both spouses are punishable under the section except in the case of a minor spouse, as a minor cannot be said to 'procure' a marriage which pre-supposes a conscious act.[30]

Thus, if a boy below 21 years of age and a girl below 18 years of age get married, then neither of them can be punished under this section. Also, no one else, i.e. their parents, priest etc. will be punishable under the Hindu Marriage Act. This section applies only when at the time of the marriage, one spouse is a child and the other not.

This clause of the Hindu Marriage Act is in contrast with section 9 of the Prohibition of Child Marriage Act, 2006, which prescribes the same quantum of punishment as the one under section 18(a) of the Hindu Marriage Act, but under the former act this punishment can only be given to an adult male (above 18 years of age) who marries a child bride (below 18 years of age)[31], while in the latter act, even an adult female can be punished.

Here, the scope of HMA seems much wider and liberal compared to the narrow scope of PCMA. A child is a child, whether male or female, if an adult male can marry a minor female, then even an adult female can

(a) in the case of contravention of the condition specified in clause (iii) of section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both.

[28] *Supra n.* 16

[29] JUSTICE RANGANATH MISHRA, *MAYNEE'S HINDU LAW & USAGE* 335 (2006, 15th Edn)

[30] *Ibid* pp. 335, 336

[31] Section 9, Prohibition of Child Marriage Act-. Punishment for male adult marrying a child.- Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

marry a minor male, though cases of the same might be comparatively rare, the possibility still exists. The PCMA completely disregards this possibility.

HMA does not prescribe any punishment for anyone else involved in such marriages. The PCMA, as already discussed, does punish others also.[32]

The effectiveness of the punishment clauses in both the above mentioned acts is rendered almost useless by the fact that only an affected party can file a petition under these clauses. These acts should be made a crime, where the police can take voluntary action, or any citizen can file a complaint. This provision deals with the premature ending of a child's childhood, hence it is no less heinous than a crime like murder.

Mohammedan Law

Juristically, marriage (*nikah*) in Islam is considered a contract and not a sacrament.[33] Religiously, it is recognized as the basis of society, a means to continue the human race, which as an institution leads to the uplift of man.[34] It is a contract, but it is also a sacred covenant[35], hence, the saying **-** marriage partakes of the nature both of *ibada* (worship) and *muamala* (worldly affairs).[36]

Role of Age in Marriage

Every Mohammedan of sound mind, who has attained puberty, may enter into the contract of marriage.[37] Once they have attained puberty, parental consent is not required.[38]

[32] Refer Chapter 2
[33] ASAF A.A. FYZEE, OUTLINES OF MOHAMMEDAN LAW(2005, 4th Edn)
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] M. HIDAYATULLAH & A. HIDAYATULLAH *MULLA,* PRINCIPLES OF MOHAMMEDAN LAW (1990,19th Edn)

Generally, puberty is presumed by the age of 15 years.[39] In Muslim law, majority is said to be achieved when the girl/boy attains puberty. This presumption of 15 years (and sometimes even lesser, if puberty is earlier) is an appalling practice which in reality not only leads to extreme medical complications in the life of the minor, but also steals away their childhood from them.

A marriage of a Mohammedan who has attained puberty is void if it is brought about without his consent.[40] If a girl/boy has not attained puberty, they can be contracted in marriage by their guardian.[41]

Dissolution of This Marriage

The Dissolution of Muslim Marriages Act, 1939 (DMMA) states that a girl, who has been married by her guardian before she attained the age of 15 years, can rescind her marriage up till the age of 18 years provided that the marriage has not been consummated.[42]

Consummation of the marriage during minority would not destroy this right. The assent should come after puberty, as before that the minor is considered incompetent to contract. Nor should the consummation have taken place without her consent.[43]

Under the customary law, and in practice, this option is called the 'Option of Puberty' or '*khyar-ul-bulugh'*, and it is extended to even the males.[44] Under this law, the girl loses this right if on attaining puberty, and on being informed of this right to repudiate, she still doesn't repudiate

[38]Md. Idris v. State of Bihar, 1980 Cri L.J. 764.
[39]*Supra n*. 36
[40]*Ibid*
[41]*Ibid* at p. 253
[42] Section 2.Grounds for decree for dissolution of marriage.-A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely –
(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated
[43]Lakina v. FalakSha Allah Baksh, AIR 1950 Lah 45.
[44]*Supran.* 40 pp. 234, 235

without unreasonable delay.[45] But, in the case of a male, this right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.[46] Filing a suit for dissolution, should be considered as repudiation.[47]

Here, an anomaly is observed between the customary law and the statutory law. DMMA gives an age limit (18 years) for the exercise of the option while the customary law adopts a more practical view, takes into consideration the fact that many women might not even be aware of this right and thus imposes no such limit and uses a subjective time frame for the exercise of this right. Also a similar right is not extended to the male under DMMA while it is made available to them under the customary law, which again is the more liberal of the two views.

Under the *Shia* law, a marriage of a minor brought about by anyone other than the father or paternal grandfather is wholly ineffective until it is ratified by the minor on attaining puberty.[48]

Repudiation

After repudiation, until a decree has been obtained from the court, the marriage continues to subsist.[49] The Calcutta High Court has held that no order of the court is necessary, unless **a** Judicial Seal on the act is necessary, and the Madhya Pradesh High Court has upheld the Calcutta view.[50]

Since it is highly subjective as to what amounts to repudiation, it's safe to reinforce the same with a judicial decree.

[45] Abdul Khasen v. Jamila Khatun Bibi, (1940) Cal. 401. 44 C.W.N. 352, 188 I.C. 490
[46] *Supra n.* 43 at p.235
[47] Mulka Jehan v. Mohamed (1873) LR. I.A. Sup. Vol. 192, 26 W.R. 26.
[48] Badal Aurat v. Queen-Empress (1891) 19 Cal. 79.
[49] *Supra n.* 45 at p. 235
[50] Mafizuddin Mandal v. Rahima Bibi (1933) 58 Cal. L.J. 73; Pirmohomed v. State of M.P., (1960) A.M.P. 24.

Christian Personal Law

The law relating to marriages in Christian Personal law is governed by the Indian Christian Marriage Act, 1872 (ICMA) and the Indian Divorce Act, 1869 (IDA). While the former deals with the solemnization of Christian marriages, the latter deals with the dissolution of the same.

Who is a Christian? Who can get married under ICMA?

Section 3 of the Indian Christian marriage Act, 1872 (ICMA) states that

- the expression "**Christians**" means persons professing the Christian religion;
- and the expression "**Indian Christians**" includes the Christian descendants of natives of India converted to Christianity, as well as such converts;

Thus the word Christians also includes Indian Christians.

In order to get married under the ICMA, it is mandatory for at least one person out of the couple to be a Christian.[51] That is even if both the parties are not Christians, they can get married under ICMA as long as one of them is. This provision is unique to this Act**.**

Procedures to Get Married Under ICMA

In order for anyone to get married under the ICMA, they have to have obtained a valid certificate. Christians can get married under the various methods prescribed in the Act. But Part VI of the Act is applicable only to Indian Christians.

[51]Section 4. Marriages to be solemnized according to Act—
Every marriage between persons, one or both of whom is or are a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Part III, Section 12 states that a notice of intended marriage is required to be provided by the parties to the marriage, if the marriage is to be solemnized by a Minister of Religion.[52] This part also states that where one or both the parties getting married is a minor, then parental consent of the minor is required to get a certificate.[53]

Minor is defined by the Act as being a person who is below 21 years and is not a widow/widower.[54]

Where the marriage of a girl above 18 yrs but below 21 and belonging to Roman Catholic Church is solemnized by a minister belonging to the Roman Catholic Church, the marriage does not become null and void on the ground that the consent of the girl's parents is not taken. This section

[52]12. Notice of intended marriage.—Whenever a marriage is intended to the solemnized by a Minister of Religion licensed to solemnize marriages under this Act — one of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—
(a) the name and surname, and the profession or condition, of each of the persons intending marriage;
(b) the dwelling-place of each of them;
(c) the time during which each has dwelt there; and
(d) the church or private dwelling in which the marriage is to be solemnized:
Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

[53]Section 19. Consent of father, or guardian or mother.—
The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorised to give such consent be resident in India.
Section 20. Power to prohibit by notice issue of certificate—
Every person whose consent to a marriage is required under section 19, is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorized with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

[54] Section 3- "minor" means a person who has not completed the age of twenty-one years and who is not a widower or a widow;

does not apply in such a case where the marriage is solemnized by a person mentioned in sub-section (1) of section 5, the section only applies when the marriages are solemnized by ministers of religion licensed under the act.[55]

The Act does not prescribe any minimum age below which even with parental consent the minor cannot get married. In our country, where child marriages are the norm in rural areas, and are usually brought about by the child's parents, this Act fails to serve an effective purpose by giving the deciding power to the parents. This power should have been vested in a neutral authority, like a Judge/Magistrate.

Section 60(1) ICMA states that one of the conditions for the certification of a marriage of Indian Christians, where the marriage is conducted without the requirement of a notice under Part III of the ICMA, is that the age of the groom should not be less than 21 years while that of the bride should not be less than 18 years.[56]

- This age limit is not applicable to non-Indian Christians * as they are not governed by this part (Part VI) of the Act.
- This age limit is not in conformity with the definition of 'minors', as here the ages for boy and girl are different. If an Indian Christian below the prescribed age limit wants to get

[55] *Lakshmi Sanyal v. S.K. Dhar*, AIR 1972 SC 2667

[56] Section 60- On what conditions marriages of Indian Christians may be certified—

Every marriage between Indian Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise:

(1) the age of the man intending to be married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen years;

(2) neither of the persons intending to be married shall have a wife or husband still living;

(3) in the presence of a person licensed under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

"I call upon these persons here present to witness that, I, A.B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C.D., to be any lawful wedded wife or husband" or words to the like effect"

married, he/she can still do so by following the provisions in Part III which are applicable to all Christians.

- The Act also offers no clarity on the laws applicable if an Indian Christian marries a non-Indian Christian and whether Part VI will be followed or not.

The presence of all these anomalies within the Act and the absence of a uniform law applicable to all Christians render the act complicated, perplexing and ineffective against child marriage.

Punishment

The penalty for the non-compliance of the procedures prescribed in the Act for the solemnizing of Christian marriages is given in Part VII of the Act (Sections 66-76).

The Parsi Marriage And Divorce Act, 1936

The Parsi Marriage and Divorce Act, 1936 (PMDA) came into force on the 22nd June, 1936. The Parsis are the group of people who came and settled down in India from Persia. The PMDA defines Parsis as "a Parsi Zoroastrian".[57]

Age of Marriage

Section 3 of PMDA clearly states that for a valid Parsi Marriage, among other things, the groom has to have completed the age of 21 years while the bride has to have completed the age of 18 years when the marriage is solemnized.[58]

[57] Section 2(7)- a " Parsi " means a Parsi Zoroastrian
[58] Section 3.Requisites to validity of Parsi marriages.

A Parsi marriage in violation of the given age condition, is null and void.[59]

Certificate and Registry of Marriage

The PMDA makes it mandatory for the officiating of the Parsi marriage to certify the marriage, with the signatures of himself, bride, groom, and two witnesses, and to send the certificate to the Registrar of the place of solemnization of the marriage.[60] The Registrar is then supposed to enter the certificate in a register kept by him for that purpose.[61]

Every Registrar is supposed to, at regular intervals, send a copy of all the certificates which he has received, since the last interval, to the Registrar-General of Births, Deaths and Marriages.[62]

1*[(1) No marriage shall be valid if- 1. the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule 1; or
2. such marriage is not solemnized according to the Parsi form of ceremony called " Ashirvad " by a priest in the presence of two Parsi witnesses other than such priest ; or

2*[(c) in the case of any parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.]

3*[(2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section (1) any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.]

[59] JUSTICE S.K. DESAI, PROF. R.C. NAGPAL, KUMUD DESAI- INDIAN LAW OF MARRIAGE & DIVORCE 330 (2004, 6th Edn,)

[60] Section 6- Certificate and registry of marriage

Every marriage contracted under this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in Schedule II. The certificate shall be signed by the said priest, the contracting parties 1*** and two witnesses present at the marriage; and the said priest shall thereupon send such certificate together with a fee of two rupees to be paid by the husband to the Registrar of the place at which such marriage is solemnized. The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for that purpose and shall be entitled to retain the fee.

[61] Ibid

[62] Section 9, PMDA- Copy of certificate to be sent to Registrar- General of Births, Deaths and Marriages-

On the failure to carry out their duties in an appropriate manner, the priest and the Registrar are liable to be punished with imprisonment as well as fine under the PMDA.[63]

The above provisions prescribe an efficient precaution manner for the conduct of a Parsi marriage. The punishments awarded also act as a safeguard against any marriages being conducted in violation of any of the provisions of the PMDA. This will ensure that no promoters of child-marriages take advantage of the Act.

But the rigidity of the act is somewhat reduced by the lenient provisions of section 17 which states that failure to wholly comply with the provisions of section 6 or the part/ wrong compliance of the same shall not render the marriage invalid.[64]

Special Marriage Act, 1954

This Act state that the minimum age for marriage is 18 years for females, and 21 years for males.[65] The contravention of the same renders the marriage void.[66]

Penal Law & Child Marriages

How effective the personal laws of a country are is dependent on the Criminal law of the Country on the same issue. If the Criminal law itself

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Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the State Government by which he was appointed from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by such State Government a true copy certified by him in such form as such State Government from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals.

[63]Sections 12 to 15 of the PMDA.

[64]Section 17- Formal irregularity not to invalidate marriage**.**

No marriage contracted under this Act shall be deemed to be invalid solely by reason of the fact that it was not certified under section 6, or that the certificate was not sent to the Registrar, or that the certificate was defective, irregular or incorrect.

[65] Section 4(c)

[66] Section 24(1)(i)

authorizes the act, then personal laws allowing the same is no shock or surprise. When it comes to child marriages, the Indian Penal Code (IPC) fails miserably.

Rape

Section 375 IPC deals with rape. This section states that sex with a girl below the age of 16 years of age, with or without her consent, is rape; but forceful sex with one's wife, if she is not below 15 years of age, is not rape![67] Through this provision, not only is the Penal law authorizing child marriage where the girl is below fifteen years of age, it is also legalizing forceful sex in marriages, even ones where the wife is below 15 years of age, when even consensual sex with a girl below 16 years of age is rape. Moreover, it is even more shameful that the state of Manipur has further reduced the age of wife to be thirteen from fifteen.

Section 376 lists out the punishment for rape. Its reprehensible provision states that if a husband rapes his wife and she isn't below 12 years of age, he will be punished with imprisonment for 2 years and/or fine; when the punishment for rape generally is an imprisonment of minimum 7 years

[67] 375. Rape.
A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -
First: - Against her will.
Secondly: -without her consent.
Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly: - With or without her consent, when she is under sixteen years of age.
Explanation: - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception: -Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

which may extend to 10 years/life and fine.[68] That is if the raped wife is between the ages of 12 and 15 years, the quantum of punishment awarded to the husband is less than 1/3rd of that awarded for other cases of rape. Moreover, while in the marital rape case the punishment is imprisonment OR fine, for other cases, its imprisonment AND fine. Not only is the quantum of imprisonment shamefully less, it is also replaceable with fine.

When the Penal law of the country itself

- Recognizes marriages where the bride is below 12 years of age;
- Awards no punishment for the rape of one's wife who is above 15 years of age;
- Prescribes appallingly less punishment for rape of wife between 12 and 15 years of age, as compared to rape of other women,

it is no wonder that no major personal law in the country adopts a stronger view towards the prevention of child marriage in the country.

Kidnapping

Section 361 of the IPC deals with the kidnapping of a minor, or a person of unsound mind, from his/her lawful guardian.[69] Here, minor is a girl below 18 years of age, or a boy below 16 years of age.[70]

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[68] 376. Punishment for rape.
(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:
Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years…

[69] Section 361. Kidnapping from lawful guardianship :
Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

In relation to the scope of this article, the role of kidnapping is limited to the question of a minor girl running away and getting married without her guardian's consent. Can the guardian of the girl accuse the groom of kidnapping their ward? The courts * answered this question in the negative, where the girl voluntarily, without any inducement, ran and got married.[71] This was observed by the Supreme Court in the case of *S. Varadarajan v. State of Madras*. In this case, despite the father sending the girl to some remote place, she rang the accused, met him at a particular place, and got a registered marriage done. Here the Supreme Court made a distinction between 'taking' (active persuasion) and 'allowing a minor to accompany a person'. There is no inducement in the latter. Thus the Supreme Court set aside the conviction of the accused.[72]

The same principle has been upheld by the court in the case of *Baldev Singh v. State of Punjab*.[73] Here the court held that it is not kidnapping when the girl herself leaves her home with ornaments, clothes etc. to meet the accused, with whom she was having an affair.

Thus the mindset of the court is clear; as long as the girl is not influenced by the accused, and is acting out of her own discretion, it is not kidnapping. While the approach of the court is credible, that no one should be punished for the voluntary actions of someone else, it is the subsequent acceptance, thereby encouragement, of minor marriages, that is disturbing.

Law Commission of India Report - 205, 2006

The Law Commission of India came out with a proposal in 2008 to amend the Prohibition of Child Marriage Act, 2006 and the other allied laws. The Report was called Report no 205. The report spoke about the

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Explanation: - The words "lawful guardian" in this section includes any person lawfully entrusted with the care of custody of such minor or other person…

[70] *Ibid.*

[71] S. Varadarajan v. State of Madras, AIR 1965 SC 942

[72] *Ibid*

[73] (1984) 1 Crimes 936.

position of child marriages in other countries, the effects of early marriage on the mental, physical, psychological health of a child especially a girl child, history of child marriages, age of sexual consent and the anomalies between various personal laws, the penal law of the country and PCMA.

The report suggested the following amendments to rid the Acts of the various evils:

i) That child marriage below a certain age, i.e. 16 years of age be made void. However, all the Sections relating to maintenance in Section 4 of the PCMA 2006 regarding maintenance to the female party to the marriage till her remarriage and the provisions relating to child custody and legitimacy of the children in Section 5 and 6 of the PCMA 2006 should be made applicable to cases of void marriages also.

ii) All marriages between 16 and 18 should be made voidable at the option of either party. The sections relating to maintenance, child custody, and legitimacy in Sections 4, 5 and 6 should be applicable to voidable marriages as they are at present. Consequently Section 3(1) and 3(3) of the PCMA 2006 should be amended to incorporate the changes outlined in paragraphs (i) and (ii) above and will read as under:-

"3(1) (i) Any marriage of a child below 16 years of age solemnized after the commencement of this Act will be null and void and may, on a petition be presented by either party thereto against the other party be so declared by a decree of nullity.

(ii) Every marriage of a child between the ages of 16 and 18, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage."

Section 3(3) should be amended to read as under:-

"(3) The petition under Section 3(1)(ii) may be filed at any time till the person contracting a child marriage attains 20 years of age."

iii) That the exception to the rape Section 375 of the Indian Penal Code be deleted. This would ensure that the age of consent for sexual intercourse for all girls, whether married or not, is 16. The 172nd Report of the Law Commission had recommended increasing the age of consent for all girls to 16.

iv)Registration of marriages within a stipulated period, of all the communities, viz. Hindu, Muslim, Christians, etc. should be made mandatory by the Government.

v) The age of marriage for both boys and girls should be 18 years as there is no scientific reason why this should be different. Consequently the present Section 2(a) of the PCMA should be deleted and replaced by the following Section 2(a):- "(a) 'child' means a person who has not completed 18 years of age."

vi) Other acts like the Hindu Marriage Act should also be amended to ensure that the provisions in the said acts are the same as and do not contradict the Prohibition of Child Marriage Act, 2006.

The recommendations of the Commission are therefore found to be commendable and much in need in the present society. The author's views on the topic will be discussed in the Conclusion of this article.

Conclusion

It is evident through the previous pages that there is no uniformity among the various laws present in the country, on the topic of the 'minimum age of marriage'. The PCMA is applicable to one and all, but it too is at loggerheads with various other laws, and it does not prescribe any concrete method to curb the menace of child marriage. Thus sufficient reform is much needed in all the above acts.

Here, it is important that we consider the age of marriages in certain developed countries.

- In Australia, the legal age of marriage is 18, marriage below which is void. But a person can apply to the court to get married once they have reached the age of 16.[74]
- In New-Zealand, the minimum age of marriage is 20, marriage below which is void. But a person between the ages of 16 and 20 can get married with parental consent.[75]
- In United Kingdom, marriage below the age of 18 is void.[76]
- In U.S.A. different states have different laws. The legal age of marriage under most of these laws is 18, below which is void.[77] But certain states like California allow a person above the age of 16 to get married with parental consent.[78]

After considering the above laws in developed countries, and recommendations of the law commission in the previous chapter, the following recommendations can be made-

a. Marriages below the age of 18 should be void ***ab initio***. However, all the Sections relating to maintenance in Section 4 of the PCMA 2006 regarding maintenance to the female party to the marriage till her remarriage and

[74] The Australia Marriage Act, 1961 with amendments up to act No. 46 of 2006, Part II, 11; www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/62C9133A12096F07CA25719C00335 accessed on 1st April 2010

[75] Marriage Act 1955 ,*Available at* www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=578134860&infobase=pal_statutes.nfo&jump=a1955-092&softpage=DOC accessed on 1st April 2010

[76] Marriage Act 1949, Halsbury's Laws of England, 4th Edn. Reissue, Vol.29(3) p.41

[77] Cornell University Law School, Legal Information Institute(LII), www.law.cornell.edu/topics/Table_Marriage.html accessed on 1st April 2010

[78] California Family Code, Section 301, www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=300-310 accessed on 1st April 2010

the provisions relating to child custody and legitimacy of the children in Section 5 and 6 of the PCMA 2006 should be made applicable to cases of void marriages also.

b. People above the age of 17 can get married with the consent of a Judge/Magistrate. Such marriages will be considered valid.
c. Violation of this law should be treated as a penal offence, where anyone can file a complaint, and not necessarily the affected party. Everyone involved in such marriages should be made punishable.
d. Marriageable age for boys and girls should be the same.
e. All provisions applicable should be gender neutral.
f. Married women should be treated on par with other women and a common penal law, especially regarding rape, should apply to them.
g. All personal laws, penal laws, uniform laws should be amended to the above effect and there should be no conflict among these laws, OR, PCMA should be amended and made the only governing law in this respect .

With the implementation of the above recommendations, there shall prevail no confusion as to the age of marriage and the validity of underage marriages, and the menace of Child Marriage shall be slowly curbed and soon abolished.

"From Inertia to Imperative Reforms" – Contemporary Perspectives in the Indian Electoral System

Shreyas Bhushan & Lakshmi Menon[1]

Abstract

Although the Background Paper on Electoral Reforms released by the Government does address certain crucial flaws in our electoral system and the corresponding changes that are imperative, certain themes were left unaddressed by it. This paper is our humble attempt to try and address such a vacuum. Here we suggest certain alternatives which we feel are pertinent to improving the contemporary Indian electoral system, by constantly drawing parallels from other jurisdictions. Among others, the merits of different methods for representation and vote computation are discussed to identify the most suitable system. This is followed by a comparison between the multi-party and a two-party system, vis-à-vis cultural diversity and political policy-unity, is in order. The need for minimum educational qualification of representatives and formal legislative training are also substantiated upon. Further, the responsibility of the electorate, the concept of neutral voting and the right to recall a representative shall be explored. Finally, recommendations and suggestions are summarized.

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SECTION – I

Introduction

The quality of any democracy may be judged by two factors, the people who run it and the way in which they are chosen to rule. Therefore, in the largest functional democracy of the world, a discussion on the electoral system, particularly on the quality of those elected, on the quality of representation, would not be out of place. The terms "will of the people" and "rule by the majority" which were once used to describe and define a democracy, today seem to be misnomers in the Indian context.

Methods of Representation

In this day and age, where equality and fairness seem to be the touchstone on which every decision is gauged, we are to undeniably focus on the different methods of representation and ascertain the best one which represents the actual will of the people. In this regard, first and foremost, it is to be noted that India follows the Single Winner Voting System, specifically the "first-past-the-post" method where each voter votes for one choice and the choice which receives the most votes wins, even if it receives less than a majority of votes. The question arises; in a country like India which is marked with diversity, is this the correct method to be followed?

It must be remembered that when elections were initially introduced in India, several factors such as a minimum competition among candidates, a large illiterate vote bank, lack of resources and experience prompted Indian policy makers to adopt the First Past the Post System of voting [FPTP] as the most suitable option. The limited number of candidates contesting from a limited number of established national parties ensured that votes were not unduly fragmented and the true holder of the majority mandate was generally elected winner. However, in the current scenario, the multiplicity of parties and subsequently, the increase in the number of contesting candidates, has proven the inadequacies of the FPTP system. Suppose there are 100 voters, eligible to cast one vote each and 10

contestants. Even if one of the candidates gets 11 votes, he will be declared the winner. This in turn means that the rest of the 89 votes are wasted or go without representation.

This major defect, coupled with many other factors, has prompted much debate within the academic and legal circles; this includes a Law Commission Report on the lines of rethinking a voting system for India. To find a perfect system that can cure all ills may not be possible. However, a system with the least number of defects may be chosen on a relative basis.

Thus, in this section of the paper, we explore various alternative systems of representation to the FPTP, in order to identify the one with the most number of advantages as far as the Indian Electoral System is concerned.

A. Single Winner System –

1. **Two Round System -** The two-round system (also known as the second ballot, runoff voting or ballotage) is a voting system used to elect a single winner where the voter casts a single vote for their chosen candidate. However, if no candidate receives the required number of votes (usually the absolute majority or 40-45% with a winning margin of 5-15%), then those candidates having less than a certain proportion of the votes, or all but the two candidates receiving the most votes, are eliminated, and a second round of voting occurs. The two round system is used around the world for the election of legislative bodies and directly elected presidents. For example, it is used in French presidential, legislative, and cantonal elections, and also to elect the presidents of Afghanistan, Brazil, Bulgaria, Chile, Colombia, Finland, Ghana, Guatemala, Indonesia, Liberia, Poland, Portugal, Romania, Serbia and many other countries.

An example with actual mathematical figures would afford a better understanding of the system – Imagine an election to choose the best

car of the year. There are 25 people to vote and four cars: Maruti, Hyundai, Honda and Skoda.

Round 1: In the first round of voting each person votes for the one car they most prefer. The results are as follows:

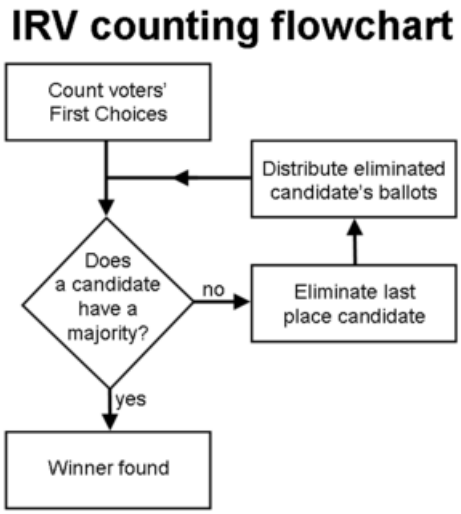
Maruti: 10 votes, Hyundai: 6 votes, Honda: 8 votes and Skoda: 1 vote

Round 2: No car has an absolute majority of votes (in this election that would be 13); so the two cars with the most votes, Maruti and Honda, proceed to a second round, while Hyundai and Skoda are eliminated. Because their favorite cars have been eliminated, Hyundai and Skoda supporters must now vote for one of the two remaining cars. The sole Skoda supporter is power conscious, so gives his vote to Honda. However, Hyundai supporters are split: 3 prefer Maruti and 3 votes for Honda. Of those who supported Maruti and Hyundai in the first round no-one decides to change their vote. The results of the second round are therefore:

Maruti: 13 & Hyundai: 12

Result: Maruti now has an absolute majority so is declared the winner.

2. Instant- Runoff Voting -Instant-runoff voting (IRV), also known as preferential voting, the alternative vote and ranked choice voting, is a voting system used to elect one winner. Voters rank candidates in order of preference, and their ballots are counted as one vote for their first choice candidate. If a candidate secures a majority of votes cast, that candidate wins. Otherwise, the candidate with the fewest votes is eliminated. A new round of counting takes place, with each ballot counted as one vote for the advancing candidate who is ranked highest on that ballot. This process continues until the winning candidate receives a majority of the vote against the remaining candidates. A graphical representation of the same may be studied for greater clarity on the working of the instant run off method –



Instant runoff voting is used to elect the President of India, members of legislative councils in India, The President of Ireland, the National Parliament of Papua New Guinea, and the House of Representatives of Fiji. It is also used in Irish by-elections and for electing hereditary peers for the British House of Lords. IRV is employed by several jurisdictions in the United States.

3. Borda Count - The Borda count is a single-winner election method in which voters rank candidates in order of preference. The Borda count determines the winner of an election by giving each candidate a certain number of points corresponding to the position in which he or she is ranked by each voter. Under the Borda count the voter ranks the list of candidates in order of preference. So, for example, the voter gives a '1' to their first preference, a '2' to their second preference, and so on. The number of points given to candidates for each ranking is determined by the number of candidates standing in the election. Votes can be counted by giving

each candidate a number of points equal to the number of candidates ranked lower than them, so that a candidate receives n – 1 points for a first preference, n – 2 for a second, and so on, with zero points for being ranked last (or left unranked). Another way to express this is that a candidate ranked in i^{th} place receives n – i points. For example, in a five-candidate election, the number of points assigned for the preferences expressed by a voter on a single ballot paper might be:

Ranking	Candidate	Formula	Points
1st	A	(*n* – 1)	**4**
2nd	B	(*n* – 2)	**3**
3rd	C	(*n* – 3)	**2**
4th	D	(*n* – 4)	**1**
5th	E	(*n* – 5)	**0**

- Advantages and disadvantages of the different systems -

Firstly, as regards the two-round system, in a country like India where most of the times, no candidate is able to enjoy even a simple majority mandate, the system definitely helps in choosing the absolute representative leader. However, one of the strongest criticisms/ practical limitation against the two-round voting system would be the cost/personnel required to pull two elections in a vast country like India. Further, the two-round voting system also has the potential to cause political instability between the

two rounds of voting, adding further to the economic impact of the two-round electoral system and thereby creating unrest and chaos amongst the public.

Secondly, as regards the IRV, without doubt, it aims at ensuring that the person who is elected has the true majority support. However, the complex counting process will have to be coupled with cutting edge technology. In fact, Pierce County, Washington election officials outlined one-time costs of $857,000 to implement IRV for its elections in 2008, covering software and equipment, voter education and testing. This definitely has to be taken into consideration.

Lastly, as regards the Borda Count method, neither does it need any expensive technology nor a high standard of voter education. However, this method might in fact lead to a situation where the absolutely preferred candidate might end up losing the elections, something which is in stark contrast to the "first past the post" method.

B. Multiple Winner Method – List System

Party-list proportional representation systems are a family of voting systems emphasizing proportional representation in elections in which multiple candidates are elected (e.g. elections to parliament). In these systems, parties make lists of candidates to be elected, and seats get allocated to each party in proportion to the number of votes the party receives. Voters may vote directly for the party, as in Israel, for candidates and that vote will pool to the party, as in Turkey and Brazil, or for a list of candidates, as in Hong Kong.

In most proportional systems, the parties each list their candidates according to that party's determination of priorities. In closed list systems, voters vote for a list of candidates, with the party choosing the order of candidates on the list [and thus, in effect, their probability of being elected]. Each party is allocated seats in proportion to the number of votes it receives, using the party-determined ranking order. In an open list, voters may vote, depending on the model, for one person, or for two,

or indicate their order of preference within the list – nevertheless the number of candidates elected from the list is determined by the number of votes the list receives. This system is used in many countries, including Finland (open list), Latvia (open list), Sweden (open list), Israel (where the whole country is one closed list constituency), Brazil (open list), the Netherlands (open list), Russia (closed list), South Africa (closed list) and Democratic Republic of the Congo (open list).

Pros and Cons -

The system no doubt more clearly represents the wishes of the voters' as expressed at the ballot box. Supporters of a small party are likely to be represented by at least one Member of Parliament rooted in their region and sharing their political views and convictions thereby also ensuring that minority parties end up with a much fairer representation. Further, if each vote counts, people will feel more inclined to involve themselves in elections.

However, in a diverse country like India where there are more political parties than cell-phone service providers, an obvious problem cannot be overseen, i.e., with such a number of parties, a majority for a single party becomes less probable. If the government must be based on too many small parties, they may disagree when new issues emerge. This may become a danger to political stability and cause anticipated elections absorbing the attention of politicians. If instability gets notorious in a country, the state as a whole will just not be able to perform the tasks it should. Further, small parties may also abuse their position to get support for special interests (for examples subsidies for institutions related to the party) in exchange for support for the government policy. This is nothing less than a form of corruption. Also, the list system generally demands more knowledge of party beliefs/manifestos etc and greater activity of the voters (for example, to rank candidates in order of preference such as in the single transferable vote system), and hence may discourage participation. The procedure may simply prove to be too complex for many voters. In conclusion, before adopting for a change in the voting system, careful thought and consideration must be given to the overall

conditions in India, political, economical and social, and a well-thought-out system must be adopted.

SECTION- II

Choosing A System – Multi Party System, Bi Party System or Independents -

The Indian sub-continent has been termed the largest functional democracy in the world and is known to follow the multi party system where the right to form political associations is not restricted and any person or a group of persons may declare themselves as a political party. However, in this part of the paper, we wish to explore the merits, demerits of the multi party system vis-à-vis the bi-party system or whether there must be a party system at all in the first place and suggest remedial measures to cure the defects if any.

Multi party and Bi party systems compared

It seems very odd that one should start with the proposition that democracy is good, and then proceed to the proposition that the party system is essential to work it, and then proceed to create parties. It is just the other way about in practice. Since, with freedom of thought is essential to democracy, some public policies do not receive universal assent, each of them divides the people into two groups: for and against. In view of the multiplicity of dividing issues it is not possible to form just two political parties, coherent and homogeneous. Many issues cut across one another and do not line up. Often, differences and criticisms within a party are greater than between parties. Some issues will have to be subordinated rigorously, if only two parties are to be permitted. It amounts to denial of freedom to some people and to some views, which is anti-democratic.

Freedom of speech and vote are essential to democracy. Under the party system, there is such freedom in the meetings of the party, which have, however, no constitutional status, whose proceedings are not public and whose decisions are not binding on the people. But in the duly constituted legislature, whose proceedings are public and whose decisions are

binding on the people, freedom of speech and vote is denied to the minority in the party, which has to toe the line of its majority in the legislature. Members who form even a bare majority in the ruling party but a minority in the legislature can have their way which is also anti-democratic.

Though the party system occurs in America under her presidential system, party discipline is not as rigid as in Britain or India under the parliamentary system, because the executive is not "responsible" to the legislature, and the defeat of a President's proposal does not involve his resignation or the dissolution of the Congress. The consequent stability permits greater freedom of speech and vote in the American Congress. It is, therefore, more democratic than the parliamentary system in Britain or India. Thus, our laws on Anti- Defection and the system of a party Whip dictating the will of all the other party members is definitely antithetical to democracy.

System of "Independents"

Under a different line of jurisprudence, it is argued by some that the party system is inconsistent with national interest. Democracy demands all for the nation and none for a party, but the party system demands each for his party and none for the nation.

It has been strongly alleged that the party system in India has been a handicap to good government. This is because most Ministers find it difficult to keep their slippery seats without humouring their party factions at public expense, and have little time to study public questions. India has self-government; she should now concentrate on good government. The party system is not the way to secure it.

As Sir Winston Churchill rightly pointed out first duty of a Member of Parliament was to do what, in his faithful and disinterested judgment, he believed right and necessary for the honour and safety of his country; his second was to his constituency; and only his third was to his party. This is hardly ever followed in practice.

The Swiss Federal Constitution seems to offer an example which India may well follow, with adaptations if necessary. It is a democracy which, in the opinion of very competent critics, is the most efficient in the world, and yet it is neither parliamentary nor presidential. It is collegiate or coalition democracy, opposed to party democracy. "The most interesting feature about the Swiss party system is the absence of strongly centralized parties on the American or the British model," said Prof. R. C. Ghosh of the Calcutta University.[2] Christopher Hughes remarked that the Swiss Confederation has never known the two-party system where government alternated with opposition. It has always a national government consisting of all parties.

Democracy is best served by "independents" who are elected for their individual character, competence, and experience and are free to speak and vote on the merits of each question in the elected bodies, national or municipal. This practice may be adopted in India with adaptations.

The Ultimate Choice

On a comparative analysis of all the three options, we would suggest that the present multi party system be allowed to continue in India with strong reforms. There must not be conditions imposed upon the formation of parties since this might hamper their right to free speech and expression, as well as their right to form associations under Art.19 of the Constitutions. However, a post incorporation audit of such parties formed must be performed on a yearly basis by the Election Commission. Only such parties who are politically active, do not violate the Model Code of Conduct in the elections, do not encourage persons with a criminal background to contest elections and perform regular financial audits must be allowed to stand. Also, such parties which promote religion based politics must be discarded. And finally, most importantly, Anti-Defection laws must be remodelled to allow a legislator to dissent freely without fear or favour.

[2] (The Government of the Swiss Republic, 1953, p. 128)

Other Reforms Suggested –

India should switch over to at least a partial proportional representation in Parliament. That would ensure stability, also a more genuine political representation. At least 20 % of the legislators should be elected indirectly from universities and other professional bodies to improve the quality of legislative work. The Constitution should be amended to permit the leader of the government to take Ministers on his Council from outside Parliament, as in Japan, without impairing the principle of collective responsibility to the legislature. The legislators, on nomination to the Council of Ministers, should resign from the houses to which they are elected, as in France, so that they do not waste their time and resources on politicking and pandering to local constituencies.[3]

SECTION – III

Minimum Educational Qualification of Representatives and Formal Legislative Training

A. The imperative need for Minimum Educational Qualification

Through this paper, it is our humble attempt to introduce the idea of a minimum educational qualification requirement for the contestants of elections, particularly national elections and the concept of formal legislative training to the elected candidates.

It may be evidenced from the working of the Parliament and the wide range of laws they are required to draft, that every member of the legislature is required to know a bare minimum concerning the subject as well as the essential procedures required for drafting. Only then will he or she be in a position to contribute effectively to the debate on the bill and suggest necessary changes. In law, there is a presumption favouring the collective wisdom of the Parliament and regarding the constitutionality of the Statues drafted by it. But here it may be pointed out that due to lack of

[3]NaniPalkhivala, *We are third rate, unfit to be a democracy*, THE REDIFF SPECIAL, 14/07/1998

expertise, several important pieces of legislation are only discussed for a matter of minutes, the details of which are filled into a ready-made frame or standard format and is passed without much ado, unless it is a politically sensitive question.

The intellectual exchanges and discourses in the Indian Parliament that used to be the hallmark of the past, from the time of the Constituent Assembly, are slowly deteriorating. Once known for his expert knowledge and astuteness, today, the Indian Parliamentarian is finding it tough to grapple with the enormity of the subjects he has to handle.

The primary reason we attribute to this is that members of Parliament, barring a few lawyers and other professionals, are by far not experts in core disciplines. It is not suggested that they be post doctoral holders, but a basic educational requirement must be prescribed to enable them to comprehend matters quickly and in the most accurate manner, in order to help them arrive at the right decisions. If not all members, there must at least be a specific percentage of persons selected for their academic brilliance say by nomination from Varsities or other public bodies.

B. Training Program for Legislators

As a measure to support the efficacy and efficiency of the process of law making and the law makers respectively, it is suggested here that one to three months rigorous training be imparted to the elected candidates in order to acquaint them with the functioning of the Parliament and their rights and duties as Parliamentarians. This training process may be provided by previous office bearers, retired or sitting judges, experts in parliamentary procedure, lawyers or any other competent persons. Even if it is argued that such a training program will consume time and will incur costs, its long term benefits are undeniably greater. As a measure of safeguard, probably those Parliamentarians who are re-elected and have undergone the procedure once may only be required to acquaint themselves with the changes in the law and avoid the repetitive parts of the sessions. Breaking up of the program into different levels, one for novices and the other for experienced members will help save time and effort.

SECTION- IV

Responsibility of the Electorate –

B. G. Deshmukh, former Cabinet Secretary and the Principal Secretary under Rajiv Gandhi's government, had once suggested that the discussion on electoral reforms should take into account the imperfections which the universal franchise imposed on India's democratic process. He explained: "*There is a theory that unless the electorate knows what are their responsibilities, they should not be given these rights,*[4]*"* Thus, as the elected are responsible to the electorate, the electorate too owes a responsibility to itself – this is essential to witness the functioning of a healthy democracy.

Such responsibility of the electorate is discussed in two specific contexts below – one, in their exercise of vote, the right to reject and two, in the audit of their elected representatives – the right to recall non-performing or representatives who abuse their mandate.

A. Right to Reject –

It is believed that only an informed voter can do justice to democracy. But when such a voter is not allowed to disagree with the choices put forth to him, not only him, his right to choose his representative, but the whole democratic system is at a loss.

The campaign that supported the right to reject has resurfaced in India with the Anna Hazare Movement against corruption and rekindled the debate on the issue. The system that presently governs elections to India's parliament and state assemblies does not have a mechanism to enable voters to reject all contesting candidates within an electoral constituency. The Election Commission first made this proposal in 2001. It also figured in the proposals made by the commission in regard to electoral reform in the year 2004 when Mr. T.S. Krishnamurthy was the Chief Election Commissioner (CEC).

[4] Interview, B G Deshmukh, REDIFF ON THE NET, 25/11/1999

The Real Implications of the Rule

Presently, one section of the population views the recently incorporated Rule 49 O under the Conduct of Election Rules, 1961 as the embodiment of the right to reject candidates in an election. However, a few clarifications on its true basis and functions are in order.

Prior to 1992, India voted physically, not electronically. So every single vote was accounted for on paper, given the fact that the voter was signed into the polling station physically and a ballot paper with the selected candidate was physically accepted from him/her. Today, India votes electronically.

In the present scenario, a voter is physically signed into the station but votes privately, by pressing a button on the EVM (Electronic Voting Machine). Also, every polling station has a specific number of registered voters. Thus, when there are X number of voters and in case a person does not vote, then there will be X-1 number of votes, leaving no trace of who did not vote. Logically this leaves us with a possibility that such "empty", unaccounted votes can be misused. It is for this reason that Rule 49-O exists. Via this rule, a voter is given an opportunity to sign a separate form (Form 17-A), and submit it to the presiding officer, thereby putting this decision on record. This clears up the haze when votes are being tallied. The implications of the rule were also explained in a petition filed by the People's Union for Civil Liberties.[5]

In short it is our argument that Rule 49-O of the Conduct of Elections Rules, 1961 prescribes procedure to be followed by election officials supervising a polling booth when a would-be voter whose identity has been confirmed and name ticked off the electoral roll refuses to cast a vote at the last moment. Since there would be a discrepancy between the electoral roll and the number of votes cast, Rule 49-O allows the

[5] *Peoples Union for Civil Liberties v. Union of India and Anr.,*Writ Petition (Civil) No.161 Of 2004

registration of a 'no vote'. This procedural allowance is not a neutral voting mechanism.

This position has been reaffirmed and all doubts regarding the same are put to rest by the Election Commission's Press Note issued in 2008[6]

Suggested Change and its Advantages -

The implications of permitting neutral voting in India are unclear. In a situation where a candidate is elected on the basis of a small fraction of positive votes cast by the voters of a constituency, the remaining majority of votes being rejections under a neutral voting mechanism, the democratic legitimacy of such a candidate would be questionable. Mandating a minimum amount of votes to be cast in favour of a winning candidate might result in representative offices lying vacant.

While countries like Russia allows voters to vote "against all" candidates, it would be too drastic to suggest a similar move in India. What we require is a specific provision allowing a "none of the above option" since a "no vote" can be for multiple other reasons rather than pointing out to lack of choice of competent candidates. Also a provision within the EVM or ballot paper which does not compromise the secrecy of the voter is required urgently since under the present scheme, a voter is required to register himself with his name and other details while exercising his right under 49 O.

The benefits of incorporating such a provision are briefly dealt with below.

Benefits of negative voting -

- Moral pressure on political parties

The Law Commission in its 170th report on Reform of Electoral Laws, while recommending the negative vote, explained its benefit: "The negative vote is intended to put moral pressure on political parties not to put forward candidates with undesirable record i.e., criminals, corrupt

[6]No.ECI/PN/35/2008

elements and persons with unsavoury background". However, it has been pointed out that such pressure would be more likely to work, if, the negative vote also carries weight in determining the outcome of an election. For example, the election rules could provide for a re-election in case 'None of the above' option receives more votes than any candidate, and also bar the original candidates from contesting again.

- Elimination of bogus voting

As mentioned earlier, the chances for a misuse in the instance that a voter does not vote are reduced drastically. Unlike a scenario where a person who is not satisfied with the candidates contesting a given election goes back without voting and there by his unaccounted vote could be misused to favour another, adding a "none of the above option" will reduce the incidence of bogus voting.

Criticisms against incorporating the right to neutral vote -

Critics say that it may be impractical to implement, that it is unlikely to change voting patterns, and hence unnecessary. Examples are cited of countries with the negative vote where it has not made a great difference. The State of Nevada in the United States has a 'None of these candidates' option in its ballots and votes gathered under this option are reported, though the 'first-past-the-post' candidate is always declared elected.

Other democracies around the world have considered various strategies and reforms to enhance participatory democracy. Reforms in the electoral system to include a 'right to recall' a sitting legislator or to mandate compulsory turnout need to be examined and considered if they do not violate the fundamental and civil rights of Indian citizens. This concept of right to recall is explored in the next section of this paper.

B. Right to Recall

The debate regarding the representative character of our politicians has led to activists such as Anna Hazare demanding the right to recall. The Chief Election Commissioner (CEC), Mr S. Y. Quraishi, has opposed the idea, on the ground that it cannot be implemented and that it could "de-

stabilise" the country in areas "where people already feel alienated". However it is argued that the demand also doesn't have basis for another reason — it could undermine the democratic rights of a number of individuals and communities in a pluralist society such as ours.

The practice of right to recall, or recall referendum, or representative recall exists in Switzerland, the US, the UK, Canada, Venezuela, among others, but there isn't enough evidence to suggest that it should be accepted as an inevitable character of democracies across the globe.

To better understand this concept we must understand the quality of representation first.

Quality of representation

Election simply means translating votes or converting citizens' will into members of a legislative body and further as heads of state. India accepted the First-Past-The-Post (FPTP) method of elections, where the winning candidate needs to get just one vote more than his nearest rival, irrespective of whether he gets 50 per cent of the votes cast plus one vote or not. This method was adopted on the grounds of being simple, and bringing about speedy outcomes. However, over the years it has been criticised for electing people to power despite their getting a small share of votes.

Implications of the Right

It is our humble opinion that the right to recall, though a noble idea, in its present form as articulated suffers from two serious drawbacks which are discussed below.

- Right to recall - Adverse impact on weaker sections

Applying the right to recall to the current Lok Sabha members on the condition of a minimum requirement of 50 per cent plus 1 vote would imply that almost all the MPs will end up being recalled at any point in time. This is because when votes are cast to recall a candidate, it would always be a bi-polar decision, since the recall ballot will offer only two options, 'yes' and 'no'. The option of 'recall' has already been tried out at

panchayat levels in the states of Punjab (1994), Bihar (2010), Madhya Pradesh (2000), Maharashtra and Chhattisgarh (2004), but it hasn't produced any good results.

On the contrary, experience tells that it has been primarily misused as a tool in the hands of the dominant castes against candidates belonging to the weaker sections, and women.

- Fear of instability and hampering of Efficiency

It is argued that if Anna's formula of right to recall becomes commonplace, it may add to the instability of governments, by empowering not those who win elections, but those who lose. With a society so deeply-embedded in castes, sub-castes, religions and sects, the idea of not waiting for five years for the next election and bringing in recall at the drop of a hat, would eventually amount to undermining the very essence of Indian democracy. Also, the efficiency of those in power may be seriously compromised by the fear of being cast away and it may lead to biased decisions taken only to retain the favour of those who threaten to recall that member.

Our Suggestions

What we recommend is that the right to recall be implemented at the lower rungs of democracy, as has already been done in a few Panchayat Systems. Once these pilot projects are operational, they may be perfected upon by experience. It would not be wise on the part of the legislators to directly incorporate such provisions at the highest level without studying its actual impact on the system. An expert Committee may also be empowered to look into the matter, study other jurisdictions which have such a model and then propose a formula for India with the necessary changes and adaptations, if at all they find the process viable. Most importantly, the electorate must be informed correctly of such a right and the conditions for invoking it must be stringent.

SECTION- V

Concluding Remarks and Recommendations

This paper was presented at a seminar on electoral reforms organized by the Centre for Parliamentary Studies and Law Reforms, NUALS and was well received. The suggestions and recommendations made by the authors were discussed at length and a general consensus was arrived at regarding them. The aim of this last section is to include in a summary manner the above mentioned suggestions and recommendations -

- On the point of a system of voting, it is our opinion that if it Single Winner Method or Multiple Winner Method, or any other system for that matter, it needs to be tailor-made to suit India's unique electoral requirements given its enormity and complexity. No system is cent percent perfect, but needs to be perfected from experience. Therefore, blindly adopting any one approach from another jurisdiction is not going to solve the problem.

- As far as the party system is concerned, we vote for the multi-party system to continue but with strong reforms in place, including a party audit, changes in the Anti- Defection law and the selection of experts

- We also recommend a minimum educational qualification criterion be imposed on those who wish to contest elections and a pre-legislative training program to be imparted to the elected candidates to ensure better efficiency of the law makers and the process of law making.

- Our view on the right to reject candidates is that the present Rule 49 O is insufficient as it is only a procedural allowance that has been granted and seriously compromises the secrecy of the ballot. We strongly moot for a "none of the above" option to be incorporated in the EVMs and that in case the number of such votes exceeds the number of votes actually cast, then the election must be conducted again, debarring all such people who stood for it previously.

- Finally, on the right to recall, we think given the enormity and complexity of the Indian electorate, it would be premature to include such a right at this point. In this age of coalition governments, such a right would only destabilize the system further. We suggest that such a right be piloted at the Panchayat or State levels, be perfected by experience and only then be incorporated, after being thoroughly studied by an Expert Body.

Lok Adalats in India: "Issues and Perspectives"

Dr. G.B. Patil[1]

ABSTRACT

The author seeks to trace the genesis of Lok Adalats and its importance in the Indian society. The organization, working and procedure of Lok Adalats have been discussed in general along with the plethora of advantages that trail this mechanism of dispute resolution. Suggestions have been put forth to cure the limitations faced so as to fulfill the need of bringing better delivery of justice.

Introduction:

Mahatma Gandhi, the father of the nation, has rightly said: "I had learnt the practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realised that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby — not even money certainly not my soul".[2]

[1]Reader and Principal ,K.L.E. Society's , G.K. Law College, Vidyanagar,

[2]GANDHI, M. K., THE LAW AND THE LAWYERS 258(Navjivan Trust, Ahmedabad, India, 1962, Reprint 2001)

Resolution of disputes is an essential characteristic for societal peace, amity, comity, harmony and easy access to justice.[3] Indian socio-economic conditions warrant highly motivated and sensitised legal service programmes as large population of consumers of justice (heart of the judicial anatomy) are either poor, ignorant, illiterate or backward and are at a disadvantageous position. The State, therefore, has a duty to secure that the operation of legal system promotes justice on the basis of equal opportunity. The Constitution of India has defined and declared the common goal for its citizens as — "to secure to all the citizens of India, justice, social, economic and political; liberty; equality and fraternity[4] ". The eternal value of constitutionalism is the rule of law which has three facets i.e. rule by law, rule under law and rule accordingly to law. How to secure to all citizens, the justice which the Constitution talks about, is a big question being faced by the judiciary today. As Lord Devlin famously quipped, "If our business methods were as antiquated as our legal methods we should be a bankrupt country[5]." It is aptly said in Magna Carta[6] - **"**We are moving towards a time when it will be impossible for the courts to cope up with the dockets. If something is not done, the result will be a production of line of justice that none of us would want to see."

[3]Jitendra N. Bhatt ,*Round Table Justice Through Lok-Adalat (Peoples' Court) – A Vibrant - Adr - In India* , (2002) 1 SCC (Jour) 11.

[4]*The Preamble of the Constitution of India*. M.P. JAIN, INDIAN CONSTITUTIONAL LAW 16 (5thed, vol.1, Nagpur: Wadhwa & Company, 2003)

[5] Quoted by Anil Divan, *Legal and Judicial Reform*, National Conference On Legal And Judicial Reforms - The Bird's Eye View On Balance Sheet And Projections, Federation of Indian Chambers of Commerce and Industry, Sep.6, 2002.

[6] The seven hundred years old clarion call of the Magna Carta- To no one will we sell, to no one will we refuse or delay the right to justice very pertinently embodies the principle of legal aid.

Any conflict is like cancer. The sooner it is resolved, the better for all the parties concerned and the society in general. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Hence, it is essential to resolve the dispute the moment it raises its head. The method to achieve this goal must be agreeable to both the parties and it should achieve the goal of resolving the dispute speedily. Peace is the sine qua non of development. Disputes and conflicts dissipate valuable time, effort and money of the society. It is of utmost importance that there should not be any conflict in the society. But, in a realistic sense, this is not possible. So, the next best solution is that any conflict which raises its head is nipped in the bud. With the judicial system in most of the countries being burdened with innumerable cases, any new case takes a long time to be decided. And till the time the final decision comes, there is a state of uncertainty, which makes any activity almost impossible. Commerce, business, development, administration, etc., all suffer of the long time taken in resolving disputes through litigation.

The Courts' dockets are overloaded and new cases are being filed every day. It is becoming humanly impossible to decide all these cases by the regular Courts in a speedy manner. It is a well known fact that justice delayed is, in effect, justice denied. This phrase is legitimate, what with over 3.5 crores pending suits in various courts and tribunals, some of which have been appealed and argued for more than 20 years[7] in the

[7].With so many years elapsing after a case is filed, the underlying circumstances and conditions of the dispute may change so as to leave the parties

country.[8] The huge backlog of cases only makes justice less accessible. The delay in the judicial system results in the loss of public confidence on the concept of justice. To ease the heavy burden on the courts, it would be in the fitness of things if the cases can be resolved by resorting to 'Alternative Dispute Resolution' Methods before they enter the portals of Courts. The accumulated frustration of the people desiring a quick disposal of their cases is the biggest reason for the people having responded with hope, excitement and zeal in holding Lok Adalats for ending pending disputes.[9] The common man has started looking upon legal system as a foe and not as a friend. For him, law is always taking something away. When we go to court, we know that we are going to win all or lose all. Whereas, when we go to any method of ADR or for informal settlement with different expectations, we know that we may not get all that we want, but we will not lose everything. Hence the need for fast and equitable dispute resolution is what has lead nations around the world to adopt various manifestations of alternative dispute resolution (ADR)[10], including India. Indeed, the emergence of ADR has become, what some label as a "global necessity", as judicial backlog proliferates[11].

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disinterested in the litigation, further increasing judicial delay and resulting in wasted resources.

[8]Chief Justice of India concerned over 3.5 crore pending court cases, Available at http://economictimes.indiatimes.com/News/Politics/Nation/Chief-Justice-of-India-concerned-over-3.5-crore-pending-court-cases/articleshow/4820440.cms

[9]SARFARAZ AHMED KHAN, LOK ADALATS - AN EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION MECHANISM 27 , (Aph Publishing Corporation,(2006))

[10] In California, for example, though ADR was introduced to civil trials only two decades ago, today 94% of cases are referred for settlement through ADR and 46% of such cases are settled without contest. The Northern District of California is one of ten federal district courts authorized by 28 U.S.C. §§ 651-658 to establish a mandatory, nonbinding court-annexed arbitration program. The result is that California has been able to decide civil cases within less than

Genesis of Lok Adalats:

Lok Adalats originated from the failure of the Indian legal system to provide fast, effective and affordable justice[12]. The entire mechanism of Lok Adalats is designed and evolved with the object of promoting justice. Justice has three connotations, namely, social, economic and political. The first two connotations are handled by the said mechanism. They not only give an opportunity to the parties to resolve disputes but such resolutions - are at the lowest possible cost , achieved amicably with the consent of the parties concerned. 'Access to Justice' means an ability to participate in the judicial process.[13] It is that human right which covers not only bare court entry but has many dimensions including the time consuming factor.[14]

India has a very strong history of ADR. ADR has been an integral part of our historical past like the *zero*. The evolution of the system can be traced back to the Vedic times. Since time immemorial, with minor variations, there have been instances of people's courts in several Indian villages, imparting justice to myriads of people with little or no access to formal courts. References to the Lok Adalat system were found in the classics of Kautilya, Gautama, Brihaspati and Yagnavalkya.

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two years from the date of filing, compared with decades in India. Since the enactment in 1990 of the Civil Justice Reform Act in the U.S., there has been tremendous growth in the creation of ADR programs.

[11]*Supra*, note.2.

[12]Girish Patel, *Crippling Lok Adalats*, India Together, Dec. 2007.

[13]Upendra Baxi, *Access, Development And Distributive Justice- Access Problems Of The Rural Population*, *JILI* Vol.18, July-Sep 1976, No.3 at 376.

[14]M.G. CHITAKRA, LOK ADALAT AND THE POOR, 60(Ashish Publishing House,(New Delhi: 1993).

They were known by names such as the *kula, sreni and gana*. But the concept of Lok Adalats was pushed into oblivion during the last few centuries before independence and particularly during the British regime. However, the Britishers did not totally ignore ADR in India. In *Sitanna* v. *Viranna,*[15]the Privy Council affirmed the decision of the Panchayat in family disputes. While doing so, the Court observed that "Reference to a village Panchayat" is a time honoured method of deciding disputes of this kind. The first Lok Adalat was held in 1982, in the village of Una, in the district of Junagarh, Gujarat with great preparation and remarkable simplicity. The late Chief Justice of the Gujarat High Court, M P Thakkar, could not bear the sight of workers begging, widows, landless labourers, Dalits and Adivasis cherishing hope for justice howsoever faint it could be. It was a great success and the idea picked up which led to a number of Lok Adalats at different places with the help of a select and sensitised group of advocates. Though this was in its rudimentary form, a fairly modern version of the Lok Adalat system, that exists till date began in Chennai in 1986. Subsequently, the Committee for implementing Legal Aid Schemes (CILAS) constituted by the Ministry of Law and Justice, Government of India in 1980 recommended the establishment of Lok Adalats. Consequently, it has assumed great importance and attained a statutory recognition under the Legal Services Authorities Act, 1987. The institution has developed, since, by leaps and bounds, by the people themselves, in order to provide for equitable justice speedily at minimal cost.

[15]Sitanna v. Viranna AIR 1934 P.C. 105.

Mandate on ADR Modes in various Legislations:

The Constitution of India:

The Constitution of India has defined and declared the common goal for its citizens as — "to secure to all the citizens of India, justice — social, economic and political; liberty; equality and fraternity[16] ". The Constitution, as amended in February 1977, reads: "The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability[17]." Further, the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, as social order in which justice – social, economic and political shall inform all the institutions of national life[18].

Various Legislations:

The Industrial Disputes Act 1947 provides for both conciliation and arbitration for the purpose of settlement of disputes[19]. The Hindu Marriage Act, 1955, mandates that the court before granting relief under this Act, the Court shall in the first instance, make an endeavour to bring about reconciliation between the parties, where it is possible according to

[16] *Supra*, note.3.
[17] Article 39A of the Constitution of India.
[18] Article 38 of the Constitution of India.
[19] Section, 4,5,&10A of I D Act.1947.

the nature and circumstances of the case[20]. The Family Courts Act, 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from that of ordinary civil proceedings[21]. The Code of Civil Procedure as amended in 2002 has introduced conciliation, mediation and pre-trial settlement methodologies for effective resolution of disputes. One of the amendments introduced for speedy disposal is that judgment is to be ordinarily pronounced within 30 days subject to a maximum time limit of 60 days (for extraordinary reasons) is.[22] The Gram Nyayalayas Act, 2008, provides for the establishment of the Gram Nyayalayas at the grass roots level for the purpose of providing access to justice to the citizens at their doorsteps. The Gram Nyayalaya shall be established for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Panchayats.[23] It shall be a mobile court and where the Gram Nyayalaya decides to hold mobile court outside its headquarters, it shall give wide publicity as to the date and place where it proposes to hold mobile court.[24] It shall exercise the powers of both Criminal and Civil Courts.[25] Its seat will be located at the headquarters of the intermediate Panchayat; they will go to villages, work

[20]Section 23(2) of the Hindu Marriage Act, 1955.
[21]Section, 9 Family Courts Act, 1984.
[22]Section 89 of the Code of Civil Procedure as amended in 2002.
[23] The Gram Nyayalayas Act, 2008; Section 3(1)
[24]*Ibid*; Section 9
[25]*Ibid*; Section 11

there and dispose of the cases.[26] It shall try to settle the disputes as far as possible by bringing about conciliation between the parties and for this purpose it shall make use of the conciliators to be appointed for this purpose.[27]

The Organization, working and Procedure of Lok Adalats in general:

Justice S.M. Dharamadhikari has called Lok Adalats as Indianisation, humanization and spiritualization of justice dispensation on the following accounts:

- Indianisation of justice dispensation - Based on customs and traditions found in villages and societies of India.
- Humanization of justice dispensation - More and more participation of human beings involved with large consideration to human aspects in the course.
- Spiritualization of justice dispensation - Process to uplift society by educating its members to do justice to each other.

The idea of the Lok Adalat is to attain two basic objectives:

- To resolve disputes that have not come to mainstream courts yet,
- To resolve the disputes which have already come to the courts, by negotiating with the assistance of an experienced member of the team who functions as a conciliator.

[26] *Ibid*; Section 4
[27] *Ibid*; Section 26

Since its inception, the Lok Adalats have been instrumental in settling disputes relating to several matters. The cases dealt with by Lok Adalats seem to bewilder an outsider studying the same. It is a misconception amongst many that the nature of cases dealt with by the Lok Adalats are essentially petty cases, while in reality, they are not so. In fact, large number of cases dealt with by Lok Adalats involve matters that are hotly contested and are indeed fit for settlement through amicable means such as negotiation.

A separate Chapter is inserted in the Legal Services Authorities Act, 1987 to deal with the organization, cognizance, power and procedures relating to the Lok Adalats, and the effect of settlements arising before the same. The act empowers each state authority, the Supreme Court Legal Services Committee, the High Court Legal Services Committees, District Legal Services Authorities and the Taluk Legal Services Committees to organize Lok Adalats at such places and intervals as they think fit[28]. Permanent Lok Adalats may be established at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification[29].

The concerned Authority or Committees are empowered to organize Lok Adalats and to select the members for the Lok Adalat, consisting of retired or serving judges. The power to prescribe qualifications remains with the Central Authority for Lok Adalats organized by the Supreme Court Legal Services Committee and with State Governments for other Lok Adalats at the State Level[30]. A Lok

[28] Section 19 of the Legal Services Authorities Act, 1987.
[29] *Ibid*; Section 22B(1)
[30] *Ibid*; Section 19(2)

Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before; or any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized, provided, that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law[31].

The State Legal Aid and Advisory Boards or District Legal Aid Committees organize Lok Adalats. The members of the Lok Adalat are called 'Conciliators'. The members may be drawn from serving or retired judicial officers or from other fields of life. The number of members is to be determined by the organizing authority. Likewise the qualification and experience required for the members have to be prescribed where the Lok Adalat is organized by the Supreme Court Legal Services Committee, by the Central Government in consultation with the Chief Justice of India. In other cases, it has to be done by the State Governments in consultation with the Chief Justices of the High Courts.

The legal aid committee concerned announces a date for organizing a Lok Adalat at least one month in advance. It also determines the cases to be taken up in the Lok Adalat. The district or sessions Judge who, in most of the states, is the Chairman of the district legal aid boards, directs the subordinate judges of the area to be covered by the Lok Adalat to prepare a list of pending cases which they consider suitable for negotiation. Similarly, the District Magistrate or Deputy Commissioner or Collector, as he is known in some places instructs his subordinate

[31] *Ibid*; Section 19(5)

officers to prepare a list of revenue and executive cases to be settled in the Lok Adalat. The cases may pertain to civil, revenue and compoundable criminal disputes. For the labour and industrial disputes, sometimes, different courts are organized since such disputes are of a different nature and a camp has to be held in the town or the city where industries are located. But sometimes, such cases are also taken up along with other cases. For the selection of cases *fit for compromise*, there is no hard and fast rule. It is the responsibility of the subordinate judges to select the cases in which a compromise is possible. After the list of cases is prepared, the cases are analyzed and consolidated under various heads to which the group of cases pertains and substance of each case is recorded in a proforma that can be used for reference, verification and correspondence later on. Notices are then issued with the assistance of legal aid boards, social action groups and social organizations. Discussions take place and efforts are made for a negotiated settlement. The process of settlement, thus, goes on for about a month.

On the specified day of organizing the Lok Adalat, the parties to the dispute assemble at the predetermined place. The place may be in some village, or other area, a school or college or even Court Premises, where the legal aid teams are accessible to resolve the disputes of the people by reconciliation and compromise. The teams usually consist of retired judges, spirited public men and voluntary social organizations and elders of the locality, who are informed with the spirit of service and are adept in bringing about rapprochement between parties by way of appropriate guidance and persuasion.

During the sessions of the Lok Adalats, multiple panels are set up. The number of panels may go upto 10 or 15 or even more, as the need

may be. Each panel usually consists of two or three conciliators. One of them may be a retired judge or a senior retired civil servant or an advocate or an academician. The members of the panel are generally chosen by the Legal Aid and Advice boards on the basis of their record of public service, honesty and respectability among the local populace and are expected to be good conciliators and to be sympathetic to people's problems. Before the actual holding of the Lok Adalat Session, the local legal aid committee along with the local people and social workers interview the parties, talk to them in detail explaining the pros and cons of their cases. After assessing the scope of settlement that is acceptable to them, they try to convince them about the feasibility and desirability of resolving the disputes by conciliation and compromise. This process sometimes continues even at the compromise site. Once this settlement is arrived at between the parties, it is given a written form by the members of the panel of the Lok Adalat and the signatures of the parties are obtained. The members of the panel of the Lok Adalat also countersign it. Thereafter, either on the same day or the following day, the decree or orders are passed in terms of compromise, after the judge examines the fairness and the legality of the settlement that has been arrived at by the free and mutual consent of the parties and not by force.

Advantages of Lok Adalat:

Overall effect of the scheme of Lok Adalats is that the parties to the disputes sit across the table and sort out their disputes by way of conciliation in the presence of the Lok Adalat Judges, who would be guiding them on the technical and legal aspects of the controversies.

The benefits that litigants derive through Lok Adalats are many:

- Firstly, there is no Court-fee and even if the case is already filed in the regular Court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.
- Secondly, there is no strict application of the procedural laws and the Evidence Act while assessing the merits of the claim. The parties to the disputes, though represented by their advocate, can interact with the Lok Adalat Judge directly and explain their stand in the dispute and the reasons therefore, which is not possible in a regular Court of law.
- Thirdly, disputes can be brought before the Lok Adalat directly instead of going to a regular Court first and then to the Lok Adalat.
- Fourthly, the decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat whereas in the regular law Courts there is always the scope of appeal to the higher forum on the decision of the trial Court, which causes delay in the settlement of the dispute finally. The reason being that in a regular Court, decision is that of the Court but in a Lok Adalat it is a mutual settlement and hence no case for appeal will arise. In every respect the scheme of Lok Adalat is a boon to the litigant public, whereby they can get their disputes settled fast and free of cost.
- Last but not the least, faster and inexpensive remedy with regard to legal status.

General Observations on the Functioning of the Lok Adalats:

The statistics give us a feeling of tremendous satisfaction regarding the functioning of Lok Adalats. Up to the middle of last year, more than 2,00,000 Lok Adalats have been held and therein more than16 million cases have been settled, half of which were motor accident claim cases. More than one billion US dollars were distributed by way of compensation to those who had suffered accidents. 6.7 million persons have benefited through legal aid and advice.

But inspite of all this, the system of Lok Adalats is not without limitations.

- The procedure of organising, conducting Lok Adalats is becoming rigid especially after the enforcement of the Legal Services Authorities Act, 1987. Further, with the giving of statutory basis, the informality of Lok Adalats has disappeared, and every technicality that bogs down regular courts has crept into the Lok Adalats.
- The permanent Lok Adalats are conciliation-cum-arbitration tribunals to settle disputes between selected public utility services and individuals. It is observed that recourse to these tribunals in preference to civil courts is unlikely. Public utility services would rather compel the private parties to have recourse to legal redress instead.
- The major defect of the mechanism of Lok Adalats is that it cannot take a decision, if one of the parties is not willing for a settlement, though the case involves an element of settlement.

Adjudication before a Lok Adalat is by consent, and if one party does not agree, the case goes back to the court. If there is no consent, there is no decision. The adamant attitude shown by either one of the parties will render the entire process futile. Even if all the members of the Lok Adalat are of the opinion that the case is one fit for settlement, under the present set-up, they cannot take a decision unless all the parties consent to it.

- The Lok Adalat is required to be presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. For example, in some matrimonial cases, the participation of a social worker is mandatory. Moreover, even though the LSSA requires three people (a judge, a lawyer, and a social worker) to sit on a Lok Adalat panel, this is rarely done. Further, The Legal Services Authority Act, 1987 mandates that judicial panels of Lok Adalats ought to include one social worker and one lawyer or other legal expert and that one of the three members must be a woman. But the statutory requirement that the panel include a woman or a social worker is not strictly enforced.
- Lack of cooperation from the Bar and the Bench: Lok Adalats were meant to bring about the resolution of disputes on the basis of equality, fairness, and justice. Some argue that this give-and-take has deteriorated over time. Part of the reason for this has been "undue public pressure, particularly pressure from the lawyers and judges, for one-sided settlement and sacrifice." Initially, lawyers were dead against the widespread adoption of Lok Adalats. If a case settles too quickly, advocates who are compensated by appearance lose out on 10 to 15 years of fees.

There is still a great deal of resentment towards Lok Adalats among advocates, and the resultant uneven participation rate is handicapping the functioning of Lok Adalats.

- The goal of the Lok Adalats is to effect a compromise. As Lok Adalats dispose cases in a mass scale, it is difficult to expect that compromise settlements of mutual benefits would be searched for. Thus, parties approaching a Lok Adalat may just revert to court.
- Politicization of the Lok Adalats have proven to be one of the greatest detriments to the system, as the lofty ideals stand eroded with inept handling of matters due to political interference.

Suggestions:

Morality, honesty, justice, equity and good conscience are the high and lofty ideals upon which this institution of Lok Adalats is founded. This is the system which has deep roots in Indian legal history and its close allegiance to the culture and perception of justice in Indian ethos. Experience has shown that it is one of the very efficient and important ADRs and most suited to the Indian environment, culture and societal interests.

In order to make the institution more effective and efficient, the following suggestions have been made for consideration and implementation.

- The provision of consent must be done away with if the matter is a perfect case to be referred to the Lok Adalat. A comprehensive mechanism is to be evolved in this regard.

- The awards of the Lok Adalats must be given precedent value for similar disputes brought forward in the Lok Adalats, because the awards given by the Lok Adalats are final and no appeal lies. However the same may require constitutional amendment.
- Advocate fee structure should be changed and bonuses for rapid successful settlement of cases must be given, rather than payment by appearance. The accountability of judges must also be increased through the adoption of a procedural code for Lok Adalats and sanctions in case of default. Attractive honorarium should be paid to advocates and conciliators who officiate at Lok Adalats.
- Abstaining parties should be penalized –If a party has agreed to appear before the Lok Adalat, but abstains from attendance, the party should be penalized. If the advocate fails to appear before the Lok Adalat, it should be treated as dereliction of duty and the same should be reported to Bar Council of India to be dealt with severely. Further, the Lok Adalats should be empowered to proceed *ex parte* in such cases.
- Ambient atmosphere and infrastructure should be provided, so as to generate enthusiasm, interest and confidence amongst the general public in regard to the effective and impartial functioning of Lok Adalats.
- The litigant public and advocate community must be convinced regarding the benefits of Lok Adalats.
- More weightage (quota) should be given for cases disposed at Lok Adalats so that the judges will take more interest in settling the matters at Lok Adalats.

- High courts have to keep vigil over the subordinate courts regarding the implementation of Section 89 and order X of the CPC.
- The Executive has to positively respond to the grievances of the general public and solve the same at their level itself, as the Government is the major litigant.

Conclusion:

The Law Commission of India has observed – If a professionalized model of justice delivery system cannot be extended to meet the legal needs of Indian masses, it becomes incumbent to consider alternatives. In the existing situation, resorting to Lok Adalats has enabled the settlement of disputes amicably. The success of Lok Adalats may be measured by the overall atmosphere generated in the country-strengthening the philosophy of *Smanve* (reconciling of individual liberty with social good), not by the number and nature of Lok Adalats held, cases settled or compensation awarded. A large section of the population of India and the unlettered masses have found the dispensation of justice through the regular courts very cumbersome and ineffective. Given the special conditions prevailing in Indian society and the economic structure, highly sensitized legal services are required. Hence, Lok Adalats (People's Court), where justice is dispensed summarily without too much emphasis on legal technicalities, has proved to be a very effective alternative to litigation. The concept of Lok Adalats is no longer an experiment in India, but it is an effective, efficient, pioneering and palliative alternative mode of dispute settlement which is accepted as a viable, economic, efficient, informal and expeditious form of resolution of disputes. It is a hybrid or admixture of mediation, negotiation,

arbitration and participation. The concept of legal services which includes Lok Adalats is a "revolutionary evolution of resolution of disputes".

Therefore, it is humbly submitted that if proper steps are taken by the policy makers of our country then it would drastically bring down the number of pending cases in our country and would provide speedy justice to everyone as 'justice delayed is justice denied'.

Book Review: K. Panduranga Rao, Law Relating To Debts Recovery Tribunals; Asian Law House (5th Edition, 2010) Price- Rs 990.

Recovery of dues to the banks has become a serious problem as huge amounts of public money were blocked in the hands of defaulting borrowers. This book is an indispensable publication and an easy reference for those engaged in this field. It is a compendium of main Act i.e., the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and allied Acts relevant to the area. It encompasses commentary with critical analysis of provisions of the Act. Each section is presented along with exclusive comment and cases clarifying a particular section. This book details the entire history of the subject and the applicable allied Acts under the head synopsis. It enlists cases till 2009 and particularly full text of important judgments of Supreme Court is appended. Analysis of cases made is authentic, brief to the point and clearly brings out their importance in the development of law. The book is in a hard bound form padded cover with gold lettering and quality finishing. It is a systematically arranged handbook for bank officials, legal practitioners and those who are mostly dealing with this intrinsic area.

The subject matter in the book is sorted as parts and Part I deals with the Act namely, The Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Part II deals with Recovery Procedure with appended notes and short commentary. Part III deals with The Debt Recovery Tribunal (Procedure) Rules 1993. Part IV deals with regulations i.e., The Debts Recovery Tribunal Regulations of Practice, 1996. Part V deals with allied laws such as The Securitization and Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002; The Security Interest (Enforcement) Rules, 2002; The Code of Civil Procedure 1908; Companies Act 1956; The Industrial Finance Corporation Act, 1948; The Industrial Reconstruction Bank of India Act, 1984; Limitation Act, 1963; Sick Industrial Companies (Special Provisions) Act, 1985; The State Financial Corporations Act, 1951; The Unit Trust of India Act, 1963; The Banking Regulation Act, 1949 and The Banking Ombudsman Scheme, 2006. The latest amendments to the Acts namely The Recovery of Debts Due to Banks and Financial

Institutions (Amendment) Act, 2000, and The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act 2004 are also appended here in the book. Part VI deals with Notifications regarding establishment of Debt Recovery Appellate Tribunal and Debt Recovery Tribunals. Part VII deals with Judgments. One flaw as to Part VI and Part VII that one could find in the book is that in the contents, Part VI is shown as notifications but in the text Part VII is shown as notifications and no Part VI as such is given in the text . Again in the contents Part VII is shown as judgments but in the text it is Part V that deals with both judgments and allied laws.

The considerable effort undertaken to bring out this edition is remarkable. The 5th edition of this scholarly exposition of statutes and case laws will be a valuable addition to any library.

Sheeba S. Dhar,
Assistant Professor, The National University of Advanced Legal Studies, Kochi.

Book Review: Justice P.S. Narayana, Law of Insolvency (Bankruptcy) Asia Law House, Hyderabad (8th Edition, 2010) Pp. 86 + 950, Price Rs. 810/-

Books on the law of insolvency are not uncommon, but one which is comprehensive, plainly worded, well edited and above all reasonably priced is a rarity. The book under review is such a rare gem. The author and publisher need to be honestly admired and congratulated for having come out with a one kind book that caters not just to a law student's taste, but is equally palatable to academicians, researchers, lawyers, judges and all others in contact with the subject. The book can safely be recommended as a reference book for the topics it discusses.

The voluminous book covering 950 pages discusses in detail two pre-eminent statutes dealing with insolvency law and procedure, the Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909. The former Act and its 83 sections with its commentaries is divided into 7 parts and the latter Act with its 127 sections and commentaries is divided into 12 parts. The schedules are provided along with the Acts and so are two model forms of petitions filed under Ss. 9 and 10 of the Provincial Insolvency Act, which is intended to help a potential litigant who may come to court as a creditor or debtor.

The book also highlights the various rules in relation to the Insolvency Acts as applicable to Andhra Pradesh, Madras Courts and Bombay Courts and Appendices to the Rules which include forms, provisions relating to fees etc.

The commentaries are noteworthy for their detail, comprehensiveness and reliance on a plethora of case law. The number of cases and their relevance is also commendable.

A minor flaw in an otherwise creditable work is the fact that insolvency provisions mentioned in the Code of Civil Procedure have not been discussed in detail. The reviewer feels that the author has emphasized specifically on the two statutes, which does not seem to do justice to the title of the book that purportedly deals with law of insolvency in general.

Again more number of recent decisions of the higher courts would have been welcome. A brief narration about the evolution and object of insolvency law in general and its relevance in a modern day scenario of indemnification by insurance schemes would no doubt have added to the worth of the book and aided the users. Again effect of insolvency in revenue recovery proceedings is an interesting area that is not seen discussed in the book. But as long as the work sticks to the more specific 'statute oriented' approach, it is an extremely well drafted book.

The lucid style of commentaries with a synopsis of the sections, notes on the scope and effect of the provisions and the use of case law to supplement that, equips the book to meet high qualitative standards. The table of contents, cases and subject index are also impressive.

The printing of the book is as good as the content and language. The book is reasonably priced considering the effort put in to create such a voluminous work, the quality of the work and the print. The reviewer honestly believes that the book would be a useful tool to all who are seriously interested in insolvency laws.

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