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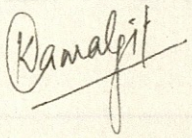
EDITORIAL

It is a matter of immense pleasure to place before you the latest RGNUL Law Review, the RLR Volume VIII, Number I January-June 2018. It has indeed been a challenging and daunting task for the Editorial Board to ensure that quality Legal Research which is original and fresh with new ideas is brought forth to the community at large and serves the purpose of uplifting the society and bringing radical changes much needed in the contemporary world at large. As the University Grants Commission has come up with the UGC (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations, 2018 it has become imperative to guarantee that we continue to maintain the high standards of excellence that we seek to achieve in all that is published under the University Banner. This Journal, a referred publication comprising six articles on multifarious issues is an effort in this direction. This Issue contains an insight into Green Consumerism and its Justifiability towards sustainable Consumption wherein the environmental facets have been stressed upon. The Public interest Litigations have been looked at from the point of view of Disability rights, the right to die has been fervently debated to legalize Euthanasia, the Patentability of Computer related inventions in India has been explored, a Critical analysis of the Surrogacy Regulation Bill, 2016 and of the Registration of Marriages in India has been made in this Volume. The Journal seeks to broaden the study of complex legal issues and develop new perspectives to the advancement of Legal thought and writing. I must take this opportunity to convey my heartiest and sincere thanks to all the contributors for their invaluable contributions and hope that they continue to do so in future also. I am confident that this Journal will strive to be more and more successful in achieving its cherished mission of increasing the knowledge quotient and initiating intellectual debate and dialogue.



Dr. Kamaljit Kaur

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GREEN CONSUMERISM AND ITS JUSTIFIABILITY TOWARDS SUSTAINABLE CONSUMPTION: AN ENVIRONMENTAL FACET

Rattan Singh *
Shikha Dhiman **

1. Introduction

In this era of 21st century, environment protection has been a debatable and most concerning issue. Many international conventions, declarations and treaties have been passed in order to make provisions for the protection of environment in different countries which in turn will protect the ecology as a whole. The United Nations Conference on Human Environment (Stockholm Declaration) was passed at international level in 1972, another being in 1992 i.e. United Nations Conference on Environment and Development (Rio Declaration), Basel Convention for transboundary pollution in 1989 and Cartagena Protocol of 2000 etc. Agenda 21 is a comprehensive plan of action taken globally by various organisations of the United Nations in different areas in which the human impacts on the environment. United Nations Conference on Sustainable Development, Rio +20 raises the slogan of 'The Future We Want', by further realizing the various objectives of the Conference. Such objectives are: eradication of poverty, discouraging unsustainable and encouraging sustainable consumption as well as production, protection of natural resources and managing the natural resources in a way to develop socially and economically. The Commission on Sustainable Development (CSD) was created in December 1992 to monitor and report about the implementation of all local as well as national agreements taken on environment protection, sustainable development and sustainable consumption. The present situation in Earth today has been disturbed by the incognizant consumption. The problem lies within the consumption pattern, for the reason, that we have only one planet and finite natural resources to rely upon. The whole consumption pattern relies heavenly on the purchasing capacity of the man. The burden is on the man as to what he buys from the market, whether the product he buys is environment friendly or not, whether it can be recycled or not, what are the effects of using such product, how that product is to be disposed and many more

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questions that relates with the purpose of buying any commodity from the market. If the product is environment friendly, can be recycled, can be easily disposed of without harming the environment; it can be said that the product is sustainably consumed. The notion of sustainable consumption is highly linked up with eco consumer as the consumption is done by the consumers. The more sustainably the consumer will consume, the more he will lead to protect and save the environment. Over the last few years, researchers have found out that sustainability has been increasing just because of the growing significance of green orientation in the consumer purchasing process all over around the world. People are getting little aware and are now moulding their way of lifestyle and living so as to pay more attention towards bending down for green oriented behaviour. This is tremendously being done in a more better and enhanced manner in comparison to olden day's time.

2. Green Consumer/ ECO Consumer

The term 'green consumer' implies those consumers who purchase green products or environmental friendly products. It has been opined and viewed by various researchers that green consumers mean:

1. The ones who are more unfeigned in their acts and intentions so as to opt for greener and sustainable lifestyle;
2. Who usually calculate the harmful environmental practices as unsustainable and inadequate;
3. Who do not themselves expect from the corporate world to be green in their activities, but however, they peep for those companies who are itself taking substantial efforts and steps to make a profound commitment to improvise themselves.

Green consumer can also be defined as a person who uses only eco friendly products thereby in order to stop the usage of plastics anymore in the environment. As of now, we know that awareness is being made with respect to non usage of plastics. Many companies have now started making lots many products which are eco-friendly and hence green consumers look for them. Some of the products made for green consumers by the companies are:

a. *Energy Star:* It is for those appliances as well as electronics that promotes saving of energy.
b. *USDA Organic Seal:* It is for cosmetics and foods that are fully organic.

c. *Green Seal:* It is for the purpose of cleaning products which are actually safe for the environment.

d. *Forest Stewardship Council Logo:* It is for the paper as well as wood products.

This implies that all the products in the market carrying these logos and seals are environment safe, else not. So it would be highly recommended for all those green consumers to look into this detail before getting any such product from the market. The term 'green consumer' is closely linked with 'green consumer behaviour' so as to understand the attitude and behaviour of the green consumers while buying any product. We can define green consumer behaviour, the one that has these three characteristics[1]:

i. Buying informed alternatives, reflecting some glimpses of environmental motivation, managing household as well as collective and consumer activism behaviours;

ii. Prefer buying and using those products which leaves the lowest environmental impacts. This can be as of some biodegradable products, recycled products and using lower energy;

iii. Using of organic products which is made with different processes that affords for saving of energy and after that by the action of recycling, in fact a green consumer is one who purchase products and services perceived to have a positive (or less negative) influence on the environment.

Consumers are said to be 'green' only if the 'value more for environment' instead of 'valuing for money' while selecting and buying the products and services. When it comes to differentiate 'green consumer' with other 'consumers', demographic (i.e. age, income, education etc.) seems to be one of the modes of classifying consumers but not the best mode to differentiate between them. Hence, psychographic techniques like attitude of people, their lifestyle, their values and motives can considered to be the powerful way of dramatically differentiating them. Different types of consumers are there differentiating on the grounds of their attitudes. Some of them as mentioned as follows[2]:

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1 Retrieved from <*http://en.m.wikipedia.org/wiki/Green_consumption*> accessed on 14.05.2018 at 07:44 p.m.

2 L. Viswanathan and G. Varghese, "Greening of business: A step towards sustainability", *Journal of Public Affairs,* Vol. 18, No .2 (2018) p. 4-5.

1. Living a lifestyle of Health And Sustainability

Such consumers are often known as LOHAS. These are such sub sets of the entire consumer population which are more concern about the progressiveness and preservation of the environment. They are considered as operative and functional environmental stewards who have imbibed in them the notion of sustainability. They are the staunch supporters and buyers of green products in the market. Price of any commodity does not affect such consumers or does not impact their decisions.

2. Naturalites

These are those consumers who have their prior interest for the preservation of environment. Protection of environment becomes a by-product of their lifestyle which they make it healthy one. Such consumers usually consume natural products which is free from artificial factors that contribute towards green environment. They work as a stout derivative target for various brands of green consumers.

3. Conventionals

Conventionals are those consumers who act in a more practical and rational manner and who invest in those products which minimises cost and results in saving the money. Differentiation in pricing is considered to be the biggest factor that boosts up such type of consumers to purchase and go for environmental friendly products. Though at times, not environmentally conscious by nature but still their attitude and conserving priorities are acting in a way which is thereby imparting positive impact on the environment.

4. Drifters

Such a sub-set of consumers are not deeply embedded to sustainability but leans towards doing their part. They are in search of green products and are more suitable to adaptability in the green market. Such a group of consumers is mainly targeted and has much more growth in the market.

5. Unconcerned

Such consumers are those which have their own other priorities. These are those who are not sure about the usage of green products. These consumers purchase commodity strictly based on the price and value of such product. They are least inclined towards environment protection and have minimum sense of healthy

lifestyle. Such consumers in society also never bother about any other social concern too.

3. Green Consumerism in India: A Boon

Green Consumerism means a practice of such a consumption that involves environmental consciousness. The definition of 'green consumerism' seems to be more scientific one. From this standpoint, 'green consumerism in India' brings into picture the actions of people in society in order to preserve and promote the environment by intentionally neglecting few types of products as well as services. Some of them are highlighted as under[3]:

1. Jeopardizing the quality of environment and also the protection as well as security of other consumers;
2. Leading to environmental deterioration at the time of extraction of natural resources;
3. Causing environmental declination while their manufacturing process, usage or at the time of disposal;
4. Causing unwarranted waste. It may be because of over packaging of the products or because of an overly short life span;
5. Tremendously affecting other nations as well as communities, especially the ones located in the South.

Under the wider meaning of the term 'green consumerism', consumers themselves agree to contribute for better environmental results thereby making informed decisions and choices about their buying of a product, its use and obviously its disposal. For example, while doing environment impact assessment, it is always preferred to go for recycled paper instead of unrecycled one, for the reason, the production of former type of paper is comparatively less harmful to the environment[4]. Therefore, green consumerism refers to the act of purchasing or not purchasing some of the decisions made by the consumers that is based on the environment and prevailing social criteria. Green consumerism applies mortality packet in order to camouflage its market besetting origins. To enunciate upon it into

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[3] Gurjeet Singh, "Green Consumerism In India: The Challenges Ahead", retrieved from *<http://www.google.co.in/url?sa=t&source=web&rct=j&url=http://14.139.60.114:8080/jspui/bitstream/>* accessed on 20.05.2018 at 10:56 a.m.

[4] Dean Pettit and Jerry Paul Sheppard, "It's not easy being Green: The limits of Green Consumerism in Light of the Logic of Collective Action", retrieved from *<www.sfu.ca.sheppard.papers>* accessed on 22.05.2018 at 01:10 p.m.

detail, the act of buying 'green' implies the act of purchasing more of moral and ethical act, irrespective of the fact that 'buying' is the actual issue to be addressed. But if focus of the people can be made on few activities like reuse, recycle and reduce; then the issue will be depoliticised and hence will become the confidential concern of people intricated in it. So the outcome of green consumerism can best result when there is change in the lifestyle of the people. It, therefore, enunciates that the abstraction of green consumerism has to be more lifestyle oriented rather than product oriented. Alongwith the act of buying green products, another burden that lies on the people in the society is the act of disposing the products.

Green consumerism is an idea which enunciates that the consumers are the driving force for environmental change and that too for a better change in the future. The resultant effect of the notion of bringing about green consumerism will not only lead to the notion of sustainable consumption but will also offer for some more advantages to the environment. The following are few of the listed benefits of green consumerism:

1. It helps in pollution control.
2. It builds up a striking balance between the consumer behaviour's expectation on one side and profit markets of businesses on the other side. A consumer has to understand that he is just not purchasing the product from the market, in fact he is purchasing all the possible consequences that is attached to the product's production. This will, however, results in adverse impact related to the product overall.
3. It promotes for sustainable development in the society.
4. It tries to link up people with their traditional and indigenous industries. For example: the earthen pots which were initially used but were abandoned from last few decades. But now again it has been in demand because of its utility.
5. It will lead to prosperity in country when people will save their money by using the products which are not expensive but still environment friendly.

Hence, it can be understood that the concept of green consumerism will not only help the consumers but will also reflect its best consequences on the environment.

4. Sustainable Consumption: Environmental Policy Perspective

The universal and spherical consumption of all natural resources is actually considered as unsustainable according to the pace it is being consumed day by day.

Rapid growth, industrialization and increasing population is putting lots of strain on the environment. Therefore, making this consumption of natural resources sustainable is in itself a biggest challenge to humanity. The term 'sustainable' implies the ability to use anything without destroying natural resources completely and which can lasts for a long period of time. Sustainable consumption is a notion which thereby means that the natural resources should be used in a way so as to leave minimal impact on the environment. It amounts the consumption of all goods and services that are socially and economically viable as well as which suits the basic human needs worldwide. The notion of 'sustainable consumption' has been adopted from the term 'sustainable development' which was defined by the Bruntland Commission Report as "the needs of the present without compromising the ability of future generations to meet their own needs". Hence, 'development' can only be there if there is 'sustainable consumption' because the latter is an indispensable aspect of the former.

The very first and foremost definition of the word 'sustainable consumption' came up in the year 1994 in Oslo. This definition was coined in context of the Bruntland Commission Report that has actually defined 'sustainable development' which further imbibes in it both consumption as well as production: "Sustainable production and consumption is the use of goods and services that respond to basic needs and bring a better quality of life, while minimizing the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so as not to jeopardize the needs of future generations".

However, later in the year 2002 the notion of 'sustainable consumption' was recognised in the Johannesburg Plan. This opinion on sustainable consumption came out at the World Summit on Sustainable Development i.e. WSSD[5]. At that point of time, sustainable consumption was viewed as one of the three far reaching objectives and essentials of sustainable development along with eradication of poverty and management of natural resources. These objectives were culled out in order to advance and nurture economic as well as social development. It was conceded that some of the principal changes in a way the people in society are consuming is essential for accomplishing global sustainable development[6].

The question that comes out is that how the consumption patterns can be made sustainable? What can be done in order to promote consumers to make environment

[5] Sustainable Development Knowledge Platform, retrieved from <*http://sustainabledevelopment.un.org/topics/sustainableconsumptionandproduction*> accessed on 21.05.2018 at 08:36 a.m.

[6] *Id.*

– smart choices? The answers to such questions can be well dealt if we check out the private consumption patterns of an individual. In order degrade negative impact of consumption on environment and climate, the foremost thing to remember and change is as to how and what to consume. The government has taken some of the initiatives with an intent to provide some suitable strategies as to focus upon what the State at its own level can do. Moreover, what the State can do in relation to municipalities and other business sectors which will make it comparatively facile for the consumers to live and act sustainably in an environment[7]. Few of such aspects are stated as under[8]:

i. Accelerating awareness as well as knowledge.
ii. Accentuating cooperation.
iii. Inspiring different sustainable modes of consumption patterns.
iv. Organizing reasonable use of natural resources.
v. Ameliorating information on sustainability efforts of corporate sector and companies.
vi. Phasing out deleterious and dangerous chemicals.
vii. Upgrading and refining security for all consumers.
viii. Concentrating upon saving of food and water.
ix. Ensuring use of public transport.

5. Citizens-Consumers as Agents for Sustainable Consumption

Consumers are responsible for every activity they do in ecosystem. It can be buying of any producer, availing any services, producing any commodity, consuming anything etc. Therefore in this regard, consumers are deemed to be as agents of the environment and more precisely as agents for sustainable consumption. This is so because whatever they do or consume or produce, it is to effect on environment in one or the other form. Thence, the liability falls upon the consumers to peep into the environmental and sociological impact of every activity or every commodity that they consume in an environment. Following are few of the activities that can be done by the consumers in order to promote sustainable consumption:

a. Effective use of natural resources.

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7 Strategy for Sustainable Consumption, retrieved from <*www.oneplanetnetwork.org.sites.files*> accessed on 28.05.2018 at 02:40 p.m.

8 *Id.*

b. Minimisation of wastes and all forms of pollution.

6. Methods to Achieve Sustainable Consumption

As of now, in order to shun and escape some disasters that happen in environment which further results in societal consequences, the upcoming consumption patterns have to be marked differently. Companies who are producing variated products need to look for new business leaders that can lead the production only after looking the environmental as well as societal affects of it. Some of the big companies has already initiated with this approach of production in order to provide products that are not harmful to the environment. For example: H&M and Timberland. Some of the other renowned companies (like: The Body Shop, Patagonia, etc.) have started communicating about the ecological impact of their products. Instead of using the private vehicle, people should resort to public transport. Therefore, many car companies have started this practice of launching car-sharing activity which promotes further for product sharing or renting of products. In the state of Punjab, Haryana and Chandigarh, the practice of hiring a car, name 'Zoom Car' has begun under this scheme. The city of Curitiba in Brazil showcased how life satisfaction can be increased by promoting public transport. Also government should impose taxes on few items and avoid subsidies in order to reflect its environmental impact. Government should bring out some policy with regard to eatables. Example: meat is taxed in New Zealand, consumption of food items that undermines well being like smoking is done in Australia, France imposes high rate of tax on sugar – rich soft drinks. Moreover, education and awareness is required at high level so as to encourage people for farming and livestock production and organic activities. One should make people aware by communicating them about the harmful effects of wasting electricity, water and other natural resources. Such stimulation should be done to encourage the public as well as it should be done within the companies[9]. Also motivate discussions and deliberations on different ways to improve lifestyles. Non Governmental Organisations are supposed to make their consumers aware and know about their (NGO's) crucial as well as technical role. Such Non Governmental Organisations are required to uplift consumer's mindset for their societal and environmental impact, which can further assist them out to lay out some ways for sustainable lifestyles. Thence, they are to figure out some platforms which can

[9] "Ways to Achieve Sustainable Consumption", retrieved from <*www.global-economic-symposium.org/knowledge/towards-sustainable-consumption/proposal/ways-to-achieve-sustainable-consumption*> accessed on 27.05.2018 at 07:40 p.m.

compare the environmental impact of the products over and around their lifestyles[10].

Therefore, in the time of climate change and scarcity of resources all over the world, consumption patterns also have to be changed all across the world. Instances have to be shown in every country to all the consumers that material wealth enjoyed by them is at the cost of their present and future well being. This can be only affected when strong efforts are initiated by government, NGO's, producers, companies and of course, the consumers.

7. Conclusion

In present times, if such a situation arises wherein one person has to give a thought between his purchasing as well as consuming (especially the green consumption) option, it enunciates that such persons are put in trade-off footing where they are suppose to make informed alternatives between environment protection and their own desires and needs. The need for the environment protection has nothing much to do with the legislations passed by the Legislature or the judgments pronounced by the Judiciary. But in fact the truth is that the environment protection can be effectively done when one begins from his home, when one begins from himself. The Constitution of India in the very initial lines of Preamble states: "We The People", this signifies 'we the consumers'. All the people living in the society are consuming products and services in one or the other form. So, it enunciates that we all as being the consumers need to bear the burden on ourselves individually and look into the matter in more detail. One more way out to subdue and surmount such technical issues is to accentuate as well as focus upon the approbatory sides of green purchasing choices. Also to make the consumers understand and aware about the pros when they spend money on greener products and often comparatively expensive product decisions. It should be borne in mind that in green marketing, the cost benefit thinking should, therefore, be adopted[11].

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10 *Id.*

11 "Green Consumerism", retrieved from <*www.cres.gr.behave.pdf.green.consumerism*> accessed on 27.05.2017 at 06:47 p.m.

THE PUBLIC INTEREST LITIGATION (PIL) ENRICHING DISABILITY RIGHTS DISCOURSE IN INDIA

Dr. Yogesh Pratap Singh*

1. Introduction

The world Summit for Social Development,[1] established the concept of social integration to create an inclusive society, *"a society for all"* as one of the key goals of social development. Following this, significant policy commitments were made in the Millennium Declaration (2000)[2] which subsumes social integration in its synthesis of peace, security, development and human rights and further embodies social inclusion principles as well as the objectives and goals set out by international communities in previous UN Conferences. As the international community moves rationally to the concept of a universal basic income, our Constitution already reflects it in the fundamental governing principle of equality of opportunity. Speaking of the imperatives of inclusive democracy, Dr. Ambedkar said:[3]

> *"It was, indeed, a way of life, which recognizes liberty, equality and fraternity as the principles of life and which cannot be divorced from each other: Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things."*

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1 At the World Summit for Social Development, held in March 1995 in Copenhagen, Governments reached a new consensus on the need to put people at the centre of development. The Social Summit was the largest gathering ever of world leaders at that time. It pledged to make the conquest of poverty, the goal of full employment and the fostering of social integration overriding objectives of development. At the conclusion of the World Summit for Social Development, Governments adopted a Declaration and Programme of Action which represent a new consensus on the need to put people at the centre of development. Five years on, it was reconvened in Geneva in June 2000, to review what has been achieved, and to commit themselves to new initiatives. For details visit, https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html

2 The United Nations Millennium Declaration resolved that "Only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable." Endorsed by 189 countries, it committed nations to a new global partnership to reduce extreme poverty. And it sets out a series of targets to be reached by 2015. These have become known as the Millennium Development Goals (MDGs). For details visit, http://www.un.org/en/development/devagenda/millennium.shtml

3 G. V. G. Movoor, *Fall of the Nation: An Illustrative Narrative of the Vehicles I Have Travelled By*, Notion Press, Chennai (2016).

2. Universal in the Constitutional

The Constitution of India is a unique legal document that enshrines a special kind of norm and stands at the top of the normative pyramid. It shapes the appearance of the State and its aspirations throughout history. It determines the State's fundamental political views and lays the foundation for a just and inclusive society and so. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one.

The question then arises as to how to make the concept of just and inclusive society operational, even in the face of resistance to change. Indeed, in some cases, social exclusion is willfully pursued as it serves vested interests. The challenge for policy makers, law persons and scientists are, therefore, to find ways to dissociate the concept of social inclusion from the Utopian realm of a "perfectly inclusive" world vision to redefining it as a practical tool used to promote an inspirational yet realistic set of policy measures geared towards a *"society for all"*. This recognizes a paradigm shift so as to recognize the dignity, value and importance of each person, not only as an ethical norm and moral imperative, but also as a legal principle, a societal goal and ultimately, a practice. No human being should be condemned to endure a brief or miserable life as a result of his or her class, country, religious affiliation, ethnic background or gender. Protection in terms of upholding human rights, and accountability, in terms of upholding the rule of law shall be two pre-conditions of a just and inclusive society. As a student of law you must be aware that these proposed goals may be comprehended by legislative frameworks - backed by international law standards and informed by public engagement - that include effective and equitable regulations and implementation mechanisms; capable, inclusive, responsible and transparent institutions to implement the laws; accessible, fair and transparent dispute-resolution processes of the bar and bench, reliable enforcement mechanisms; and an empowered civil society able to claim its rights to resources and services, and to demand accountability of those responsible for such delivery. The priorities of public expenditure and the effective outcomes of such expenditure as the responsibility of those in power, are the constitutional learning of seventy years of independence.

3. Ensuring a Constitutional India: The Role of Judiciary

Being the guardian of fundamental rights, judiciary in India has sought to internalize this constitutional morality of power and has tried to play a soft or a sharp nudging role in ensuring a just and inclusive society—whether it be—human rights which

includes right to shelter, social security, right to adequate nutrition, clothing, education & livelihood; gender justice; education, protection of minorities , through constitutional calibrated controls of all those who govern through elected bodies, political ministries, administrative, revenue and police services. The judicial messages that the people of India have a sovereign right to demand from those who govern the constitutional society as spelt out in the Directive Principles to ensure fundamental rights for all. This naturally flows from the well-established concept that the holders of high judicial powers ought always to elevate the constitutional idea of India beyond its regime sponsored and expedient versions. Justices may *occasionally* fail to so do; were they to *systematically* fail to translate high judicial power into a fiduciary power (as a form of social *trust*), the very idea of constitutional India would disappear.

4. The Appearance of Public Interest Litigation (PIL)

The phrase 'Public law Interest Litigation' was first conspicuously used by American scholar Abram Chayes to describe the practice of lawyers or public-spirited individuals who seek to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws and articulate public norms. He identified four distinct kinds of public law litigation in the United States.[4] *First,* the joinder of parties has been liberalized. Today, all parties with an "interest" in the controversy can join the litigation. Though "interest" has been defined narrowly sometimes to preserve efficiency concerns, the courts have responded by allowing class-action claims that are more flexible with regards to the parties.[5] Second, the courts have given growing importance to equitable relief.[6] *Third*; focus on injunctive relief as an example of this procedural development. Chayes claimed that injunctions are a much greater restraint on a party's future actions than the risk of future liability. The injunction is continuing and a party may seek a further order from the court to change or modify the injunction if the circumstances so require.[7] Finally, through an injunction, the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action." This equitable relief is more concerned with balancing the interests of the parties than the traditional form of monetary relief. These elements of public law were resonated when the Supreme

4 See Abram Chaves, The Role of the Judge in Public Law Litigation, 89 *Harvard Law Review* 1281 (1976).
5 *Id.* at 1289
6 *Id.* at 1289
7 *Id.* at 1292

Court of India decided to democratize judicial remedies based on pragmatic approach to social justice.

The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in *Mumbai Kamgar Sabha vs. Abdul Thai*[8] and was initiated in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India,*[9] wherein an unregistered association of workers was permitted to institute a writ petition under Article 32 of the Constitution[10] for the redressal of common grievances.

In 1978, the Supreme Court received a letter from an inmate detailing the gruesome torture of a fellow inmate at the hands of the prison guards.[11] The note, a mere scribble on a piece of paper, prompted the Court to assume jurisdiction over the case, ruling that a prisoner was entitled to the same rights and liberties conferred on the rest of society. The case opened the floodgates to a litany of public interest claims, assuming virtually every form, including media reports, formal briefs, and letters.[12]

Krishna Iyer J., articulated the rationale for liberalization of the rule of *Locus Standi* in *Fertilizer Corporation Kamgar Union v. Union of India.*[13] Justice Krishna Iyer and Bhagwati in their concurring opinion held that:

> *....Public interest litigation is part of the process of participative justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps.*

and the idea of 'Public Interest Litigation' bloomed in *S.P. Gupta and others vs.*

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8 AIR 1976 SC 1455.

9 AIR 1981 SC 298.

10 Article 32 provides: Remedies for enforcement of rights conferred by this Part: *(1)* The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed; *(2)* The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part; *(3)* Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2); and *(4)* The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

11 Epistolē, in turn, derived from the verb epistellein, *meaning* "to send" or "to send from." *Epistolary* appeared in English four centuries after epistle and can be used to describe something related to or contained in a letter (as in "*epistolary* greetings") or composed of letters (as in "an *epistolary* novel"). *Epistolary Jurisdiction* used by the Supreme court is one of the most significant procedural innovations to secure justice for all. Encouraging letter petitions is based on the idea of easy and effective access to all without any procedural burden.

12 *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675.

13 AIR 1981 SC 344.

Union of India,[14] where this court observed:

> *"Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ."*

In spite of the lowering of the threshold, people at large are denied access to justice due to "prevalent poverty, social restrictions and illiteracy. In this backdrop, Justice Bhagwati, in holding that social and economic conditions necessitate this model of standing observed:

> *When a person or class of persons to whom legal injury is caused by violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the Court for relief under Article 32 ... so that the fundamental rights may become meaningful not only for the rich and the well-to do who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reasons of lack of awareness, assertiveness and resources unable to seek judicial redress.*

This expansion of standing has enabled Indian non-governmental organizations (NGOs) to collaborate with each other in fact-finding and data accumulation efforts to ensure that public interest actions are pursued in a bona fide manner. The Supreme Court not merely relaxed the concept of standing but radically democratized it; no longer is it important to show that one's fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient to show that one argues for the violations of the worst-off Indian citizens and persons within India's jurisdiction. Regarding concern for social justice and human rights have now become the order of the day and this concern has prompted a creative partnership between active citizens and activist justices in order to translate preambular promises into a reality.

5. Disability Rights Discourse in India

The Rights of Persons with Disabilities Act 2016 was passed nine years after the government ratified the United Nations Convention on the Rights of Persons with

[14] AIR 1982 SC 149.

Disabilities.[15] This shows how much concern the Union Government and Parliament have for the disabled and how much respect these constitutional organs of governance have for international law, in spite clear constitution mandate to foster respect for international law.[16]

The law deals only with those already disabled because India's statutory law nowhere deals with the prevention of disability as a duty of the State to its citizens and an enforceable right of the citizens. In Section 2(s) it defines a "person with disability" to mean a person with long term physical, mental, intellectual or sensory impairment which in his interaction with barriers, hinders his full and effective participation in society equally with others. The definition does not mean the disabled who have such disability which was preventable. The Act nowhere makes anyone in the administration or the political structure liable for the preventable disability.[17]

The idea of prevention was specified for the first time in relation to disability, by the Mental Health Act, 2017. Section 29 makes it a mandatory duty of the appropriate Government to plan, design and implement programmes for the "promotion of mental health and prevention of mental illness in the country." But then after having specified "prevention of mental illness", the Act goes to sleep.[18] Prevention is not specified as a specific function of the Central Authority, constituted under Section 33 "for the purposes of this Act". The functions of the Central Authority, headed, in terms of Section 34, by the Union Government's Health and Family Welfare Secretary or Additional Secretary, pertain to the registration, supervision and development of norms for mental health institutions, the functioning of mental health establishments , maintenance of a national register of clinical psychologists, nurses and psychiatric social workers, training law enforcers and others about the provisions and implementation of the Act, advising the Central Government on all matters relating to mental health care and services and discharging mental health functions which the Central Government may assign to it. There is no provision requiring the Central Authority to make a country wide plan for the prevention of mental illness and the promotion of mental health. Avoidable mental disability as a preventive measure is simply forgotten as part of the Central Authority's functions.[19]

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15 The Parliament enacted this Act, to replace, as per section 102 of the 2016 Act, *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act*, 1995.

16 Article 51 of the Constitution directs that the State shall endeavor to foster respect of international law as a fundamental principle of governance.

17 Krishan Mahajan, *How The Law Disables, TISS Journal of Disability Studies and Policy Research, Mumbai* (Dec. 2017), p. 4.

18 *Id.*

19 *Id.*

The little chance that this had, after the mention of "prevention" of mental illness in Section 29 seems to disappear with the duty laid on the appropriate Government to "integrate mental health care services into general health care services at all levels." In Section 18(5)(a), while giving in Section 18(1), every person a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government.[20]

Since prevention of disability is generally absent from The Rights of Persons with Disabilities Act 2016 and from the concept of health on which general health services are run, mental health services will also be infected by the same problem in spite of the words "prevention of mental illness" in Section 29 of the Mental Healthcare Act, 2017. After this, like the 2016 Disabilities Act, the 2017 Mental Healthcare Act, gives the mentally ill, the right to live with dignity,[21] a free services entitlement to the destitute, the homeless and those below the poverty line,[22] legal aid to the abandoned[23] and the right to be informed of free legal aid by the magistrate, police officer and others as also the right to such aid to exercise the rights under the Act. Indian citizens get a cornucopia of statutory rights after being disabled, physically or mentally. There is no statutory support to prevent them from being disabled. There is no statutory duty on any government official to prevent the disability and be held accountable for not preventing it. The disabled must rehabilitate themselves. But the Rehabilitation Council of India Act, 1992[24] has nothing on the concept of prevention in the Schedule under Section 11 concerning the recognized qualifications for rehabilitation professionals which entitle such professionals to practice or hold office in the Government or in any institution maintained by it. In any event, the rehabilitation idea seems to be available under the Rehabilitation Act only to the mentally retarded and not the mentally ill. At the same time the 2017 Mental Health Care Act seems to have nothing specific in terms of the rehabilitation of the mentally ill, even though the definition of mental health care[25] uses the word "rehabilitation", in relation to not only mental illness but also "suspected mental illness." Accordingly, the 2016 and 2017 Acts dealing with physical and mental disabilities do not refer to the UN Standard Rules for the Equalization of Opportunities.[26]

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20 *Id.*
21 *See* Section 20.
22 *See* Section 18 (7).
23 *See* Section 19(2).
24 As amended by Act 38 of 2000.
25 *See* Section 2(o)
26 *See https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html*

6. Boost to Disability Right Discourse: The Role of PIL

In absence of a comprehensive legislative framework initially and aftermath, the disability rights movement in India received a significant judicial nourishment. The Supreme Court pronounced two major judgments concerning the higher education and accessibility rights of the persons with disabilities (PWDs). These judgments have come at a strategic time, when India has just completed 10th Anniversary of ratifying the United Nations Convention on Persons with Disabilities (UNCRPD) in October 2007 and we have just completed 1st Anniversary of the Rights of the Persons with Disabilities Act, 2016, which came into effect on December 27, 2016. In these judgments, the Apex Court has taken serious note of the callousness shown by the Central Government, the State Governments and the Union Territories in implementing the erstwhile 'Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act), 1995 which has now been replaced by 'the Rights of the Persons with Disabilities Act, 2016.

In *Justice Sunanda Bhandare Foundation v. Union of India & Anr.*[27] the Supreme Court issued directions to the Central Government, State Governments and Union Territories to implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[28] Further directions were issued to the Secretary, Ministry of Welfare, Government of India, the Chief Secretaries of the States, the Administrators of Union Territories, the Chief Commissioner of the Union of India and the Commissioners of the State Governments and Union Territories shall ensure implementation of the 1995 Act in all respects including with regard to visually disabled persons.

The Parliament, comprehending the commitment to the Convention of the United Nations General Assembly, had brought in a new legislation "The Rights of Persons with Disabilities Act, 2016", replacing the 1995 Act. More rights have been conferred on the disabled persons and more categories have been added. In addition, access to justice, free education, role of local authorities, National fund and the State fund for persons with disabilities have been created. Considering the need of complying with the judgment rendered in *Justice Sunanda Bhandare Foundation*

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27 *(2014) 14 SCC 383* Writ Petition (Civil) No. 116 of 1998.

28 The Writ Petition was filed by Justice Sunanda Bhandare Foundation, a charitable trust seeking for (i). Implementation of *the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act*, 1995; (ii). Direction for the reservation of 1% of the identified teaching posts in the faculties and college of various Universities in terms of Section 33 of the 1995 Act, and (iii). Declaration that denial of appointment to the visually disabled persons in the faculties and college of various Universities in the identified posts is violative of their fundamental rights guaranteed under Articles 14 and 15 read with Article 41 of the Constitution.

case,[29] and the provisions of the Rights of Persons with Disabilities Act, 2016, a 3-Judge Bench of the Supreme Court observed that, the 2016 Act outstandingly makes a paradigm shift in the perception and requires a march forward look with regard to the persons with disabilities and the role of the States, local authorities, educational institutions and the companies. The court wished that the creditable policy inherent within the legislative framework should be executed with immediate effect and directed all the States and the Union Territories to file compliance report within twelve weeks.[30]

6.1 Disable and Access to School Education

It is an established fact that the children with special needs have to be imparted education not only by special teachers but there has to be special schools for them. Access to education has already been regarded as a Fundamental Right as per Article 21A of the Constitution. There is a statutory obligation under the Rights of Children to Free and Compulsory Education Act, 2009. The Supreme Court in a significant *Rajneesh Kumar Pandey v. Union of India*[31] raised its concerns for the integration of the children who are disabled or suffer from any kind of disability or who are mentally challenged in the mainstream schools for getting education. 'Disability', does not mean `disability' as has been defined in the Rights of Persons with Disabilities Act, 2016. The Rights of Persons with Disabilities Act, 2016 includes certain physical disabilities which may not be a warrant for getting admission in special schools. The students who suffer from blindness, deafness and autism or such types of disorder may be required to have separate schools with distinctly trained teachers.[32]

6.2 Disable and Access to Higher Education

While emphasizing on the need of creating a level playing field for the PWDs in *Disabled Rights Group vs Union of India,*[33] the Supreme Court has directed all Government or other institutions of higher education which receive aid from the Government to immediately comply with the obligations under section 32 of the new legislation of 2016. Originally, this petition sought judicial intervention for enabling the PWDs to seek admission to the law colleges. However, the scope of providing

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29 *(2014) 14 SCC 383.*

30 *Justice Sunanda Bhandare Foundation v. Union of India, 2017 SCC OnLine SC 481*, order dated 25.04.2017

31 WP (c) Nos. 132 2016

32 *Id.*

33 W.P. (C) No. 292 of 2006.

reservation in higher education to PWDs with benchmark disabilities under the new law, does not limit it to a study of any particular discipline. The Supreme Court rightly seized this opportunity and widened the coverage of its directions to all educational institutions.[34] This will enable the PWDs in claiming the statutorily guaranteed reservation in higher education concerning any field of study. The Supreme Court did not merely call for a compliance with reservation scheme envisioned under the law but said that it is equally essential to impart education in a fruitful manner. It is because, unless students with disabilities will have an easy and impediment free access to the class rooms, library, bathroom, science laboratories, computer rooms, etc. within an educational institution, the ultimate goal of the law will not be accomplished. In this regard, the court categorically observed that absence of adequate provisions to facilitate proper education to PWDs would amount to discrimination. The Supreme Court has also directed the University Grants Commission (UGC) to constitute an Expert Committee and consider the feasibility of 'Guidelines for Accessibility for Students with Disabilities in Universities/Colleges' as suggested by the petitioner. In a greater progressive move, the Supreme Court has further directed that the UGC constituted Expert Committee to weigh the feasibility of instituting an in-house body in each educational institution. Such a body in an educational institution may representation from among the teachers, staff, students and parents to supervise day to day needs of differently abled persons as well to oversee the progress of implementation of the Schemes that would be devised by the UCG's Expert Committee. This judgment brings major relief to the PWDs aspirants of higher education in the country. The Supreme Court is all geared up to oversee that the Executive implements the new law in a time bound manner and effectively.

6.3 Disable and Reservation in Employment

The Supreme Court recognized the fact that employment is a vital factor in the empowerment and inclusion of people with disabilities and it is an alarming truth that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. They are denied the right to make a useful contribution to their

[34] This public interest petition raised three very vital questions concerning persons suffering from 'disability' as contained in *'Disabilities Act*, 1995' and now replaced by the *Rights of Persons with Disabilities Act*, 2016. First; non-implementation of 3% reservation of seats in educational institutions as provided in Section 39 of the *Disabilities Act*, 1995 and Section 32 of the *Disabilities Act*, 2016. Second important issue raised in this petition is to provide proper access to orthopaedic disabled persons so that they are able to freely move in the educational institution and access the facilities. Third issue pertains to pedagogy i.e. making adequate provisions and facilities of teaching for disabled persons, depending upon the nature of their disability, to enable them to undertake their studies effectively.

own lives and to the lives of their families and community. The Supreme Court in *Union of India v. National Federation for the Blind & Ors.*[35] held that the Governments at Centre and States as well as the Union Territories have a clear and unqualified obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons.[36] The court while declaring state action inconsistent with the law declared by the court held that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, law laid done in Indra Sawhney is not applicable with respect to the disabled persons.[37] The court in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, issued few directions including that the government of India shall issue instructions to all the departments/public sector undertakings/Government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.[38]

6.4 Disable and Reservation in Promotion

In another landmark judgment *Rajeev Kumar Gupta vs. Union of India*,[39] the Supreme Court while setting aside Government of India's instructions disallowing reservation in promotion for persons with disabilities, held that 3% reservation must be given in direct recruitment as well as in promotion wherever posts are identified to be suitable for disabled persons.[40]

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35 (2013) 10 SCC 772.

36 *Id.*

37 The court also reiterate that the decision in R.K. Sabharwal (supra) is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal.

38 *Supra* note 35.

39 W. P. (C) No. 521 of 2008. Decided on June 2016.

40 The petitioners Mr. Rajeev Kumar Gupta and seven other disabled persons serving as engineers in Prasar Bharti raised their grievance that the higher-level engineering cadre posts were filled mostly

6.5 Disable and Access to Public Infrastructure

The Supreme Court also acknowledged merit in another petition seeking all accessibility requirements to meet the needs of visually disabled persons in respect of safe access to roads and transport facilities. Through, *Rajive Raturi v. Union of India & Ors.*,[41] the Supreme Court recognized the concerns of the visually impaired persons towards accessing obstacle-free walking areas as well as ease in using transport facilities. The Rights of Persons with Disabilities Act, 2016 also clearly provides for a barrier free environment under Chapter VIII and reflects the intent of the legislature for facilitating conducive physical environment to the PWDs in accessing public places and public transport system. The Supreme Court observed that without these facilities, movement of PWDs gets impaired and this can even be treated as infringement of their fundamental rights under Article 19 (1) (c) of the Constitution, which is guaranteed to each and every citizen of the country.[42] Similar to the case above, this approach of the Apex Court reflects that it is in no mood to exempt an omission on part of the Executive in negating public access to PWDs by cornering the implementation of the Disabilities Act, 2016. The Supreme Court also recalled the approach followed by it in *Francis Coralie Mullin vs Administrator, Union Territory of Delhi,*[43] and reiterated that the right to life under the Article 21 of the Constitution also mandates that every citizen has a right to live with dignity. It is an umbrella right which subsumes several other rights that enable life to be led meaningfully. One such right includes the right to accessibility which was read as part of Article 21 in the case of *State of Himachal Pradesh & Anr. vs Umed Ram Sharma & Ors.*[44]

The Supreme Court has issued series of timelines to Central Government and the State Governments for complying with provisions laid down in sections 40 to 46 of the law concerning enhancement of PWDs accessibility to transport and government buildings'. Some of the major deadlines issued by the Apex Court include:

1. Direction to the States to identify 50% of all government buildings fully

by promotion. Though these posts were apposite for persons with disabilities, the Government was denying them 3% reservation in these posts, which were defeating the very ethos of *Disabilities Act*, 1995. At the heart of the problem were the written instructions of Government of India dated 29th December 2005, which prohibited reservation in promotion for disabled persons in Group A and B posts.

41 W. P. (C) No. 243 of 2005.

42 *Id.*

43 (1981) 1 SCC 608.

44 (1986) 2 SCC 68.

accessible by PWDs by February 28, 2018 with a rider that no further extension of time shall be granted; completion of retrofitting by December 2018;

2. Direction to States to identify 10 most important cities/towns and complete accessibility audit of 50% of Government buildings in those cities/towns by February 28, 2018, and completion of retrofitting in them by December 2019.

The governments have been asked to file status report in three months in compliance of these orders, and thereafter fresh directions will be issued. This judgment will certainly have far reaching implications and would benefit all kinds of disabled persons not restricting it to visually disabled persons.

In both these judgments, the Supreme Court has seized a ripe opportunity to hold the governments accountable for not acting in conformity with the disability laws till date and failing to transfer the benefits to the PWDs. The disability rights discourse which is much underrated has found momentum once again. The judiciary has handed down many judgments upholding the rights of PWDs in the past, but the judgments pronounced on December 15, have set an unprecedented trend of prescribing timelines to the Executive for implementing the usually ignored disability law. These fine judgments have reinforced disabled friendly judicial activism of the Supreme Court. The differently abled community has perhaps found new friends in the Apex Court.

6.6 Disable and Liability of Non-State Actors

The Supreme Court in a charitable verdict *Jeeja Ghosh v. Union of India*[45] ruled that the unceremonious conduct of SpiceJet airline, where it deplaned Ms. Jeeja Ghosh, a person with cerebral palsy amounted to unreasonable discrimination. Grounding the rights of the disabled in the Constitutional value of human dignity, the court held that what the disabled seek is not sympathy, but a recognition of the fact that they too should be allowed to enjoy the freedom to pursue their hopes, dreams and rights on a footing of equality with their able-bodied counterparts. Noting the paradigm shift in the societal conception of disability, the court took note of the fact that the paternalistic medical model of disability, which views the disabled as persons afflicted with illness and disease, has given way to the social model, which recognises them as equal and competent

[45] *Jeeja Ghosh v. Union of India* WP (C) Nos. 98 2012.

members of society.[46] Recognizing the centrality of ensuring equal treatment in fact, not just in law, the court significantly held that real equality does not merely mean absence of discrimination; it is equally imperative for the state to provide the disabled access to opportunities through affirmative action and reasonable accommodation.[47]

The apex court while directing SpiceJet to pay 10 lakh rupees as compensation to the victim observed that *"following aspects may be reconsidered by the DGCA/Government to see whether they can be incorporated in CAR 2014 by proper amendments, standardization of equipments, help desk, wheelchair usage, security checks, on board facilities, complaints mechanism, trainings, offloading.*[48] It further directed that the official respondents, in consultation with other departments as mentioned above, shall consider the aforesaid aspects, and even other aspects which deserve such attention but may not have been specified by the court, within a period of three months and on that basis whatever further provisions are to be incorporated should be inserted.[49]

7. Conclusion

PIL appears to be the most successful when the court intervenes to require implementation of policies which have already achieved broad consensus but through disorganization or failure to prioritize have not been put into action. The court in such situations does no more than require the government to act in ways it has already committed itself to, but simply failed to honour. The "right to food" case, for example, turned existing policies into fundamental rights and elaborated on them. The court can also be effective in its intervention in cases where there is a conspicuous gap in policy-making in areas affecting most fundamental rights, such as the right to dignity and equality of mentally disabled people. Another area has been that of sexual harassment. The court has held that sexual harassment constituted a violation of women's' constitutional right to dignity and drafted quasi-legislative guidelines, drawing on internationally recognized norms.[50] However, in the process the court has tried to preserve constitutional limits on its powers in relation to the other branches of government and in seeking to enforce orders made by the court in PIL cases. Justice Bhagwati has stressed the need for cooperation with state agencies. Moreover, certain principles of judicial restraint

46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Visakha v State of Rajasthan* (1997) 6 SCC 241.

have been articulated by the court. First, while the court has acted as a critic and monitor of the government, it has acknowledged that it is beyond its powers to usurp the administration or be itself involved in continued surveillance of administrative bodies. Second, the court can be activated only if the executive is remiss in its constitutional/statutory obligations to the disadvantaged. Next, the court will respond only if there is already in existence ameliorative legislation for the welfare of the poor and disadvantaged.[51]

There can be no better illustration of the impassivity and inconsiderateness entrenched in the laws and policies than the fact that in a country that has the world's largest disabled population, the government has hitherto failed to institutionalize a vigorous process for efficiently recording the disabled population in the country. The generous interpretation given by the Supreme Court to the disability rights discourse undeniably demonstrates a progressive approach that led to the enactment of new legislation. New law intends to confirm India's international commitment towards United Nations Convention on Rights of People with Disabilities (UNCRPD) but eventually it depends on the agencies mainly the government who will be responsible not only for implementation of new regime but also in creating awareness about this discourse. Despite a robust disability legislation envisioned to increase the social and political participation of people with disabilities, there continues to be significant barriers in accessing all aspects of the policymaking process. Studies in United States recognizes the significance of direct participation of people with disabilities in all policy debates, and civic engagement. For people with disabilities, civic engagement can help to create self-efficacy, promote social integration, and develop personal interests. Advocacy and technology are other two critical tactics used by the disability community to advance the rights of people with disabilities. Further understanding of how these tactics and tools empower people with disabilities to connect with government is required. Judiciary as a savior of human rights and dignity has done a decent effort to fill the void created by the legislature and executive. However, there is also a recognized need to ensure that conceived judicial remedies are clear and feasible and to secure enforcement of its orders through cooperation with the government, so that PIL can actually contribute to improving the lives of the disable. As one Supreme Court judge has said, "Since the court possesses the sanction neither of the sword nor the purse and...its strength lies basically in public confidence and support...the legitimacy of its acts and decisions must remain beyond all

[51] See Jill Cottrell," *Third Generation Rights and Social Action Litigation*, (1993), in Law and Crisis in the Third World, Editors, S. Adelman and A. Paliwala, London: Hans Zell, 102-126.

doubt...certainty of substance and certainty of direction are [the elements] which command public confidence in its legitimacy."[52]

[52] Jamie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, Volume 37, Issue 3, 1 July 1989, Pages 495–519, *https://doi.org/10.2307/840090*

LEGALISATION OF PASSIVE EUTHANASIA IN INDIA- RIGHT TO DIE WITH DIGNITY WITH SPECIAL REFERENCE TO 'ADVANCE MEDICAL DIRECTIVE'

Dr. Purnima Khanna*

> "Not long ago, the realms of life and death were delineated by a bright line. Now this line is blurred by wondrous advances in medical technology– advances that until recent years were only ideas conceivable by such science fiction visionaries as Jules Verne and H. G. Wells. Medical technology has entered a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die in dignity."[1]

1. Introduction

Euthanasia, also known as mercy killing, physician assisted death and compassionate murder, in general, means ending the life of a person to relieve him from pain and suffering caused due to an irrecoverable disease. In recent times the debate with reference to the legality of *euthanasia* has gained momentum as it touches social morals, medical ethics as well as right to life of a person. Article 21 of Indian Constitution provides fundamental right to life and liberty to all the persons. Time and again Indian judiciary has to deal with the question that whether fundamental right to life includes right to die or not? The constitutionality of section 306 and section 309 of Indian Penal Code has been challenged in various landmark cases. In the present article the author has made a humble attempt to highlight various aspects relating to the subject of *euthanasia* and right to die with dignity. For this constitutional scope of right to life has been discussed in detail with the help of relevant legal provisions and historic judgments of Indian courts. Hon'ble Supreme Court has taken up various facets of *euthanasia* and *advance medical directive* in detail in *Aruna Ramchandra Shanbaug v. Union of India and others*[2] and *Common Cause (A Registered Society)* v *Union of India.*[3] The main questions of law that arose

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1 *Rasmussen* v. *Fleming (1987) 154 Ariz 207* quoted in Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 67.

2 Writ Petition (Criminal) No. 115 of 2009, the Supreme Court of India, retrieved from *http://judis.nic.in/supremecourt/imgs.aspx, on March 5*, 2018.

3 Retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

before the court and the court's observations on the matter and directions and guidelines issued by it have also been discussed in the present paper. The author has also given a brief overview of the legal position prevailing in other countries.

2. Euthanasia and Advance Medical Directive

The word *euthanasia* is derived from the Greek word *thanatos* which means death and the prefix *eu* means easy or good.[4] Thus, *euthanasia* means an easy and good death. According to the British House of Lords Select Committee on Medical Ethics, "Euthanasia means deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering."[5] The term *euthanasia*, in medical context, was used for the first time by Francis Bacon in seventeenth century. According to him, "Euthanasia refers to an easy, painless, happy death, during which it was a physician's responsibility to alleviate the physical sufferings of the body."[6]

The Supreme Court of India in *Aruna Ramchandra Shanbaug* v. *Union of India and others*[7] discussed that "Euthanasia is of two types: Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e. g withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma."[8] The court observed that "general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained."[9]

Recently, the Hon'ble Supreme Court in its milestone judgment *Common Cause (A Registered Society)* v *Union of India,*[10] delivered on March 9, 2018, drew a distinction between passive and active euthanasia. Analysing various decisions of the Supreme Court of Canada and the Supreme Court of United States of America, the

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4 Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 3

5 N.M. Harris, "The Euthanasia Debate", J R Army Med Corps., October 2001, p. 367- 70, retrieved from *https://en.m.wikipedia.org* on March 10, 2018.

6 Francis Bacon, *The Major Works by Francis Bacon*, Ed. Brian Vickers, p. 630, retrieved from *https://en.m.wikipedia.org* on March 10, 2018.

7 Writ Petition (Criminal) No. 115 of 2009, the Supreme Court of India, retrieved from *http://judis.nic.in/supremecourt/imgs.aspx, on March 5*, 2018.

8 *Ibid.*

9 *Ibid.*

10 Retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

court observed,

> "In case (of passive euthanasia) when death of a patient occurs due to removal of life supporting measures, the patient dies due to an underlying fatal disease without any intervening act on the part of the doctor or medical practitioner, whereas in the cases coming within the purview of active euthanasia, for example, when the patient ingests lethal medication, he is killed by that medication."[11]

As stated by Lord Goff in *Airedale case*,[12]

> "The former can be considered lawful either because the doctor intends to give effect to his patient's wishes by withholding the treatment or care....However, active euthanasia, even voluntary, is impermissible despite being prompted by the humanitarian desire to end the suffering of the patient."[13]

According to George D. Pozgar, "The distinction between the two is imperative for the purpose of considering the duty and liability of a physician who must decide whether to continue or initiate treatment of a comatose or terminally ill patient. Physicians have to use reasonable care to preserve health and to save lives of people, therefore, unless fully protected by the law, they will be reluctant to abide by a patient's or family's wishes to terminate life- support devices."[14]

Euthanasia can be further divided into voluntary euthanasia, done with the consent of the patient and non- voluntary euthanasia, done without the consent of the patient e.g. patient is not in a condition to give such approval.

A further distinction is sometimes drawn between *euthanasia* and *physician assisted suicide*. The difference between the two lies in the person administering the lethal medication. In euthanasia, the lethal medication is administered by the doctor while in physician assisted suicide the patient takes it himself, as advised by the doctor.

According to the Law Commission of India,

> "A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical

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11 *Ibid.*

12 138 L Ed 2d 772, 521 US 793 (1997).

13 Quoted in *Common Cause (A Registered Society)* v. *Union of India* retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

14 See George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 370.

> procedures and allow nature to take its own course, as was done in good old times."[15]

According to George D. Pozgar, "An *advance directive* is a written instruction, such as a living will or durable power of attorney for health care, recognised under state law (whether statutory or as recognised by the courts of the state) and relating to the provision of such care when the individual is incapacitated."[16] Further "the Advance Directives allow the patient to state in advance the kinds of medical care that he or she considers acceptable or not acceptable. The patient can appoint an agent to make those decisions on his or her behalf."[17]

According to Ministry of Health, Singapore,

> "An Advance Medical Directive (AMD) is a legal document a person signs in advance to inform the doctor that he does not want the use of any life-sustaining treatment to be used to prolong his life in the event he becomes terminally ill and unconscious and where death is imminent."[18]

According to the Supreme Court of India, "protagonists of advance directives argue that the concept of patient's autonomy for incompetent patients can be given effect to, by evolving new ways so that such patients can beforehand communicate their wishes which are made while they are competent."[19] The court highlighted that "Advance directives are permissible in various countries so as to specify an individual's health care decisions and also to appoint persons who are authorised to take those decisions in case the person is unable to communicate his wishes to the doctor."[20]

3. 196th Report of Law Commission of India

The Law Commission of India in its 196th Report, also dealt with the issue of *euthanasia* and recommended as follows:[21]

> There is need to have a law to protect patients who are terminally ill, when they

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15 Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 3

16 George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 374.

17 *Ibid.*

18 Retrieved from *https://www.moh.gov.sg* on March 5, 2018.

19 Quoted in *Common Cause (A Registered Society)* v *Union of India* retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

20 *Ibid.*

21 Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 401, 402.

take decisions to refuse medical treatment, including artificial nutrition and hydration, so that they may not be considered guilty of the offence of 'attempt to commit suicide' under sec. 309 of the Indian Penal Code, 1860.... It is also necessary to protect doctors (and those who act under their directions) who obey the competent patient's informed decision or who, in the case of (i) incompetent patients or (ii) competent patients whose decisions are not informed decisions, and decide that in the best interests of such patients, the medical treatment needs to be withheld or withdrawn as it is not likely to serve any purpose. Such actions of doctors must be declared by statute to be 'lawful' in order to protect doctors and those who act under their directions if they are hauled up for the offence of 'abetment of suicide' under sections 305, 306 of the Indian Penal Code, 1860, or for the offence of culpable homicide not amounting to murder under sec. 299 read with sec. 304 of the Penal Code, 1860 or in actions under civil law.[22]

4. Legal Position in Other Countries

A brief overview of the law relating to euthanasia existing in other countries is as follows:

4.1. United Kingdom

In November, 2005 "Assisted Dying for Terminally Ill Bill" was introduced in House of Lords in which it was provided that a competent terminally ill person of major age suffering unbearably may either request for assisted suicide or euthanasia.[23] However, the doctors of Royal College of Physicians and the Royal College of General Practitioners on May 9, 2006 issued a united plea against legalising mercy killing that would allow patients to choose when to die. In the opinion poll, out of 5000 respondents only 26 per cent were in favour of a change and the remaining were against it.[24]

4.2. United States of America

Active euthanasia is illegal in all the states of USA, but physician assisted suicide is permissible in the states of Oregon, Washington and Montana. In both Oregon and Washington, only self- assisted dying is permitted. Physician- assisted dying and any form of aid to help a person commit suicide outside the provisions of law is considered to be criminal offence.[25] The opponents of physician assisted suicide in

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22 *Ibid.*

23 See *Times of India*, Hospitals to Allow Suicide, December 14, 2005, p. 9.

24 See *The Times*, May 10, 2006, UK edition, quoted in K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 591.

25 See *Common Cause (A Registered Society)* v. *Union of India* retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

USA plead that the right to active assistance in hastening one's death does not legally or morally flow from a right to refuse or forego medical treatment.[26] It is said that when a person chooses to refuse life sustaining devise (treatment) the death occurs naturally from the underlying disease, whereas, in case of physician assisted suicide an overt act and not the disease causes death.[27]

4.3. Netherlands

It is the first country to begin efforts to legalise physician assisted suicide. Beginning in 1973, a series of guidelines were worked out whereby physicians who complied with them were not be prosecuted for murder despite the provision in Article 293 of the Dutch Penal Code provides that anyone who takes life of another person even at his explicit request will be punished with imprisonment of twelve years.[28]

In 2002 the *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* was passed. It provides that "Euthanasia and physician- assisted suicide are not punishable if the attending physician acts in accordance with criteria of due care."[29] "Euthanasia is allowed if each of the following conditions is fulfilled:[30]

a. The patient's suffering is unbearable with no prospect of improvement.
b. The patient's request for euthanasia must be voluntary.
c. He must be fully conscious of his condition, prospects and options.
d. There must be consultation with at least one other independent doctor who needs to confirm the above mentioned conditions.
e. The death must be carried out in a medically appropriate manner in the presence of the doctor.
f. The doctor must report the cause of death to the municipal coroner in accordance with the provisions of the Burial and Cremation Act."[31]

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26 K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 587.

27 *Ibid.*

28 *id.*, p. 590.

29 Buiting H, Van Delden et al., "Reporting of Euthanasia and Physician Assisted Suicide in the Netherlands: Descriptive Study," 2009, retrieved from hhttps://en.m.wikipedia.org

30 *Aruna Ramchandra Shanbaug* v. *Union of India and Others*, Writ petition (criminal) No. 115 of 2009, retrieved from *judis.nic.in* on March 1, 2018.

31 *Aruna Ramchandra Shanbaug* v. *Union of India and Others*, Writ petition (criminal) No. 115 of 2009, retrieved from *judis.nic.in* on March 1, 2018.

4.4. Belgium

It is the second European country to legalise the practice of euthanasia after Netherlands. In Belgium, "Assisted suicide can be practiced by doctors under set conditions. Patients who wish to end their own lives must be conscious when they demand for euthanasia and shall repeat their request for euthanasia. They must be suffering from constant and unbearable pain arising from an accident or incurable illness. It is further provided that the authorities shall ensure that poor or isolated patients do not ask for euthanasia for the reason of money."[32]

4.5. Switzerland

Assisted suicide is legally permitted in Switzerland and can be performed by non-physicians. However, active euthanasia is illegal there. Article 115 of the Swiss Penal Code, which came into force in 1942, considers assisted suicide a crime if the motive is selfish.[33] The Swiss law is quite distinctive as the recipient of euthanasia may be citizen of any country and presence of a physician is not compulsory to carry the process of assisted suicide.

4.6. Australia

In Australia all states, except Tasmania, have laws for Advance Directives. The advance directives as provided by different laws in these states differ in their nature and their binding effect but the purpose of all the laws is same, that is, preservation of the patient's autonomy. The laws provide for circumstances under which the advance directives become inoperative.[34] For instance, in Queensland, "the directive becomes inoperative if the physician is of the opinion that giving effect to the directive is inconsistent with good medical practice or where circumstances have changed, including new advances in medicine, medical practice and technology so that it will be inappropriate to give effect to the directive."[35]

The State of Northern Territory of Australia in 1995 enacted "the *Right of Terminally Ill Act,* 1995 to permit the terminally ill patients to opt for mercy killing, i.e., euthanasia under the strict supervision of medical practitioners in accordance with

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32 See *Ibid.*

33 See Nidhi Saxena, "Legalisation of Passive Euhanasia in India (Aruna Ramchandra Shanbaug's Case) - Beginning of a New Last civil Right Movement for Demand of Death with Dignity," 2011, *Cri LJ,* Journal section, p. 325.

34 See *Common Cause (A Registered Society)* v *Union of India* retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

35 See *Ibid.*

the guidelines provided in the *Right of Terminally Ill Regulations,* 1996. However, the Act was declared unconstitutional by the courts and it was repealed in 1997."[36]

5. Right to Die with Dignity - Judicial Response

Euthanasia is one of the most complicated and debatable issue faced by the courts and legislatures all over the world. According to the Apex court, "If a man is allowed to or, for that matter, forced to undergo pain, suffering and state of indignity because of unwarranted medical support, the meaning of dignity is lost and the search for meaning of ife is in vain."[37] In *Gian Kaur* v *State of Punjab,*[38] the constitution bench of Supreme Court held that the fundamental right to life under Article 21 of the Constitution does not include right to die. It overruled the earlier two judge bench decision of the Supreme Court in *P. Rathinam* v. *Union of India.*[39]

In 2009 in its historic judgment of *Aruna Ramchandra Shanbaug* v. *Union of India and others*[40] the Supreme Court dealt with the issue of euthanasia in an elaborate way. A writ petition was filed by Ms. Pinky on behalf of the Aruna Shanbaug under Article 32 of the Constitution. The petitioner's case was that thirty six years ago, Aruna was brutally sodomised and strangulated due to which her brain got damaged. Since then she is living in a persistent vegetative state. It was prayed before the court that she should be stopped being fed and let to die peacefully. "The main legal issues that came up before the court in this case were:

a. If a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies be permissible and unlawful"?

b. If the patient has earlier expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his / her wishes be respected when such situation arises?

c. If the person has not earlier expressed such a wish, can his family or next of kin make a request to withhold or withdraw futile life-sustaining treatments?" [41]

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36 K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 589.

37 *Common Cause (A Registered Society)* v *Union of India* retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

38 1996 (2) SCC 648.

39 1994 (3) SCC 394.

40 Writ Petition (Criminal) No. 115 of 2009, the Supreme Court of India, retrieved from *http://judis.nic.in/supremecourt/imgs.aspx, on March 5*, 2018.

The Supreme Court while deciding *Aruna Shaunbag's case* relied upon various foreign cases. It will be important to discuss the *Airedale case*. In *Airedale's case*, Lord Keith of Kinkel, noted that "it was unlawful to administer treatment to an adult who is conscious and of sound mind, without his consent. Such a person is completely at liberty to refuse to undergo treatment, even if the result of his doing so will be his death. This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive."[42] It was held that "if a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion is in the best interests of the unconscious patient."[43]

Answering the first and second legal issue the court agreed with the decision of *Airedale' case* and held that "if a person is in a permanent vegetative state withdrawal of life sustaining treatment will be permissible. In regard to the third legal issue the court observed that if the person has not expressed such wish previously a question arises as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)?"[44] The Supreme Court held, "It is ultimately for the Court to decide, as parens patriae, as to what is is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight in coming to its decision."[45] The court laid down following directions will continue to be the law until Parliament makes a law on the subject:[46]

> "a. A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in

41 Writ Petition (Criminal) No. 115 of 2009, the Supreme Court of India, retrieved from *http://judis.nic.in/supremecourt/imgs.aspx, on March 5*, 2018.
42 See *Ibid.*
43 *Ibid.*
44 Writ Petition (Criminal) No. 115 of 2009, the Supreme Court of India, retrieved from *http://judis.nic.in/supremecourt/imgs.aspx, on March 5*, 2018.
45 *Ibid.*
46 See *Ibid.*

the best interest of the patient.

b. Such a decision requires approval from the High Court concerned as laid down in Airedale's case."[47]

Recently, a constitutional bench of Apex court, in its judgment delivered in *Common Cause (A Registered Society)* v *Union of India,*[48] delivered on March 9, 2018, has issued directions to legalise passive euthanasia in India. A writ petition was filed by the petitioner, a registered society under Article 32 of the Constitution of India. The petitioner prayed before the court to issue suitable guidelines and directions so as to declare right to die with dignity as a fundamental right as a part of right to life under Article 21 of the Constitution. It further sought the court to issue direction to the Union of India to adopt suitable measures in this regard in consultation with the State Governments. It was further prayed by the petitioner that terminally ill patients shall be allowed to execute *Living Will* and *Attorney Authorisation* to be used in case he is admitted in the hospital with serious illness.[49] The main assertions put forth by the petitioner were in brief as follows:[50]

"a. Each individual has right to decide about continuing or discontinuing his life in case of irreversible permanent progressive state.

b. Every person has an inherent right to die with dignity as a part of Article 21 of the Constitution.

c. Right to die without pain and suffering is essential to a person's bodily autonomy which is inherent in the right of privacy.

d. Progress of modern medical technology relating to medical science has resulted in prolonging the dying process of the patient causing distress and agony to the patient and his near and dear ones.

e. Right to die with dignity is an inseparable and inextricable aspect of right to live with dignity.

f. The execution of a *living will* is needful as penal laws create a dilemma for doctors to take help of modern techniques or not."[51]

The Union of India filed an affidavit whereby it was contended that "the Law Commission of India has submitted its report on the *Medical Treatment of*

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47 *Ibid.*

48 Retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

49 See *Ibid.*

50 *Ibid.*

51 Retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.

Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006. However, the Ministry of Health and Family Welfare was not in favour of the enactment of the same."[52] The reasons cited by the respondent were in brief as follows:[53]

"a. The Hippocratic-oath is against intentional killing of a patient.

b. It will serve as a setback to the development of medical science to relieve pain and suffering.

c. Suffering is a state of mind which varies from person to person and also depends upon surrounding environmental and social factors.

d. Can doctors claim to have knowledge and experience to say that the disease is incurable and patient is permanently invalid?

e. Conducting euthanasia may cause psychological pressure and trauma to the concerned doctor."[54]

The Supreme Court has dealt with the issues raised in the present petition in an articulate and detailed manner. Legal position in various countries and their landmark decisions on the subject of euthanasia have been discussed and analysed. The court held that "when a patient is terminally ill or in a permanent vegetative state with no hope of recovery, hastening the process of death so as to reduce the period of suffering constitutes right to live with dignity. Active euthanasia involves a specific overt act to end patient's life while in case of passive euthanasia something necessary to preserve patient's life and for artificially prolonging his life is not done." [55]

The court observed, "An inquiry into common law jurisdictions reveals that all adults with capacity to consent have the right of self- determination and autonomy. The said right paves the way for the right to refuse medical treatment....A competent person who has come of age has the right to refuse specific treatment....even if such decision entails a risk of death....where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/ she does not wish to be treated, then such directive has to be given effect to."[56]

The court held that "a failure to recognise advance medical directive may amount to non- facilitation of the right to smoothen the dying process and the right to live with

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52 *Ibid.*
53 *Ibid.*
54 *Ibid.*
55 Retrieved from *http://indiankanoon.org/doc/184449972/* on March 15, 2018.
56 *Ibid.*

dignity. In regard to Advance Medical Directive the main directions of the court held that it can be executed in writing only by an adult who is of sound mind. It must be voluntarily executed, without any coercion, inducement or compulsion. It shall clearly mention as to when medical treatment may be withdrawn. The name of the guardian or close relative authorised to give consent to withdrawal of medical treatment shall be specified. The document shall be signed by the executor in the presence of two attesting witnesses and countersigned by the Judicial Magistrate First Class. The document can be acted upon only when approved by a Medical Board consisting of the Head of the treating Department and at least three experts from the field of general medicine, cardiology, neurology, nephrology, psychiatry or oncology. The Chairman of the Medical Board shall convey the decision of approval to the Judicial Magistrate First Class, who shall visit the patient at the earliest and, after examining all the aspects, authorise the decision of the Board. If the Medical Board refuses the permission the executor or his family may approach the High Court under Article 226 of the Constitution. High Court may appoint an independent committee for the purpose. The court directed that the Advance Directive can be withdrawn or altered by the executor at any time."[57]

6. Conclusion

On the basis of foregoing discussion it is concluded that the present legal position in India, on the subject of *euthanasia,* is that passive euthanasia is now permissible and legal in India. However, it can be exercised only according to the directions and guidelines laid down by the court. Further, active euthanasia is not permissible under any circumstance. Our judiciary has played a significant role to fill in the void left by the legislature on the issue of *euthanasia.* Till a law is passed on the subject directions and guidelines issued by the court will operate as law.

[57] For details see *Ibid.*

PATENTABILITY OF COMPUTER RELATED INVENTIONS IN INDIA

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1. Introduction

Information technology has gained special significance in the recent past and has emerged as a vital tool for scientific development. Industrial growth has been accelerated due to the computerization of manual and mechanical activities. Therefore, new developments are taking place in the field of computer related applications, software and devices. Therefore, it becomes imperative to get them protected by patents. The dispute of software protection arises on the issues of copyright or patent protection. Indian Copyright Act, 1957 issues copyright for the protection of software. Indian patent law grants patent for Computer Related Inventions (hereinafter referred to as CRIs). The Patent Office recognizes that the core elements in the application of information technology are computers and their devices. Though software or computer programmes *per se* are not protected by patent under Indian patent law and the same are protected by copyright but if any software is coupled with a device or computer hardware then software gets embedded in that very device or hardware. In such case, it will definitely be protected by patents in the shape of CRIs in India.

2. International Perspective of CRIs

According to Article 52 paragraph 2 of European Patent Convention (EPC), programmes for computers are not patentable inventions. However, this clause is subject to the clause mentioned in paragraph 3 which states that the provision of paragraph 2 shall exclude patentability of the subject matter or activities only to the extent that an application or a patent relates to such subject matter or activities as such. The term 'as such' is not properly defined. The practice followed by the European Patent Office and the decisions by the Board of Appeals show that the computer programme having some technical effect can be considered for patent. The patent issued by European Patent Office under EPC is binding on all countries of

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European Union. However, each country has its own patent law and own Patent Office. Article 27 Paragraph 1 of TRIPs Agreement, 1995, *magna carta* of intellectual property rights, provides that patent shall be available for any invention, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. However, the issue of patentability and its exclusion is a controversial issue in case of determining patentability of advanced technological patents. But the dilemma is that TRIPs Agreement does not define the exact meaning of the term invention. However, it mentions about patentability criteria such as novelty, inventive step and industrial application. Further, Article 27 Paragraphs 2 and 3 of the TRIPs Agreement speak about exclusions from patentability. In both the paragraphs, it has not been mentioned that the computer programme or software should be excluded from patentable subject matter. Apart from this, computer software is mainly protected by Article 10 of TRIPs Agreement. It says that the source code and object code shall be protected as literary work under Berne Convention, 1971.[1]

In United States of America (US), section 101 of Title 35 of the United States Code states that an invention is patentable only if it is novel, useful, and fits into one of four categories: (1) processes, (2) machines, (3) manufactures, or (4) compositions of matter. While CRI or software is not explicitly mentioned in the US patent law. The United States Patent and Trademark Office (USPTO) has a practice of granting software patents. This practice is supported by many decisions of the US courts. For example, in *Diamond v. Diehr*[2], the United States Supreme Court stated that controlling the execution of a physical process by running a computer program did not preclude patentability of the invention as a whole.[3] China has also no express provision for the grant of software inventions but China's State Intellectual Property Office (SIPO) has the practice of granting CRIs through its guidelines issued from time to time.[4] Among the European Countries, England under section 1(2) of the Patents Act, 1977 excludes an invention relating to a program for a computer as such.[5] Similar is the case under French and German patent law.

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1 Ravindra Chingale and Srikrishna Deva Rao, "Software Patent in India: A Comparative Judicial and Empirical Overview" 20 *JIPR* 119 (2015).

2 450 U.S. 175 (1981).

3 Software Patent Law: EU, New Zealand, and the US compared, *available at*: *http://resources.info secinstitute.com/software-patent-law-eu-new-zealand-and-the-us-compared/#gref* (last visited on October 27, 2017).

4 A New Era for Software Patents in China, *available at*: *https://www.law360.com/articles/924934/ a-new-era-for-software-patents-in-china* (last visited on October 27, 2017).

5 Feroz Ali Khader, *The Law of Patents - With a Special Focus on Pharmaceuticals in India* 102 (2009).

3. Background of CRIs in India

The first reference to CRIs in Indian patent law came with the tabling of the second Patent (Amendment) Bill in Parliament in 1999. This Bill was subsequently referred to a Joint Parliamentary Committee, constituted on December 22, 1999. Section 3 of the Patents Act, 1970 comprises a list of creations that are not considered as inventions and are unpatentable. The Committee recommended a modification in section 3(k) of the Patents Act, 1970 to insert the words "*per se*" into the phrase "a mathematical or business method or a computer programme or algorithm". Therefore, under section 3(k) of the Patents Act, 1970 "a mathematical or business method or a computer programme *per se* or algorithm" would be unpatentable. The Committee clarified that the phrase was being inserted to ensure the patentability of inventions relating to computer programs that may include other things "ancillary thereto". The Committee further stated that the intention of its recommendation was not to reject the patentability of CRIs as such, but to distinguish them from the underlying computer programs, i.e., not to deny the grant of patents for software inventions, but to identify and deny patent applications for computer programs only. The Committee's recommendations became law with the Patents (Amendment) Act, 2002.[6]

Further, in 2004, the government attempted to pass the Patents (Amendment) Ordinance, 2004 in order to clarify the scope of software patenting. The Ordinance was intended to amend section 3(k) of the Patents Act, 1970 to read "a computer programme *per se* other than its technical application to industry or a combination with hardware", thus allowing the patenting of computer programs coupled with industrial application that were used in combination with hardware. However, strong parliamentary opposition led to the abandonment of Ordinance.[7]

4. Requirements of Indian Patent Law for Patentability of CRIs

In order to obtain a patent for CRI in India, an invention must fulfill the following criteria mandated by the Patents Act, 1970:

i) An invention must be "capable of industrial application". The phrase in relation to an invention, means as defined under section 2(1) (ac) of the Patents Act, 1970 that the invention is capable of being made or

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6 Patenting Computer-Related Inventions in India, available at: *https://www.lexology.com/library /detail. aspx?g=2ef31d2d-6318-48c9-8a8d-b7b40ecfb7d4* (last visited on September 25, 2017).

7 *Ibid.*

used in an industry.[8]

ii) An invention shall involve an "inventive step" means a feature of an invention that involves technical advancement as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art. Inventive step has been defined under section 2(1) (ja) of the Patents Act, 1970.[9]

iii) An invention must involve "novelty". Definition of "new invention" under section 2(1) (l) of the Patents Act, 1970 defines novelty which means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification. In other words, the subject matter has not fallen in public domain or that it does not form part of the state of the art.[10]

After satisfying the above mentioned three fold criteria an invention must not fall under the exclusions of section 3 of the Patents Act, 1970. For software patents or the patents for CRIs section 3(k) of the Patents Act, 1970 contains exclusion that "a mathematical or business method or a computer programme *per se* or algorithms are not inventions and hence are not patentable." It is to be noted here that computer program is governed by Copyright Act, 1957.[11] In Copyright Act, it is noted that a computer implemented invention could be the subject of a patent. While section 3(k) of the Patents Act, 1970 declares that a computer program *per se* is not patentable, however, it would be patentable if the computer program is part of a patentable process.[12] Computer software, though, protected by the copyright law but software as essential part of the hardware, when connected to hardware can be protected by patents, e.g. UV spectrophotometer, automatic fomenters, etc. Thus, software patent is granted for an invention based on computer related innovation.[13]

Though patent for a computer program *per se* is not patentable, a claim expressed as a computer arranged to produce a particular result, and computer programs which have the effect of controlling computers to operate in a particular way may be the subject matter of a patent. The prevailing view is that where the subject matter as

8 D.N. Choudhary, *Evolution of Patent Laws* 4 (2006).
9 Srividhya Raghvan, *Patent and Trade Disparities in Developing Countries* 111 (2012).
10 S.K. Singh, *Intellectual Property Rights Law* 198-199 (2013).
11 *The Copyright Act,* 1957 (Act 14 of 1957), ss. 2(o), 13.
12 T. Ramappa, *Intellectual Property Law of India* 147-148 (2010).
13 Deepa Goel and Shomini Parashar, *IPR, Biosafety and Bioethics* 51 (2013).

claimed makes a technical contribution to the known art, the patentability should not be denied merely on the ground that a computer program was involved in its implementation.[14]

5. Indian Patent Office and CRIs

With an aim to foster uniformity in the field of patents on CRIs, Indian Patent Office releases Manuals and Guidelines for Examination of Computer Related Inventions from time to time. These guidelines do not constitute rule-making and are provided to assist the Patent Examiner of such patent applications. They also provide that in case of any conflict between the guidelines and the Patents Act, 1970, the provisions of the Act will prevail.[15] The Indian Patent Office has issued following guidelines:

5.1 Patent Office Guidelines of 2013

The Indian Patent Office issued first set of CRI Guidelines on June 28, 2013 for examining patent applications for CRI. These guidelines defined two terms: technical effect and technical advancement for testing the patentability of the invention so as to determine whether the invention was outside the scope of section 3(k) of the Patents Act, 1970. Technical Effect was defined as solution to a technical problem, which the invention taken as a whole, tends to overcome. A few general examples of technical effect are: higher speed, more economical use of memory, improved reception/transmission of a radio signal, more efficient data base search strategy, more effective data compression techniques. Technical advancement was defined as contribution to the state of art in any field of technology. It was stated in the guidelines that it is important to divide between software, which has a technical outcome and that which does not have, while assessing technical advancement of the invention. Technical advancement comes with technical effect, but it is to be noted that all technical effects may or may not involve technical advancement. Essentially, all computer programs need a combination with some hardware for its functionality. However, novel software may not qualify for a patent if it is applied on a known hardware. Therefore, if a CRI offered a technical advancement over conventional methodologies, the invention would be patentable.[16]

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14 *Supra* note 5 at 50.

15 A Quick History of CRI Guidelines in India, *available at*: *https://sflc.in/a-quick-history-of-cri-guidelines-in-india/* (last visited on October 10, 2017).

16 Neeti Wilson, "Computer Related Inventions (CRIs) revisited by Indian Patent Office - Finalizing the CRI Guidelines - Third Attempt" 21 *JIPR* 118 (2016).

5.2 Patent Office Guidelines of 2015

The second set of CRI Guidelines was issued on August 21, 2015. It was considered that the revised guidelines had a positive effect. The 2015 guidelines clarified that for being considered patentable, the subject matter should involve the following:

i) a novel hardware, or

ii) a novel hardware with a novel computer program, or,

iii) a novel computer program with a known hardware which goes beyond the normal interaction with such hardware and affects a change in the functionality and/or performance of the existing hardware. A computer program, when running on or loaded into a computer, going beyond the normal physical interactions between the software and the hardware on which it is run, and is capable of bringing further technical effect may be considered as patentable. These guidelines also required that claims should be assessed from the point of view of technical advancement based on certain indicators.

These further clarified that technical advancement of the inventions concerning CRIs may not fall within section 3(k) of the Patents Act, 1970, if:

i) The claimed technical feature has a technical contribution on a process which is carried on outside the computer;

ii) The claimed technical feature operates at the level of the architecture of the computer;

iii) The technical contribution is by way of change in the hardware or the functionality of hardware;

iv) The claimed technical contribution results in the computer being made to operate in a new way;

v) In case of a computer program linked with hardware, the program makes the computer a better computer in the sense of running more efficiently and effectively as a computer.

vi) The change in the hardware or the functionality of hardware amounts to technical advancement.

However, these guidelines were put in abeyance within few months of its release. Stakeholder's consultations led to the third set of CRI guidelines which have now

come into effect.[17]

5.3 Patent Office Guidelines of 2016

On February 19, 2016, the Controller has issued the revised Guidelines for Computer Related Inventions. The current guidelines are in tune with the provisions in the Act. The Patent Office has accepted the three part test suggested by Software Law Freedom Centre, to determine the patentability of CRIs:

i) Properly interpret the claim and identify the actual contribution;

ii) If the contribution lies only in mathematical method, business method or algorithm, the claim should be denied;

iii) If the contribution lies in the field of computer programme, check whether it is claimed in combination with a novel hardware and then proceed to other steps to determine patentability with respect to the invention. The computer programme in itself is never patentable. If the contribution lies solely in the computer programme, deny the claim. If the contribution lies in both the computer programme as well as hardware, proceed to other steps of patentability.[18] Hence, embedded software has become patentable in India.

5.4 Patent Office Guidelines of 2017

Indian Patent Office on 30th June, 2017 has issued new guidelines for Computer Related Inventions. The key features of 2017 guidelines are:

i) The recommended test to determine patentability of CRIs as provided by guidelines of 2016 has been deleted.

ii) The guidelines tried to provide certain definitions related to CRIs. These state that definitions of computer, computer network, computer system, data, function and information shall be construed as defined in Information Technology Act, 2000; computer programme as defined in the Copyright Act, 1957 shall be taken; since hardware is not defined in Indian statutes, hence, dictionary meaning "the physical and electronic parts of a computer, rather than the instructions it follows" shall be considered.

iii) For examination procedure, the procedure as followed in other

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17 *Id.* at 118-119.

18 *Id.* at 119.

applications for grant of patent shall be followed in CRIs.[19]

6. Emerging Trends in Patentability of CRIs in India

In the case of *Enercon India Limited, Daman v. Aloys Wobben, Germany,*[20] the IPAB discussed the invention containing the steps for controlling the wind turbine based on external ambient conditions by using automatic control units like the computers. The IPAB revealed that the invention cannot be treated as computer program *per se* or a set of rules of procedure like algorithms and thus are not objectionable from the point of view of patentability.

The case, *Accenture Global Service Gmbh, Switzerland v. Assistant Controller of Patents and Designs, New Delhi and another,*[21] relates to Indian patent application number 1398/DELNP/2003, which is now a granted patent as patent number 256171, whose present legal status at the Patent Office database is, "inforce with due date of next renewal as 21/02/2017". However, this patent application was initially refused for patent registration by Patent Office under the provisions of exclusions from patentability. But the patent applicant appealed before the IPAB and as per the Controller's decision, it was held that the instant invention as claimed is not software *per se* but a system is claimed which is having the improvement in web services and software. Accordingly, it was held that the invention since not falling in the category software *per se*, corresponding objection was waived and the patent was granted.

Patent Office is also in the practice of granting patents and an Indian patent application number 3803/CHENP/2008 titled "DISAGGREGATED SECURE EXECUTION ENVIRONMENT" has been granted patent on September 19, 2016. This patent claims priority from US patent US11/353,675 with PCT International Application Number as PCT/US2007/002322. The subject matter of this patent relates to, an electronic device, such as, a computer, which may be adapted for self-monitoring for compliance to an operating policy.[22]

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19 Guidelines for Examination of Computer Related Inventions, available at: *http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI__.pdf* (last visited on March 3, 2019).

20 ORA/08/2009/PT/CH and Miscellaneous Petition Nos. 7/2010, 31/2010, 51/2011, 86/2012, 142/2012 & 143/2012 in ORA/08/2009/PT/CH, available at: *http://www.ipabindia.in/Pdfs/Order-224-10-ORA-20-09-PT-CH.pdf* (last visited on July 12, 2015).

21 IPAB, OA/22/2009/PT/DEL, available at: *http://www.ipabindia.in/Pdfs/Order-283-2012-OA-22-2009-PT-DEL%20(Final).pdf* (last visited on July 14, 2016).

22 Software Patents in India, available at: *http://www.techcorplegal.com/Indian_Law_Firm/softwa re-patents-in-india-laws-cases-granted-patent-examples-copyright-protection/* (last visited on October 2, 2016).

Thus, Indian Patent Office does not permit patent for computer programmes *per se*, but the stipulation opens a new area that software will not be patented if it is not software *per se*. Taking clue from it, international software giant Microsoft filed 306 applications in the year 2004 alone. The areas of patent applications relate to speech recognition, graphics and images, wireless computation, security related software, interface system, database computer architecture and data management.[23]

7. Critical Appraisal of Patentability of CRIs

The Indian patent law grants patent protection to CRIs. Indian Patent Office has issued guidelines for the patentability of CRIs four times. The draft guidelines of Indian Patent Office emphasises on technical advancement and new hardware for grant of patent to CRIs. However, these guidelines do not explicitly mention in which type of inventions patents can be granted. This is the major criticism against the guidelines. In this regard, it is suggested that Indian Patent Office should issue settled guidelines in order to avoid the revision of guidelines every year. The guidelines, *inter alia*, neither clearly defines the word '*per se*' to remove the ambiguity about patentability of software applications nor the word 'novel hardware'. Moreover, by the Patent Office Guidelines of 2017, removal of three fold test has further enhanced the problems. As a result every matter gets involved in litigation and one has to approach the court to get clarity about the guidelines and to wait for the judicial decision. Investment, research and development in the IT sector is increasing; the Indian economy has been digitalized; software increasingly forming the basis of innovation and business competition in India, hence, we need strong patent protection in this area. Software developer invests precious time and money in developing software but the Indian laws are insufficient to protect his labour.

8. Conclusion

It may be noted hereby that the Indian law clearly excludes computer programmes *per se*. The guidelines have to be read in conjunction with the provisions of the Patents Act, 1970. The discretion is being conferred to the examiner to focus on the underlying substance of the invention, not the particular form in which it is claimed, while determining the patentability of CRIs. A blanket exclusion of hardware novelty requirement in a patent application may not be dispensed with during examination. It is shown that national laws can be designed more suited to the local conditions by

[23] Intellectual Property Rights, A Bulletin from TIFAC, New Delhi, April 2005, quoted from M.K. Bhandari, *Law Relating to Intellectual Property Rights* 166 (2015).

keeping in mind the groundwork of patent law principles and international agreements. It may, therefore, be necessary to have different rules applicable to areas of purely functional aspect such as software. There is growing demand in software patenting, hence, there is need to revisit with the Indian patent law with regard to patentability of CRIs.

CRITICAL ANALYSIS OF THE SURROGACY REGULATION BILL, 2016

*Gagan Preet**

1. Introduction

To procreate is one of the innate desires of every human being. However, everybody is not fortunate enough to fulfill this desire by natural copulation and due to medical or social reasons they remain infertile, which in turn affects their personal and social life. Different communities in different jurisdictions have tried to find ways and means to find solutions to infertility since time immemorial, by performance or non-performance of various rituals. Emergence of age-old institution of Adoption was also a response to provide an alternative solution to cure infertility. But the drawback of this method is that the person's innate desire to have one's own biologically related child remains unfulfilled. The desire, to have one's own genetically related children, led to experimentation and advancements in the field of medicine and technology. Advent of assisted reproductive technologies is also a response to provide a solution to the problem of infertility. Artificial insemination, surrogacy, cryopreservation, IVF etc. are the most commonly used Assisted Reproductive Technologies. Though these technologies have been instrumental in providing a solution to infertility, but their usage has given rise to number of number of legal, ethical, social and human rights issues.

The techniques which have enabled the childless to conceive and bear children are commonly grouped under the heading "Assisted Reproductive Technologies (ART)" Any "procedure or method designed to enhance fertility or to compensate for infertility" outside the traditional means of procreation can be labeled as assisted reproductive technology.[1] As per Sec 2(a) Surrogacy (Regulation) Bill, 2014 "assisted reproductive technology" means techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract. It includes a number of scientific techniques that assist reproduction, for example, artificial insemination (AI), *in vitro* fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection

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1 R. Blank & J.C. Merrick, "Human Reproduction Emerging Technologies, 85 (1995).

(ICSI),cryopreservation etc. Early and well known interventions were IVF and AI, which are now taken as basic and popular treatments for problems of infertility. The usage of these techniques has challenged the people's understanding of parenthood and biological relationships. Surrogacy is considered to be the most controversial assisted reproductive technique.

2. Definitions of Surrogacy

The word "*surrogate*," is originated from the Latin word "*Surrogare*," it means "substitute" or "deputy" that is, a person appointed to act in the place of.[2] Generally speaking, surrogacy is an arrangement whereby a woman bears a pregnancy and delivers the baby for another woman, either from the use of her own egg or from the fertilized eggs of another woman placed in her womb. It is difficult to give uniform and universal definition of surrogacy. There are various definitions of surrogacy and each one has the own notion over the subject matter. The *Black's Law Dictionary* defines surrogacy as, "*the process of carrying and delivering a child for another person.*"[3] The Warnock Committee Report, 1984 defined surrogacy as, "*a practice in which woman agrees to carry a child for another person with the intention to hand over the child after birth.*"[4] This definition of the Warnock Report, 1984 makes it clear that after the birth of the child the surrogate mother has to surrender the child to the couple. However, it is not clear in the definition that who all can have access to surrogate arrangements.

The New Assisted Reproductive Technology (Regulation) Bill, 2014 defines surrogacy as, "*an arrangement where the surrogate carry the pregnancy of the child through the method ART with the intention to deliver the baby to the commissioning parents and in which the surrogates and her husband gametes are not used in it*".[5] This definition makes it very clear that there should be an agreement between the parties between the parties prior to the pregnancy and in such pregnancy neither the surrogates nor her husband's gametes are used and the surrogate has to surrender or handover the child to the commissioning parents after the birth. *The Surrogacy (Regulation) Bill, 2016* defines surrogacy as, "*a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over*

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2 Malini Karkal, "Surrogacy from a Feminist Perspective", *Indian Journal of Medical Science*, Vol. 5, 1997

3 Law Commission of India Report No.228,at pg 9

4 Law Commission of India Report No.228,at pg 9

5 Section 2 *(zq)* of The New Assisted Reproductive Technology (Regulation) Bill, 2014

such child to the intending couple after the birth.[6]However, definition in the latest Bill, 2016 is silent on it. However, in both definitions the surrogate has to relinquish the baby to the commissioning couple.

3. The Surrogacy (Regulation) Bill, 2016: An Analysis

This proposed Bill for the regulation of Surrogacy is aimed to change the prevailing notions and practices relating to surrogacy in India. To restrict the exploitation of the surrogate mothers, a complete ban on commercial surrogacy has been suggested in the Bill. Although altruistic surrogacy is permissible under proposed law, however restrictions have been imposed on its practice as well. Option of altruistic surrogacy is open only to Indian couples, with proven infertility and married for a minimum of five years.[7]Single persons, live-in partners, foreigners, overseas citizens and homosexuals have been debarred from taking the benefit of surrogate arrangements in India[8].

The proposed Bill aims at banning commercial surrogacy, rather than regulating it for the good of all the parties concerned. By putting a complete ban on this practice will lead to black market of surrogacy, which will further intensify the subjugation encountered by the Indian surrogates.[9]This Bill also intends to bring about changes in the present regulatory structure. Prevention of exploitation of the surrogate mothers, is no doubt the main objective of this Bill, however some of the provisions of this Bill have caused annoyance to medical community as well as to the general public.

Although the major aim of making and passing this bill was to prevent exploitation of the parties concerned in the surrogate arrangement. But some of the provisions of the Bill have outraged the medical fraternity and general public at large. As per section 2 (ze) of *The Surrogacy Regulation Bill,2016*,one of the condition laid down is the necessity of being a surrogate mother is that she has to be a relative only, a non-relative cannot be a surrogate.[10] This provision, itself limits the very extent of surrogacy because most of the times, due to different reasons, surrogacy is the last resort which the infertile couple chooses. Even though the option of adoption exists,

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6 Section 2 *(zb)* of The Surrogacy (Regulation) Bill, 2016

7 *The Surrogacy Regulation Bill,2016,*s 4.c*(II)*.

8 *Ibid.*

9 SimranAggarwal&LovishGarg, 'The new surrogacy law in India fails to balance regulation and rights LSE Human Rights' (2016) The Centre for the Study of Human Rights *at http://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-andrights/* (last accessed 31.12.2017).

10 The *Surrogacy (Regulation) Bill*, 2016, s. 2(ze).

but adoption itself is a very tedious process and moreover the desire to have one's own genetically related child is very dominant in the Indian societal setup. Moreover, if state intends to restrict surrogacy and promote adoption then streamlining of adoption procedures should have been the priority rather than limiting and restricting surrogate arrangements in the first place only. The idea of "altruistic surrogacy" as expressed in the Bill tends to limit the scope for prospective surrogate mothers as well as the intending parents. Reason being, that a female can serve as a surrogate only once in her lifetime[11] and limiting factor for intending couple is that they should have a willing and healthy relative on whom they can depend for such an arrangement. Moreover, in all the jurisdictions where altruistic or philanthropic form of surrogacy is permitted, superfluous restrictions of limiting it to close relatives etc. are not imposed.

The legislators have failed to consider it from the perspective of such a couple, where both the husband and wife are orphans and their parentage is not known, and they have grown up in orphanages. Does it mean that such a couple, if unfortunately they turn out to be infertile, can never have access to surrogate arrangement, as they do not have any such '*relative*' who can act as surrogate mother for them. Isn't it going to be violative of their basic human rights? And won't it be discriminative in nature, from their perspective. Moreover, restrictions as to the age of the husband must be in the bracket of 26 to 55 years of age and the wife must be between 23 to 50 years of age are not well founded. Complete ban has been imposed on egg donations, possibly with the objective to curtail trafficking of children byway of unlawful surrogacy racket. Nevertheless, complete ban will not serve the purpose. Restructuring of the policies and a comprehensive legislation is the need of the hour, which can help in resolving the issue without repressing the whole industry.

4. The Surrogacy (Regulation) Bill, 2016: A Critique

1.4.1 Complete Ban on Commercial Surrogacy

Due to increasing and unregulated incidences of surrogacy in India, a move has been initiated by the Government to change the regulatory framework of surrogacy in India. A press statement from the health ministry said that India "has emerged as a surrogacy hub for couples from different countries, which has spiraled into unethical practices, putting both surrogate mothers and their babies at risk". Nevertheless, rather than regulating this thriving industry, the government has

[11] *Ibid.*, at S. 4 (iii) (b) (III).

recommended complete ban on commercial aspect of surrogacy. Only "heterosexual married couple, married for a minimum of five years who have proven infertility which has been certified by approved authority[12]" can resort to surrogate arrangements. This Bill specifically prohibits any kind of exchange of money in case surrogacy agreements. Though the surrogate will be entitled to the medical expenditure incurred by her during the course of pregnancy. This proposed law is against the basic essence of Article 19 of the Indian Constitution in general, and is specifically violative of Article 19(1) (g), which ensures "freedom of trade and profession" for all. Surrogacy has been a thriving industry in India and had been a lucrative source of earnings for not only the surrogate mother but for many others associated with this industry. A complete ban on commercial nature of surrogacy will be detrimental to the interests of stakeholders and this cannot be categorized as reasonable restriction. Commercial surrogacy has been made punishable under the proposed law and it attracts a punishment of ten years imprisonment and Rs 10 lakh as fine[13].

1.4.2 Foreigners and NRI's cannot take Benefit of Surrogacy in India

Another major drawback of the proposed Bill is that it completely prohibits foreigners and even NRI's to take the benefit of surrogate arrangements in India. As in the Bill, it has been restricted to Indian citizens only.[14] Surrogacy industry in India is estimated *"around $1 billion a year and growing"*. Putting a complete ban on foreigners will affect the stakeholders, whose source of income is total dependent on this industry. Another obvious criticism of this Bill is that if there is no prohibition for foreigners to adopt children from India by way of inter-country adoption, then why this right has been restricted unnecessarily. It could have been restricted to infertile foreign couples only. But completely putting a ban on foreigners is not appreciable.

1.4.3 Only Infertile Indian Couples can Resort to Surrogate Arrangements

The proposed law permits only "heterosexual married Indian couple" [15] with "proven infertility" to resort surrogate arrangements. A deliberate attempt has been made to prevent the homosexual couples from getting the benefit of such arrangements in India. According to this Bill, "live-in partners, and single men and women have been

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12 The *Surrogacy (Regulation) Bill, 2016*, Section 4 (c)(II)
13 *Ibid*, at sec 37
14 *Ibid.*, at s. 4(iii)(c)*(II)*.
15 *Ibid.*, at s. 2(g).

prohibited from entering into such arrangements". The reason why this provision attracts criticism is due to the fact that Union Ministry of Women and Child Development has a completely contradictory approach regarding inter-country adoptions. As the ministry, facilitates the fast-track adoption of Indian children to foreigners, regardless of their marital status.

The latest Regulations for Adoption of children notified on January 4th, 2017, have rationalized procedures for Inter-country adoption. These Regulations permit single persons to adopt a child although it puts a restriction on the adoption of girl child by a single male.[16]Even the ART Guidelines of 2005 for the Regulation of Surrogacy does not impose a bar on an unmarried female's right to resort to ARTs for conception with a donor sperm, and the resulting child is accorded legitimacy also. Moreover, various draft Bills on the subject, which have been tabled in 2008, 2010 and 2013 respectively, have reportedly proposed that single persons as well as foreigners will have access to assisted reproductive technologies in India. Nevertheless, ART Bill 2014 and ART Bill 2016 restrict the use of surrogacy for married Indian infertile couples. Even this provision seems to be discriminatory in nature, because as far as adoption of child is concerned, irrespective of the marital status, with certain restrictions as to age gap, they are permitted to adopt a child. Other controversial as well as discriminative provision in this proposed Bill is that it has totally restricted surrogacy for homosexuals. Minister for external affairs Ms. Swaraj stated that "Each country has to make laws that are aligned with our values, as per a legal framework. Homosexual couples are not recognized by law in India."[17]

1.4.4 Five years of marriage, with proven infertility condition precedent for accessing surrogacy

For having access to surrogate arrangements under this Bill, "a couple has to be married for at least five years, with proven infertility before resorting to these facilities". Further, there are other restrictions laid down in the Bill, "the woman has to be between 23-50 years of age and the man should be 26-55 years old". As far as the provisions of Hindu Adoption Act, 1956 and Juvenile Justice Act,2015 are concerned , there is no stipulation regarding the age of the adoptive parents in these Acts. Thereby, this discriminatory approach as to age for adoption and age for entering into surrogate arrangements is also uncalled for.

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16 'Adoption Regulation 2017' (2017), WCD, available at *www.wcd.nic.in*, last visited on 15.07.18.

17 'Surrogacy Bill Gets The Cabinet Nod' (2016) The Hindu *at http://www.thehindu.com/news/national/Surrogacy-bill-gets-the-Cabinet-nod/article14591267. ece* (last accessed 31.12.17).

1.4.5 Surrogacy Permissible Only Once

This Bill imposes unreasonable restrictions for resorting to surrogate arrangements. If a person already has a surrogate child, that person cannot enter into surrogate arrangements again for having a child. The restriction is for the surrogate mother as well, as she cannot act as a surrogate more than once in her lifetime. Although, the proposed Bill aims at curbing exploitation of women and trafficking of children, however imposing a complete ban on commercial surrogacy, will lead to black marketing of surrogacy market, which will further lead to exploitation of surrogates and trafficking of children.

1.4.6 Bill violates the Constitutional Mandate

Certain provisions of the Bill are violative of constitutional provisions, as it violates "right to livelihood" and "right to reproductive autonomy" as guaranteed under the umbrella of Article 21 of the constitution. A blanket ban on commercial surrogacy poses a threat to right to livelihood of innocent and poor surrogates. Prior to this Bill, these surrogates were duly compensated by the commissioning parents for the services rendered by her. Out of these earnings, the surrogates used to financially support their families. These earnings were much more than the earnings by them through any other vocation. This Bill is violative of Article 14 of the Constitution, which guarantees *"equality before the law and equal protection of laws to all persons"*. Imposing unnecessary restrictions with respect to eligibility criteria on the basis of nationality, marital status and sexual preferences is also violative of Article 14.As the main objective of this Bill is to prevent exploitation of surrogates, imposition of such unreasonable restrictions fails to comprehend any nexus with the envisioned intent of this legislation.[18]

1.4.7 Other ARTs ignored under the proposed Bill

First, it focuses exclusively on surrogacy at the cost of ignoring the regulation of other assistive reproductive technologies such as in-vitro fertilisation, sperm donation, etc. Two, it raises some serious questions about the Government of India's

[18] SimranAggarwal&LovishGarg, 'The new surrogacy law in India fails to balance regulation and rights LSE Human Rights' (2016) The Centre for the Study of Human Rights *at http://blogs. lse. ac. uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-andrights/* (last accessed 31.12.2017).

commitment to protect and promote the constitutional, reproductive and human rights of Indian citizens.[19]

1.4.8 Violative of International Covenants and Obligations

International Covenants ratified by India safeguards human life, health and dignity, however the provisions of *The Surrogacy Regulation Bill (2016)* are violative of these basic principles. "*Right to found a family*"[20], which is a well recognised human right recognised under International Covenants, the proposed legislation tends to interfere with the reproductive rights of the individuals and thus violate the basic spirit of the well accepted principles of human rights covenants. Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW) necessitates all the state parties to ensure equality for men and women and provides the freedom to "*to decide freely and responsibly on the number and spacing of their children.*" [21] poses another challenge to the proposed legislation. Therefore this proposed Bill by restricting access to altruistic surrogacy tends to violate one of the fundamental commitments of the state to safeguard equal treatment and have non-discriminatory approach in accessing reproductive health services.

1.4.9 Mandatory screening of intending couples to check their suitability missing

A major drawback of the Draft Bill, 2016 is that it does not provide for any guidelines for the screening of couples, based on their means to support the child, their past criminal records, health, age and family information check etc. before they are actually permitted to have access to these ARTs. Absence of such screening guidelines can lead to jeopardizing the interests of the surrogate child, as the child may ultimately land up under the care of such persons, who lack the credibility of being a parent to the child and can even be a threat to the child's security.[22]

1.4.10 Surrogate Mother only a close relative

As per the provisions of this Bill, the eligibility criteria prescribed for the surrogate mother mandates her to be a married blood relative of the infertile

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19 KapilSibal, 'Unequal By Law' (2016) The Indian Express *athttp://indianexpress.com/article/opinion/columns/nda-government-commercial-surrogacy-regulation-bill-reproductive-technologies-3026339/* (last accessed 31 December 2018).

20 The Universal Declaration of Human Rights. Art 16.

21 The *Convention on the Elimination of All Forms of Discrimination against Women,* Art 16(1) (e.)

22 Sameer Malik, 'Surrogacy Bill and Transparency in Assisted Reproductive Technology in India', (2017) The Economic Times, available at *https://health.economictimes.indiatimes.com/news/policy/surrogacy-bill-and-transparency-in-assisted-reproductive-technology-in-india/56613629* (last accessed 25 May, 2018).

couple, and has herself borne a child of her own, she should not be a NRI or a person of foreign origin, and moreover she can act as a surrogate only once in her lifetime. These restrictions seem to be unreasonable in today's time, where everyone is busy. How many close relatives will be ready to act as surrogates, is yet to be seen when the relationships itself are dying a slow death because of lack of affection and communication with each other in today's materialistic world. Mr. Hari G Ramasubramanian, a surrogacy law expert and founder of Indian Surrogacy Law Centre and Gift Life Egg bank, "Surrogacy cannot be seen as illegal and immoral. The draft Bill is both draconian and unreasonable. It is a violation of the reproductive right of the surrogate mother. Moreover, the proposed Bill even banned egg donation that would only ensure that a sizeable number of people seeking IVF treatment would not be able to take it up now".[23] Moreover, in the proposed Bill the definition of close relative is also missing, which creates all the more confusion in availing the services of surrogate mother.

5. Conclusion

To conclude with we can say that with advancement in the field of reproductive technology and medical sciences, there is an eminent need of a legislation in India to avoid complications arising in surrogate birth, and also to cater to various other requirements The very basic question which arises is regarding the legitimacy of such contracts and the child produced as a result. On this issue it is proposed that these contracts should be legalized under some appropriate statute considering the interest of the infertile couples who keep longing for a child.

As the very purpose of the surrogate birth is to facilitate the intending parents to have a child, proper legal framework should be adopted to have the hassle free delivery of the child to the intending parents. Moreover it should also be taken into consideration that the surrogate mother is not deprived of proper care and nurture during her pregnancy and even after delivery for some time. The prospective legislation should also provide an answer to unresolved legal issues such as prenatal injuries that may be sustained by the child where such child is born alive with some congenital ailment or deformities brought about say by a gestational mother. The law should clearly provide for whether a tort action should lie on behalf of the child or whether the primacy of the gestational mother's health may be upheld to undermine the health of the foetus. Assuming the injuries was perhaps as a result of the negligence or illegal conduct of the gestational mother - will she be immune from civil or criminal action

[23] 'Surrogacy Bill Gets The Cabinet Nod' (2016) The Hindu *at http://www.thehindu.com/news/national/Surrogacy-bill-gets-the-Cabinet-nod/article14591267. ece* (last accessed 31.12.17).

either on behalf of the child or the state? Again Anglo-American legal systems have evolved guiding legal principles either of statutes or of case laws to resolve these problems. These legal systems' responses to such problems only reflect some degree of legal growth with technological advancements and indeed a robust legislative tendency.

Whilst it is conceded that these techniques are only just creeping into our country, in no distant future the full effects and attendant consequences of the new reproductive technologies will be so manifest that immense distortions and damage would have been done in the absence of statutory intervention. To delay legislative regulation in this area will be an invitation to legal complications is that could result from a socially beneficial practice. A comprehensive legislation regulating the entire reproductive technology practice should be introduced. Such legislation must start by the legality or otherwise of reproductive practice. It must clearly define and stipulate roles and status for all the participants in the procreation process. The status of the child must be clearly defined under the prospective legislation. Above all, it should also clearly specify the categories of persons who can have access to such fertility treatment. In this regard such prospective legislation must be mindful of the rights to equality and privacy and should not have a discriminatory approach towards unmarried persons; neither should it restrict access to treatment merely on grounds of a person's sexual preference.

In all, the objective of such legislation should be not be to offend those who have moral or other objections to these new practices but to assist those people who for physical, medical or psychological reasons are unable to have children by way of normal copulation. If the entire new reproductive technologies are fully complemented with a workable legislation, far from threatening and distorting the family ties and societal understanding of the family, it will actually strengthen the family. So the need of the hour is a coherent legal framework that is comprehensive in scope and sensitive to ethical and societal impact in this new reproductive era. The issue of surrogacy, if not regulated, will prove to be an avenue of exploitation and subjugation of women, especially in a country like India, where the masses are illiterate and thus vulnerable. To crown this, a new disturbing trend is seen amongst the fertile educated and young career oriented married women who are resorting to surrogacy for avoiding interruptions in their careers on account of motherhood and do not want their bodies to be disfigured due to after effects of pregnancy. Such emerging trends spell disaster for family as the fundamental unit of society. Thus, surrogacy and other assisted reproductive technologies is not per se a vicious practice and hence it is required to limit its use to only those who are infertile and have well

established constitutional right to access such technology and prevent it from being misused.

The twin objective which the *Surrogacy (Regulation) Bill* 2016 aims to achieve is to prevent the manipulation of women from poor strata and prevention of surrogacy being equated to renting of womb. Although the intentions of the legislators are well positioned, however the provisions of the proposed fail to support these intentions. It is endorsed that, the State intervention is mandatory in order to keep a check on all the exploitative activities, which lure the poor women towards surrogacy, however it is further stressed that such intervention should not act against the interests of all those who are within their rights to be benefited by surrogacy. Thereby, imposing a complete ban on commercial surrogacy, will be detrimental to the interests of all those who are actually in need of child by such arrangements. Thereby, need of hour is to have a balanced and poised approach; in which proper checks and balances ensuring transparency in such arrangements be incorporated by the Government for the protection of interests of all the stakeholders. Such measures will ensure elimination of role of intermediaries, thus safeguarding that surrogate mother gets properly compensated for her efforts in the whole process.

Surrogacy is not a very recent trend; it has been in vogue for over a decade. The restrictions imposed by the proposed *The Surrogacy Regulation Bill, 2016* are violative of the interests of the certain stakeholders, such as foreigners, single persons and even homosexuals. They enjoy equal protection under Articlec14 and 21 of the Constitution; however the proposed law tends to violate equality before law and right to reproductive autonomy and parenthood as ensured by right to life to such persons. Moreover, this right cannot be curtailed, particularly when the option to attain parenthood through Inter-country adoptions is open to single as well as foreign couples in India. This proposed Bill restricts even the medical experts to provide services in surrogacy procedures, apart from altruistic surrogate arrangements. Restrictions imposed in this Bill, denies right of livelihood to surrogate mothers. The objective behind excluding foreigners, overseas citizens etc. from, taking recourse to surrogacy, was to prevent misuse of this practice. However, the standards propagated by this proposed Bill for domestic altruistic surrogate arrangements can prove to be counterproductive and push this practice into wrong hands and will provide avenues for black marketing of surrogate arrangements which will further lead to corruption and exploitation of surrogates. As under the proposed law, only a 'close relative' can act as surrogate for intending parents, to evade the restrictions close relatives will be created on purpose and surrogate mothers will be impregnated within Indian Jurisdiction and later on moved to places which openly accept such arrangements. If

the proposed Bill is enacted as law in India, there is a huge possibility that surrogacy market will grow underground, which will in turn threaten the lives of the innocent surrogate mothers. Thus, there is dire need for a comprehensive legislation which also considers the societal practices associated with the use of surrogacy.

REGISTRATION OF MARRIAGES IN INDIA: A CRITICAL ANALYSIS

*Dr. Kamaljit Kaur**
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1. Introduction

Women, since ancient times, have been discriminated and gender inequality has always been rampant in the Indian society. After Independence, the Constituent Assembly made an attempt to curb the prejudices against women existing within the society. However, their endeavors could not reach the paradigm of personal laws. The Ministry of Law drafted the Hindu Code Bill to overcome the prevailing biases pertaining to gender within the society. However, the reforms initiated did not bring any substantial change because the problems like Bigamy, Child Marriage, Gender Violence, Desertion by NRI husbands etc. continue to exist, despite the fact that various legislations have been passed penalizing these practices.

Status of women after the marriage has been clearly laid down under various legislations but still there is no reduction in litigation regarding the matrimonial status of the parties. Kerala tops the list of states with the highest number of matrimonial disputes pending in family courts, with over 52,000 cases awaiting adjudication at the end of November 2016.[1] Bihar, whose population is three times that of Kerala and which has an area twice that of the southern state, has the second highest number of cases pending in family courts – 50,847 and Madhya Pradesh is third on the list with 46,866 cases pending.[2] On several occasions, women fail to provide the proof in order to validate her marriage and in the absence of any evidence, there lies no legal remedy which causes extreme hardship to women as they cannot avail any Matrimonial Rights.

There are numerous instances of marriage frauds, for example, on account of optional registration of Marriage, women are tricked to marry where one or more essential condition of marriage ceremony is not satisfied thereby, depriving women of the

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1 Utkarsh Anand, "Kerala Tops States with Pending Matrimonial Cases in Family Courts", *The Indian Express*, 8 January 2017.

2 *Id.*

legal and social remedies.[3] Therefore, courts every now and then, have prescribed for the compulsorily registration of marriage so that the status of women and children born out of wedlock can be determined.[4]

The Legislature and Judiciary occasionally, have made various efforts in making the Registration of Marriage compulsory and effective but till now no concrete result have been achieved. Apart from personal laws, the legislature has tried to make registration of marriage compulsory either by framing a new statute or by amending the existing statues. Judiciary has also directed the central and state governments to provide for the legislation to make Registration of Marriages compulsory.

2. Panoramic View of India and the World Regarding Registration of Marriage

The analysis of the recommendations or directions given would be incomplete without mentioning the status quo of India and World on the Registration of Marriage. Thus, with an eye to understand clearly the background under which the initiatives have been undertaken, one needs to see the present stance of Registration of Marriage nationally and globally.

2.1 Position in India

India is a country with a diverse and unique culture. There are many communities having their own practices and customs for the marriage. Invalidating the non-registered marriages would, therefore, be highly unsuitable in India. Thus, the government refuses to interfere in their traditions. Law has to be in sync with the multicultural practices and existing personal law systems.[5] However, the government is not inactive, instead it has played a passive role with the purpose to provide protection to the people. One such effort is providing for the optional or compulsory Registration of Marriage under numerous legislations.

Under the Indian Christian Marriage Act, 1872, Registration of Marriage solemnized under the Act is compulsory.[6] When the marriage is solemnized by the priest, they have the authority to register the marriage and issue a marriage certificate. The parties can even approach the marriage registrar within their jurisdiction to register the marriage.

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3 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.
4 *Kanagavalli v. Saroja*, AIR 2002 Mad 73.
5 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.
6 The *Indian Christian Marriage Act*, 1872, s. 27.

Under Muslim Laws, Kazis are appointed by the state government for assisting the solemnization of marriages. However, the presence of Kazis at the time of marriage is not necessary.[7] It is the Kazi who prepares the *nikahnama* which includes the details of the parties along with the sign of two witnesses and authentication by Kazi (his/her signature and seal). This document in standard form is kept by all Kazis and they have to fill in it all the details of the marriages which are solemnized and thus, it serves as proof of marriage for the purpose of registration.

Every marriage contracted under the Parsi Marriage and Divorce Act, 1936, shall immediately on the solemnization thereof, be certified by the officiating priest and send the 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.[8] Every Registrar sends to the Registrar-General of Births, Deaths and Marriages, a true copy certified by him of all certificates entered by him in the said register of marriages.[9]

The Special Marriage Act, 1954 provides for Compulsory Registration of Marriage. It was enacted with the purpose of interfaith marriages. Any marriage celebrated or solemnized under this Act, the Marriage Officer shall enter a Certificate of Marriage which shall deemed to be conclusive evidence of marriage.[10] Section 16 of the Act provides for the Procedure for Registration. It is a unique feature of Special Marriage Act, 1954, which protects the interest of parties and children born out of a lawful wedlock.[11]

Section 8 of the Hindu Marriage Act, 1955 provides for optional Registration of Marriages. The State Government may provide for the Registration of Marriage for the purpose of facilitating the proof of Hindu Marriages.[12] Furthermore, the State Government also has the power to opt for the compulsory Registration of Marriage.

Under the Foreign Marriage Act 1969, the provision has been provided for the Registration of Marriage by Indian citizens in foreign countries. The same can be registered by the registrar appointed by Central Government.[13] The registration of foreign marriages is provided under section 17 of the Act.

In order to prevent the issues related to NRI marriages, Ministry of Women and

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7 The *Kazi Act*, 1880, s. 4.
8 The *Parsi Marriage and Divorce Act*, 1936, s. 6.
9 The *Parsi Marriage and Divorce Act*, 1936, s. 9.
10 The *Special Marriage Act*, 1954, s. 13.
11 *M v. A*, 2018 SCC Online Del 8005.
12 The *Foreign Marriage Act*, 1969, s. 8.
13 The *Foreign Marriage Act*, 1969, s. 3.

Child Development provides for need to Register NRI Marriage within 7 days of marriage and if the NRI marriages are not registered within seven days, the passports and visas would not be issued.[14] The move would require amendments in the existing legislation. Thus, Registration of Marriage of Non-Resident Indian Bill, 2019, provides for the necessary changes.

Other Legislature that existed for the Registration of Marriage is The Births, Deaths and Marriages Registration Act, 1886. The title of the Act is somewhat deceptive as the Marriage Registration is not compulsory under it. It provides for the voluntary registration of those births and deaths and of the marriages registered under the Indian Christian Marriage Act, 1872, and of certain marriages registered under the Parsi Marriage and Divorce Act, 1865, for the establishment of General Registry Offices for keeping registers of certain births, deaths and marriages.[15] However, there is no provision which provides for the appointment of Marriage Registrars.

In the year 1969, Registration of Births and Deaths Act was passed. It contains no provision relating to marriage registration. Nothing in this Act shall be construed to be in derogation of the provisions of the Births, Deaths and Marriages Registration Act, 1886.[16]

Though the Registration of Births and Deaths (Amendment) Bill, 1969 was introduced to include the Registration of Marriages, it did not cover all citizens. These amendments applied only to the Christian community and it once again remained short of becoming a national legislation.[17]

Seeing the plight of the women and the extent of marital fraud, the National Commission for Women drafted Compulsory Registration of Marriages Bill, 2005. It aimed at making the Marriage Registration Certificate as conclusive proof of Marriage and the same shall be presumed to be correct unless the contrary is proved.[18]

The Committee on Empowerment of Women discussed the issue keeping in view the NCW's bill and submitted the report. Irrespective of religion, it stayed that the registration should be made compulsory by simpler, affordable and accessible

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14 "NRI marriages need to be registered within 7 days: Women and Child Development Ministry", *Economic Times*, 14 June 2018.

15 The *Births, Deaths and Marriages Registration Act*, 1886, Preamble.

16 The *Births, Deaths and Marriages Registration Act*, 1886, s. 29.

17 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

18 The *Compulsory Registration of Marriages Bill*, 2005, s. 18.

procedure. The report shed light on the plight of Indian women whose husbands, in a number of cases refused to acknowledge their marriage before contracting a second marriage or leaving their former wives altogether and refusing them maintenance, etc.[19]

Goa is the only state which follows the Uniform Civil Code in India. The process of Registration of Marriage is initiated by the State Government before the solemnization of marriage according to religion rites and ceremonies of the parties and the governed by Civil Registration Code of 1912 which is extendable to Daman and Diu as well.[20]

2.2 International Obligation of India

UN has specifically provided for the keeping of record and data on birth, death and marriages in order to protect the rights of the individuals. United Nations defines civil registration as the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population as provided through decree or regulation in accordance with the legal requirements of a country.[21] In the Indian context, however, the maintenance of vital statistics does not serve the sole purpose of record-keeping by the State.[22]

India has signed the Convention on the Elimination of All Forms of Discrimination against Women on 30 June 1980 and ratified it on 9 July 1993. Article 16 of the Convention provides for the "Equality in Marriage and Family Relations".[23] However, India had made reservation regarding Articles 5 and 16 of the Convention. When India submitted its combined fourth and fifth report in 2012 to the Committee on Elimination of Discrimination against Women (CEDAW), CEDAW advised India to speedily enact legislation for compulsory registration of all marriages and to consider withdrawing its declaration regarding Articles 5 and 16 of the Convention.[24] The Committee is also concerned about two things; the coexistence of multiple legal

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19 Ministry of Overseas Indian Affairs and Ministry of External Affairs (14th Lok Sabha), Committee on Empowerment of Women (2006-2007), Twelfth Report On 'The Plight of Indian Women Deserted by NRI Husbands (Aug. 2007)'.

20 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

21 "Civil Registration Systems", available at *https://unstats.un.org/unsd/demographic/sources/civilreg, (last accessed 28 February 2019).*

22 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

23 *Convention on the Elimination of All Forms of Discrimination against Women,* (adopted 18 December 1979, entered into force 3 September 1981) Art. 16, A/RES/34/180.

24 Committee on the Elimination of Discrimination against Women on 'Concluding observations on the combined fourth and fifth periodic reports of India (24 July 2014)', available at *https://digitallibrary.un.org/record/778815/files/CEDAW_C_IND_CO_4-5-EN.pdf, (last accessed 10 January 2019).*

systems with regard to marriage and family relations in the State and India's continuing reluctance to review its policy of non-interference in the personal affairs that results in deep and persistent discrimination against women.[25]

2.3 Registration of Marriage in Some Foreign Jurisdictions

Like India, Registration of Marriage is not compulsory globally. However, there are countries which recognize compulsory registration. In South Africa, Marriage laws are provided under Marriage Act, 1961. Non-Registration of Marriage does not affect marriage validity. It only provides for Certificate of publication of banns.[26] This certificate only serves as evidence for Registration. However, there are other evidence as well proving the marriage. In Sri Lanka, under Muslim Marriage and Divorce Act, 1951 every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of Nikah ceremony connected therewith.[27]

USA have a comprehensive system regarding the Registration of Marriage. One needs to obtain a Marriage License from the state officials and has to solemnize marriage either by civil or religious ceremony before the expiration of the Marriage License. After marriage, the Marriage License has to be signed by the required persons and the requirement varies from state to state. The Marriage License has to be filed with the issuing office (usually done by the person who presided over the ceremony of the marriage) and issuing office after the satisfaction provides for the Marriage Certificate which is the proof of the marriage.

Marriage Act, 1949 in UK provides that every person shall, immediately after the solemnization of the marriage, or, in the case of a marriage according to the usages of the Society of Friends, as soon as conveniently may be after the solemnization of the marriage, register in duplicate in two marriage register books the particulars relating to the marriage in the prescribed form.[28] Clergymen, Registering Officer, Registrar and Secretary of Synagogue are appointed to register the marriage performed as per usage of Church of England, Society of Friends, Jewish Religion and Registered Building respectively .[29]

One needs to obtain Certificate of No Impediment to Marriage and have to perform the civil ceremony for marriage at town hall (*mairie*) which is officiated by Officer of

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25 *Id.* para 40.
26 The *Marriage Act*, 1961, s. 15 (South Africa).
27 The *Muslim Marriage and Divorce Act*, 1951, s. 17 (Sri Lanka).
28 The *Marriage Act*, 1949, 12, 13 & 14 Geo 6 c 76, s. 53 (England).
29 The *Marriage Act*, 1949, 12, 13 & 14 Geo 6 c 76, s. 55 (England).

Civil Status. It is necessary in order to legalise the marriage and marriage is registered by entering the details of marriage in *Livret de Famille* (official book).[30]

In Indonesia, every marriage is recorded according to the prevailing laws and regulations.[31] In Pakistan, unlike India, there is provision for the compulsory Registration of Marriage, solemnized under the Muslim law, the Muslim Family Law Ordinance, 1961. Pakistan passed Hindu Marriage Bill in March 2017 to regulate Hindu Marriages. It provides for compulsory Registration of Marriage even for the Hindus in Pakistan so that Hindu women get documentary proof of their marriage.[32]

The Muslim Marriages and Divorce Registration Act, 1974 of Bangladesh also provides for the comprehensive procedure for registration. However, when a person contravenes the compulsory registration provision, he shall be liable to be punished with simple imprisonment for a term which may extend to two years or with fine which may extend to three thousand takas, or with both.[33]

In Turkey, law providing specifically for the Registration of Marriage is not provided. However, it does not mean that registration is not provided at all. Marriage in Turkey takes place by performing the ceremony before the Registrar and it serves the purpose of registration.[34]

India, being a secular and diverse country has to take various precautionary measure for national unity. Personal Laws are the area of the community. It was for this reason that, like various other countries, India also expressed its reservation even while ratifying the Convention of 1993.[35] The responses to Questions: What action has been taken to remove the reservation India has expressed on Article 16(2) of the convention and steps taken to make Registration of Marriage compulsory? India's First Report on CEDAW at the 22nd session of CEDAW was that in view of several impediments like low levels of literacy, cultural pluralism and personal laws which govern marriages, it may not be appropriate to undertake legislation for Compulsory Registration of Marriages.[36] Because of the diversity in the community, government in India is afraid of meddling with the personal laws. Looking globally from a social perspective, it can be seen that countries providing for the compulsory registration

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30 *Civil Code*, Chapter III (France).

31 The *Marriage Law*, 1974, art. 2 para 2 (Indonesia).

32 "Pakistan Senate passes landmark Hindu marriage bill", *The Hindu*, 18 February 2017.

33 The *Muslim Marriages and Divorce Registration Act*, 1974, (Pakistan).

34 Turkish Civil Code, 1926 (Turkey).

35 *Convention on the Elimination of All Forms of Discrimination against Women,* (adopted 18 December 1979, entered into force 3 September 1981), A/RES/34/180, A/RES/34/180.

36 *Kanagavalli v. Saroja*, AIR 2002 Mad 73.

are the countries with a specific community. However, India is multicultural. Thus, it is trying to provide for compulsory registration in order to prevent marriage fraud by its judicial pronouncements.

3. Judicial Pronouncements

The Supreme Court and High Courts have from time to time expressed their concern for the Compulsory Registration of Marriage in numerous cases. It is because they find it as the only solution for curbing the social menace prevalent in the society. Sometimes, the court hopes that the legislature will undertake it seeing its necessity.

In the case of *Shardaben Vyas v. Pankajkumar Vyas*,[37] Gujrat High Court accepted the Certificate of Marriage as the proof to establish factum of marriage which was not relied upon by the trial court when the husband opposed maintenance on the ground that applicant is not the legally wedded wife. Thus, it was because of the Certificate of Registration of Marriage which protected the maintenance rights of the women.

In *Harwinder Kaur v. Gursewak Singh*,[38] the question was regarding maintenance to the wife. Husband opposed the grant of maintenance on the ground that the petitioner is not the legally wedded wife. In the absence of the Certificate of the Registration of Marriage, it seems easy to disprove the marriage unless strong testimonies are provided as that of sister of petitioner who is also the wife of the younger brother of the respondent in the present case.

In *Shri Chandrakant Harmalkar v. Smt. Sumati Sagun Harmalkar*,[39] Bombay High Court refuses to invalidate marriage in the absence of Certificate of Registration of Marriage when the marriage was not disputed. It held that the gift deed executed is void to the extent it transfers the share of Sumati to the defendants. The marriage registration certificate is for the purpose of proving the solemnization of marriage and in its absence, the rights of the wife should not be nullified.

In *Kanagavalli v. Saroja*,[40] Madras High Court while deciding who is the legal heir of the person Natarajan who had married the appellant before decree of divorce with his first wife despite the fact that they were living separately even after obtaining the decree for the restitution of conjugal rights finds the absence of compulsory registration in Hindu Marriage Act, 1955 as its lacuna. If the registration is made compulsory, the

37 (1995) 2 GLR 1679.
38 (1998) DMC 705.
39 1998 (4) BomCR 356.
40 AIR 2002 Mad 73.

prosecution against bigamy becomes easy. The Court just hoped and left it at the will of the legislature.

When the legislature will was not activated and the necessity of the Certificate in protecting the rights of the women, the Supreme Court decided to become active and directed the Centre and State government to take the following steps as it was within the legislative competence under concurrent list, Entry 5 and 30:[41]

i. The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

ii. The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-Registration of Marriages or for filing false declaration shall also be provided for in the said Rules. Needless to add that the object of the said Rules shall be to carry out the directions of Apex Court.

iii. As and when the Central Government enacts a comprehensive statute, the same shall be placed before Apex Court for scrutiny.

iv. Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

Subsequently, further directions were given where particular reference was made to the earlier observations to the effect that marriages of all persons who are citizens of India belonging to various religions should be compulsorily registered in the respective States and Union Territories where the marriages have been solemnized.[42]

This case has been listed for about more than 35 times and still, the matter is pending. States and Union Territory are not active regarding their will. Affidavits on behalf of some state still need to be filed. It seems very disappointing that despite of more than 12 years of the direction issued, the state still lacks behind.

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41 *Seema v. Ashwani Kumar*, (2006) 2 SCC 578.

42 *Seema v. Ashwani Kumar*, (2008) 1 SCC 180.

However, High Courts completely opined in sync with the positive step of the apex court. In *Baljit Kaur v. State of Punjab,*[43] Punjab and Haryana HC while emphasizing the ratio of Seema Case directed the Registrar of Marriages-cum-Tehsildar to register the marriage when the bridegroom attains the age of 21 because the Special Marriage Act, 1954 provides Registration of Marriage on attaining the age of 21.

A registered marriage not only establishes the status of the spouse but also helps in succession disputes.[44] In *Sushma W/o Hemantrao Bodas v. Malti W/o Madhukar Machile*[45] the Bombay High Court on the basis of marriage certificate produced by Malti ruled in favour of strong presumption in favour of the validity of a marriage and therefore granted the succession certificate. The court also remarked that obvious advantage of Registration of Marriages is also to facilitates proof of marriage in disputed cases like succession.

In *Sarla Baby v. State of Kerala,*[46] it was held that it is not necessary that both the spouse should be present before the notified registrar concerned for submitting their application of Registration of Marriage but should personally appear and sign in the register maintained for the purpose.

In *Najma v. Registrar General of Marriages,*[47] the appellant prayed for the Registration of Marriage under the provisions of Kerala Registration of Marriage (Common) Rules, 2008 because the Registrar refused to register the marriage under said rules owing to the fact that the appellant husband acquired the citizenship of UAE. Court held objections to Registration of Marriage are unsustainable because SC has in *Seema v. Ashwani Kumar* has already directed for compulsory Registration for all religions and the Rules do not require specific National.

A question of legal importance arises in *Deepu Dev v. State of Kerala*[48] as to whether a marriage solemnized between two persons belonging to different religions can be registered under the provisions of the Kerala Registration of Marriages (common) Rules, 2008. It has been opined by the Kerala High Court that an instruction issued by the executive that the marriages solemnized between persons belonging to different religion are not registrable under the Common Rules is repugnant and contrary to the provisions contained in the Rules.[49]

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43 (2008) 151 PLR 326.

44 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

45 2009 (111) Bom LR 3974.

46 2010(2) KHC 334 (DB).

47 2012 (1) KHC 655.

48 AIR 2013 Ker 51.

49 *Id.*

S. Balakrishnan Pandiyan v. The Superintendent of Police[50], the High Court emphasized that the marriage under the Tamil Nadu Registration of Marriages Act, 2009 is compulsory for all religion because it is a secular law. Furthermore, marriage cannot be registered without the presence of parties except in the exceptional circumstances and that is too after recording reasons in writing.

In *A. Vijayalakshmi v. State of Kerala,*[51] petitioner solemnized her marriage under Hindu Marriage Act in the Kalyanamandapam at the Madhwa Mandiram Trust, Ernakulam, where the certificate of marriage dated 27.08.1998, was issued by the said organization. However, without registration their marriage they settled in the USA. Due to their differences, they applied for the divorce in the USA. The court needed the Certificate of Marriage Registration in order to grant the divorce. Thus, Court directed to follow the procedure so that she can legally claim her right to divorce.

Madras High Court has gone a step ahead by directing the Registrar to register a marriage solemnized between a man and Transwoman. In *Arunkumar v. The Inspector General of Registration,*[52] the Registrar refused to register the marriage because of lack of legal provision enabling registration of such marriages. However, High Court interpreted 'Bride' as woman including transwoman.

It is thus, seen that judiciary has indeed focussed a lot on the Registration of Marriage in an effort to curb marriage frauds that have taken place around the country and even outside India. It seems difficult to provide justice because of lack of proofs. These judgments indicate that the non-Registration of Marriage can be an obstacle especially at the time of matrimonial disputes and highlights the need of the Certificate of Registration of Marriage.

4. Implications of Judicial Pronouncements

In light of the direction issued by the Supreme Court and the emphasis laid down by the High Courts, the Parliament and State Government have taken positive steps. However, it seems futile as the status quo is still the optional Registration of Marriage. No concrete steps have been taken by the government in pursuant to making the Registration compulsory.

4.1 Legislative Initiative

Keeping in view the direction of the Supreme Court in *Seema v. Ashwani Kumar*, The

50 (2014) 7 MLJ 651.
51 2018 SCC OnLine Ker 3023.
52 WP(MD) No. 4125 of 2019, Decided on 22.04.2019.

Registration of Births and Deaths (Amendment) Bill, 2012 was introduced in the Parliament (Rajya Sabha). It seeks to amend the Registration of Births and Deaths Act, 1969 so as to provide for Registration of Marriages irrespective of religion professed and practiced by the parties to the marriage.[53] It was passed in Rajya Sabha on 13 Aug 2013. The bill could not be passed in Lok Sabha because of the dissolution of 15th Lok Sabha on 21st February 2014.

The new Government made another attempt for the making of Registration of Marriage compulsory. In its new attempt, the Legislative Department drafted a new fresh bill, Registration of Birth and Death (Amendment) Bill, 2015 based on the earlier Bill. The Department has asked the Commission to examine and submit a report with regard to various issues relating to compulsory Registration of Marriages. The Law commission thereby submitted the 270th report.

In order to protect the women from the trap of fraudulent marriage with NRIs, Ministry of External Affairs with the Ministry of Women and Child Development and Ministry of Home Affairs and Ministry of Law and Justice introduced Registration of Marriage of Non-Resident Indian Bill, 2019 on 11 Feb, 2019 in Rajya Sabha. The Bill provides compulsorily registration of marriage of NRI with the citizen of India under any existing law within 30 days of their marriage[54] and in case of non-compliance, the passport or travel documents of an NRI can be impounded, if it is brought to the notice of the passport authority.[55]

Apart from the initiative at the central level, Governments at the state level are also active in pursuant to the directions issued by Supreme Court. To illustrate, Punjab Legislature passed Punjab Compulsory Registration of Marriages Act, 2012 for compulsorily Registration of Marriage; Delhi Government passed an executive order The Delhi (Compulsory Registration of Marriage) Order, 2014; the Rajasthan Compulsory Registration of Marriages Act, 2009 was enacted for the state of Rajasthan etc. However, it again falls short of the initiative needed as there are still some states who did not comply with the Apex Court's direction.

4.2 Initiative of the Law Commission

The Law Commission took up the issue on various occasions. Here the focus remains on two reports because of the implication of the judicial pronouncement. In February 2008, the 18th Law Commission of India, in its 205th Report titled "Proposal to Amend

53 The *Registration of Births and Deaths Act*, 1969, Statement of Object and Reason.
54 The *Registration of Marriage of Non-Resident Indian Bill*, 2019, s. 3.
55 The *Registration of Marriage of Non-Resident Indian Bill*, 2019, s. 4.

the Prohibition of Child Marriage Act, 2006 and Other Allied Laws" recommended Central Government to make the Registration of Marriage compulsory for all religion.[56]

The Law Commission has taken up the subject *suo motu* in the light of the directions of the Supreme Court dated 14.2.2006 in *Seema v. Ashwani Kumar* and submitted its 211th report. There is diversity in personal laws and therefore, the same are not uniform regarding the Registration of Marriage. The commission examined the existing varied personal laws regarding Registration of Marriage. These manifold laws make the process complex. The Commission in its 211th Report proposed an enactment of a "Marriage and Divorce Registration Act" which is to be applied to the whole of India on all citizens. It, therefore, recommends to the Births and Deaths Registration Act, 1886 be repealed and Births and Deaths Registration Act, 1969 be re-named as "Births, Deaths and Marriages Registration Act, 2012".[57]

The 18th Commission, in its 212th Report titled "Laws of Civil Marriages in India – A Proposal to Resolve Certain Conflicts, 2008" proposed to pass the law to resolve conflicts between various personal laws. The report stated:

> Numerous marriages take place in India which is outside the ambit of various personal laws but cannot be governed by the Special Marriage Act either for the reason of not having been formally solemnized or registered under it. The question which law would then apply to such marriages remains unresolved.[58]

The latest report submitted was on the demand of Legislative department for fulfilling the directions of the Supreme Court. It has made the various recommendation like Centralized System of Registration, IT-based registration etc.

The Law Commission in its 270th report made the following recommendation: [59]

- Although there is difficulty in implementing the compulsory registration of marriage because of interference in Personal Laws, the merits that such an enactment holds cannot be overlooked.
- The Bill of 2015, finding its legislative competence under Entry 5 of Concurrent List, will be weighted over the state legislature by virtue of Article 254 of Indian Constitution.

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56 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

57 The Law Commission of India, 211th Report on 'Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform (2008)'.

58 The Law Commission of India, 212th Report on 'Laws of Civil Marriages in India – A Proposal to Resolve Certain Conflicts (2008)'.

59 The Law Commission of India, 270th Report on 'Compulsory Registration of Marriages (July, 2017)'.

- All these steps initiated are just supplementary and not derogatory to any specific legislation of personal laws in India.
- In order to remove illiteracy, the local civic bodies and municipalities should take steps to create awareness in order to get all the marriages registered compulsorily.
- Further, it is necessary to attach marriage certificate whenever the name of the spouse is written in any application, for receiving any benefit on behalf of husband or wife or out of any welfare schemes initiated by the government.
- It provides for linking with Unique Identity Number so that records of birth, marriage and death can be traced easily.

Law Commission has thus, recommended for Compulsory Registration of Marriage by modifying the existing administrative and legislative machinery. The Law Commission while making the recommendation has kept in mind the prevailing diversity in the country and in no way aimed at eliminating it or nullify the existing state legislature.

5. Critical Analysis

Registration of Marriage was stressed to make compulsory so as to curb the child marriage. Child marriage is a global issue that needs to be addressed. There exist various International Conventions pertaining to Child welfare like Declaration on Social and Legal Principles relating to Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally,[60] Convention on the Rights of the Child[61]. South Asia is home to almost half (42 percent) of all child brides worldwide and India alone accounts for one-third of the global total.[62]

Registration of Marriage, as insisted by Courts from time to time, will help in preventing the Child Marriage because marriages will be registered when the valid condition of marriage is fulfilled ensuring that the essentials required for a valid marriage are being satisfied and one such essential is the age of bride and groom.

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60 *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, 3 December 1986, A/RES/41/85.

61 *Convention on Rights of Child*, (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

62 "Ending Child Marriage Progress and Prospectus", *UNICEF*, available at, *https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf (last accessed 28 January 2019).*

But the question is, would it seriously curb child marriage? It is so because in the words of Justice S. A. Bobde in *Anurag Mittal v. Shaily Mishra Mittal*,[63] if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Thus, despite the provision for mandatorily registration of marriages, there is still no express provision declaring child marriages as nullity.

Take an instance under the Special Marriage Act where the Registration of Marriage is compulsory. The condition requires for the registration of marriages solemnized under personal laws is that at the time of registration the parties should be aged 21 or above.[64] It nowhere signifies essential condition related to marriage as to below 18 or 21 years for girl or boys respectively for registration. The same situation was addressed in *Baljit Kaur Case*[65] where at the time of marriage the bridegroom was below 21 but still, the court allowed the registration when they applied for it after attaining the age of 21 because the act did not apply any such restriction for the registration. Supreme Court in *Nandakumar v. State of Kerala*,[66] was again faced with the similar situation where the groom aged 20 years married a 19 years age bride where on the validity of the marriage, Justice Sikri held that it cannot be said that merely because the groom was less than 21 years of age, marriage between the parties is null and void.

Proper implementation of the mandate of age during registration would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.[67] Thus, the matter has to be seen by addressing various conflicting and contradictory legislations over this matter.

The Supreme Court highlights that in the case of Compulsory Registration of Marriage the prosecution against bigamy becomes easy. The prosecution may become easy in the sense that the second wife will be able to prove the first marriage as valid and thus easy for her to claim benefits. But there is another side of the story as well. What if Husband pleads no solemnization of the second marriage when the second wife pleads for bigamy? After compulsory registration, non-registration will result in no marriage. Burden of proof of second marriage lies upon the second wife because having no certificate of marriage will lead to the presumption of no marriage. In this way obstacles still, exist in the success of prosecution for bigamy. Even if the presumption for marriage exists in favour of the second wife, there may

63 (2018) 9 SCC 691.
64 The *Special Marriage Act*, 1954, s. 15.
65 (2008) 151 PLR 326.
66 (2018) 16 SCC 602.
67 2012 (6) AD (Delhi) 465

exist chances of frivolous litigation by the female. Making prosecution easy ensures no surety or assurance that bigamy can be prevented. It is just the aftermath that is concentrated. However, Prevention is better than Cure and efforts must be attentive on that area. The Supreme Court was thus, right in determining the evidentiary value of Certificate of Registration of Marriage as to the validity of marriage rather than its 'Conclusive value'.

The Law Commission suggests for the need of central legislation in this regard. While insisting on the need of Central Legislation, the Law commission highlights two things; firstly, there is no need of separate legislation and secondly, the existing infrastructure of registration of births and deaths to be used for the Registration of Marriages as well because the ultimate objective is only to provide for a mechanism for compulsory registration.

There is no doubt that a central legislation is needed for uniformity or to fill the vacuum of law in case the state does not provide for any legislation or executive direction or order. But going for Central Legislation should be an alternative if the states do not provide for it. Even if Central Legislation is provided, it should give precedence to the State Legislations as the State Government is in a better position to deal with the diverse personal laws which are sensitive in nature.

The existing infrastructure can be adjusted for the Registration of Marriage but there is a need of separate legislation as there are many legislative gaps that need to be addressed; one being the child marriage. There is a need for the separate law to provide condition specifically for registration so that the anomaly in the existing statues like Special Marriage Act can be addressed. The existing legislature that can be amended for the same is the Registration of Births and Deaths Act, 1969. There does not arise any specific role of state because of uniformity and no diversity in such matter. However, in the present matter, the law has to deal with the personal laws which are diverse in nature involving the custom and usage which have to be handled calmly. The question arises that when it comes to compulsory Registration of Marriage, should the law encourage this tacit compliance of child marriage by allowing these valid marriages under various personal laws to get registered, or should the law not register these marriages which may amount to turning a blind eye allowing the activity to continue unregulated.[68] Therefore, it is necessary to unify the law relating to marriage registration at one place and provide a comprehensive code.

[68] The Law Commission of India, Consultation Paper on 'Reforms of Family Law (2018)'.

With the change in time, the concept of Live in Relationship has been recognized in India. Protection of Women from Domestic Violence Act, 2005, gives the validity to these relation under the expression 'domestic relationship'. However, there are cases where the women fail to get remedy in case they part away with their live-in-relation. Therefore, the concept of Registration of Live-in-relationship should be introduced along with the Registration of Marriage because the law gives the Presumption of Marriage in the live-in-relationship.

IT-enabled registration is recommended. In the electronic age it has to be a method for registration but at the same time, complexity in the e-registration method has to be avoided. The National Commission for Women (NCW) has recommended including the employment status, social security number and passport details of couples in marriage registration records in a bid to deter NRI men from fraudulently marrying Indian women.[69] The best part is to have a centralized National Portal so that the database is unified. In order to make it conclusive proof, it can be linked with a Unique Identification Number with a central database.

Supreme Court is too passive in reprimanding the Central and State Government for non-compliance of its direction even after more than 12 years despite providing the time of three months. With the continuing status quo, the Central legislation appears distant dream to be fulfilled. Thus, the court has to take a stricter approach in order to enforce its order.

6. Conclusion and Suggestions

It is, therefore, seen that Registration of Marriage can be a successful step in curbing the marital frauds taking place in the country. It further aims at fulfilling the Right of Self-Determination of the transgender community as is evident from the recent Madras High Court Judgment. However, it is possible only when the Central Government and State Government work together.

The Judiciary is very active in curbing the menace. However, the power of the Judiciary is limited in the context of framing legislations. Despite giving the directions to Centre, State, and Union Territory, the judiciary has to depend upon on them. It is very depressing that more than 12 years have already been passed by and still the directions have not been complied with. Furthermore, there is no assurance after how long the same may be complied with. Therefore, Judiciary should take strict action against the states not complying the direction within the stipulated time.

[69] "National Commission for Women Suggests making Passport Details Part of Marriage Records", *The Indian Express*, 26 May 2017.

There is no doubt about the evidentiary value of Registration Certificate. But for claiming maintenance, there are other hindrances as well rather than just non-compulsory registration.[70] Even if the law provides for compulsory Registration of Marriage, the implementing agencies have to be very active and vigilant. Following are some suggestions:

- Certificate of Registration of Marriage should be made as conclusive proof of valid marriage in order to completely eliminate the fraud. A centralized and separate mechanism would prove useful in such direction.
- A separate centralized legislation providing for the strict penalty would be beneficial for a country like India where literacy is still low and people lacks awareness regarding laws.
- The law should provide for an overriding effect over the custom on the registration of marriage and it should not be seen as overpowering the Personal Laws.
- The law will be implemented in a better way when the certificate becomes a necessary document while dealing in any aspect of life as a couple. For e.g., The Certificate of Registration of Marriage must be shown at the reception of the hotels or resort whenever they claimed themselves as couple. Also, Certification of Registration of Marriage should be an essential document in case of Joint Purchase or Sale.
- Furthermore, where women failed to register their marriage, it is more likely that they will fail in their legal claim thus proving it as disadvantageous for them.[71] Thus, to avoid such situation Burden of Proof shall be on husband to prove that no marriage has taken place.

Executive authorities and Court have to be vigilant enough to prevent the frivolous litigation in case the burden of proof is on Husband. Therefore, the step in this direction has to be taken in a cautious and careful manner so that it should not become an instrument for the person to deny justice when it is aimed at providing justice.

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70 Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code" *Economic and Political Weekly*, Vol. 30, No. 50, Dec. 16, 1995, pp. 3238-3244.

71 Monmayee Basu, *Hindu women and Marriage Law: From Sacrament to Contract*, OUP India, 2001.

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