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EDITORIAL NOTE

With the increasing dynamism in challenges that the world poses to the field of law, laws need to keep evolving and meeting them to preserve peace in the society. In these times affected severely by Covid-19, several laws have been passed, some overhauling the existing structure lock, stock and barrel while the others either making small modifications or improving the existing laws.

In this Volume 8, Issue 1 of the RSRR Journal, the Editorial Board has aimed to cover wide aspects of the field of law to have a broader perspective on the changes happening in this arena. The objective of this Issue of the Journal is to provide a detailed analysis on niche areas of law along with solutions that help in bridging the gaps in these laws.

In furtherance of this objective and to facilitate effective academic discourse, the Journal has received Articles and Legislative Comments on varied areas of law viz. system of commercial courts, grundnorm and basic structure of the Constitution, Genome Editing, adequate housing and problems concerning migrants, tenancy laws and the law pertaining to the Government of National Capital Territory of Delhi ("GNCTD"). The article on the system

of commercial courts aims at providing a solution to the increasingly delaying nature of the appellate level proceedings in commercial matters. Subsequently, the article concerning grundnorm seeks to find out whether the interpretation to fix the basic structure as the grundnorm of the Indian Constitution is justified and relies on the theories of Kelsen and Austin for substantiation of the arguments. The articles on genome editing and adequate housing in relation to migrants bring out the vacuum in the respective laws and policies. The Legislative Comments on the Model Tenancy Act, 2021 and GNCTD Amendment Act, 2020 brings out the loopholes and provides suggestions on the prospective amendments that could be made to cure the ills.

On behalf of the entire Editorial Board of the RGNUL Student Research Review Journal, we are glad to present the Volume 8, Issue 1 of the journal.

Stuti Srivastava and Aditya Vyas

Editors-in-Chief

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ABSTRACT

The existing rent control laws have distorted the rental market with a ceiling on rents, low rental yields, fear of property being taken over by the squatters, and long-drawn legal battles. A necessity for changing this narrative has been achieved by the introduction of the Model Tenancy Act, 2021, whereby the landlord and the tenant are both given equal treatment with emphasis on the supremacy of the rent agreement incorporating mutually decided terms regarding rent, period of tenancy, security deposit, etc. It also sets up rent authority to quickly resolve the dispute. This paper analyses the newly approved Model Tenancy Act highlighting its important features, commending, and critiquing the law in equal measure. The paper recommends expunging a few provisions found violative of the Indian Constitution and amending the law to add necessary provisions to make it appealing and inclusive to the informal renters. The law is a step forward in removing ambiguity and building confidence between the landlord and the tenant. Nevertheless, as the Model Tenancy Act is a 'model' law the benefits of it can be experienced by the rental market only if the state governments decide to implement it.

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I. INTRODUCTION

With the aim of achieving the target of 'Housing for all by 2022'[1], on June 2, 2021, the Union Cabinet approved the Model Tenancy Law, 2021 ("**the Model law**"). It was after a long struggle of three decades[2] that there is present, a uniform regulatory framework that seeks to unlock available houses for rent and address the disparity in India's rental ecosystem. However, despite the laudable intention of the Government, the Model law may not be constitutionally valid. At the same time, it has issues that may hinder its application to full potential. This paper aims to highlight the features of the Model law, evaluate its effectiveness in achieving the intended objectives, and examine its impact on the Indian rental market.

II. BACKGROUND OF THE MODEL LAW

It is obvious that homeownership alone cannot address the housing shortage.[3] Renting of premises is a significant means to correct this shortage.[4] However, the census of 2011[5] indicates that despite approximately 110 lakh houses

[1] PRADHAN MANTRI AWAS YOJNA, https://pmaymis.gov.in/ (last visited Aug. 5, 2021).
[2] The first model law was proposed in 1992 and then again in 2011, 2015, and 2019.
[3] MINISTRY OF HOUSING AND URBAN POVERTY ALLEVIATION, Draft National Urban Rental Housing Policy (2015).
[4] MINISTRY OF FINANCE, Economic Survey 2017-18 Vol. II 148 (2018).
[5] MINISTRY OF HOME AFFAIRS, Census Data – Houselisting and Housing Data (2011).

in urban cities being vacant, the landlords are not keen to give their property on rent. The primary reason for it is the existing rental law.[6] Research shows[7] that the long-term effect of the rent control laws[8] on the rental market have been disastrous. Due to the nominal increase in rent, the landlords were not enthusiastic about improving or maintaining the housing rented under rent control; thereby, deteriorating the quality of the housing.[9] This had a domino effect and led to the rent of uncontrolled rental housing to increase further, distorting the demand-supply ratio of properties. Moreover, the rent-controlled properties were mainly occupied by families who had the means to pay the rent under free market, and therefore, it is doubtful if the rent control laws accomplished their goal of benefiting the poor.

Despite such unfair rent control laws, the Government owing to the vote bank politics has been unable to do much. To give an instance of the reach of the tenants' lobbying, the Delhi Rent Control Act was amended in the year 1994. The amendment made it easier for the landlords

[6] MINISTRY OF HOUSING AND URBAN AFFAIRS, Background Note on Model Tenancy Act (2020).
[7] Aditya Alok, Pankti Vora, *Rent Control in India – Obstacles for Urban Reform*, 4 *NUJS* 81 (2011).
[8] Such as the Maharashtra Rent Control Act, 1999; the Haryana Urban (Control of Rent and Eviction) Act 1973; the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, etc.
[9] Ali Mehdi and Makarand Bakore, *Rent Control Laws: Balancing the Interests of Landlords and Tenants*, CCS SERIES ON NURM REFORMS Centre for Civil Society (2007).

to evict the tenants. The amendment was passed by the Parliament and subsequently, got the Presidential assent. Yet was never notified due to the anger of Delhi's businessmen community.[10] Similar protests happened in Mumbai in June 2021 after the approval of Model Law.[11]

Moreover, as most of the States have their own rent control laws, there was an urgent need to have a uniform framework that would help formalise the rental market and resolve the disputes between the landlords and tenants speedily.

III. APPLICABILITY OF THE MODEL LAW

The Model law is applicable to properties covered in the definition of 'premises'[12] including residential and commercial properties but excluding industrial property. It is not applicable to premises owned by the Government or by a government undertaking or enterprise. It also excludes premises owned by a company, university, or organization

[10] Vivian Fernanades, *Model Tenancy Act can stimulate labour market, lower cost of living*, MONEY9 (Aug. 6, 2021), https://www.money9.com/news/opinion/model-tenancy-act-can-stimulate-labour-market-lower-cost-of-living-42823.html.
[11] Kiran Tare, *Why tenants in Mumbai have a right to be worried*, INDIA TODAY (June 17, 2021) https://www.indiatoday.in/india-today-insight/story/why-tenants-in-mumbai-have-a-right-to-be-worried-1816185-2021-06-17.
[12] The Model Tenancy Act, §. 2(d), INDIA CODE (2021).

given on rent to its employees as part of a service contract[13].

IV. HIGHLIGHTS OF THE MODEL LAW

The objective of the Model law is *"to establish Rent Authority to regulate renting of premises and to protect the interests of landlords and tenants and to provide speedy adjudication mechanism for resolution of disputes."*[14] It has 8 chapters comprising 47 sections and two schedules. The major features of the Model law are:

1. It makes it obligatory for the tenant and the landlord to present the tenancy agreement for registration to the rent authority within two months from the date of the agreement. The rent authority then provides a unique identification number within seven days and is responsible for uploading the details of the agreement in the local language or the State language on the website.[15] The registered tenancies are inheritable.[16]
2. Unlike the rent control laws, the Model law gives the landlord the right to revise the rent. Correspondingly, any major improvement in the property gives a right to the landlord to increase

[13] *Id.*, § 3.
[14] *Id.*, preamble.
[15] *Id.*, § 3.
[16] *Id.*, § 6.

the rent within one month of completion of the structural alteration.[17] Nonetheless, the amount must be mutually agreeable.

3. The Model law puts a cap on the advance security deposit - 2 months advance deposit for residential property and 6 months deposit on commercial property.[18] The security deposit is to be refunded to the tenant on the date of taking over vacant possession of the premises from the tenant. Though, due deduction for any liability can be made before making the refund.
4. The Model law provides for specific grounds of termination.
5. The landlord cannot withhold the essential supplies[19] if the tenant fails to pay the rent,[20] but at the same time gives a right to the tenant to complain to the rent authority if supplies are withheld along with a right to compensation not exceeding two months' rent.
6. A tenant cannot sub-let the property without the consent of the landlord.[21] However, the rent authority must be informed if the premises are sub-let.

[17] *Id.*, § 9.
[18] *Id.*, § 11.
[19] *Id.*, § 20, explanation.
[20] *Id.*, § 20.
[21] *Id.*, § 7.

7. In the event of unforeseen natural circumstances, the landlord must allow the tenant to continue in possession till a month from the date of cessation of the event.[22] The landlord is not permitted to increase the rent within this time.
8. The Model law provides for a three-tier adjudication body for speedy dispute resolution. The bodies consist of rent authority,[23] rent court,[24] and rent tribunal.[25] The civil courts do not have jurisdiction in rent-related matters under the Model law. The adjudicatory bodies are not bound by the Code of Civil Procedure, 1908 and instead the principles of natural justice apply to the proceedings[26].

V. COMMENDATION OF THE MODEL LAW

The Model law has been an anticipated piece of legislation for three decades. The law has many noteworthy provisions, the chief among them being that the rental agreements are now executed based on mutually agreed terms regarding rent, duration, and eviction grounds etc., thus reducing the possibility of litigation. The agreement is

[22] *Id.*, § 5.
[23] *Id.*, § 30.
[24] *Id.*, § 33.
[25] *Id.*, § 34.
[26] *Id.*, § 35.

to be mandatorily registered. Additionally, the Model law makes adequate protections available to the landlord as it renders the holdover tenant accountable by pressing him to pay the landlord twice the monthly rent for the first two months and after that duration, four times the monthly rent till the tenant moves out of the said premises. However, there is no penalty for not registering the agreement[27].

Unlike the rent control laws, obligations are imposed on both parties equally. As an example, the landlord is responsible for the heavy-duty acts such as whitewashing, electrical fittings, etc. and the tenant maintains the daily usage items such as being responsible for washbasin repairs, geysers, switches, etc.[28] Importantly, incentives follow the responsibilities. For instance, the landlord has a right to revise the rent and the tenant is protected from unnecessary visits by the landlord and an assurance that essential services will not be withheld.

Crucially, the Model law has provisions for a faster dispute resolution mechanism. Under it, the dispute must be resolved within 60 days of receipt of the application. Additionally, there is a cap on the number of adjournments

[27] Manish and Mukta Naik, *4 challenges Model Tenancy Act must overcome to provide affordable housing*, THE PRINT (June 17, 2021) https://theprint.in/opinion/4-challenges-model-tenancy-act-must-overcome-to-provide-affordable-housing/679338/.
[28] *Supra* note 13, at second schedule.

that can be given in a case. It also encourages witness testimony through affidavits[29], thus shortening the time of resolution.

It is anticipated that the Model law will boost investment in the real estate market by residents, NRIs, and institutional investors. A major concern of the NRIs under the rent control laws was that they feared losing their property to squatters.[30] The Model law takes that into account and has penalty provisions for not vacating after the lease period. Moreover, as the agreement is to be registered on a digital medium, it offers convenience and transparency to the NRI community.

Nevertheless, the Model Tenancy Act is only a model law, meaning it a prototype[31], giving the freedom to the States to either reject, or adopt the Model law in its entirety or adopt with modifications as the item 'land' falls in the State List of the Constitution.[32]

VI. CRITIQUE AND CHALLENGES

[29] *Id*., § 35.
[30] Nish Bhatt, *What does the Model Tenancy Act mean for NRIs?,* THE ECONOMIC TIMES (June 22, 2021) https://economictimes.indiatimes.com/nri/invest/what-does-the-model-tenancy-act-mean-for-nris/articleshow/83737960.cms.
[31] Apoorva Mandhani, *Rent, security, maintenance - what could change for tenant & landlord under Model Tenancy Act*, THE PRINT (June 6, 2021) https://theprint.in/theprint-essential/rent-security-maintenance-what-could-change-for-tenant-landlord-under-model-tenancy-act/671876/.
[32] INDIA CONST., schedule VII, list II, entry 18.

"Criticism may not be agreeable, but it is necessary. If it is heeded in time, danger may be averted; if it is suppressed, a fatal distemper may develop." -Winston Churchill[33]

No law is perfect. Yet, what is worrisome is that the Model law may not be defendable in a court as it appears to be violative of the right to privacy, which is now a fundamental right. The Model law mandates registering the tenancy agreement and necessitates submitting copies of the Aadhar card of the landlord and tenant.[34] However, the Supreme Court in *Justice K. S. Puttaswamy (Retd.)* v. *Union of India*[35] had decreed that linking Aadhar card can be made mandatory only to deliver "subsidy, benefit or service for which the expenditure is incurred from the Consolidated Fund of India". Clearly, the tenancy agreement does not fall under this criterion. Accordingly, the provisions of submitting copies of the Aadhar card run afoul of the judgment and must be removed from the law. On the same lines, the landlord and the tenant must submit their PAN details along with the Aadhar details. There is a risk that this information will be available to anyone who has access to the registration portal, violating their right to privacy. As

[33] Interview with Winston Churchill, Former Chancellor and War Secretary, New Statesman (January 7, 1939), https://www.newstatesman.com/archive/2013/12/british-people-would-rather-go-down-fighting.
[34] *Supra* note 13, at first schedule.
[35] Justice K. S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161 (India).

per *Puttaswamy,*[36] a law may infringe the fundamental right of privacy if it achieves a public purpose, and the public purpose is proportionate to the violation of privacy. However, it is doubtful whether the public purpose of using the registration data in formulating rent and housing policies will help save the Model Law from being declared unconstitutional.

Next, the scope of the Model law is restrictive and does not seem to accomplish its objective of giving equitable access to housing for all. Even though the mandatory registration of tenancy agreements on digital platforms is applaudable, the provision is not mindful of the digital divide and works on the assumption that stakeholders involved are digitally literate. Following this, the Model law also ignores the informal rental market, comprising largely of urban poor. Under the Registration Act[37] a tenancy agreement is required to be registered only if the tenure of agreement is one year or above. The Model law, however, requires mandatory registration irrespective of tenure. This will consequently lead to challenges for a tenant looking for a rental property for a short duration as the landlord will want to reap maximum benefits from the effort and money spent for registering the tenancy document, and thus would be reluctant to rent his property to such a

[36] *Id.*
[37] The Registration Act, s.17, No. 16 of 1908, INDIA CODE (1993).

tenant. Besides, the Model law is not mindful of the fact that the current tenancy market operates in a scenario where oral contracts are sufficient. It imposes no penalty on the parties for non-registration. The only incentive for registration is that a non-registered tenancy agreement would provide no relief to the parties under the law.

A few key provisions are missing in the law. Firstly, the definition of the *force majeure*[38] is limited and fails to include pandemics such as the COVID-19. Such an inclusion would have ensured that the tenant's inability to pay rent during the lockdown period will not result in eviction from the premises. Although a plea under the Contract Act[39] may be filed, yet a specific clause under the Model law will save the tenant from harassment in difficult times. Secondly, the Model law sanctions no cap on the number of times rent can be increased in a year or the factors that will influence the rate or the percentage of the hike. Besides, if the Rent Authority is to revise the rent based on an application by the landlord or the tenant, there is no timeline mentioned for completion of the process.

Lastly, the Model law has an elaborate three-tier adjudicatory system for dispute resolution. However, experience has shown that having several appeal authorities only leads to delay in final dispute settlement. It

[38] *Supra* note 13, at s.5.
[39] The Indian Contract Act, s. 56, No. 9 of 1872, INDIA CODE (1993).

is worth mentioning that while the Rent Authority must complete inquiries on the case within one month, under the Model law, there is no timeline specified within which the case must be resolved by the Rent Authority.

VII. RECOMMENDATIONS

Based on the above analysis, the following recommendations are suggested in the law:

1. To ensure that the Model Law stands the test of constitutionality, it must be tested against the principles of the right to privacy laid down in *Puttaswamy*[40] and provisions found violative must be removed from it.
2. Instead of three-tier adjudication under the Model law, the landlord and tenant must be asked to resolve the disputes by mediation. It will help in achieving the dual objectives of avoiding unnecessary delay and upholding trust between the parties.
3. The scope of law must be broadened to include registration of documents in an offline mode as well, as India is miles away to achieve 100% digital literacy.
4. Monetary upper ceiling on the rent must be mentioned in the law. Even though it may be

[40] *Supra* note 35.

argued that this will result in the same fate as that under the rent control laws, some upper limit should be provided, such as not increasing the rent to more than 20% of the prevailing market rate. This will be beneficial in building a stronger relationship between the parties, with both believing themselves to be on equal footing under the Model law.

VIII. CONCLUSION

The Model law is a much-needed legislation to bridge the gap between the existing rent control laws and India's rental ecosystem. It aims to promote transparency between the landlord and tenant and have uniform terms and conditions across different states, eventually leading to a stabilised rental market. The provisions for mandatory registrations, landlord and tenant having an option to increase the rent at mutually decided terms, the cap on security deposits, and speedy redressal of disputes between the landlord and tenant are a few noteworthy provisions as it levels the playing field. However, there are a few changes that must be made to this template to ensure that the Sate tenancy laws are able to stand the scrutiny in Court. In its present form, the Model law excludes the informal renting sector from its realm. To address this exclusion, the Model law must not rely solely on the digital platform for

registration and make the law appealable to renters from the lower-income group. It must be amended to include a criterion to finalise the rent each year as in its current form the law will not achieve its intended objective.

THE GNCTD AMENDMENT ACT, 2020: AN ALTERNATIVE CONSTITUTIONAL INTERPRETATION

[*]Ankit Agarwal & Sushmita

ABSTRACT

Delhi holds the constitutionally recognized special status of a National Capital Territory. The Government of National Capital Territory of Delhi Act, 1991 contains the administrative framework for its governance. On April 27th, the latest amendment to this law came into force. The Amendment Act modifies Sections 21, 24, 33 and 44 of the Act of 1991. It makes potentially significant changes including redefining the word 'government' to refer to the Lieutenant Governor, limiting the rule making power of Delhi's legislative assembly and so on.

A slew of articles have heavily criticized these changes. Popular media has tended to paint a picture of obvious and extreme violation of the Constitution by the amendment. The current paper explores the rest of the picture that has been left untouched. It provides an alternative constitutional interpretation to the clauses of the amendment. The paper begins with a broad analysis of the scheme and intent of the legislation, before moving into a clause by clause discussion. It backs up its constitutional validity with arguments founded in

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Constitutional jurisprudence, rationale, and common law. It addresses the potential impact of this legislation amid COVID-19 pandemic. The Research is doctrinal.

I. BACKGROUND

Part VIII of the Indian Constitution[1] introduces a unique category of administration – the Union Territories ("**UTs**"). Unlike States, which are part of a relatively rigid federal structure, UTs are under the direct administrative control of the Centre. Hence, they are also known as centrally administered territories. The constitutional status of Delhi has traversed a meandering journey. Originally called the Chief Commissioner's Province of Delhi, it held the status of a State till 1956. That year, India saw cyclonic reforms in territorial boundaries brought by the winds of the 7th Constitutional Amendment[2] and the subsequent States Reorganization Act, 1956[3]. Consequently, Delhi was designated as a UT. 35 years later, the 69th Constitutional Amendment Act, 1991[4] introduced Article 239AA[5] which gave the story an unprecedented turn. It endowed Delhi with the title of 'National Capital Territory' ("**NCT**"), and

[1] INDIA CONST. art. 239-242.
[2] INDIA CONST. amend. VII.
[3] The States Reorganisation Act, 1956, No. 37, Acts of Parliament, 1956.
[4] INDIA CONST. amend. LXIX.
[5] INDIA CONST. art. 239AA.

its administrator the designation 'Lieutenant Governor' ("**LG"**).

Article 239AA laid the constitutional framework for this new vision for Delhi. It provided Delhi with a legislative assembly which has 70 directly elected members and a council of ministers with the Chief Minister at its head, but all the while preserving the role of the administrator, in this case the LG. Drawing power from the Article, a comprehensive framework was enacted in the Government of National Capital Territory of Delhi, Act 1991 ("**Act of 1991**").[6] This law set up the requisite mechanism for the operation of Delhi's affairs in this special status, and attempted to iron out the wrinkles that existed.

However, ambiguities arose as to the division of powers and functions among the motley of entities. The judiciary, thus, made its appearance in two landmark judgments dated 4th July, 2018[7] and 14th February, 2019[8]. The former is of primary significance in this context where the Apex Court interpreted the special status of Delhi, and the peculiar relationship between the Chief Minister and the LG. The 5 Judge bench categorically held Delhi to not be a State, and barring Hon'ble Justice Bhushan, also agreed

[6] The Government of National Capital Territory of Delhi Act, 1991, No. 1, Acts of Parliament, 1992.
[7] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[8] Government of NCT of Delhi v. Union of India, (2020) 12 SCC 259.

that it was neither a UT in the strict sense. They held the LG to be bound by the aid and advice of the Council of Ministers. The latter judgment delved into the division of the power of appointment and transfer of certain officials between the NCT and the Centre.

II. INTRODUCTION

On March 24, 2021, the Parliament passed the Government of National Capital Territory of Delhi (Amendment) Bill, 2021[9]. The Central Government notified the Act with effect from April 27, 2021, thereby bringing it into force. The Act modifies Sections 21, 24, 33 and 44[10] of the parent Act of 1991. It makes changes of substantial potential including, redefining the word 'government' to refer to the LG, limiting the rule making power of Delhi's legislative assembly and so on. Amid a downpour of articles deeply criticizing this move of the government, a petition[11] has crystallized in the Delhi High Court challenging the constitutionality of the Amendment Act. A division bench comprising D N Patel CJ. and

[9] Government of National Capital Territory of Delhi (Amendment) Bill, 2021, No. 55, 2021.
[10] The Government of National Capital Territory of Delhi Act, 1991, §§ 21, 24, 33, 44, No. 1, Acts of Parliament, 1992.
[11] Shreya Agarwal, *Delhi High Court Issues Notice On Plea Challenging GNCTD Amendment Act Giving More Powers To Delhi LG*, LIVE LAW (Aug. 2, 2021, 1:31 PM), https://www.livelaw.in/news-updates/delhi-high-court-issues-notice-in-plea-challenging-the-vires-of-gnctd-amendment-act-2021-173555.

Jasmeet Singh J. has issued notice in the case, which now awaits hearing.

The petition, and the several articles on the subject have effectively painted a case of blatant violation of all essential features and provisions of the Constitution by the Amendment Act. Upon a perusal of popular media's criticism, one will be compelled to wonder how the Parliament even passed a law so patently bad. Exploring this *how* is one agenda of the current article. In other words, the current article explores the assertion that the case in favor of constitutionality of the amendment remains quite sound.

The objective is not to pick a side. It is to paint the remainder of the picture left untouched, so as to have a clearer look as to what this landmark tussle might hold for us in the foreseeable future.

III. 'VIOLATION OF DEMOCRACY, FEDERALISM AND FRANCHISE' - A FLAW IN THE CENTRAL ARGUMENT

It has become almost inevitable that a controversial law be enacted and the terms 'basic structure' are not thrown around it. Similarly, some major challenges[12] to the present legislation also raise the violation of – Democracy,

[12] P.D.T Achary, *Centre's Delhi Amendment Bill is at Odds With Supreme Court's Ruling and the Constitution,* THE WIRE (Apr. 20, 2020, 6:00 PM), https://thewire.in/law/delhi-amendment-bill-centre-lieutenant-governor-supreme-court.

Federalism, Adult Franchise and an inherent right therein to be governed by the government one has elected.

These substantial allegations follow the following simplified structure - 'The impugned Act violates Democracy. Democracy has been held to be a part of the basic structure of the Constitution. Per *Kesavananda Bharati* v. *State of Kerala*[13], Parliament cannot violate the Basic Structure. Hence, the law must be unconstitutional.' *The flaw in this central argument is that the Basic Structure doctrine was propounded to be applicable only in cases of Amendment to the Constitution under Article 368.*[14]

One may be reminded of the historical series of verdicts which drew a line between the constituent power of legislation under Article 368 and ordinary legislative power. The pioneer verdict being Justice Patanjali Shastri's *Sankari Prasad Singh Deo* v. *Union of India*[15], where he closely examined the argument that constitutional amendments were covered by the expression 'law' in Article 13. He rejected the argument holding: "the word "law" used in Article 13 must be taken to mean rules or regulations made in exercise of *ordinary legislative power* and not amendments to the Constitution made in exercise of

[13] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[14] INDIA CONST. art. 368.
[15] Sankari Prasad v. Union of India, AIR 1951 SC 458.

constituent power with the result that Art. 13 (2) does not affect amendments made under Art. 368."

[Emphasis Supplied]

This was affirmed by Justice Gajendragadkar in *Sajjan Singh* v. *State of Rajasthan*[16] and has been the settled position since.

Now, it is pertinent to highlight that not only does the present legislation not make any express amendments to the Constitution, it is additionally protected by Article 239AA Clause 7(2)[17]: "Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution."

Hence, without any express or implied amendment under Article 368, it appears that any challenge based directly on the ground of Basic Structure doctrine falls flat.

1. What is the implication of this?

The Authors do not intend to imply that the impugned law has become immune from challenge. The impact of Basic Structure being taken out of the debate is practically only this — each challenge must now be connected directly to

[16] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[17] INDIA CONST. art. 239AA, cl. 7(2).

the violation of a Fundamental Right for the law to be unconstitutional under Article 13[18]. In other words, where one could connect the alleged violation of our democracy directly to the Basic Structure and be done with their responsibilities, now the capable advocate would have to connect the violation of these principles directly to a Fundamental Right under Part III to make their case.

This additional burden might prove to be a heavy one owing to the masterful wording and the excellent scheme of the impugned law.

IV. THE AMENDMENT FORMS A PART OF A WELL-STRUCTURED, WELL-INTENDED SCHEME

The present legislation is far from arbitrary. Each individual clause of the amendment fits in place to form a central scheme — a scheme which seeks to attain a *clear, functional and harmonious separation of powers* in the NCT.

Drawing from the Statement of Objects and Reasons of the amendment bill,[19] the following salient points shall outline the general scheme and intent of the same:

One, the 69th Constitutional Amendment, 1991[20] introduced Article 239AA to provide for a constitutional

[18] INDIA CONST. art. 13.
[19] *Supra* note 9.
[20] *Supra* note 4.

framework recognizing Delhi's special status. Clause 7(a) of Article 239AA[21] is of paramount significance here "Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto."

The Act of 1991 was brought under this clause, and the present law being an amendment to that Act, also comes within its ambit.

The implication here is that *the present amendment, drawing power from Article 239AA 7(a), merely gives effect to or supplements what already exists*. It does not introduce anything new, it only seeks to fill the gaps that were left by the original law.

Two, the need for this legislation became evident after the two judgments of the Apex Court. The amendment does not nullify these judgments, it gives a rational and practical effect to them. In this era of judicial activism, the division of roles between the judiciary and the legislature seem to have been forgotten. When a law is impugned before the judiciary, and it finds that the law has some legislative faults in it, it provides an *interim* relief to the situation by *interpreting* the law. It is then the solemn duty of the legislature to take note of the decision and incorporate amendments in the law to permanently remedy the

[21] INDIA CONST. art. 239AA, cl. 7(a).

situation. In this case, the judgments exposed the lacunae of the existing framework, and the ambiguity in its interpretation. Hence, the legislature inserted viable mechanisms to fill the lacunae, and expressed its intended interpretations to remedy any ambiguity.

Three, it would be patently erroneous to say that the 69th Amendment had made Delhi a State. A five Judge Bench of the Apex Court in *NDMC* v. *State of Punjab*[22] stated it most clearly, "it is clear as noon day that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme." The administrative status of Delhi is constitutionally peculiar, whereby it stands somewhere in the spectrum between a State and a UT. The authors' considered opinion is that it stands closer to the UT end of the spectrum.

In support of the averment, a look may further be had at the wording of the first clause of Article 239AA – "the Union territory of Delhi shall be called the National Capital Territory".[23] A 3 judge bench of the Apex Court[24] has interpreted the clauses in alignment with the Author's own, clarifying that after the introduction of this article, the NCT of Delhi has been administered by the President through the administrator appointed under

[22] NDMC v. State of Punjab, (1997) 7 SCC 339.
[23] INDIA CONST. art. 239AA, cl. 1.
[24] Delhi Bar Association v. Union of India, (2008) 13 SCC 628.

Article 239. Thus, it says, "the Lt. Governor is the administrator for the National Capital Territory of Delhi and shall be representing and authorized to act for and on behalf of the National Capital Territory of Delhi."

Thus, it is made abundantly clear that merely new designations are being given to Delhi and its administrator, which is still in its fundamental nature a UT.

The above averment seeks to put forth this point – In a territory which is akin to a UT, the administrator (here LG) cannot be made a nominal head akin to a governor in a state. His powers and functions must be reserved as well. Hence, a novel, clearer separation of powers was urgently needed in the NCT, and attaining that is the primary objective of this amendment.

V. CLAUSE BY CLAUSE DISCUSSION ON THE IMPUGNED AMENDMENT

The following is a clause-by-clause discussion on the amendment.

1. Clause 1: Is the 'Government' the Lieutenant Governor?

The amendment[25] to Section 21[26] of the Act of 1991 has been the fastest one to spread. Section 21 restricts the legislative power of the assembly in certain matters. The amendment adds Section 21(3) which reads as follows -

"(3) The expression "Government" referred to in any law to be made by the Legislative Assembly shall mean the Lieutenant Governor."

The amendment is narrower in its operation than what popular news has made it to be. *First,* it is prospective in its operation. As opposed to the other clauses of Section 21 itself which use the phrase *laws passed by*, the current provision uses *law to be made by*. Hence, this change will only affect the laws that are to be made starting April 27th.

Second, let us understand what the provision actually implies. In a law made now by Delhi's legislature, where there is the term *government* attached (as opposed to say, the phrase Government of India) it shall be deemed *de jure* to be a reference to the LG. For instance, if a provision talks about salaries and allowances of an officer and ends with the phrase, "... as may be prescribed by the government."

[25] The Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 2, No. 15, Acts of Parliament, 2021.
[26] The Government of National Capital Territory of Delhi Act, 1991, § 21, No. 1, Acts of Parliament, 1992.

This would imply that the salaries and allowances would be prescribed by the LG, who ultimately will operate on the aid and advice of the Council of Ministers.

The point being made is this. As in the above example, all references to the government that are made by a law are a form of subordinate legislation or other executive function. The legislature makes a law and within it refers all the executive functions to its Ministry which has special knowledge to carry it forward. The only difference in this case is that instead of referring the task directly to the Ministry, it refers it to the LG. The LG then acts on the referral on the aid and advice of the Ministry. Hence, the impact of the amendment is twofold. *One,* it clarifies that the subordinate legislation and all other executive functions specified in a law would lie with the executive. *Two*, it manages to keep all the entities — the LG and the Council headed by the CM — in the loop while making executive decisions. It is not unimaginable that if the word *government* were to refer directly to the Council, the LG may be cut out of the process.

2. Clause 2: If the law incidentally falls outside the conferred powers, it must be reserved

The second clause[27] in the amendment has modified Section 24[28] of the Act of 1991 which deals with the LG's power to give assent to bills. The clause makes an addition to the existing list of situations in which the LG is required to reserve a bill for the President's consideration. Post amendment, if in the opinion of the Governor a bill incidentally covers any matter which falls outside the purview of the powers conferred on the legislative assembly of Delhi, he must reserve the bill for reference of the President.

This amendment clause in its essence attempts at giving effect to clause 3(a) of Article 239AA.[29] The said clause places certain limits on the legislative power of the assembly of Delhi. One limit is the clear and express bar on legislation on three items, namely Police, Public Order and Land. The other, relatively obscure one is marked by the phrase "in so far as any such matter is applicable to Union territories". That is, the assembly is only competent

[27] The Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 3, No. 15, Acts of Parliament, 2021.
[28] The Government of National Capital Territory of Delhi Act, 1991, § 24, No. 1, Acts of Parliament, 1992.
[29] INDIA CONST. art. 239AA, cl. 3(a).

to legislate on matters in the list in so far as they apply to a UT.

It is an unequivocally settled stance that the Constitution demands competency as a prerequisite for legislation. The Supreme Court in *R.S. Joshi* v. *Ajit Mills, Ahmedabad*[30] held: "In the jurisprudence of power, colorable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law."

The argument which arises here is that even though constitutional limits have been imposed on the legislating power of the assembly, there exist no mechanism to give effect to the same. The current amendment seeks to do only this. It establishes a mechanism where the LG performs his supervisory role by checking if any Bills incidentally encroach on matters outside the assembly's competence, and if so, he refers the same to the President.

3. Clause 3: Unreasonable Limitations on the Rule Making Power of Assembly?

The third clause[31] has amended Section 33[32] of the Act of 1991, which deals with the rules of procedure of the

[30] R.S. Joshi v. Ajit Mills, Ahmedabad, (1977) 4 SCC 98.
[31] The Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 4, No. 15, Acts of Parliament, 2021.
[32] The Government of National Capital Territory of Delhi Act, 1991, § 33, No. 1, Acts of Parliament, 1992.

legislative assembly. Firstly, it places a condition on the rule-making power of the assembly stating that it must not be inconsistent with that of the Lok Sabha.

There has been a subtle misreading of this clause, as is also evident in the plea filed before the Delhi High Court.[33] The plea describes this amendment clause to read as "the Rules made by the Delhi Legislative assembly to regulate the procedure and of business the assembly must be in conduct consistent with the Rules of Procedure and Conduct of Business in the Lok Sabha." However, the amendment is worded in a double negative — saying that the rules should *not be inconsistent*. This seemingly insignificant difference might just be what saves this clause from the gallows.

Let us understand the scope and effect of this amendment in this new light. The Authors' interpretation of the double negative implies that the rules of the assembly may *differ* from that of Lok Sabha as long as they are not *repugnant* to the latter. *If both rules may co-exist, this amendment does not come into play at all.* Reading the amendment without the double negative would imply a situation where whenever an amendment is made to the Lok Sabha rules, a similar amendment must be made in the assembly to keep the rules consistent. However, the current interpretation

[33] *Supra* note 11.

leaves a window where the assembly's rules need not be amended, if they can exist without contradiction.

Having settled the scope of this amendment, one must look into its need to answer, *why was even such a limitation imposed?* The definite answer lies with its creator, and so it should as it has been long regarded in our constitutional jurisprudence that the legislature knows best the need of its people. It has been categorically settled by a nine judge bench of the Apex Court[34] that even after the 69th Amendment, the legislative assembly of Delhi is subordinate to the legislature at the Centre, and any law made by it which is repugnant to a Central law shall stand void to that extent.

Nevertheless, a possible answer is that Delhi is a specially circumstanced territory. The same reasons that justified a special status for it, justify some special restrictions as well. Where in any other state or UT, a contradiction between the rules of the assembly and the Centre may not be of much effect, Delhi's nature and proximity to the Centre may make administration difficult if the two sets of rules contradict each other.

This clause of the amendment further precludes the Delhi assembly from making any *rule to enable itself or its Committees to consider the matters of day-to-day administration of the Capital or*

[34] New Delhi Municipal Council v. State of Punjab, (1997) 7 SCC 339.

conduct inquiries in relation to the administrative decisions. It goes on to endow retrospective effect on this condition.

Collective responsibility and accountability of the executive to the legislature is a constitutionally guarded feature of the NCT, under Article 239AA (6).[35] It is averred that the current amendment does not eliminate or even reduce this salient right of the elected legislature. The conduct of business in the assembly operates significantly through questions, answers and discussions. The members ask and the ministers answer. The capstone of this framework and faithful protector of Collective Responsibility is the No Confidence motion under Rule 251 of the Rules of Procedure and Conduct of Business, legislative assembly of Delhi.[36]

The words "conduct inquiry" in the amendment clause *cannot* be given such a wide interpretation so as to hold that the entire inquisitive mechanism of working of the assembly or the power to raise a no-confidence motion will be impaired by its operation. The amendment clause seeks to make two changes. *One,* it carves out from the ambit of discussions in the assembly only matters of "day to day administration". The phrase excludes both short and long term policy matters, only restricting itself to matters of

[35] INDIA CONST. art. 239AA, cl. 6.

[36] Rules of Procedure and Conduct of Business in the Legislative Assembly of the National Capital Territory of Delhi, 1997, Delhi Gazette (Extraordinary, Part IV) 97.

daily administration. *Two,* it prohibits the assembly from setting up inquiries on particular administrative decisions. The objective is to secure an independent functioning of the executive.

Independence of the branches of administration is a *sine qua non* for harmonious separation of powers. The power of the assembly is primary legislation, and that of the Council of Ministers alongside the LG is to take and implement administrative decisions. Matters of daily administration come strictly under the executive's domain. This amendment clarifies in express words what was already implied.

It is not far from imagination that the legislature may use its unbounded rule making ability to toss the entire administrative power in its hand. After the judgment of the Supreme Court in 2018, it was discernible that the Delhi government had overlooked the role of LG in the executive and kept him at a distance from administrative decisions. This amendment will secure his position and the independence of the executive in the NCT.

4. Clause 4: Concurrence of the Lieutenant Governor Mandatory in All Matters?

The last amendment clause[37] which amends Section 44[38] of the Act of 1991 has been chastised for having hamstrung the Delhi Government by forcing it to seek concurrence of the LG before implementing any decision. This clause appears to directly contravene the Supreme Court ruling of 2018 as well. Here is an alternate interpretation of the same.

Like the other clauses of the amendment, this clause seeks to give effect to a provision of Article 239AA, namely Clause 4[39]. The proviso of Clause 4 of Article 239AA makes it obligatory for the LG to refer "*any matter*" in which there is a difference of opinion between the two arms of the government to the President. The current amendment arises out of the question, *how will a difference of opinion emerge if an opinion is not sought at all?* This gaping lacuna has now been filled with a relatively clearer mechanism which gives effect to the power the *Constitution had already bestowed on the LG.*

[37] The Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 5, No. 15, Acts of Parliament, 2021.
[38] The Government of National Capital Territory of Delhi Act, 1991, § 44, No. 1, Acts of Parliament, 1992.
[39] INDIA CONST. art. 239AA, cl. 4

Another point becomes pertinent to mention here that the amendment itself has restricted this duty to only 'certain matters as may be specified by general or special order.' The Supreme Court's verdict had clarified that the words 'any matter' do not imply all matters to be sent to the President without application of mind. The amendment respects the same by limiting the matters and introducing a mandated application of mind by the LG through the requirement of a general or special order.

VI. WILL THIS AMENDMENT HAVE AN ADVERSE EFFECT ON THE COVID-19 TUSSLE?

The recurring waves of COVID-19 has brought certain administrative inefficiencies of the Delhi government to daylight. In a judgment just one day prior to the current amendment being notified, a division bench of the Delhi High Court reprimanded the government in a livid tone asking it to "set its house in order" or hand over the administration to the Centre's officers.[40] In this backdrop, will the new amendment add fuel to the fire and hinder administration further? The answer is held in the grip of

[40] Srishti Ojha, *[Oxygen Supply] "Pull Up Your Socks, Get Your House In Order, Will Ask Central Govt To Take Over If You Cannot Do It": Delhi High Court To Delhi Govt.,* LIVE LAW (May 20, 2021, 10 PM), https://www.livelaw.in/news-updates/delhi-high-court-delhi-government-on-distribution-of-medical-oxygen-central-government-to-take-over-173218.

time, but the Authors hold the considered opinion that the amendment may benefit administration instead.

An additional check being placed in the nature of an opinion from the LG, and the subsequent mechanism of seeking the President's advice in case of a difference, would serve as a robust system to prevent hasty decisions amid an alarming situation. However, where haste is required, the provision does provide LG the power to take expeditious action even while the matter remains before the President. Similar is the safeguard against hasty legislation which may incidentally encroach on matters outside the assembly's purview. The amendment allots different areas of work to the several entities that co-exist. It will make sure that the legislature does not micromanage the executive in day-to-day administration as it fights the pandemic, while securing its ultimate accountability to the people's elected representatives.

VII. CONCLUSION

In a UT, the administrator holds the bulk of the power. In a state, it is coextensively divided between the assembly and the Council. So, by granting Delhi a status where an assembly, a council, a Chief Minister and an LG all existed, a debate was inevitable as to the division of power among these entities. This amendment is a bold legislation by the Union and it seems to clarify the legislature's stance on this

debate as follows. The LG in Delhi is not just a *de jure* head of the executive like the Governor. Although in a relatively limited sense, he is akin to the administrator in a UT and is to play an active role in administrative activities. The difference is that from the whole realm of powers that lie with the administrator in a UT, the primary legislative powers have been plucked out and given to the legislative assembly, and a Chief Minister in Council has been provided to assist the LG with the rest.

The above article merely touches the fringe of an exquisite constitutional debate, as would soon unfold before the Courts. Several questions remain from both sides. What is the extent of the right of the voters in a democratic republic over the nuances of who governs their daily administration? Can it be said that the current law being formed under Article 239AA of the Constitution, as opposed to ordinary legislative power under Article 245, is an exercise of *constituent power* of the legislature, thereby reviving the Basic Structure doctrine's applicability? The foreseeable future seems to hold the answers to these and many significant questions.

ARTICLES

THE SYSTEM OF APPEALS UNDER THE COMMERCIAL COURTS ACT: A CAUSE OF CONCERN?

[*]Vasu Aggarwal & Ridhi Aggarwal

ABSTRACT

Before 2015, all civil disputes, including commercial disputes, were settled under the general civil procedure—CPC. However, resolving commercial disputes through CPC was time-consuming and costly. In 2015, the legislature introduced the Commercial Courts Act that amended certain provisions of CPC, with the objective of reducing time and costs. To further this objective, S.13 of the Act amended the system of appeals. However, due to the interpretational issues in S.13, and subsequent judicial construction, the position of the litigants with respect to appeals has been turned back to the general CPC. Since the intent of the legislature cannot be discerned due to the poor drafting, the objective of the provision has been rendered otiose.

With the objective of discovering the best standard for appeal for commercial disputes, this paper surveys the other laws—Arbitration Act, CPC and UK rules and evaluates them on two criteria—expediency and interest of justice—the two competing principled reasons governing the system of appeals. While the Arbitration Act satisfies the first criterion, it does not meet the second criterion as the

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grounds for appeal are limited. On the other hand, CPC meets the second criterion while failing to meet the first one. Thus, neither of them strikes an effective balance between the two criteria. The UK rules perform well on both criteria. This paper argues that incorporating these standards in India would improve the dispute resolution mechanism of commercial courts and potentially increase India's ranking in the Ease of Doing Business report.

I. INTRODUCTION

Ease of Doing Business Report is an annual and comparative assessment of the business atmosphere in countries around the world.[1] This assessment is meant to help both policymakers and researchers evaluate the business regulatory practices in the country.[2] The business regulatory practices include *inter alia* protecting minority investors, resolving insolvency.[3] India participates in this assessment each year and has interestingly progressed from

[1] *About: Ease of Doing Business*, WORLD BANK, (2020), https://www.doingbusiness.org/en/about-us.

[2] World Bank, *About Doing Business*, WORLD BANK, (2020) https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402_Ch01.pdf. This report offers a detailed explanation of Ease of Doing Business. It analyzes the basis on which the indicators for the report are selected. Key aspects of these indicators include—getting credit, starting a business, enforcing contracts among others. This paper is concerned with the "Enforcing Contract" indicator of this report. Since it is immensely important for both researchers and policy-makers to assess the nature of business practices in various countries, this report also highlights the various uses that it serves.

[3] *Id.*

142nd rank in 2014 to 63rd rank in 2020.[4] Although many factors have seemingly contributed to such amelioration in India's rank, the introduction of specialized Commercial Courts, in 2015, is considered to be a key factor.[5] This is because the Commercial Courts facilitate enforcement of the contracts, which is an important regulatory practice envisaged in the Ease of Doing Business Report. Although in enforcing contracts, India has moved from 186th position to 163rd since the beginning of the specialized commercial courts,[6] it is one such parameter in which India ranked below 100 among 190 countries, thus evincing the need and scope for improvement. Although the Ease of

[4] Asit Mishra, *India's Rank Jumps 14 Places In World Bank's Ease Of Doing Business Ranking*, MINT (Oct., 24, 2019), https://www.livemint.com/news/india/india-jumps-14-notches-in-world-bank-s-ease-of-doing-business-rankings-11571882591868.html.

[5] S.R.Garimella & M.Z. Ashraful, *The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business*, 12 Erasmus Law Review, 111(2019).This article is a detailed commentary on the Commercial Courts Act while drawing a connection with the Ease of Doing Business Report. The article begins by highlighting the backdrops of the Civil Justice System in India. It relies on empirical data to argue that the time and the costs of the civil proceedings are ever-increasing in India. The article, then, refers to the data released by the government of India to enunciate the nature of the aforementioned backdrop and how it is worse for Commercial disputes. While arguing for the need for Commercial Courts in India, the article established the context in which the Commercial Courts were introduced in India—giving a brief of the two relevant Law Commission Reports— the188th Report and the 253rd Report. It, further, demonstrates how the bills were received by the different legal luminaries and finally released. Then, the article points out several flaws in the current characterization of the Commercial Courts Act while suggesting various "Law Reforms". The larger theme of this article, and for what, this *paper* relies on it, is that one of the key factors in improving India's Ease of Doing Business rankings is the introduction of the "Commercial Courts" in India.

[6] WORLD BANK, Doing Business 2014 Understanding Regulations for Small and Medium-Size Enterprises 110, (2013).

Doing Business report has been made dysfunctional now, the paper refers to its indicators for guidance.

Commercial Courts *prima facie* provide the benefit of cutting through the traditional Civil Courts for high-value disputes[7] of specific nature[8] that require speedy disposal.[9]Although there is a dearth in the academic literature related to civil procedure in general,[10] the Commercial Courts Act, 2015 ("**the Act**") has received the attention of academicians who have analyzed the

[7] The Commercial Courts Act, §2(i) & § 3, No. 4, Acts of Parliament, 2015 (India), provides that the specified value must not be less than three lakhs, and similarly, S.3 provides that the Constitution of Commercial Courts was for cases of pecuniary value of more than three lakhs.

[8] The Commercial Courts Act, §2(c), No. 4, Acts of Parliament, 2015 (India). Commercial Disputes have been defined to include certain class of disputes such as "ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents"; "export or import of merchandise or services" among others.

[9] The Commercial Courts Act, long heading, No. 4, Acts of Parliament, 2015 (India). The long heading provides for the purpose of the Commercial Courts as, "adjudicating commercial disputes of specified value".

[10] Professor (Dr.) Nanda Kishore, *Indian Civil Procedure: Scholarship Urgently Wanted,* ACADEMIA, https://www.academia.edu/8662447/Indian_Civil_Procedure_Scholarship_Urgently_Wanted. Although this paper makes many seminal contributions, it is mostly concerned with the argument that there is a dearth of literature—regarding the civil procedure. The article provides *six* reasons for the under-nourishment of the civil procedure literature in India—*first*, the Supreme Court often employs its discretion, which makes academicians rely on the phrase "procedure is the handmaiden of justice"; *second*, the great line of academicians are difficult to match; *third*, the code uses archaic language, making it rather difficult to understand; *fourth*, the law commission is mostly occupied with the problem of delays and arrears, and is not much concerned with scholiastic contribution; *fifth*, procedures are tested at the trial courts, and not HCs/SCs, which might lack the technical training to improve scholarship; *finally*, the civil procedure seems to have been neglected in UK/US as well.

provisions substantively and recommended reforms. For example, Krishnaswamy and Aithala depict through both qualitative and quantitative methods, how the commercial courts have not been able to render speedy disposal.[11] They argue that the pecuniary jurisdiction—three lakhs—is too low and thus, includes a plethora of disputes; subject-matter jurisdiction—the subject matter is too broad, which renders such assessment redundant. Further, they argue that the provisions of Costs are not enough to deter insincere applications, and the infrastructure is inadequate to address the real issues.[12] Regarding the system of appeals under the Act, they observe that the Act has *"introduced a complicated system of appeals"*.[13] However, they have not detailed the reasons behind this observation. This Article attempts to unpack this observation.

Appeals are an important constituent of civil procedure. They consume both time and resources that affect the overall enforcement of the contracts. Therefore, for the ease of doing business, the system of appeals must provide

[11] Prof. (Dr.) Sudhir Krishnaswamy & Varsha Mahadeva Aithala, *Commercial Courts In India: Three Puzzles For Legal System Reform*, 11(2) JILS, 20 (2020). This article depicts through, both, qualitative and quantitative methods, how the commercial courts have not been able to render speedy disposal. Qualitatively, this article criticizes the jurisdictional provisions, the infrastructure, and other procedures such as the costs, and the appeals. Quantitatively, the article points out how, empirically, the courts of Delhi and Bangalore have not been able to realize this value. These arguments pertaining to the infrastructural issues and jurisdictional questions are accurate and need to be addressed.

[12] *Id.*

[13] *Id.* at 35.

for expediency and follow the interest of justice. This paper argues that the right balance can be struck by retaining the current levels of appeal while reducing the scope of appeals as present in the English Civil Procedure. This paper is divided into *three* parts—*first*, the interpretive issues with respect to *Appeals* in the Commercial Courts Act are brought forth to understand the legislative policy and judicial interpretation of the system of appeals in India; *second*, this paper explores different legal regimes, such as Arbitration, and the UK Rules governing civil procedure and compares them with the Commercial Courts Act; *third*, introduces the two-competing interests—"expediency" and "interest of justice" while positing a system of appeals, and argues that a right balance must be struck.

II. SYSTEM OF APPEALS AND INTERPRETATIONAL ISSUES

Before the advent of the Act, all disputes including the Commercial Disputes,[14] were subject to *at least first* appeal

[14] Other than the narrow set of exceptions provided under S.96(3) of the Code of Civil Procedure, 1908, another exception is—when a decree is passed with the consent of the parties. In such a case, an appeal may lie only if the very factum of compromise or consent is questioned [Banwari Lal v. Chando Devi (1993) 1 SCC 581] In Banwari Lal v. Chando Devi, the parties had filed an appeal for setting aside an order passed by the HC in re revision of the application. The property in question was in Chando Devi's possession and it had been delivered to the defendant as per their settlement/compromise deed. To this effect, the order had been obtained from the lower court. The plaintiff had filed another suit asking for an appeal against the settlement order. The HC had held that the lower courts cannot entertain an appeal that seeks to invalidate a compromise

from the original decree.[15] However, the position with respect to "commercial disputes"[16] has been obfuscated due to the interpretive issues that arise out of the Act. The purpose behind this technical inquiry is two-fold — *first*, to understand where the current legislative policy in providing the right to appeal in Commercial Disputes stands, and *second*, to understand the judicial evaluation of the policy around appeals in the Commercial Disputes. Two interpretive issues arise out of S.13 of the Act — *first*, the 'heading'[17] of the provision is not synchronous with the 'wording' of the provision; *second*, non-existence of "Order XLIII of the [CPC] as amended by [the] Act" as referred to in the proviso and the effect of the proviso.

filed by the parties. The SC allowed the appeal, and the order of the Trial Court was upheld. This paper relies on this case for the principle laid down regarding when an appeal may lie against a settlement deed.

[15] The Code Of Civil Procedure, § 96(1), No. 5, Acts of Parliament, 1908 (India).

[16] An inclusive definition of "commercial disputes" has been provided under S.2(1)(c) of the Act. This includes ordinary transactions of merchants, bankers et cetera, export important merchandise or services, transactions relating to carriage of goods, including transactions relating to aircrafts, their engines, distribution and licensing agreements, management and consultancy agreements, joint venture agreements, shareholders agreements.

[17] The heading is alternatively considered to be the marginal notes or title of the provision. Therefore, this paper, when mentioning "headings", considers it to be the same as marginal notes or title of the provision.

1. Non-Synchronization of the Heading and the Wording

The heading of S.13 provides for "*[a]ppeals* from *decrees* of Commercial Courts and Commercial Divisions". However, the wording of S.13 provides, "[a]ny person aggrieved by the *judgment* or *order* of a Commercial Court". Although the heading of S.13 provides for appeals from "decrees", the wording provides for appeals from "judgment" or "order".

To understand the consequences of such wording, it is essential to understand the difference between "decree", "order" and "judgment". The words 'order', 'judgment' and 'decrees' have not been defined under the Act. In the absence of such definitions of particular terms, S.2(2) of the Act directs to the definitions provided under the Code of Civil Procedure 1908 ("**CPC**").[18]

"Decree" has been defined under S.2(2) of the CPC to mean formal expression of adjudication, conclusively determining the rights of the parties.[19] A decree essentially forms the outcome of the suit. On the other hand,

[18] In addition to S.2(2), the scheme of the Act also suggests that the provisions are in the form of an addendum to the Civil Procedure Code, 1908. This is clear from multiple aspects such as the provision in question—S.13 itself refers to CPC, and otherwise, S.16 and the Schedule 1 therein provides for specific amendments to the CPC that would be directly applicable.

[19] The Code Of Civil Procedure, § 2(2), No. 5, Acts of Parliament, 1908 (India).

Judgment, as defined under S.2(9) the CPC, provides for the grounds on which a decree or an order is rendered.[20]It comprises a statement of facts, points of determination, the decision, and reasons for such decisions.[21]Similar to decree and judgment, "order" has also been defined under S.2(14) and includes decisions excluding "decree".[22] It has previously been suggested, *"An appeal lies against a decree and not against a judgment"*.[23] If an appeal cannot lie against a judgment and the wording of the provision mentions that there is an appeal against the judgment, it becomes contradictory. It would mean that there lies no appeal against the decree as the provision does not provide for it. Therefore, there is a discrepancy in the phrasing of the heading and the wording of the provision.

Since there is a discrepancy in the phrasing of the heading and the wording of the provision, it would be useful to advent to the Rules of Statutory Interpretations. Rules of statutory interpretation dictate that the heading of a provision does not form a part of the Act.[24] The heading

[20] The Code Of Civil Procedure, § 2(9), No. 5, Acts of Parliament, 1908 (India).
[21] The Code Of Civil Procedure, § o XX r 4-5, No. 5, Acts of Parliament, 1908 (India).
[22] The Code Of Civil Procedure, § 2(14), No. 5, Acts of Parliament, 1908 (India).
[23] C.K. TAKWANI, CIVIL PROCEDURE WITH LIMITATION ACT, 1963 AND CHAPTER ON COMMERCIAL COURTS 409, (Eastern Book Company, 9 ed. 2018).
[24] A similar view was expressed in Board of Muslim Wakfs, Rajasthan v. Radha Kishan (1978 Indlaw SC 99) [In this case, the question revolved around whether a disputed property could be included in the list of

is merely meant for assistive purposes.[25] Even if the headings are considered a part of the statutes, it is established that the headings cannot color the understanding of the provisions.[26] These rules of statutory

Waqfs. The appellant had challenged the decision of the HC that had held that the disputed property, in this case, could be included in the list of the Waqfs. The question of law revolved around the interpretation of S.6(1) of Wakf Act, 1954; and the counsel had called in aid the marginal heading of the provision to interpret it. However, the court held that the marginal headings cannot be called in aid for interpretation as they do not form a part of the statute. The limited purpose that they serve is with respect to ease of reference.] and Kalawatibai v. Soiryabai (1991 Indlaw SC 449) [In this case, the appellant had acquired the right by adverse possession against the revisionary during the lifetime of her mother. The case involved three important questions of law. However, the relevant issue for the purpose of the argument made in this paper was whether the marginal notes in S.14 could be interpreted in the way to read the words "female Hindu" as "limited owner". While looking at the question, the court excluded any interpretation of the marginal notes altogether. It was held that the marginal notes are not a part of the statute. Consequently, the right of the plaintiff in the property was negatived.]

[25] Id.

[26] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424. [this case is relevant only in a limited context to show that in the realm of procedural laws the marginal heading of a statute cannot contradict the wording of the provisions of the statute. Preliminarily, it must be addressed that this question is inherent of a criminal nature and involved several criminal procedural issues which are not relevant to this discussion. The facts are that Ms. Satpathy, who was the then CM of Odisha, was expected to appear at a police station under the charges of corruption. The procedure carried out by the police during the investigation was questionable in many ways. An attempt was made to use the marginal heading to S.161 of the Criminal Procedure Code to interpret the statute. The court held that the marginal heading cannot be used to suggest an interpretation that is not supported by the words of the provision. Therefore, the argument with respect to understanding the provision in an entirely different manner was rejected.] Union of India v. National Federation of Blind, 2013 Indlaw SC 674 [This case is also being relied upon for a limited argument set. This case involved the question of interpreting S.33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The appellant had argued that the organization in question was not complying with the provisions of the Act, and thus, filed a suit seeking an injunction order. According to the Act, 3% of the seats were to be reserved for persons with disabilities. Although to interpret this provision, marginal headings were taken into

interpretation directly apply to the Act.[27] Applying the rules of statutory interpretation, the heading of S.13—mention of "decree"—should not be given any weight. This would mean that as per S.13 an appeal lies not against the decree, but the judgment. As it has already been established that an appeal is not possible against the judgment, the direct consequence of there being no appeal against the decree is that there is no appeal possible.

Apart from this discrepancy in the heading and the wording of the provision, S.13(2) employs the term "decree" while excluding any other appeal apart from S.13(1). This should be considered a clear indication of the drafters' knowledge of the difference between the meaning

consideration, the court held that the marginal headings cannot control the meaning of the Act.]

[27] *In Re:* Leitz Tooling Systems India Private Limited, Bangalore, (2019) SCC OnLine Bom 890. [this ruling of the Bombay High Court does not provide for the facts that led up to the dispute. However, the dispute sought the following question to be answered by the court—"Whether in view of the amendment to the Code of Civil Procedure, 1908 by a Commercial Court, Commercial Division and Commercial Appellate Division of High Court's Act, 2015 (4 of 2016), the Defendant can be allowed to file the Written Statement after 120 days from the date of service of Writ of Summons in a Commercial Suit". The counsel argued that since the Act was improperly framed, aid must be taken from tools of statutory interpretation that help discern legislative intent in order to interpret the existing inconsistencies. The Counsel argued that the threshold of 120 days applied only to the disputes involving a specified commercial value and not to all the commercial disputes. The Court was in consonance with this argument. This case can also be seen as a prime example of how the courts consider the procedure to be handmaiden of justice. It is to be noted that this case is being relied on for a very limited proposition advanced by the counsel while arguing for a limited interpretation. The counsel had furthered his argument by giving an example of how reading S.13 by its literal phrases would render the provision otiose.]

of "judgment" and "decree". However, the Delhi High Court, to avoid rendering S.13 otiose, held that "judgment" must be read broadly to include "decrees" and thus, opened all the cases to appeal.[28] To understand the consequence of this holding, it's important to understand

[28] HPL (India) Limited v. QRG Enterprises, (2017) 238 DLT 123. [in this case, although the Delhi High Court did not provide the facts that led to the dispute, it considered the same issue in question—interpretation of S.13 and discussed both 13(1) and 13(2) in detail. On the basis of facts, the only question before the court was whether the appeal in the present case was maintainable, and in order to answer that question provisions of S.13 were to be interpreted. To do so, firstly, the court analysed the intention behind the legislature and then laid down rules of statutory interpretation of statutes. After hearing both the sides and considering that the marginal notes must not be given any credence, the court was of the opinion that the term "judgment" must be read broadly to include a decree as well. The court based its decision on consequentialist reasoning. It was held, "we are of the view that if the interpretation of the appellants were to be accepted then we would have to read Section 13 sans the proviso to Section 13(1) and sans Section 13(2). That, surely, could not have been the intention of the legislature!". Accordingly, it was held that the appeal was not maintainable] Swaraj Industrial and Domestic Appliances Private Limited v. Societe Des Produits Nestle S. A., 2017 Indlaw DEL 3760 [in this case, the appellants were neither well-educated nor were they well versed with the legal issues. They had filed an application and blamed the counsels for their incompetence which had led to the delay in filing the application. It was held that this case was an attempt to just delay the proceedings and not bona fide in nature. However, this case endorsed the holding of the HPL (India) Limited and others v QRG Enterprises which considered the question related to appeal in much more detail.]D&H Ltd. v Superon Schweisstechnik India [in this case, the commercial appellate division of the Delhi High Court adjudged that Section 13(1A) is inclusive of the appeals that lie against an order, allowing amendment of the plaint, passed by the single judge under Rule 5 of Chapter II of the Delhi High Court Rules (Original Side), 2018 ("**Rules**"). It was held that since Rules have a different identity as compared to CPC, it is inappropriate to restrict the scope of the proviso by interpreting it to include those appeals that lie only against orders specifically encapsulated under Order XLIII of the CPC and Section 37 of the 1996 Act. The court created an arbitrary distinction between two applicants on the basis of the authority that adjudicates the appeal. It rendered an extra right of appeal to the petitioners whose appeal is adjudged by the joint registrar. Thus, the judgment contravenes the purpose of the Act by broadening the scope of the proviso.]

what essentially constitutes an "appeal". The appeal includes the right of re-hearing, both on the questions of law and the questions of fact.[29] Consequently, every decree of a commercial court may be set-aside upon hearing from a higher court.

If all decrees of the Commercial Courts are subject to an appeal, it essentially turns the clock back to the position under the CPC.[30] Therefore, the purpose—time and cost

[29] Krishan Bhardwaj v. Manohar Lal Gupta, AIR 1977 Delhi 226 [in this case, the plaintiff had filed a suit against the defendant under Order 37 of the CPC. The Trial Court had declined leave to the defendant to appear and defend the suit under Order 37 of the CPC. The plaintiff had argued that the revision was entertained by HC in its appellate jurisdiction and appeal was the procedural remedy. The two judges had differed on the question of maintainability of revision petition against the order of the Trial Court. So the question was "Whether the HC had the power to set aside an order when decree or final order was passed in the proceedings". It was held that the *appeals and revisions could not be equated*. In revision, HC was only required to satisfy itself that the particular case had been decided according to the law and did not suffer from infirmity of having been passed without jurisdiction, in excess of jurisdiction, in denial of jurisdiction or is otherwise not illegal or suffering from material irregularity]; Hari Shankar v. Rao Girdhari Lal Chowdhury, 1961 Indlaw SC 157 [in this case, the question was whether the HC had the power to re-assess the evidence in revision proceedings. The appellants were the owners of a Bungalow which was given on rent to Gauri Shankar. The tenant argued that a tenant was not required to obtain consent from the owners before subletting. The procedural issue that appeared as a question before the SC was decided as, ""The power given to the High Court by this proviso is very wide. In the exercise of this power the High Court may set aside any order if it is not according to law"".]"Appeal" has been defined neither in the Act nor in the CPC. Since S.2(2) of the Act defers to the CPC, and for CPC there are judgments interpreting "appeal", it would be prudent to defer to such judgments to supply the meaning of appeal.

[30] Under CPC there is a right of first and second appeal. While the position under The Act is similar to CPC with respect to the right of the first appeal in terms of the scope—that is it lies for both the questions of facts and the questions of law. However, there exists no right of the second appeal under The Act.

efficiency—of amending the system of appeals under the Act seems to have been rendered otiose.[31]

2. The non-existence of "Order XLIII of the [CPC] as amended by [the] Act" as referred to in the proviso and the effect of the proviso

The proviso to S.13(1) provides for an appeal from "such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the [CPC] as *amended* by [the] Act". This means that the proviso is trying to limit the circumstances of appeal from the orders. There are two possible interpretations of this proviso — *first*, the amendment is specific to Order XLIII, or *second*, the amendment is a general reference to the CPC. Both these interpretations lead us to the same consequence– even after the advent of the Act, the position of litigants with respect to appeals is the same as it was under Order XLIII of the CPC.

If the *first* interpretation is adopted, it must be noted then that the Act fails to provide for a separate amendment to Order XLIII.[32] In that case, the proviso refers to a provision that does not exist in the first place. Consequently, it renders the proviso useless and turns the

[31] This idea is further developed in Part-3 of this paper.
[32] Combined reading of S.16 of the Act—which provides for Amendments to the CPC for its application to the Commercial Disputes, and schedule 1, that S.16 refers to must make this position clear.

clock back to the Order XLIII of the CPC regarding the position of litigants with respect to appeals. In fact, some authors argue that such an interpretation must be adopted to provide the litigants' benefit of appeal from the orders, which would otherwise be left on very limited grounds.[33] To bolster this argument, they argue that the drafters had intended to amend Order XLIII, and perhaps, increase the grounds under which an appeal may lie from the orders.[34] However, due to legislative amnesia, such an amendment was not executed.[35] Hence, they argued that the litigants must not suffer because of legislative amnesia. However, such interpretation needlessly widens the grounds for

[33] Ajit Warrier and Aditya Nayar, *Appeals Under The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 – A Legal Quagmire*, MONDAQ (Apr., 24, 2018), https://www.mondaq.com/india/contracts-and-commercial-law/694944/appeals-under-the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-act-2015-a-legal-quagmire. This paper considered the question of interpreting S.13 in a more restricted sense analyzing the scope of the proviso. The authors argued that a timely amendment to S.13 could prevent the plaintiffs from losing out on an opportunity to appeal. They looked at two important decisions to draw their conclusion. The first, being *Kandla Export* (discussed in much more detail in this paper) and *second,* being *Hubtown Limited.* The authors have argued that the drafters had completely forgotten about amending Order XLIII of the Code, by the time they had reached the schedule. The authors evinced that their knowledge of procedural law and commercial prudence suggests that the drafters would have wanted to increase the scope of the provision. However, it appears that the authors did not take into consideration the shifting jurisprudence around the appeals in commercial jurisprudence as argued in the third part of the paper.

[34] *Id.*

[35] Although the author fails to back this argument up with more statutory understanding, the scheme of the Act in fact bolsters the plausibility of such legislative amnesia. S.16 of the Act repeatedly refers to a concomitant phrase "as amended by the Act" which strengthens the possibility of legislative amnesia.

appeal and therefore, becomes contrary to the objective of the Act —speedy and cost effective disposal of cases.

If the *second* interpretation is adopted, it would simply refer to Order XLIII of the CPC. The consequence of it would again be that the scope of appeals from the orders would be same (and as wide) as the general CPC. Such an interpretation would again defeat the intention of the Act i.e., rendering speedy dispute resolution.[36]In *Kandla Export* v. *O. C. I. Corporation*,[37]it was observed that the Order XLIII in this provision refers to the Order XLIII of the CPC. The Bombay High Court in *Hubtown Limited* v. *IDBI*

[36] The purpose of this legislation is not questionable. It was to reduce the time of dispute resolution for commercial cases considering the concentration of cases at the routine courts. It is visible from multiple provisions of the Act including in S.5, S.15(4), which refer to "speedy" dispute resolution. Further, the strict timelines suggested in the Act, including in S.13(1), S.14, S.11, S.12, clearly imply that the Act intended to reduce the time of dispute resolution.

[37] Kandla Export Corporation v. O. C. I. Corporation, (2018) 14 SCC 715. In this case, the arbitrator had passed an award as per the Arbitration Rule no. 135 of the GAFTA (Grain and Free Trade Association). The decree was that the sellers had to pay a sum of $846,750 compounded at the rate of 4% per annum. The appellate tribunal had agreed to the decree while it slightly reduced the damages. The appeal was filed in the UK, however, the court in the UK felt that there was no need to access the award because according to the court the award was "obviously correct". The appellant wanted to file an appeal in the commercial court under S.13(1) specifically– the proviso which stated that an appeal is allowed from S.50 of the Arbitration Act. This appeal was rejected by the Gujarat HC. So even though an appeal is not provided for under S.50 of the Arbitration Act, the question was whether an appeal would be maintainable under the Act. It was held that S.13(1) of the Act did not provide for an avenue of appeal outside S.50 of the 1996 Act. The 1996 Act was standalone and exhaustive. It didn't need to be supplemented by the Act. Even though it was not a question of law, the court observed that the Order XLIII in S.13 of the Commercial Courts Act refers to the Order XLIII of the CPC.

Trusteeship[38], broadened the ambit of S.13(1) to include "appeals arising out of orders other than the category of orders falling under order XLIII of the CPC." Although the *Hubtown* judgment is contravening the *Kandla Export* judgment, the latter being delivered by the Supreme Court will be considered the correct position of law.[39] Therefore, the courts have restricted the scope of the appeals from the orders to only those circumstances as enumerated in Order XLIII of the CPC.

Therefore, the position of law under the Act is that there lies an appeal against all decrees, and orders that are enumerated only under XLIII of the CPC. Even if the *Hubtown* judgment is considered to expound the correct

[38] Hubtown Limited v. IDBI Trusteeship, (2016) SCC OnLine Bom 9019 [21]-[23]. [In this case, IDBI had filed a suit claiming a sum of over Rs. 33 Crores. More interestingly, the suit was filed before the coming in of the Commercial Courts Act in 2014. However, the court does not provide any other facts in detail. The case was shifted to the commercial courts by the Chief Justice of the High Court, after the incoming of the Act. There were two main questions. First–whether S.13 of the Act can be understood to include decrees. Second–whether it was an anomalous situation where due to the usage of the term "judgment", there could not lie any decree from the provision. It was held that the term decree must be within the term "judgment" to avoid an anomalous situation. Further, the court said that the use of the word "decision" in this provision was wide and thus, indicative of the legislative intent to do the same]. It is important to note that Warrier and Nayar (n 36) believe that this judgment has widened the scope of S.13(1) taking the effect similar to that in the *first* interpretation. However, this judgment merely reiterates the judgment of the SC in Shah Babulal Khimji v. Jayaben D. Kania, 1981 Indlaw SC 379 where it was held that order having a tinge of judgment makes it appealable. The consequence still remains as described in the *second* interpretation.

[39] INDIA CONST. art. 141. Law declared by Supreme Court to be binding on all courts. The law declared by the Supreme Court shall be binding on all courts within the territory of India.

position of law, broadening the scope of the provision would contravene the purpose of the Act –speedy disposal of appeals.

As stated at the beginning of the section, the purpose behind this inquiry was to check the legislative policy and judicial interpretation of the system of appeals. It can be concluded that although the legislature had left the position of law obfuscated, the judiciary has understood the scope of appeal only in restricted cases. However, even the judiciary did not go so far as to exclude appeals against the decrees altogether.

III. COMPARING THE STANDARD OF APPEAL

This section attempts to evaluate this legislative policy as understood by the judiciary by comparing it with other procedural laws. The background behind this comparison is that the Commercial Disputes have different procedural laws, and that the commercial world prefers restricted appeals. In that background, three procedural laws will be considered — *first*, the CPC, which governs the civil procedure in general; *second*, the Arbitration and Conciliation Act, 1996 ("**1996 Act**") because it provides for a peculiar study of appeals for the commercial disputes; *third*, the civil procedure governing commercial disputes in the United Kingdom ("**UK**"). UK has been taken as an example since it has consistently done well in the Ease of

Doing Business evaluation of the World Bank.[40] It must be noted that the scope of this paper has been restricted to the laws of UK, and no other common law jurisdiction has been referred. This is because the paper recommends limiting the scope of appeals on grounds similar as UK. The paper considers the laws of UK to be more reliable, as compared to any other common law jurisdiction, because of India's colonial history and the existing similarity in procedural laws.

1. Appeals under the CPC

Under the CPC, there is a right of first appeal from the decree of the court exercising original jurisdiction.[41] The court may re-evaluate the evidence and thereby, re-examine the questions of facts, as well as the questions of law.[42] This first appeal may not be dismissed without

[40] *Rankings: Ease of Doing Business*, WORLD BANK, (2020), https://www.doingbusiness.org/en/rankings. UK is ranked 8 overall and 34 in the Enforcement of contracts.

[41] The Code Of Civil Procedure, § 96, No. 5, Acts of Parliament, 1908 (India).

[42] Baldev Singh v. Surinder Mohan Sharma, 2002 Indlaw SC 1376 [in this case, a property dispute arose out of a matrimonial dispute. The first respondent had entered into an agreement to sell the property to one Ajay Kumar. The matrimonial dispute was settled when the marriage dissolved. However, the property in question was still existing despite the dissolution of the marriage. There were other allegations made as to whether the appellant had forged the stamp marks etc. However, the only question relevant for the purpose of this paper was whether the court has the power to determine both the questions of facts and law in an appeal. The court held that it has the power to determine, both, the questions of facts and law under the term "appeal".].

assigning proper reasons.[43] This first appeal lies in a superior court which may or may not be the HC.

Apart from the right of the first appeal, CPC provides for a second appeal from the appellate court's decree, unlike the original decree.[44] Such an appeal lies to the High Court only.[45] It may be interesting to note that the second appeal does not lie in the case of questions of facts, but only lies in cases of substantial questions of law.[46] Therefore, as compared to the first appeal, the second appeal provides for only a limited right of appeal.

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[43] Delhi UP Madhya Pradesh Transport Co. v. New India Assurance Co., (2006) 9 SCC 213. [in this short judgment without detailing any facts related to the discussion of law, the court held, "Having heard counsel for the parties, we are of the view that the regular first appeal should not have been dismissed by such a cryptic order. If a first appeal deserves to be dismissed at the admission stage itself, some reasons however brief must be recorded so that this Court may be able to appreciate the considerations which weighed with the High Court in dismissing the appeal summarily."].

[44] The Code Of Civil Procedure, § 100-103, No. 5, Acts of Parliament, 1908 (India).

[45] *Id.*

[46] *Id.;* State Bank of India & Ors. v. S.N. Goyal, 2008, Indlaw SC 798 [In this case, the appellant had misappropriated some funds which were supposed to be deposited in the bank accounts of the customers, for about 5 and 2 months. Disciplinary proceedings were conducted according to the State bank Rules, and he was found guilty. The plaintiff filed for a revision proceeding before the HC after the Trial Court's order. The Court considered the question of interpreting S.100 of the CPC. It held that "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the list between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial questions of law arising in a case as between the parties. In the context of s. 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties."

The Act provides for at least a slight deviation from the CPC to the extent that there is no right to a second appeal. It must be noted that CPC provides for *general* civil procedure and not *specifically* for commercial disputes. Therefore, as compared to the Act, the purpose and goal behind the civil procedure must be understood differently.

2. Appeals under the 1996 Act

Under the 1996 Act, S.37 provides for the possible instances of appeal,[47] and S.34 provides for possible instances of setting aside the arbitral award.[48] For setting aside the award, the possible grounds are that a party was under some incapacity, the arbitration agreement is not valid, procedural impropriety in the appointment of the arbitrator, dispute beyond the scope of arbitration, non-arbitrability of the dispute, or if it goes against the public policy of India.[49] S.37 of the 1996 Act provides for the instances of appeal—an appeal may lie from a refusal to refer the parties to arbitration,[50] refusal to grant interim

[47] The Arbitration and Conciliation Act, § 37, No. 26, Acts of Parliament, 1996 (India).
[48] The Arbitration and Conciliation Act, § 34, No. 26, Acts of Parliament, 1996 (India).
[49] *Id.* This provision has seen myriad litigations. In fact, very recently, the SC ruled on one of the most contentious issues—arbitrability of disputes—in Vidya Drolia v. Durga Trading Corporation, (2020) SCC OnLine SC 1018.
[50] The Arbitration and Conciliation Act, § 8, No. 26, Acts of Parliament, 1996 (India).. It provides for referral of the parties to Arbitration when there is a valid arbitration agreement if it is brought before a judicial authority. An appeal is allowed in the cases where the court fails to

relief,[51] setting aside of arbitral award under S.34, grant or refusal to provide an interim measure,[52] acceptance of plea under S.16.[53]

It must be noted that there are *two* important differences—*first*, arbitration is a private form of dispute resolution which gives the parties the right to decide their arbitrator (judge) and thereby, appoint an expert in the field to adjudicate the dispute,[54] as opposed to the civil courts,

recognize the presence of arbitration agreement, and thereby, fails to refer the parties to arbitration. This must be understood as being applicable to very limited circumstances.

[51] The Arbitration and Conciliation Act, § 9, No. 26, Acts of Parliament, 1996 (India). It provides for interim measures by the Court. This provision is premised on the need for urgency, when the time-period for dispute resolution is longer. It includes situations of appointment of guardian for a minor or a person of unsound mind, preservation of any goods that form the subject-matter of arbitration et cetera.

[52] The Arbitration and Conciliation Act, § 17, No. 26, Acts of Parliament, 1996 (India). It provides for the interim measures by the arbitral tribunal which are again similar to S.9 described above. It includes situations of appointment of guardian for a minor or a person of unsound mind, preservation of any goods that form the subject-matter of arbitration et cetera.

[53] The Arbitration and Conciliation Act, § 16, No. 26, Acts of Parliament, 1996 (India). It provides for the competence of the tribunal to decide on its jurisdiction. This rule is important to avoid parties from approaching the court in every case and delaying the process of dispute resolution when the status quo is in their favour.

[54] Vasu Aggarwal, *A-Z of ADR: Qualification Requirements of Mediators, Arbitrators, and Conciliators*, BIMACC (Sept., 14, 2020), https://www.bimacc.org/a-z-of-adr-qualification-requirements-of-mediators-arbitrators-and-conciliators/. In this article, the author summarises the qualification requirements of, mediators, arbitrators and conciliators, the three forms of alternative dispute resolution. The author analyses the 2019 Amendment and argues that the 2019 Amendment introduced several meticulous requirements for appointing someone as an arbitrator. The arbitrator must belong to the limited nine-categories of experts such as accountants, lawyers among others. Further, the arbitrators should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before them for adjudication.

which provides for a public resolution of private disputes and thereby, not giving the parties the right to decide their judges; *second*, arbitration is a product of consent which means that the parties *consent* to such form of dispute resolution as against the civil procedure,[55] where once a suit is instituted the parties submit their discretion to the courts. Therefore, the position of law in case of arbitration must be with the aforementioned considerations. It is to be noted that the grounds for appeals under this Act are more limited as compared to the grounds under CPC.

3. Appeals from Civil Procedure Governing the Commercial Disputes in the UK

Civil Procedure Rules 1998 ("**UK Rules**") govern the civil procedure of commercial disputes in the UK.[56] In the absence of any special rules provided for commercial disputes, general rules of appeal apply to commercial disputes. Unlike the Indian civil procedure generally, the

[55] The Arbitration and Conciliation Act, § 7, No. 26, Acts of Parliament, 1996 (India).. It provides for the arbitration agreement, employing which the parties may consent to submit a dispute to Arbitration. This is similar to a contractual agreement – in a written form, signed by both the parties. Therefore, the increased threshold of *consent* is also visible through the requirement of the contract being in writing.

[56] The UK Rules are supplemented by the practice directions. The practice directions, pt. 58.1. Part 58.1 defines the commercial disputes and provides that the part enumerated therein would apply to the commercial disputes. However, Part 58 does not provide for any provision related to appeals. Therefore, for the provision related to appeals, one must refer to Part 58.3, which provides that the UK Rules are applicable to the commercial disputes in the absence of any contradiction from Part 58.

permission to appeal is given only in the cases where the court considers that there is either a real prospect of success or when the court considers there to be a compelling reason to hear it.[57] At the same time, the court has the power to hear only limited issues.[58]

Under the same rules, a second appeal is also possible. However, the second appeal is also limited only on limited grounds such as when there's a real prospect of success, the appeal raises an important point of principle or practice, or when the court considers there to be a compelling reason to hear it.[59] It must be observed that the standard for review for both the first appeal and the second appeal is left open for interpretation by the judiciary as the terms "real prospect" and "compelling reasons" are not defined.[60]

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[57] The UK Rules, Rules and Practice Directions, pt. 52.6.
[58] *Id.*
[59] The UK Rules, Rules and Practice Directions, pt. 52.7.
[60] Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE LAW JOURNAL, 557 (1991).This kind of rulemaking is known as enacting "standards" as against "rules". In his seminal paper, Kaplow explains the difference between these two approaches to law-making. Laws are enacted as 'rules' or 'standards. "While rules entail ex-ante determination of the law's content, standards entail an ex-post-facto determination of the law's content. The costs of determining the law's content may arise at three stages—first, at the time of promulgation; second, at the time when individuals decide to engage in some conduct; third, at the time of adjudication to determine how the law applies to the said conduct. Intuitively, since rules ought to be given content at the stage of promulgation, rules are more costly to promulgate as compared with standards. Similarly, standards have to be determined by individuals, and adjudicators, and therefore, standards cost more at these stages. Therefore, ceteris paribus, if the costs of promulgating the law are greater than the costs of determination by individuals and subsequently, by

Moreover, the determination of which appeals will be heard is made by the Court of Appeal.[61] The Court of Appeal grants permission for applications for appeal without an oral hearing unless the judge opines that an oral hearing is necessary in the interest of fairness.[62]Allowing for only limited applications to be heard orally, also furthers the interest of expediency without compromising the interest of justice.[63]

IV. THE INTEREST OF JUSTICE *VIS-À-VIS* EXPEDIENCY

This section delves into the principled reasons behind the appeal, and attempts to balance two competing interests—the interest of justice and expediency. In the context of appeals, the interest of justice is to avoid any errors in the final decision-making process. This is premised on the principle that all humans are fallible, and the judges, who

adjudicators, the law must be laid down in the form of standard and not rules. In India, where the adjudication of standards is enforceable in subsequent judgments, the law's content becomes clearer with the increasing precedents, in case of standards. Such rule-making is inherently effective when it may not be possible to enumerate all possible instances. This is especially true in case of appeals where the grounds of appeal may be innumerable."

[61] The UK Rules, Rules and Practice Directions, pt. 52.5.

[62] *Id.*

[63] In the consultation exercise conducted by the Civil Procedure Rule Committee, it had been proposed that the litigant's right to an oral renewal of an application for permission for appeal should be removed and replaced with the discretion of the Court of Appeal to determine an application for appeal either on the basis of an oral appeal or by reviewing the documents.

are humans, may end up committing errors.[64] Such a premise is true for judges of superior courts and inferior courts alike.[65] Therefore, to avoid any mistake, having an appeal provides for a thorough examination of the issue.[66] However, having a wide scope of appeal delays the process of dispute resolution. This is especially true when the appeal allows for a re-examination of both questions of law and facts, which allows for re-appreciation of evidence. The question that arises is—how to balance the interest of justice and the interest of expediency in cases of commercial disputes.

In the case of commercial disputes, it is well posited that expediency is an important consideration. Such a need for expediency can be understood from the aforementioned comparison with the 1996 Act and the UK Rules. Additionally, the purpose behind the Act is also to reduce the time of civil litigation for a particular class of disputes. Further, the World Bank's Ease of doing business evaluates both time and costs in civil proceedings.

The 188th Law Commission Report suggested that the appeals from the Commercial Division must lie in the

[64] C.K. TAKWANI, CIVIL PROCEDURE WITH LIMITATION ACT, 1963 AND CHAPTER ON COMMERCIAL COURTS 472, (Eastern Book Company, 9ed. 2018).
[65] *Id.*
[66] It appears to be for the same reason that the appointment of judges to the Commercial Courts requires them to have experience in settling commercial disputes.

Supreme Court alone.[67] It was suggested that an appeal solely to the Supreme Court should have an effect of avoiding multiplicity of appeals; thus, saving both time and costs of dispute resolution.[68] On the other hand, the 253rd Law Commission Report suggested (followed in the current Act) that instead of cluttering the Supreme Court, the commercial appellate division be formed for resolution of such disputes.[69] However, the 253rd Report failed to recognize that there are two reasons for increasing time and costs — *first*, that the parties could potentially invoke Special Leave jurisdiction of the SC;[70] and *second*, that opening both questions of law and questions of facts for determination by the Appellate Court had the potential of causing an inordinate delay. However, it must be noted that it may be impractical to allow all commercial appeals to be heard by the SC.[71]

However, it may be practical to limit the scope of appeal similar to that of the UK Rules. The UK Rules through

[67] Law Commission of India, *Proposals For Constitution Of Hi-Tech Fast – Track Commercial Divisions In High Courts*, (Law Com No. 188) 155-159.
[68] *Id.*
[69] Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill 2015,* (Law Com No. 253).
[70] It must be noted that although S.13(2) of the Act provides that there cannot be any appeals other than those provided by S.13(1), the SC is granted with the constitutional power of Special Leave jurisdiction as provided under Article 136. This constitutional power cannot be taken away through later legislation—as the Constitution is the Supreme source it cannot be subjected to implied repeal.
[71] This is because of the limited strength of the SC—it has just 31 judges—who sit in division benches. Therefore, the cases would take very long to be adjudicated.

their use of "standards" provides for the right balance between the 1996 Act (which has too narrow grounds of appeal) and the CPC (which has too wide grounds of appeal). It is suggested that the grounds of appeal can be described as—"*there is either a real prospect of success or when the court considers there to be a compelling reason to hear it*".[72] Such understanding of procedural law has been backed up by Dan-Cohen.[73] Dan-Cohen provides a framework to understand procedural laws that relies on the difference between decision rules and conduct rules — decision rules are meant for the officials who are implementing and further adjudicating the disputes, whereas conduct rules are meant to decide the conduct of the individuals in the

[72] This is similar to Article 142 which states that "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner. This article confers the SC with the power to do complete justice.

[73] Meir Dan-Cohen, *Decision Rules And Conduct Rules: On Acoustic Separation In Criminal Law*, 97(3) HARVARD LAW REVIEW, 625 (1984). In this paper, Dan-Cohen provides a brilliant framework for understanding procedural laws. Although he takes the example of Criminal Law to evince the framework, he provides that the framework is capable of being extrapolated to Civil Procedure as well. The framework provides that there is an acoustic separation—the decision rules and conduct rules are separated—to the extent that the decision rules are understood only by the officials and not by the individuals. This separation plays a very important role in avoiding misuse of procedural law, and at the same time, providing for exceptions for the procedural laws.

society.

	CPC	Arbitration	UK	188th Report
Expediency	X	✓	✓	✓
Justice	✓	X	✓	✓
Practical	✓	✓	✓	X

In Dan-Cohen's paradigm, the ground of appeals such as real prospects or compelling reason is meant to be read as a decision rule to mean that whenever there is a legitimate case of an appeal, the court can allow for the appeal; and at the same, it provides for the conduct rule that in the absence of a very compelling case, the parties are discouraged to file for an appeal.[74] This strikes the right balance between expediency and interest of justice by catering to both needs at the same time.[75] The suggested

[74] This can be bolstered by providing a strict mechanism of levying costs on the appellants.

[75] Although the Civil Procedure Rule Committee, in May 2016, had proposed to narrow the grounds of appeal by changing the term "real prospect of success" to "substantial prospect of success", the legislature has still not incorporated the said changes in the statute. The committee draws a distinction between the two terms and proposes to increase the threshold for granting the permission for appeal, however the authors feel that in practicality these semantic differences would not make a significant change. This is because, the proposed amendments are

reform advocates only the inclusion of first appeal and excludes the right to a second appeal to maintain the right balance. This is because allowing for a second appeal would subvert the interest of expediency. Moreover, restricting the second appeal would not contravene the interest of justice since the parties can approach the Supreme Court by invoking the special leave petition.[76]

It is important to address that the suggested reform is valid in the already posited law. Although some believe that the right to first appeal is universal, it is well settled in law that the right to appeal is only a statutory right and that a statute cannot be held to be invalid/unconstitutional just because it does not provide for a provision to appeal.[77]

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theoretical in nature and even if they get approved, these terms will be left open to the interpretation of the judges.

[76] The SC, in multiple decisions, such as Pritam Singh v. State, AIR 1950 SC 169 and (most recently upheld in) Samaja Parivarthana Samudhaya Asha Deep v. Central Bureau of Investigation CRL.P 9421/2017, has held that although the power under Article 136 of the Constitution of India is discretionary, these powers are exercised in special circumstances only. In Pritam Singh v. State, this Court observed,

"On a careful examination of Article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article".

[77] Babubbai & Ca. v State of Gujarat, (1985) 2 SCC 732. [In this case, the provision in question was R.27 of the Bombay Town Planning Rules, 1955. The provision provided that the government may reserve lands for the construction of roads and other public purposes. So, the only remedy for the occupant was a summary eviction. The question before the court was whether R.27 violates Article 14 of the Constitution or is in general unconstitutional. The Court held that the right to appeal was a statutory right and neither a fundamental nor a universal right. Therefore, a statute or rule is not ultra vires the constitution on the basis that it does not

V. CONCLUSION

This paper considered the question of appeals in the Commercial Courts Act, 2015. The Act was brought into force to improve the procedure for commercial disputes, especially in terms of reducing the time and costs of the dispute resolution process. While there were some improvements made such as the exclusion of interlocutory orders, there was a little change in position of appeal from the CPC. This little change was the exclusion of the second appeal. This paper argued that this little change is not enough to achieve the objective of the Act and increase India's ranking in the Ease of Doing Business Report.

This paper first brought forth the interpretive issues related to appeals under the Act. It was concluded that the judicial interpretation of the legislative policy has rendered the provision related to appeal very similarly to the CPC. Second, it compared the system of appeals under the Act with the CPC, the 1996 Act, and the UK Rules. This comparative evinced a shift in the jurisprudence from having a broad right to appeal to a narrower right to improve the dispute resolution process. Finally, this paper explicated the debate between the interest of justice and

provide for an appeal.]; Prakash Amichand Shab v. State of Gujarat, (1986) 1 SCC 581 [the factual matrix of this case is same as *Babubhai.* An important observation, in this case, was, "Unless the Court finds that the absence of an appeal is likely to make the whole procedure oppressive and arbitrary, the Court does not condemn it as unconstitutional."].

the need for expediency. It argued that following the model similar to the UK Rules that is the adoption of standards may strike the right balance between both these competing interests.

ADEQUATE HOUSING: A DISTANT DREAM OF INTERNATIONAL (CLIMATE) MIGRANTS? - INDIAN SCENARIO

[*]Prabhat Singh

ABSTRACT

Humans often migrate from one place to another in search of the requisites which they beseech for. In an era where migration has become common, the government has an onus, posed by national as well as international obligations, to provide affordable housing in order to respect their 'human right' of proper shelter. The need for affordable housing was realized by the Indian government when the migrant crisis happened due to the pandemic. As a result of which, the government formed policies for providing affordable housing. While this step is commendable, it is suggested to enact a statute regarding the same. International conventions put the onus on the government for safeguarding the interests of those who are unable to do so. With the change in environment, there is a possibility for migration. While the status of migrants due to climate change is ambiguous and undefined in international law, various conventions ask the state to respect the basic human rights. The principle of non-refoulement protects the rights of climate migrants. It is recommended that in order to protect the rights of migrants in the long run, there should be a

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change in the definition of refugees and climate migrants should come under it.

I. INTRODUCTION

Migration may be best defined as, "*the crossing of spatial boundary by one or more persons involved in change of residence.*"[1] According to the 2011 census, India had 45.6 crores migrants, while 99 percent of the total were internally displaced and 1 percent were immigrants.[2] There were 4.5 crores migration for work resulting in 8 percent of total migrants.[3] The urban centers, common preferences for migration, have created the most inhuman and brutal living conditions.[4] The displacement can be internal as well as external in nature. It is a documented fact that there is a possibility of displacements due to climate change. The same is evident from Article 4[5] of the African Union Convention for the Protection of Internally Displaced

[1] Pieter Kok, *The Definition Of Migration And Its Application: Making Sense Of Recent South African Census And Survey Data* 7 SOUTH. AFR. J. DEMOGR. 19, 20 (1997).
[2] Madhunika Iyer, *Migration in India and the impact of the lockdown on migrants,* THE PRS LEGISLATIVE RESEARCH (June 10, 2020), https://prsindia.org/theprsblog/migration-in-india-and-the-impact-of-the-lockdown-on-migrants.
[3] *Id.*
[4] S.P. Sathe, *Right To Shelter: Review Of Housing Law And Policy In Maharashtra*, 35 J. INDIAN L. INS. 13, 13(1993).
[5] States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change.

Persons (the Kampala Convention).[6] According to a report by the International Organization for Migration, "*200 million to 1 billion will migrate from climate change alone by 2050*"[7] and about 7 million people in India will migrate.[8]

Migration often results in homelessness. The gravity of the state of being homeless is severe. Migrants abandon their homelands either on a semi-permanent or permanent basis[9], which might result in homelessness[10] and this state of being homeless is severe in subaltern strata. It is estimated from the census of 2011 that there are approximately more than 1.7 million people who are homeless[11] and 500 million landless people in India.[12] According to the Government of India, around 10 million migrants had attempted to return to their hometown due to the lockdown following COVID 19.[13] It is well

[6] *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,* 22 Int'l J. Refugee L. 119,124 (2010).
[7] Paramjit S. Jaswal & Stellina Jolly, *Climate Refugees: Challenges And Opportunities For International Law,* 55 J. INDIAN L. INS. 45,46 (2013).
[8] *Id.*
[9] Norman Myers, *Environmental Refugees in a Globally Warmed World,* 43 BIOSCIENCE 752, 752(1993).
[10] Christine H. Lindquist, et. al., *The Myth of the Migrant Homeless: An Exploration of the Psychosocial Consequences of Migration,* 42 SOCIOL. PERSPECT., 691, 692(1999)
[11] Varun Sharma & Abhishek Goyal, *Homelessness: Need of wakeup call for a 'state' in slumber,* SCC ONLINE BLOG, (July 21, 2021) https://www.scconline.com/blog/post/2020/07/01/homelessness-need-of-wakeup-call-for-a-state-in-slumber/ .
[12] *Id.*
[13] Yogima Seth Sharma, *Labour minister Gangwar clarifies his response on migrant workers in Parliament,* ECONOMIC TIMES (September 16, 2020, 12:29 PM), https://economictimes.indiatimes.com/news/economy/policy/labour-minister-gangwar-clarifies-his-response-on-migrant-labourers-in-

recognized that homelessness is a direct assault on the right to life.[14] One of the biggest problems for them is the non-availability of affordable housing as, largely, they belong to lower-income households.[15] Moreover, according to a survey, there has been a shortage in 95.6% of urban housing in which many belong to the lower-income class.[16] 'Housing affordability' has become a common way to summarize the housing difficulty in many nations.[17] Without affordable housing, people are left impoverished, the economy shrinks and damage is done to the environment.[18]

In an era where migration-both interstate and intrastate, has become common, the government has an onus, posed by national as well as international obligations, to provide affordable housing in order to respect the migrants'

parliament/articleshow/78142699.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[14] Leilani Farha (Special Rapporteur on adequate housing), U.N. Doc A/HRC/31/54 (Dec. 30,2015).

[15] G.Stacy Sirmans & David A. Macpherson, *The State Of Affordable Housing, Journal Of Real Estate Literature*, 11 J. REAL ESTATE LIT. 133, 139 (2003).

[16] Gaurav Wahi & Karan Sharma, *Affordable housing in India-Key Initiatives for Inclusive Housing for All*, SMARTNET (Feb 2016) https://smartnet.niua.org/sites/default/files/resources/Affordable%20Housing-ICC%20-%20Final.pdf.

[17] J. David Hulchanski, *The Concept Of Housing Affordability: Six Contemporary Uses Of The Housing Expenditure-to-income Ratio*, HOUSING STUDIES (Oct. 1995), http://www.urbancenter.utoronto.ca/pdfs/researchassociates/HulchanskiConcept-H-Affd_H.pdf.

[18] Khalil Shahyd, *Why Affordable Housing Matters for Environmental Protection,* ENERGY EFFICIENCY FOR ALL (August 23, 2019), https://www.energyefficiencyforall.org/updates/why-affordable-housing-matters-for-environmental-protection/

'human right' of proper shelter. Recognizing this right becomes more important in the case of climate refugees and migrants. The term 'migrant' begs a precise definition in international law.[19] Hence, the state can make the difference between a regular and an irregular migrant. On the other hand, the Convention Relating to the Status of Refugees (1951)[20], later modified by the 1967 Protocol relating to the Status of Refugees[21]("**Refugee Convention**") defines 'refugees' but the definition fails to acknowledge the aspect of climate refugees. The migrants who fulfil the present pre-requisites of Refugee Convention are termed as 'convention refugees' whereas others are known as 'voluntary' migrants. The Refugee Convention adopts a restrictive definition which in turn narrowly limits the legal status of a refugee. Hence, it becomes imperative to study their human rights to have adequate and affordable housing in a state. In order to do so, the paper tries to draw a nexus between the rights of climate refugees and affordable housing from an Indian perspective while doing a comparative study with its counterparts. The paper also attempts to explain how the onus should be on the government to recognize and

[19] *Migrants and Refugees*, OHCHR https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf.

[20] United Nations Convention Relating to the Status of Refugees, Jul. 28,1951, 189 U.N.T.S. 150.

[21] United Nations Protocol Relating to Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

implement affordable housing especially during a pandemic.

II. AFFORDABLE *VIS-A-VIS* ADEQUATE HOUSING

Traditionally, human needs include "*food, clothing, and shelter*"[22] with shelter being the primary[23] human necessity. Even then according to a report[24] by the United Nations, more than 100 million persons on this planet are homeless and about 1 billion inadequately housed. Adding to that concern, it is estimated that there will be an addition of another 300 million urban residents by 2050.[25] Furthermore, roughly a quarter of the world's population lives under extremely unhealthy conditions.[26] Moreover, it is predicted that more than 3 billion people will be dwelling in unhygienic slums all over the world by 2030.[27]

The Agenda 21 adopted by the 1992 UN conference on environment and development recognizes, *"the right to*

[22] ShantiStar Builders v. Narayan Khimalal Totame & Or., (1996) 1 SCC 233 (India).
[23] Prafulla C. Mishra, *Right To Shelter: A Human Right Perspective*, 40 J. INDIAN L. INS. 230, 230 (1998).
[24] *An estimated 100 million people are homeless worldwide*, SHARE THE WORLD'S RESOURCES (Sept. 6, 2018), https://www.sharing.org/information-centre/reports/estimated-100-million-people-are-homeless-worldwide.
[25] *No Poverty: Affordable and Resilient Houses*, UN INDIA, https://in.one.un.org/unibf/no-poverty/ (last visited 1 March 2021).
[26] Prafulla, *supra* note 23, at 231.
[27] *Make cities and human settlements inclusive, safe, resilient and sustainable,* UNITED NATIONS STATISTICS DIVISION, https://unstats.un.org/sdgs/report/2019/goal-11/ (last visited 27 August 2021).

adequate housing as ***a basic human right*** *and that people should be protected by any means of unfair eviction from their homes or land*" and any such act is a gross violation of human rights.[28] The UN Special Rapporteur on adequate housing has defined adequate housing as, "*the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.*"[29] Therefore, the right to adequate housing is intrinsically connected with the realization of other basic human rights and it should be understood in connection with the inherent dignity of the individual. The right to adequate housing has been recognized by several international conventions[30] as a human right[31]. In International law, article 25(1)[32] of the UN Declaration of Human Rights ("**UDHR**") [33] particularly deals with the right to housing. The article

[28] U.N. Comm. on Human Rights, U.N. Doc. E/CN.4/RES/1993/77 (March 10, 1993) (Emphasis Added)

[29] *Id.*

[30] See, for example, Convention on the Elimination of All Forms of Racial Discrimination, Article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, Article 27 (3) of the Convention on the Rights of the Child, Article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements,1976 (Report of Habitat: United Nations Conference on Human Settlements).

[31] Miloon Kothari (Special Rapporteur on adequate housing as a component of the right to an adequate standard of living), ¶17, U.N. Doc. E/CN.4/2005/43 (2003).

[32] Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, ***housing***, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (Emphasis added)

[33] G.A. res. 217A (III), at 71 (Dec. 10, 1948).

provides that *everyone* has the right to have a standard of living that is *adequate* for the family that includes housing.[34] A liberal interpretation of 'everyone' here may also include non-citizens of a state and any denial, which may be de jure or de facto, attracts various rights violations mentioned in international conventions. Foremost, any violation attracts infringement of other human rights which may include areas of education, health, etc. To uplift this obligation a state can, ask for international support as mentioned in article 11(1) of the International Covenant on Civil and Political Rights ("**ICCPR**")[35] which provides that the government of the state, with the help of the international community, should act to the full extent to realize the right to adequate housing. Here, the article recognizes housing as 'adequate' housing.[36] Furthermore, being a treaty, it is legally binding on the state parties which have ratified it. As India has rectified this covenant, it has to be read into Article 21 which will be also enforceable in Indian Court. Although ICCPR does not explicitly acknowledge the right to adequate housing what it recognizes is the right to life[37] which, as discussed above, may include right to housing. As mentioned in article 2(1) of the covenant, each state

[34] *Id.* (Emphasis added)
[35] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. ("ICCPR")
[36] U.N. Comm. on Economic, Social and Cultural Rights, at ¶ 7, U.N. Doc. E/1992/23(Dec. 13, 1991).
[37] *Supra* note 33, art. 6.

party needs to respect rights present in the convent and make them available to *everyone* present in the *territory.* The states can opt for '*shelter for all*' approach according to their respective jurisdiction and resources. According to the United Nation Commission on Human Settlement[38], commonly known as UN-Habitat, 'shelter for all' means, *"**affordable shelter** for all groups in all types of settlements, meeting the basic requirements of **affordability**, tenurial security, structural stability, and infrastructural support, with convenient access to employment and community services and facilities."* [39] Moreover, the right is available to everyone, without any discrimination.[40] Affordable housing is an important aspect at the international, national, and more importantly at an individual level and the same has multiple nexus to an individual's well-being.[41]As unaffordable housing undermines not only individual mental health but also the wealth and economic progress of society overall.[42] On the other hand, affordable housing increases household wealth increases the health, and higher quality of neighborhoods.[43] It has been acknowledged that the lack of affordable housing puts the subaltern in a situation where they have to choose among basic human necessities:

[38] G.A. Res. 56/206 (Dec. 21, 2001).
[39] G. Stacy Sirmans, *supra* note 15, at 2.
[40] *Supra* note 20.
[41] CHRISTINE H. LINDQUIS, *supra* note 10.
[42] Andrea J Boyack, *'Sustainable Affordable Housing',* 50 ARIZ ST. LJ. 455, 463 (2018).
[43] *Id.*

housing or food, housing or clothing, housing or education, housing or health care, and so forth.[44]

Before moving any further, it is imperative to put forward a definition of 'affordable housing' in order to understand the nuances of it. Affordable housing does not have any specific definition *per se*, and the meaning of the word changes contingent upon the country in question. A layman meaning of this word that has been, also, accepted by the Indian Government is, *"Affordable housing refers to any housing that meets some form of* ***affordability criterion****, which could be income level of the family, size of the dwelling unit or affordability in terms of EMI size or ratio of house price to annual income."*[45] Therefore according to this, the affordability of a household is an interactive outcome of house price, income, spending, number of heads in the family, location, and other demographic factors that affect the size and maintenance of the household. It is pertinent to note that housing is the single largest expenditure and most of the savings go into this area and a minor impact on this can affect several things which, in turn, can affect the overall

[44] Arturs Kucs, et.al., *The Right to Housing: International, European and National Perspectives*, 64/65 CUADRN. CONST. CTDR. FAD. FURIO. CRL. 101, 102(2008), https://www.semanticscholar.org/paper/The-right-to-housing%3A-International%2C-European%2C-and-Ku%C4%8Ds-Sedlova/de10a04fc4a02e92d5d34955ea8ae4d7889de415.

[45] Kalpana Gopalan & Madalasa Venkataraman, *Affordable housing: Policy and practice in India*, 27 IIMB MAN. REV. 129, 130 (2015). (Emphasis added)

welfare of families.[46] Affordable housing becomes important for the welfare of people who cannot afford or do not have resources to avail themselves of a shelter for themselves for a long term. Due to heterogeneous conditions, there exist no objective test to define an affordability problem. An attempt to solve this can be: any household is said to have an affordability problem if it is paying a substantial amount of income to obtain the basic amenities of adequate and appropriate housing, but on the other hand, it is affordable when the household can pay initial costs, current rents, or any other cost, that make them able to stay in the particular dwelling on a long-term basis while at the same time being able to maintain the minimum standard of living defined by the international or national standards. Moreover, house ownership is not a prudent choice for everyone, especially for the lower economic strata of society. Further, this difficulty behind house ownership may be categorized into three main reasons: the high price of the monthly mortgage is often unaffordable as discussed above, the low credit score often makes it impossible to apply for a home loan, lack of cash in hand making the instalments difficult.[47]

[46]Kana Ram, *Affordable Housing Opportunities in Small Indian Cities- A Case study of Industrial Migrants*, (2013) http://www.isocarp.net/Data/case_studies/2397.pdf (last visited April 25, 2021).

[47] Andrea J, *supra* note 42, at 483.

III. INDIA: NEED VS. AN AMBIGUOUS TAKE

While in some countries right to affordable and adequate housing has been categorically mentioned and accepted as a matter of right[48], the same has not been specifically mentioned in any codified law of India. In India, several rights have been recognized by the Indian Constitution and other statutes, the term 'adequate housing' does not have any specific mention, albeit, India being a signatory to several conventions which extensively deal with 'adequate housing'.[49] Moreover, the importance of adequate housing has been acknowledged by the judiciary several times but the stance remains uncertain. The importance of a shelter was recognized by the Supreme Court in the case of *Chameli Singh* v. *State of Uttar Pradesh*[50] when it held that, *"Shelter for a human being is not mere protection of his life and limb. It is a home where he has opportunities to grow physically, mentally, intellectually, and spiritually."*[51] Moreover, an adequate shelter is more than having a roof overhead, it is also about having "…. *adequate privacy, adequate space,*

[48] See, for example, CONST. OF THE RUSSIAN FED. art.40; CONST. OF MEXICO art. 4; CONST. OF PORTUGAL art. 65.
[49] Dr. P.K. Pandey, *Right To Adequate Housing In India: Human Rights Perspective*, 2 THE LEGL. ANLST. 21, 21 (2012).
[50] Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.
[51] *Id.*

*adequate security…….**at a reasonable cost**."*[52] It is more of a habitat development.[53]

The right to adequate housing and land is intrinsically related to other human rights that are guaranteed by various international instruments. For example, forced eviction has been recognized as a violation of human rights.[54] Furthermore as acknowledged by the Special Rapporteur on Adequate Housing, *"The indivisibility of survival, health, environmental conditions, and housing confirms the need to view housing rights within a holistic and interdependent framework."*[55] Adequate housing is imperative for a child as it provides an environment where the child can grow holistically, and the self-confidence of a child sustainably depends on the place which ought to be peaceful. As reported, the chances of death of a child, before reaching the age of five, increase by 40-50 times when not provided with adequate shelter.[56] Adding to this vulnerable position, as per a report[57], among the leading causes of death in children, before the age of five are indoor air pollution,

[52] *Supra* note 25.
[53] PRAFULLA, *supra* note 23, at 231.
[54] Miloon Kothari (Special Rapporteur on adequate housing as a component of the right to an adequate standard of living), ¶21, U.N. Doc. A/HRC/4/18 (2007).
[55] Justice Rajinder Sachar (Special Rapporteur on Adequate Housing), U.N. Doc. E/CN.4/Sub.2/1992/15 (1992).
[56] *Id.*
[57] *Mortality among children under five years of age as a human rights concern,* OHCHR https://www.ohchr.org/documents/issues/women/wrgs/health/studymortalityamongchildren.pdf.

unsafe drinking water, poor hygiene practices. The importance of children to have adequate housing has been recognized by the Supreme Court of India in the case of *Shantistar Builders* v. *Narayan Khimalal*[58] where the court held that "*The constitution aims…...development of every child….possible only if the child is in* ***a proper home***."[59] India with one of the largest populations of street children in the world, it becomes imperative to safeguard this right.[60]

When looked at from a constitutional perspective, Article 21 of the Indian Constitution provides for the right to life and personal liberty. It is a settled law that the right to life includes the right to live in an appropriate environment with bare necessities of life, such as education, pure water, proper shelter, clothing, etc.[61]In the case of *P.G. Gupta* v. *State of Gujarat and others*[62], it was held that the right to shelter comes under the ambit of Article 19(1)(g), and reading this article with Articles 19(1)(e) and 21 implies the right to residence and settlement as well. A liberal interpretation of Article 21 read along with Article 19(1)(e) provides a mandate to protect human rights and the right

[58] Shantistar Builders v. Narayan Khimalal, AIR 1990 SC 630.
[59] *Id.* (emphasis added)
[60] Sankunni K, *Estimated 18 million children live on streets in India, home to one of the largest child populations on Earth*, TIMES NOW NEWS (April 2, 2021), https://www.timesnownews.com/india/article/estimated-18-million-children-live-on-streets-in-india-home-to-one-of-the-largest-child-populations-on-earth/744047.
[61] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.
[62] P.G. Gupta v. State of Gujarat and Others, 1995 Supp. (2) SCC 182.

to shelter.[63] Further, when Article 39(b) is read with Article 46 –that directs the state to promote the interest of weaker sections with special care of social, economic, and educational interests– it can be concluded that the state can distribute the resources vested in them to benefit the community as a whole. There have been proactive steps taken by the Indian judiciary in the past regarding the importance of home or shelter for homeless people. In the case of *People's Union for Civil Liberties* v. *Union of India*[64] , the court held that the right to shelter comes under the ambit of the right to life. Further, in the celebrated judgement of *Olga Tellis* v. *Bombay Municipal Corporation* [65], the court recognized that *"[T]hat which alone makes it possible to live, leave aside what makes life livable must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.*" In *Kharak Singh* v. *State of UP* [66], the court while reiterating that the right to shelter constitutes an important 'constitutional' right held that, *"Life is something more than mere existence."*

The prima facie question that may now arise is: if these rights are –directly or indirectly–enunciated or acknowledged either in constitution or in judgements, then why are the government of state(s) not giving enough

[63] Sathe, *supra* note 4, at 15.
[64] People's Union for Civil Liberties v. Union of India, (2010) 5 SCC 423.
[65] Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545.
[66] Kharak Singh v. State of UP, AIR 1963 SC 1295.

importance to housing rights? A succinct answer would be that many governments around the world are afraid to place importance on housing rights because implications originated from these rights may bring criticism if these rights are not implemented or fulfilled by the government.[67] A possible and common counter argument is that the right to affordable housing as a right can be seen as a public expenditure or taking the resources of someone else to provide a shelter for someone.[68] It must be acknowledged that providing affordable housing does not impose an obligation on the government to provide built houses for the whole nation. Rather, it is to cover the various intricacies to make a household affordable. The right to affordable housing is far broader than the right to own a property. Where the latter focuses only on the ownership perspective, the former poses various obligations on the government to make policies regarding the overall affordability of the house that may include sustainable and non-discriminatory access to health care, education, rental policies, etc. The state should acknowledge the right to housing to every individual irrespective of their status in the society or access to economic resources and income.

[67] Scott Leckie, *The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach*, 11 HUM. RTS. Q. 522, 527 (1989).
[68] *Id.* at 543.

In India, the subject 'housing' belongs to the state list but the central government can be held responsible for making and implementing the broad policy for weaker sections of the society.[69] However, various reports categorically state that if there is a need to amend the present legislation to make the housing activity more effective and fruitful, then the same should be encouraged.[70] The scope of availability of affordable housing does not constrain itself to ownership but also rental houses. Rental houses play an imperative role in the formation of any housing policy. It is evident that not everyone in society is eligible to buy a house, even with affordable pricing. This is where the concept of rental houses comes into the picture. They can be considered as a *sine qua non* of a good housing policy. With affordable rental and ownership housing, the fundamental rights of moving freely[71] in the territory of India and settling[72] in any part of it would be facilitated. Moreover, recognizing the right to affordable housing as a fundamental right may perform an essential role to implement the rights that lie with it and any infringement regarding the same will attract legal remedies. Even though historically, the rent-to-own models have been victimizing the renters rather than encouraging them,[73] a sustainable

[69] Prafulla, *supra* note 23, at 232.
[70] Sathe, *supra* note 4, at 15.
[71] India Const. art. 19 (1)(d).
[72] India Const. art. 19(1)(e).
[73] Andrea J, *supra* note 42, at 491.

approach can be engaged by acknowledging the inequity between the renters and the household owners. As opined by Andrea, *"the unaffordability is driven primarily by lack of supply"* [74], meaning lack of affordable rental houses only exacerbate the situation. It is important for the state to form policies, after examining both socio-political and economic conditions, which should be tailored as per demographic of that particular region. A sustainable approach can be formed wherever the rental price of a house is too expensive for an individual. One of the appropriate examples of such a sustainable approach can be of the Netherlands. With the formulation and adoption of the Housing Act of 1901("**HA**"), the Netherlands became one of the first countries in Europe to inculcate the right to housing in its constitution.[75] The HA creates housing associations which are largely independent but funded as well as regulated by the State. The government subsidizes the rent to make the housing affordable. Moreover, the tenants can challenge any exorbitant and unreasonable rent through the Rent Tribunal Act; the decision of the tribunal will be binding on both the parties.[76] This approach can and must be considered as a base to form policies regarding rent-housing affordability in India.

[74] *Id.* at 469.
[75] Arturs, *supra* note 44, at 119.
[76] *Id.* at 120.

A COMPARATIVE ANALYSIS

Apart from the international treaties discussed above, some regional treaties and legal statutes partially protect the civil and political rights regarding the right to affordable housing. This chapter of the article, while dealing and appreciating those instruments, will take motivation from these instruments to suggest a sustainable and inclusive approach-for India. The European Social Charter, categorically provides for the protection of the right to adequate housing. It also provides that, in order to exercise the right to housing the parties should undertake measures which are designed to a) promote the access to the housing of an adequate standard; b) curtail and reduce homelessness; c) make the prices of housing adequate and *accessible* to those who are with inadequate resources.[77] Further, The European Convention on Human Rights and Fundamental Freedom, being one of the most powerful international conventions on human rights, provides for the protection of private life and home under Article 8(1). The convention provides for direct application of complaints if any state of the Council of Europe infringes any of the given rights.[78]

[77] European Social Char. art. 31. (Emphasis added)
[78] Arturs, *supra* note 44, at 105.

The African Charter of Human Rights does not categorically provide for the right to adequate housing but some provisions relating to the same have been enunciated in several articles[79] which when read along with other treaties, protects the right to adequate housing. Article 60 of the Charter provides that all the members of the treaty should recognize the obligation posed by the international conventions. The African Charter of the Rights and Well Being of the Child provides in article 20 that the states are under an obligation to take all the appropriate measures to assist the parents and any other people responsible for the child with appropriate material regarding housing.[80] Moreover, the Constitution of South Africa expressly provides for the right to adequate housing as a fundamental right. Section 26 of the South Africa constitution provides that everyone has the right to have access to adequate housing and the government should take all reasonable measures within its available resources to implement and protect this right. The constitution also provides that the government is under an obligation to respect and realize the right to adequate housing.[81] The constitution creates an extensive system for the

[79] See, for example, Article 16 deals with the right to health; article 24 deals with the right of peoples to a general satisfactory environment favorable to development.
[80] African Charter on the Rights and Welfare of the Child, 3 AFR. J. INT'l & COMP. L. 173, 181 (1991).
[81] Const. Of The South Africa sec. 26.

implementation of this socio-economic right. This was recognized in the case of *Government of the Republic of South Africa and Others* v. *Groothbroom*[82]. ("**Grootbroom case**"). The judgment given by Justice Yacoob was among the first housing rights judgements which placed negative obligation upon the state to not deprive a person of his/her right. The court while deciding this case and *KwaZulu-Natal*[83] relied on the Indian jurisprudence on enforceability of social rights. The Court while deciding *Groothbroom* case said that Section 26 does not create an obligation to provide housing but it creates an obligation to form comprehensive, coherent and workable policies and programs. This judgement can be a prime example of how international principles would be the way forward in a national scenario.

The right to housing is well recognized in United States of America with the help of The Protocol of San Salvador. It is limited and is substantially governed by Article 11 which provides that all persons have a right to live in a healthy environment. The Constitution of Argentina recognizes the right to adequate housing in Article 14, according to which, "*The state shall grant the benefits of social security, which shall be complete and non-renounceable. In particular, the States shall*

[82] Government of the Republic of South Africa v Groothbroom 2000 (11) BCLR 1169 (S. Afr.).
[83] Soobramoney v Minister of Health (Kwazulu-Natal) 1997 (12) BCLR 1696 (S. Afr.).

establish.... full protection of the family; protection of the family welfare; economic compensation to families and access to ***decent housing.***"[84] In an exemplary manner it recognizes the international as well as regional treaties in its constitution.[85] Apart from the above conventions and constitutions, the Constitution of Brazil may be the best one where it provides, in an exhaustive way, not only for the right to housing but also other pertinent subjects which may tend to affect the right to housing. The Constitution provides for a minimum wage in order to provide the workers with such wages from which they could be capable of meeting the basic needs, which includes housing.[86] The government also has a responsibility to promote the housing construction programs.[87] The most important article of the constitution which deals with the upliftment of the right to housing is Article 203(III).[88] The Netherlands, as discussed above, was among the first European countries to have the right to housing in its constitution. Article 22(2) of the Constitution of the Kingdom of the Netherlands provides that the authorities have an obligation to provide sufficient living accommodations. Due to the explicit mention of right to

[84] Argentina Const. art. 14. (Emphasis Added)
[85] *Id.* art. 75.
[86] Brazil Const. art. 7 IV.
[87] *Id.* art. 23 IX.
[88] This article provides for the social assistance which shall be furnished to anyone whosoever is in need, irrespective of the fact that they have contributed to social security or not.

housing in their respective instruments, the competent authority becomes accountable for respecting and implementing the right to housing.

India, as discussed above, does not provide for explicit mention of right to housing neither in Constitution nor in any other statute. A prima facie comparison, between the states mentioned above and India, tends to unearth the plausible paucity of steps taken by the Indian legislature in recognizing the right to housing. As per the author, the recognition of this right is imperative due to 'degenerating' role of the judiciary. Although, there have been many judgements –as discussed in above chapters– of a progressive nature, there have been instances where the Indian judiciary has taken an 'anti-people' stance while reversing the nature of progressiveness in various judgements. For e.g., derogatory statements, according to author, were made by the learned amicus curiae against slum dwellers in the case of *Almitra Patel* v. *Union of India*[89]. It was opined that, "*The Court should, however, direct that the local authorities, Government and all statutory authorities must discharge their statutory duties and obligations in* ***keeping the city at least reasonably clean****. We propose to do so now by issuing appropriate directions.*"[90] It can be concluded by this statement that the learned amicus curiae were referring the

[89] Almitra Patel v. Union of India, (2000) 2 SCC 679 at 685.
[90] *Id.* (Emphasis Added)

slum dwellers as an impediment and generator of waste. Similarly, the Delhi High Court in the case of *Navniti CGS* v. *Lt. Governor*[91], the court ordered the demolition of a slum cluster in the year, which was undertaken by the competent authority after a gap of two years without any prior information notice as a result of which the residents were not provided with resettlement. In recent times, the judgement passed a bench headed by now retired Justice Arun Mishra has unleashed a humongous catastrophe on the solders of hapless dwellers.[92] The court ordered the eviction of slum dwellers along the railway tracks. The court in this case did not make a reference to *Olga Tellis* and thereby, the order can be considered as *per incuriam.*[93] Adding salt to injury, the Central Government maintains the status quo of modus operandi of scheme implementation where it has never implemented. As argued by Gonsalves and Anupradha,[94] these schemes, *"…. are all empty promises to the urban poor, just as the Supreme Court judgments declaring housing to be a fundamental right*

[91] Navniti CGHS v. Lt. Governor of Delhi, WP (C) 5697/2002, High Court of Delhi, August 2004.
[92] V. Venkatesan, *Justice Mishra's Last Order: Eviction of Slum Dwellers Along Railway Tracks in 3 Months*, THE WIRE (September 6, 2020), https://thewire.in/law/justice-arun-mishras-last-order-eviction-jhuggies-railway-tracks.
[93] *Id.*
[94] Colin Gonsalves & Anupradha Singh, *Evicting without rehabilitating violates rights of slum dwellers*, THE INDIAN EXPRESS (June 18, 2021), https://indianexpress.com/article/opinion/columns/manohar-lal-khattar-haryana-government-slums-rehabilitation-coronavirus-7363948/.

remained on paper." It can be concluded from this discourse that the justice for the poor continues to be dependent not on the judiciary's commitment but on the proclivity of individual judge. Moreover, it is due to erratic and unsettled take by the Indian judiciary, it becomes important to promulgate and implement a right to housing law,[95] which will not only provide security of tenure but also commits to ending homelessness and forced evictions[96]

IV. CLIMATE MIGRANTS: A STRUGGLE TO DWELL

The first World Climate Conference was organized in the year 1979 by the World Meteorological Organization where it was held that climate change should be taken as an 'urgent' problem for the world. The term 'climate refugee' was first defined by United Nations Environment Programme ("**UNEP**") researcher Essam El-Hinnawi as: "*those people who have been forced to leave their traditional habitat,* ***temporarily*** *or* ***permanently****, because of a marked* ***environmental disruption*** *(natural and/or triggered by people) that jeopardized their existence or seriously affected the quality of their*

[95] *Press statement by Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context Ms Leilani Farha,* OHCHR (April 22, 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19861&LangID=E.

[96] Rauel Rolnik (Special Rapporteur on adequate housing as a component of the right to an adequate standard of living), U.N. Doc. A/HRC/25/54 (December 30, 2013).

life."[97] According to him, 'environmental disruption' means any change due to which the resource base is unable to render suitable support to human life. The formation of United Nations Framework Conventions on Climate Change ("**UNFCCC**")[98], during the Rio summit which is popularly known as Earth Summit, was more than a simple convention as the name suggests it concerns the *framework* regarding the issue of climate change. Furthermore, the Kyoto Protocol[99] , which was a result of a need to have a forceful international response, opted for "*common but differentiated responsibilities and respective capabilities for nations*."[100]According to this principle, the developed country party are to provide financial resources to the developing country parties in implementing the objectives enshrined in the UNFCCC.

While the international conventions failed to examine the definition of climate refugees, some regional instruments try to include this in their respective conventions. For example, Article 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, provides the definition of a refugee as someone

[97] Diane C. Bates, *Environmental Refugees? Classifying Human Migrations Caused by Environmental Change,* 23 POPUL. ENVIRON. 465, 466(2002). (Emphasis added)
[98] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107.
[99] Kyoto Protocol to the Framework Convention on Climate Change, Dec. 11, 997,2303 UNTS 161. ("Kyoto Protocol")
[100] *Id.* art. 10.

who was compelled to flee due to *an event* that seriously disturbed the public order. An event herein shall include any climatic event. In similar fashion, internally displaced persons due to climate disasters are covered by the Kampala Convention as,

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or *natural or human-made disasters*, and who have not crossed an internationally recognized state border.[101]

The needs of migrants will differ based on the type of displacement, factors that may include economic, cultural, political contexts.[102] Some countries have formed special rules or policies to permit the individuals coming from a country that went through severe upheavals, due to climate change making that particular country uninhabitable for them. Some of those countries are United States of America, New Zealand, Sweden, and Finland. The United States implemented Temporary Protected Status ("**TPS**") for protecting the migrants or persons who are unable to go back to their country due to armed conflict or

[101] Kampala convention, *supra* note 6, at art. 1(k).
[102] Lauren Nishimura, *'Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, 27 INT. J. REFUG. LAW 1,3 (2015).

environmental disaster.[103] TPS is, as understood by the author, a blanket form of humanitarian relief where the relief from removal is administered to a group of individuals. The United State Secretary of Homeland Security has the authority to designate a country under the head of Temporary Protected Status and the authority to gain an extension to any protected state is vested in the hands of the Secretary.[104] As for 2021, twelve[105] countries have been provided with this status. However, this status is provided only[106] to the ones who were present in the States during the implementation of the designation. Further, as the name suggests, it is a temporary designation and not a permanent one. The status only grants legal status to remain in the country and does not provide with a separate path to avail the citizenship or permanent residence.[107] During the designated period, holders of the TPS cannot be detained on the basis of their immigration

[103] Eva Segerblom, *Temporary Protected Status: An Immigration Statute That Redefines Traditional Notions of Status and Temporariness*, 7 Nev. L.J. 664,665 (2007).

[104] Jill H. Wilson, *Temporary Protected Status and Deferred Enforced Departure*, Congressional Research Service (August 9, 2021), https://sgp.fas.org/crs/homesec/RS20844.pdf.

[105]*Temporary Protected Status*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/humanitarian/temporary-protected-status.

[106] EVA, *supra* note 103, at 667.

[107]*Temporary Protected Status: An Overview*, AMERICAN IMMIGRATION COUNCIL,(August 9, 2021), https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview?__cf_chl_jschl_tk__=pmd_gFWuSeDIN_MS4ApTxA6.9DVMJ6Dklt8q5K9O5ZcVEM8-1630139085-0-gqNtZGzNAlCjcnBszQjR

status and are eligible[108] for the Employment Authorization Document which is one of the ways to prove the employers that the status holder is allowed to work[109]. In addition to this, the holder is eligible to travel abroad although with a prior authorization of the Secretary. A similar kind of protection is given by the European Union from the establishment of the 'Temporary Protection Directive', when there is a mass influx of people from where it is not feasible to treat the individual application of the individuals. Sweden as well as Finland both have included migrants due to environmental factors in their respective immigration policies. Further, the Finnish Aliens Act provides for residence permit on the basis of the protection needed by the individual[110]. Moreover, there has been an agreement between New Zealand and Tuvalu, which is known as the Pacific Access Category ("PAC") agreement wherein a specific annual quota for the citizens of Tuvalu was granted residence in New Zealand. The PAC presents a special immigration agreement that enables the refugees affected by climate change to move to a less vulnerable environment.

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[108] JILL H., *supra* note 104.

[109] *Employment Authorization Document*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document (last accessed 28 August 2021).

[110] *Second Right to Housing Report: The Right to Housing in Comparative Perspective,* MERCY LAW RESOURCE CENTRE (2018), https://mercylaw.ie/wp-content/uploads/2018/06/MLRC-Second-Right-to-Housing-Report.pdf.

Moreover, Switzerland and Norway formed the Nansen Initiative on Disaster and cross-border Movements. The initiative is a state-led initiative with an aim of building consensus and principles regarding the protection of displaced persons across the borders as a result of natural disasters.

The extreme weather events-across Asia and the Pacific-have not only a direct relationship to internal and temporary displacement, but also contributes to international migration.[111] Although Asia-Pacific region is leading[112] global action plans on climate change, there exist *no instruments* similar to that of other regional instruments[113]. The importance of regional cooperation is evident from the fact that approximately 1 million people will be at risk dwelling around the country's Bay of Bengal sector i.e., West Bengal and Odisha, whereas 15 million people in Bangladesh by 2050 will be at risk.[114] With the increase in sudden and slow-onset of disasters due to climate change, risks are generally amplified for people with no or limited access to the resources and social security.[115] The cross-border displacement as a response to

[111] U.N. ESCOR, U.N. Doc. E/ESCAP/GCM/PREP (Sept. 5, 2017).
[112] *Id.* at 6.
[113] *Addressing Climate Change and Migration in Asia and the Pacific*, Asian Development Bank (2012), https://www.adb.org/sites/default/files/publication/29662/addressing-climate-change-migration.pdf. (Emphasis Added)
[114] Norman, *supra* note 9 at 755.
[115] *Supra* note 111 at 4.

climate change will be gradual and hidden through the existing channels, as a result of which people's capacity to move will be reduced or constrained.[116] As per Angela Williams, "*regional cooperation…. which builds on existing geopolitical bonds and economic relations…. appears a model better suited to climate change displacement."*[117] Regional agreements are more likely to achieve a greater commitment and intended results that might otherwise be achieved at international level.[118] Although Asia-Pacific regional consultative processes have not prioritized climate change and migration, there is a forum available for future dialogue and cooperation.[119]

Further, climate change and human rights are closely intertwined. The same was acknowledged in a resolution[120] by UN Human Rights Council ("**UNHRC**"). The resolution reaffirmed the basic rights of life, food, health, and housing which are under threat due to climate change. It must be kept in mind that those who are migrating because of environmental factors have the same rights as others who crossed the borders normally.[121] Various

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[116] *Id.* at 5
[117] Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 LAW & POL'Y, 502,518 (2008).
[118] *Id.*
[119] *Supra* note 111 at 15.
[120] Human Rights Council Res. 10/4, U.N. Doc. A/HRC/10/L.11 (May 12, 2009).
[121] Susan Martin, *Climate Change, Migration, and Governance*, 16 GLOB. GOV., 397, 402 (2010).

articles[122] have been enunciated in UDHR which protect individuals' rights to migrate to other country where they can seek asylum from the persecution taking place in their home country; although there is no *obligation* on the host state to provide one. Article 12 of ICCPR provides that, "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement, as mentioned in Article 13, and freedom to choose his residence". But this right is restrictive in nature which may be according to the law, necessary for public order (*ordre public*) and national security. In addition to this, OHCHR has recommended[123] that any irregular entry of migrants should not be considered as a criminal offence and the private individual should not be criminalized under the law of host country. Further, it calls upon the state to provide the migrants with necessary medical attention and wherever the detention of migrated individual is required, the condition in detention should in consonance with international standard.

India is one of the most vulnerable countries in the world and has been hit by at least one extreme weather event

[122] See, for example, art. 13, art. 14.

[123] *Recommended Principles and Guidelines on Human Rights at International Borders,* OHCHR, https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

every month.[124] According to the Internal Displacement Report, about 3.6 million people were displaced between the years 2008 to 2019.[125] Whereas, there has been a displacement of about 5,90,000 within the year of 2019 due to disasters.[126] Furthermore, according to a survey[127] of the National Disaster Management Authority, more than half of the states of India are prone to disasters. In the case of Rohtang Pass,[128] the National Green Tribunal acknowledged the fast change in the climate as a result of increased human activity.

When it comes to the obligation of international law, 'displaced persons' serves as a descriptive term and does not form a judicial category, and thereby, States are not under obligation as it does not form a status.[129] *Prima facie,* the government of the migrants' country has the primary

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[124] Hridayesh Joshi, *Climate change now displaces more people than war, and India should be worried*, QUARTZ INDIA (February 21, 2020), https://qz.com/india/1806064/india-vulnerable-as-climate-refugees-surge-amid-floods-droughts/.

[125] Rajit Sengupta, *Forced displacement is the new norm in India,* DOWNTOEARTH (May 22, 2020), https://www.downtoearth.org.in/news/climate-change/forced-displacement-is-the-new-norm-in-india-71303#:~:text=Between%202008%20and%202019%2C%20the,vulnerable%20to%20cyclones%20and%20tsunamis .

[126] *India,* INTERNAL DISPLACEMENT MONITORING CENTRE, https://www.internal-displacement.org/countries/india (Last visited April 24, 2021).

[127] Malini Nambiar, *A Decade of Disaster Risk Management in India*, 50 ECON. POL. WKLY. 36, 36 (2015).

[128] The court on its own motion v. the State of HP, Application No. 237 (THC)/2013 (CWPIL No. 15 of 2010), order dated 6 February 2014.

[129] David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees,* 16 GEO. INT'L ENVTL. L. REV. 209, 217 (2004).

duty to act whenever their rights are violated. India, not being a signatory to Refugee Convention, is obliged by the principle of non-refoulement,[130] a *jus cogens* norm.[131] This principle has become a customary international law[132] wherein it prohibits the transfer of aliens from one authority to another authority where they might be subjected to torture, inhumane or degrading treatment or where the rights and freedoms might be at risk.[133] This principle applies *to all migrants* at all times, irrespective of migration status.[134] Although, the present principle applies to the contracting state,[135] it is imperative to acknowledge that although the state is under no obligation to admit the climate refugee , the state is under an obligation not to refoule them, as per the non-refoulement principle. Further, the 'floodgate argument'[136] which was given in the

[130] Refugees Convention, *supra* note 20, art.33(1); State of Arunachal Pradesh v. Khudiram Chakma, 1994 Supp (1) SCC 615.

[131] Oliver Jones, *Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective,* 58 INT COMP LAW Q. 443, 450 (2009).

[132] *Note on Migration and the Principle of Non-Refoulement*, 99 INT'L REV. RED CROSS 345,346 (2017).

[133] Vadislava Stoyanova, *The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory*, 3 INTERDISC. J. HUM. RTS. L. 1,1 (2008).

[134]*The principle of non-refoulement in international law,* OHCHR, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf. (Emphasis added)

[135] *Id.*

[136] Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 Windsor Y.B. Access Just. 1, 5 (2016).

case of AF(Kiribati)[137] before Immigration and Protection Tribunal of New Zealand, wherein the State argued that, if the state accepts a person who migrated due to climate change or environmental degradation, the same will open a gate for millions to take shelter under the head of a climate refugee, is, according to author, untenable as the UNHCR provides the funds to the refugees taking shelter in a state. In the recent judgement of *Nandita Haksar* v. *State of Manipur*[138] of Manipur High Court, the court observed that the principle of non-refoulement can be, *prima facie,* read with Article 21 of the Indian Constitution. Moreover, on the contention about an exodus of refugees as a threat[139] given by the states for not providing shelter, the court responded that while providing protection to illegally entered Myanmarese individuals,

> They did not enter our country with the clear-cut and deliberate intention of breaking and violating our domestic laws. They fled the country of their origin under imminent threat to their lives and liberty. They aspire for relief under International Conventions that were put in place to offer protection and rehabilitation to refugees/asylum seekers.

[137] *AF (Kiribati)*, [2013] NZIPT 800413 (N.Zealand).
[138] Nandita Haksar v. State of Manipur, 2021 SCC OnLine Mani 176.
[139] S.C. Res. 688, (April 5, 1991).

The court while citing the case of *National Human Rights Commission* v. *State of Arunachal Pradesh*[140] noted that,

> Every person is entitled to equality before the law and equal protection of the laws…. no person can be deprived of his life or personal liberty except according to the procedure established by law…. The state is bound to protect the life and liberty of every human being, be he a citizen or otherwise.

Therefore, certain protection has been guaranteed under the Articles 14 and 21[141] of the Indian Constitution for the foreigners.[142] In the case of *Chairman Railway Board* v. *Chandrima Das (Mrs.)*[143], the apex court held that the Bangladeshi citizen who crossed the borders 'illegally' was entitled to be protected under article 21 of the Constitution. Further, as noted by the court in the case of Nandita Haksar, *"India has no clear refugee protection policy or framework, it does grant asylum to a large number of refugees from nearby countries…….mainly from Afghanistan and Myanmar."*[144] Moreover, foreigners do not have the right to reside and settle in the country in accordance with article 19(1)(e).[145] In absence of any national legal framework, UNHCR

[140] National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742.
[141] Louis De Raedt v. Union of India, (1991) 3 SCC 554.
[142] Salomon v. Commrs. Of Customs and Excise, (1996) 3 All ER 871.
[143] Chairman Railway Board v. Chandrima Das (Mrs.), (2000) 2 SCC 465.
[144] Nandita Haksar,*supra* note 99, at ¶ 19.
[145] Union of India v. Ghaus Mohammad, AIR 1961 SC 1526.

conducts[146] refugee status determination which provides refugees coming from neighboring countries which includes Myanmar temporary resident permits.

V. AFFORDABLE HOUSING: A WAY FORWARD

The right to life in any civilized society requires proper shelter, food, a decent environment, and medical care.[147] However, in a neo-liberal society, private developers and investors dominate the system of housing.[148] This creates disparate opportunity due to which there is a gap in housing affordability which perpetuates discrimination based on income, race and thereby, shaking the basic foundation of the right to equal opportunity,[149] due to which there is a creation of a housing crisis that requires a human rights response.[150] Further, with a decline in public housing,[151] the supply of affordable housing has become dependent on the private construction of affordable housing, which in turn has a profit-making focus rather than a humanitarian approach.[152]

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[146] Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT'l J. REFUGEE L. 251, 255 (1999).
[147] Prafulla, *supra* note 23, at 235.
[148] Farha, *supra* note 14, at 3.
[149] Gaurav, *supra* note 16, at 23.
[150] *Id.*
[151] Houses are provided to the lower stratum in the economy which is subsidized by the public funds.
[152] Andrea J, *supra* note 42, at 475.

While housing policy deals with the question of ownership and mortgage affordability, the question of rental affordability does not find a place in that. It is evident from the census that the number of rentals in the urban population is increasing, and the number of renters today is greater than ever before. Moreover, a substantial part of these renters belongs to the low-income class who cannot afford to pay the cost of separate housing.[153] Rental affordability is an omnipresent problem in today's world. Increasing the supply of affordable housing may curb some issues relating to the same, but it is not a go-to solution as the affordability gap depends on the demographic location of the person. Wherefore, housing affordability should not be concluded from the perspective of cost-to-produce but ability-to-pay perspective.[154]

One unsustainable aspect of housing is the divide of the support given to the house owners and the renters. It is evident that the security lasts only till the rent agreement and the bargaining power vests in the hand of the owner who often tends to exploit the renters. To protect the interest of the renters, tenant subsidies and houses with an affordable price should be reserved or rather preserved for the members of a stratum of society which is the neediest segment. While the Constitution of India provides that the

[153] *Id.* at 468.
[154] *Id.* at 481.

state should provide services at low or no cost, an apolitical and honest administrative system is a core requirement which is-what it seems- impossible in the present system.[155] As opined by S. Ambirajan, *"Our system works on F-mistake (failing to reach the targeted population) and E-mistake (intervention reaches predominantly the non-targeted population) given by Giovannu Andrea Cornia and Frances."*[156] An impediment in this subsidy regime can be the identification of the actual beneficiary as the immediate recipient of the subsidy may not be the actual or ultimate gainer of the scheme, making subsidy an unproductive incubus. Therefore, the subsidy should be overt and tailored to maximize the minuscule benefits to the identified targeted and intended recipients. However, the subsidy may have financial repercussions on the budget.

Reserve Bank of India's analysts have opined that excessive government consumption expenditure –which include subsidies– has a negative impact on growth of the country.[157] Although, as stated in a report[158] by the World

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[155] S. Ambirajan, *State Government Subsidies: The Case of Tamil Nadu*, 34 ECON. POL. WKLY., 811, 816 (1999).

[156] *Id.*

[157] Rajiv Kumar & Alamaru Soumya, *Fiscal Policy Issues for India after the Global Financial Crisis (2008-2010)*, ASIAN DEVELOPMENT BANK INSTITUTE (2010),https://www.adb.org/sites/default/files/publication/156104/adbi-wp249.pdf.

[158] *India: Sustaining Reform, Reducing Poverty*, World Bank, https://web.worldbank.org/archive/website00811/WEB/PDF/ESDPR.PDF.

Bank, there is a need to reallocate the expenditures from subsidies towards investment in infrastructure, the affordability of housing is a legitimate rationale for housing subsidies.[159] In order to minimize the financial burden on the government, the subsidy should ultimately be rationalized and phased out in the later phases as they may lead to undesirable wastage of scarce resources.[160] In addition to this, the subsidy should be valid for a period during which the recipient can settle and work holistically on their economic status and after such period the administration should re-evaluate their status and pass-on the subsidy to ones who fulfills the criteria fixed. Moreover, with a demand-side subsidy system-where government subsidies the tenants of affordable housing-the policy makers, with the help of simple legislative decisions, can alter the programs which will be beneficial to the left out or new individuals.[161]

The right to adequate housing is a basic human right that poses an obligation on the government to ensure the attainment of these rights by all people and any kind of impediments should be dealt with and removed by the government[162], and there should be active participation of

[159] John M. Quigley, *Rental Housing Assistance,* 13 CITYSCAPE, 147, 148 (2011).
[160] *Id.*
[161] Adam Zaidel, *Affordable Housing: The Case for Demand-Side Subsidies in Superstar Cities*, 42 THE URBAN LAWY. 135, 151 (2010).
[162] Vancouver Declaration, *supra* note 30.

government, non-government organizations to ensure there should be legal security regarding the tenancy, moreover, there should be equal access to affordable and adequate housing for everyone.[163] Therefore, the right to affordable housing becomes imperative to respect obligations posed by the international conventions. The same was recognized in the case of *Sudama Singh* v. *Government of Delhi and another*[164] where the Delhi High Court opined on the importance of implementing the international conventions. This is especially required as the right to shelter comes under the ambit of fundamental rights of the Indian Constitution.[165] Not having an affordable shelter can have serious implications on health and can also cripple the overall development of the family and society as a whole. Further, Committee on Economic, Social and Cultural Rights ("**CESCR**") provides that the right to adequate as well as affordable housing is indeed a human right and the same creates an obligation, beyond any doubt, on the state to uplift and implement[166] the right

[163] U.N. Conference on Human Settlements: Habitat II, ¶ 10, U.N. Doc. A/ CONF.165/14, annex I (Aug. 7, 1996).
[164] Sudama Singh v. Government of Delhi and another, 2010 SCC OnLine Del 612.
[165] State of Karnataka v. Narasimhamurthy,1995 5 SCC 524.
[166] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 9 HUM. RTS. Q. 122,122 (1987).

wherever it is legally bound to do so. Also, as per CESCR General Comment No. 3[167],

> a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. [168]

As shown in preceding parts of this article, according to author, India has been failing to discharge this obligation. A policy regarding the same should primarily be designed to provide low-cost housing to not only the lower strata of the society but to anyone and everyone.[169] Due to the migrant crisis, the Indian government was motivated to form a scheme, Affordable Renting Housing Complexes ("**ARHCs**") for the underprivileged class to provide affordable rental housing. The ARHCs will be implemented with the help of two models: utilizing the existing funded houses and converting them to ARHC, and construction of ARHC by private entities. The scheme is in correspondence with the "Housing for all" incentive. The scheme has targeted the Economically Weaker Section

[167] U.N. SCOR. Comm. on Economic, Social and Cultural Rights, U.N. Doc. E/1991/23 (De. 14, 1990).
[168] *Id.* at 86.
[169] *Id.*

(EWS)/ Low Income Group (LIG) who are urban migrants/poor. This scheme can be considered as a silver lining in the uncertain clouds of dwelling.

V. CONCLUSION

As said by Sylvia Lopez-Ekra, International Organization for Migration ("**IOM**") Ghana Chief of Mission, "*Migration is often misperceived as the failure to adapt to a changing environment. It is, however, one of the main coping and survival mechanisms that are available to those affected by environmental degradation and climate change."* International Conventions obligate the state to safeguard the human rights of life and property of those within the territory of the state against the threat posed on the migrants by a disaster. India faces a natural disaster every year, which sometimes makes the condition of the affected area unsuitable for living. While the problem originated from the environment, it is an equal crisis of social, political and economic, and human rights. Additional problems are associated with climate migration, which may include poverty, population pressure on the potential state, lack of affordable shelters, unemployment, and many other things. There has been a paucity in the system of global governance which should be acknowledged by international organizations. The most significant impediment, according to the author, to the protection-and appreciation-regime for climate migrants is

the lack of political will. In order to discontinue this political impasse, it's high time for the 'soft law' to put an onus on states along with repercussions for failing any obligation. Although the effects of climate change are omnipresent and well recognised, developing-and-underdeveloped countries bear the most of the brunt. It is suggested and expected that there should and must be an increase in humanitarian assistance with the help of international cooperation. In order to safeguard the economic interests of developing-and underdeveloped-countries, a common pool of financial resources-exclusively for climate migrants at the international level should be set up.

While India itself has many problems –homelessness, poverty, unemployment– international climate migrants will be in a quandary. Due to the principle of non-refoulement, the state cannot refoule the climate migrants. A major impediment for recognizing refugees or international climate migrants is the 'floodgate' argument, according to which recognizing international climate migrants or refugees will allow and encourage a major influx of international climate migrants to consider India as a host country. In order to tackle this, it is suggested that a policy should be formed which will define and designate a temporary status to climate migrants in accordance with the rights provided to refugees under international law.

This designation should be regularly and extensively re-evaluated. The policy should be codified in the later stages, which will enable the legislature to set more certain and consistent standards to designate the status. Moreover, as of now, UNHCR conducts the determination for refugee status and provides requisite funds to the refugees in India. Therefore, UNHCR along with the government should work towards dealing with the issue of climate migrants holistically as only the nomenclature is different and not the human rights.

In addition to that, India can form bi-lateral agreements between neighbouring countries as the probable influx from neighbouring countries is more than other countries. The neighboring countries are also under a constant threat for such environmental migrants. For instance, Nepal experienced a powerful rainstorm in 2019. There were 50 deaths, 10,000 displaced[170] due to heavy pouring, and about 1 million people affected by the disaster[171]. It is highly probable that some may seek refuge in India in the future due to the melting of glaciers. Moreover, with the submergence of Sundarbans and many islands, like

[170] *Monsoon rains trigger deadly flooding in Nepal,* AL JAZEERA (July 14, 2019), https://www.aljazeera.com/gallery/2019/7/14/monsoon-rains-trigger-deadly-flooding-in-nepal.

[171] Rebecca Ratcliffe, Arun Budhathoki, *At least 50 people dead and 1 million affected by floods in SouthAsia*, THE GUARDIAN (July 14, 2019), https://www.theguardian.com/world/2019/jul/14/at-least-people-killed-in-nepal-floods-monsoon.

Lohachara island in Hooghly River, in the Indian Territory, it becomes pertinent for India to acknowledge the displacement due to climate disasters. As suggested above, there is a need to make a policy over migration due to these events and to formulate a climate change policy as there is a high possibility of an influx of migrants due to climate change. Migration caused by environmental change requires a theoretical framework to integrate human rights and respect all the suitable problems one could face in the potential destination. Moreover, the definition of 'refugee' under Refugee Convention should be amended to add 'climate refugee' in it, if not this, at least a separate head should be provided to them in the international convention. Further, international conventions provide housing rights for 'everyone'. Therefore, looking from that liberal perspective, it becomes pertinent for the host state to provide affordable shelter, and every other thing which can be considered as basic amenities for a desirable life with the help of bi-lateral ties and international support. The host state should be provided with the financial resources from the migrant's home country in order to ameliorate the probable financial stress on the host country.

Let me conclude my study with a sense of optimism and hope that in the near future various international organizations along with state governments will be able to

inculcate the definition of climate refugee in the present conventions. Moreover, various multilateral treaties, regarding safeguarding these refugees' human rights in a foreign land could be formulated and climate refugees could be provided with the right of affordable housing, at least, in the form of rental housing. Moreover, the state should focus more on inculcating the protection of housing by affordable means in the statutes and not just in policy, as a policy is an inconstant initiative that changes according to the party in power. Moreover, this is necessary to make the recognition of the right to housing a legal obligation and not a political one. Nonetheless, Schemes like ARHCs depict a motivation of the government for working towards underprivileged migrants. The author hopes that inclusive schemes like this can be formulated for the migrants, particularly ones crossing international borders due to climate change.

COUNTERBALANCING THE INTERESTS OF INNOVATION AND CONSUMERS' DATA: SETTING THE REGULATORY STANDARDS FOR IOT STAKEHOLDERS

[*] Aryan Babele and Abhijeet Vaishnav

ABSTRACT

The advent of technologies as everyday utilities, more commonly referred to as smart objects, connected over an online network, are the Internet of Things (IoT). The dependency on IoT applications have increased manifold rapidly due to them facilitating ease into the lives of humans. IoT industry has the great potential in tremendously bringing value creation as well as innovation in a variety of sectors, ranging from human interaction to healthcare sector, and from transportation to the way of banking. However, the popularity of these applications may also transmit risks of potential disruptions to the existing state of the market, ranging from consumers' data protection issues to targeted broad-scale shutdown of systems, Therefore, the wide usage of IoT like devices and services calls for a new set of IoT specific regulatory standards on data protection and cyber-security. Since the regulations and technological advancements often become adversaries, there arises a need to have a regulatory framework which should be technology-friendly to maintain the right balance between technological

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innovation, commercial consumption and consumer protection in respect of IoT. This paper deals with the understanding of IoT in light of protection of data related to consumers. Further, the paper examines various data protection concerns associated with proliferation of IoT such as manipulation of consumers' data, non-transparency in data-transfers, unethical data collection and dissemination, information security, consent-tracking models, among others. The paper also studies the need of regulatory framework in the national vis-a-vis international scenario in respect of IoT. The paper seeks to bring forth suggestions to balance the interests of the consumers as well as the IoT industry.

1. INTRODUCTION

The Internet of Things ("**IoT**") marks a major transformation in the evolution of Internet. It has not only expanded the scope of facilitating interaction between humans through machine-to-machine communications, but has also facilitated collection of data and sending of instructions, to or from, everyday objects that interface with, or form part, of the world. As IoT's functions have begun to extend to collection and processing of real-time data as well, it would not be wrong to derive a new notion that the 'society is majorly based on information and ideas more than the physical things.' In the digitalized era, with machine-to-machine interaction, IoT helps in bridging gaps not only between different technologies themselves

but also between technology and people, connecting them all to the platform of the Internet.

In simpler terms, IoT refers to all those everyday physical 'utilities' or 'things' that have the capability to interact with the environment, people and other devices in real time. When a 'thing' is connected to the Internet, it has the capability to send and/or receive information. Such processing capabilities make 'things' smarter, without a need for inherent super storage. IoT involves a network that connects various technologies over the same, for them, to interact and share their data. For instance, a smartphone user can listen to any song on demand over the music streaming apps. This is not because one has every song stored in that phone, but is due to the smart phone's capability to connect to the Internet to send information (asking for the music) and receive information (streaming the music) from the cloud storage that is stored somewhere else in the world.

IoT is increasingly penetrating into our everyday lives. It is growing at such a rapid rate that the experts have calculated that the number of Internet connected devices in the world might reach 43 billion by 2023[1]. In the US itself, the

[1] Fredrik Dahlqvist, Mark Patel, Alexander Rajko, & Jonathan Shulman, *Growing opportunities in the Internet of Things*, McKinsey & Company, (Sep. 01, 2021), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/growing-opportunities-in-the-internet-of-things.

number of connected devices per person has doubled to 25 in 2021 from 11 in 2019, according to a report by Deloitte.[2] As the society is becoming more informed and aware of these technologies and IoT, there arises an urgent need for people to be self-aware as well. In an increasingly IoT dependable society, flip side of such technology should also be recognized. Being one of the most disruptive technologies of our time, IoT has globally emerged as an Internet-based infrastructure. It, in an absolute manner, integrates multiple numbers of connections such that numerous devices get engaged in processing, collecting and sharing the data, for specific tasks. Such advancement could also translate into the drastic improvements and unprecedented growth in diverse markets like the healthcare, energy, transportation, and logistics.[3]

This paper seeks to analyse how ubiquitous IoT is in various sectors, highlighting its advancement in those sectors. On the other hand, it also highlights upon incidents that have innately shaken the consumer

[2] 2021 Connectivity and Mobile Trends Survey, Deloitte, (Sep. 1,2021), https://www2.deloitte.com/us/en/insights/industry/telecommunications/connectivity-mobile-trends-survey.html.

[3] Sanford Reback & Tony Costello, *Deconstructing the Internet of Things,* Bloomberg Government, (Sep. 1,2021), https://www.multivu.com/players/English/7371431-bloomberg-visa-the-digital-trust securingcommerce/flexSwf/impAsset/document/166030bd-bc8d-40ed-97c2-5f60a0270bbd.pdf.

protection related regulatory structure and increased concerns of data protection. The IoT industry has for long thrived largely upon the non-personal data, which is now being called for regulation by concerned policymakers. Against this backdrop, the paper ultimately attempts to put forth points for the need of regulations to control the expansive IoT applications and balance the outlook of the consumers' data interests as well as that of IoT manufacturers/ service providers. The recommendations presented in the paper are the broad based principles as well as the best practices that may be considered for implementation by the regulators, as well as the IoT industry stakeholders for self-regulation.

2. UNDERSTANDING 'INTERNET OF THINGS' ("IOT")

The term 'IoT' when used in 1999 by Kevin Ashton, was originally used to indicate those technological objects that embody tiny wireless chips that could be sensed so that each 'thing' could be tracked in space and time via the Internet.[4] Mostly, it has been described as the 'world of interconnected, sensor-laden devices and objects.'[5]

[4] Sidney Perkovitz, *The Internet of Things: Totally New and A Hundred Years Old*, Jstor Daily, (Sep. 1,2021), https://daily.jstor.org/internet-things-totally-new-hundred-years-old/.

[5] FTC Staff Report, Internet of Things: Privacy & Security in a Connected World, FTC 1 (2015) https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/ 150127iotrpt.pdf [*hereinafter* FTC IoT Report].

Despite an increasing dependency on the IoT, there is yet to be evolved a single, uniform and universally accepted definition. The consultancy-firm, McKinsey, provides a broad definition of IoT, which includes 'sensors and actuators' in physical objects that are connected to each other through Internet networks (wired or wireless), in return, which produces big volume of data for computers to analyze.[6] Another attempt was made under the EU's project on Coordination and Support Action for Global RFID-related Activities and Standardization ("**CASAGRAS**"), which defined IoT to be

> *'a global network infrastructure, linking physical and virtual objects through the exploitation of data capture and communication capabilities. This infrastructure includes existing and involving Internet and network developments. It will offer specific object-identification, sensor and connection capability as the basis for the development of independent cooperative services and applications. These will be characterised by a high degree of autonomous data capture, event transfer, network connectivity and interoperability.'*[7]

[6] Michael Chui, Markus Löffler, & Roger Roberts, *The Internet of Things*, McKinsey, (Sep. 1,2021), http://www.mckinsey.com/industries/high-tech/our-insights/the-intemet-of-things.

[7] *Final Report: RFID and the Inclusive Model for the Internet of Things; EU Project (216803)*, European Commission: London, UK, (Sep. 4, 2021), https://docbox.etsi.org/zArchive/TISPAN/Open/IoT/low%20resolut

India's Ministry of Electronics and Information Technology ("**MeitY**") attempted to define IoT as,

> "*a seamless connected network of embedded objects/ devices, with identifiers, in which M2M communication without any human intervention is possible using standard and interoperable communication protocols.' - Phones, Tablets and PCs are not included as part of IoT.*"[8]

As per this definition, IoT devices include all those technologies which can interact with each other with minimal human intervention. It attempts to identify IoT as all those devices which practice machine-to-machine ("**M2M**") interaction and are interoperable. Phones, tablets, and personal computers ("**PCs**") are excluded from the definition of IoT, which brings out a major fallacy in the definition of failure to recognize M2M communication of these three 'things' with other smart things. For instance, communication between the smartphone with other smart devices like the printer, air-conditioner, etc. However, a plausible argument for such classification maybe due to these things not fulfilling the

ion/www.rfidglobal.eu%20CASAGRAS%20IoT%20Final%20Report%20low%20resolution.pdf.

[8] *IoT Policy Document*, Ministry of Electronics and Information Technology, (Sep. 1,2021), http://meity.gov.in/sites/upload_files/dit/files/Draft-IoT-Policy%20(1).pdf.

one of the prescribed parameters to be identified as IoT. All the three gadgets mentioned require the human involvement in various steps to facilitate interaction between humans and them and their interaction with other smart things.

To further elucidate and for purposes of this paper, IoT, essentially, can be explained as a 3-step process. First- ability of the sensors to detect and capture data from the real-time environment, just like a human being. Second- continuous data transmission through Internet-network connected to a cloud-storage application for data storage. Third- analysis of the data, which further helps in expediting the organisational processes, enabling the customisation of products and services, automatically decreasing unused information and increasing efficiency with safety and security.[9]

> *'IoT deployments will generate large quantities of data that need to be processed and analysed in real time… Processing large quantities of IoT data in real time will increase as a proportion of workloads of data centres, leaving providers facing new security, capacity and analytics challenges.'*[10]

[9] *Internet of Things*, *Patent Landscape Analysis*, WIPO, (Sep. 1,2021), http://www.wipo.intlexport/sites/www/patentscope/en/programs/patentlandscapes/documents/internetofthings.pdf.
[10] *Gartner says the Internet of Things will transform the Data Center,* Gartner, (Sep. 1,2021), http://www.gartner.com/newsroom/id/2684616.

Thus, it is imperative to note the underlying essence of all the attempted definitions, some which have been discussed, that IoT thrives on data. In the digital age where technology is changing facets of industries, human interaction as well as its own foundation on a daily basis, a universally accepted definition of IoT may take time to come along and be seamlessly accepted. While a universal definition of IoT continues to be worked upon, one of its essential functions of data collection and/ or ability of processing the same remain undisputed. This level of data collection and ability of IoT to manipulate the same for advancement of human-kind and technology is what makes such technologies disruptive as well. This calls for regulations and a system of checks and balances to be introduced for IoT to continue to yield common good and prevent them from turning pervasive, intrusive or destructive.

3. AN OVERVIEW OF THE MARKET OF IOT APPLICATIONS AND SOLUTIONS

As has been widely recognized, IoT has well penetrated into various aspects of our lives; impacting industries as well. It is estimated that IoT's vast expanse in key industrial sectors may even lead to increase in efficiency by 15-40%

in developed nations.[11] Increasing usage of IoT has provided humans with unimagined richness in their interaction processes and contribution to the lives medically, socially and technologically. IoT's vast expanse in various industries has encouraged Indian Government to plan for 100 smart cities with key features of smart urban lighting, transport system, smart parking, amongst other smart initiatives.[12] In December 2019, the Ministry of Electronics and Information Technology approved over INR 4 billion for the implementation of 'FutureSkills Prime', a program aimed at 'up-skilling ecosystem for B2C in emerging and futuristic technologies', including IoT.[13] In the recent times, its usage has increased so much so that it may be equated to be as a backbone of almost all industrial sectors, some of which are discussed below.

Automotive and transport industry is seen to be realising the potential of IoT in their domain with real-time monitoring and accurate information of critical data in the operations of public transportation, traffic and public

[11] *Australia's IoT Opportunity: Driving Future Growth- An ACS Report*, Australian Computer Society, (Sep. 1,2021), https://www.acs.org.au/content/dam/acs/acs-publications/ACS-PwC-IoT-report-web.pdf.

[12] Supra 8.

[13] 16th Law Commission of India Report, *Action Taken by the Government on the Observations/Recommendations of the Committee contained in their Fourth Report (Seventeenth Lok Sabha) on 'Demands for Grants (2019-20)*, (Sep. 1,2021), http://164.100.47.193/lsscommittee/Information%20Technology/17_Information_Technology_16.pdf.

bikes. With increased usage of telematics hardware and software in vehicles, spending on IoT in automobile sector globally was around USD 32 billion in 2020, and expected to reach USD 100 billion by 2026, at a Compound Annual Growth Rate ("**CAGR**") of 21.12%.[14]

Global Positioning System ("**GPS**") is an IoT device that has become an essential technological solution for many problems in the transportation industry. IoT not only caters to the ground level of transportation but also to waterways and airways. Few examples of successful IoT implementation in transport industry are GoDirect's Fuel Efficiency software, Rolls Royce autonomous freight shipping, Honeywell's IoT connected aircrafts, etc.[15] All the automated processes such as fleet management, public transit management, smart inventory management, geo-fencing, etc. requires continuous capture and analysis of mission-critical data.

[14] These data points claimed to be used by companies including KPMG, Deloitte, Accenture and more. *Automotive IoT Market Research Report by Component, by Connectivity, by Communication, by Application, by Region - Global Forecast to 2026 - Cumulative Impact of COVID-19*, ReportLinker, (Sep. 1,2021), https://www.reportlinker.com/p06081367/Automotive-IoT-Market-Research-Report-by-Component-by-Connectivity-by-Communication-by-Application-by-Region-Global-Forecast-to-Cumulative-Impact-of-COVID-19.html?utm_source=GNW.

[15] Vivian Zhang, *Why the transportations sector needs data scientists,* VentureBeat, (Sep. 1,2021), https://venturebeat.com/2018/04/20/why-the-transportation-sector-needs-data-scientists/.

Application of IoT has led to lesser risks and reduced costs of transportation, real-time communication of the roadside messages like the toll rates, lane closures, speed limits, ability of the vehicle to communicate to its environment, surveillance, etc. Advent of technologies connected via Internet has led to the development of various automated vehicles. These can be put to use by accessing them through the virtual network rather than being present with/in them in the real-time world. Examples of evolution of the smart transport can be found in the automated cars; Audi's launch of Vehicle-to-Infrastructure technologically equipped car[16] (the car is equipped to communicate with traffic light information in select cities), as a step to smarter and safer cities, etc.

Some of the advancements made in India under smart transport industry include the anti-lock braking system and electronic stability program, which is estimated to save 10,000 lives in India from car accidents.[17] With such rapid penetration of IoT in the transport and automotive sector,

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[16] *Audi launches first Vehicle-to-Infrastructure (V2I) technology in the U.S. starting in Las Vegas*, Audi Newsroom, (Sep. 1,2021), https://media.audiusa.com/en-us/releases/92#:~:text=Press%20releases-,Audi%20launches%20first%20Vehicle-to-Infrastructure%20(V2I)%20technology,U.S.%20starting%20in%20Las%20Vegas&text=Las%20Vegas%20continues%20its%20leadership,traffic%20signal%20network%20to%20vehicles.

[17] *Smart Transportation - transforming Indian cities*, Grant Thorton, (Sep. 1,2021), https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/smart-transportation-report.pdf.

the industry may soon introduce technology that is able to communicate vehicle-to-vehicle, and contribute towards smart road transportation. Such transformation of hardware-oriented industry to software-oriented industry has opened arenas for the transport and automotive industry to explore and contribute in boosting IoT in the future.

In **Healthcare**, it has been estimated that by 2020, 40% of IoT-related technology will be health-related, more than any other category, making up a USD 117 billion IoT market in healthcare.[18] As per Grand View Research, IoT market in healthcare, by 2025, is expected to reach USD 534.3 billion (CAGR 19.9%).[19] Induction of wearable biosensors and wireless communication technologies (fitness tracking devices, wellness bands, etc.) have facilitated healthcare significantly around the world during the ongoing Covid-19 pandemic situation. The combination of personal health technologies and the IoT suggests the rise of powerful Internet of Medical Things ("**IoMT**") that features expanded abilities to exchange useful data, improvements in context awareness, and the

[18] Harald Bauer, Mark Patel, & Jan Veira, *The Internet of Things: sizing up the opportunity,* McKinsey & Company, (Sep. 1,2021), http://www.mckinsey.com/industries/high-tech/our-insights/the-internet-of-things-sizing-up-the-opportunity.

[19] *IoT in Healthcare Market Worth $534.3 Billion By 2025 | CAGR: 19.9%,* Grand View Research, (Sep. 1,2021), https://www.grandviewresearch.com/press-release/global-iot-in-healthcare-market.

ability to initiate actions based on data that are collected and analysed.[20] Health-related IoT applications allow researchers to collect rich and accurate data to an extent which was not possible in conventional physician-patient interactions.

Another stepping stone with convergence of technology and medicine is the evolution of certain applications which help in personalised healthcare of the patients and easier communication between the patients and doctors. In India, this comes with the recognition of 'telemedicine' by government in the face of social distancing measures during Covid-19 situation.[21] Also, IoT is being increasingly employed for medical surveillance. While increasing number of medical devices are introduced in the market which are digitally enabled and connected, regulations too need to be imposed to keep such technology from becoming disruptive. In lieu of this, the US Food and Drug Administration, in 2013, released a system of unique

[20] Nichola P Terry, *Will the Internet of Things Transform Healthcare?,* 19 VJE & TL 329 (2016), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1121&context=jetlaw.

[21] Telemedicine is defined as "the delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities". *Telemedicine Practice Guidelines*, Ministry of Health and Family Welfare, (Sep. 1,2021), https://www.mohfw.gov.in/pdf/Telemedicine.pdf

identification of the medical devices which the companies can recall in case of an adverse event, to improve patient care.[22]

Some of the examples of IoT's health-related applications are IBM's 'Watson for Oncology', Google's DeepMind Project etc. IoT's inclusion in healthcare witnessed a sudden increase during the COVID-19 pandemic, where 5G thermometers were used to screen patients for fever[23], smart bracelets and rings were worn by patients in China.[24] These bracelets and rings are synced with CloudMind's AI to check temperature, Blood pressure, and oxygen level, at regular intervals.[25] Hospitals have now started to deploy 'smart-beds' which can detect when it is occupied by a patient and send appropriate information to doctors/ nurses in case the patient is trying to get up from the bed.[26] Conventional healthcare sector is disrupted, but the path to transform the model of care through influx of

[22] *FDA finalizes new system to identify medical devices*, US Food & Drug Administration, (Sep. 1,2021), https://wayback.archive-it.org/7993/20170112084527/http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm369276.html.

[23] Tim Hornyak, *What America can learn from China's use of robots and telemedicine to combat the coronavirus* , CNBC, (Sep. 1,2021), https://www.cnbc.com/2020/03/18/how-china-is-using-robots-and-telemedicine-to-combat-the-coronavirus.html.

[24] Charles Arthur & Ruan Shuhui, *In China, robot delivery vehicles deployed to help with COVID-19 emergency*, United Nations Industrial Development Organization, (Sep. 1,2021), https://www.unido.org/stories/china-robot-delivery-vehicles-deployed-help-covid-19-emergency

[25] Ibid.

[26] R. Babu & K Jayashree, *A Survey on the Role of IoT and Cloud in Health Care*, 4 IJST Research 2217 (2015), http://ijsetr.com/uploads/624351IJSETR4609-407.pdf,.

technology is difficult. In India, usage of IoMT and IoT is widely seen in care delivery cases to pre-detect symptoms of breast cancer and treatment options, in delivery of better patient care and in smart ambulances to periodically capture data and vitals automatically.[27]

A revolutionizing step of technology into medicine is introduction of Electronic Health Records ("**EHRs**"). It is a repository of information regarding the health of a subject of care in computer-processable form that is able to be stored and transmitted securely, and is accessible by multiple authorized users.[28] Indian government has introduced standards for EHR in India which can be adopted by healthcare institutions on voluntary basis. An example of how IoT in healthcare will improve facilitation of ease can be explained. While it usually takes two hours on an average for Indian hospitals to decide to which department a patient has to be taken to, IoMT can dramatically improve healthcare.[29] Therefore, with time

[27] *Reimagining the possible in the Indian healthcare ecosystem with emerging technologies*, PWC India, (Sep. 1,2021), pwc.in/industries/healthcare/reimagining-the-possible-in-the-indian-healthcare-ecosystem-with-emerging-technologies.html.

[28] *Electronic Health Record (EHR) Standards for India - 2016*, Ministry of Health and Family Welfare, (Sep. 1,2021), https://www.nhp.gov.in/NHPfiles/EHR-Standards-2016-MoHFW.pdf.

[29] Ravi Ramaswamy, *Riding technology: The role of IoT in healthcare surveillance*, The Economic Times (22/07/2017), (Sep. 1,2021), https://economictimes.indiatimes.com/small-biz/security-tech/technology/riding-technology-the-role-of-iot-in-healthcare-surveillance/articleshow/59710658.cms.

and effort reduction, IoMT is helping more in providing preventive mechanisms than the curative.

In **Manufacturing**, the sensors-embedded devices are used to track the status of machinery and monitor the flow of inventory, which implement real-time updates to further reduce downtime; such IoT applications are estimated to achieve gains of USD 53.8 billion by 2025, from around USD 33 billion in 2020.[30] Manufacturers utilising IoT solutions in 2014 saw an average 28.5% increase in revenues between 2013 and 2014, according to a TCS survey.[31] Several leading global manufacturers- including the likes of Bosch, Harley Davidson, GE, and Siemens- are early adopters of smart manufacturing.[32]

However, such expansive deployment of IoT will require more electricity to sustain an IoT environment of data centres and data storages.[33] It is remarkable to note that in

[30] *IoT in Manufacturing Market by Component (Solutions (Network Management and Data Management) and Services (Professional and Managed)), Deployment Mode, Organization Size, Application, Vertical (Process and Discrete), and Region - Global Forecast to 2025*, Markets and Markets, (Sep. 1,2021), https://www.marketsandmarkets.com/Market-Reports/iot-manufacturing-market-129197408.html.

[31] John Greenough, *Internet of Things in Manufacturing*, Insider, (Sep. 1,2021), https://www.businessinsider.com/internet-of-things-in-manufacturing-2016-10?IR=T.

[32] Kevin O' Marah & Pierfrancesco Manenti, *The IoT will Make Manufacturing smarter,* Industry Week, (Sep. 1,2021), https://www.industryweek.com/manufacturing-smarter.

[33] Robin Kester*, Demystifying the Internet of Things: Industry Impact, Standardisation Problems, and Legal Considerations*, 8 ELR 205, (2016), https://www.elon.edu/u/law/wp-content/uploads/sites/996/2019/07/V8_No1_Kester.pdf.

the past two decades, India has witnessed an exponential increase in the demand for digital storage, from 1 petabyte in 2001 to more than 34 petabytes which then continuously increased by 25-30% every year.[34] It is the predictions of researchers that data centres of the world will even consume 1/5th of Earth's power by 2025.[35] Due to such statistics, IoT developers are focussing on making IoT a right solution for excessive energy consumption rather than making it a disruptive agent for **Energy sector.** The IoT market with respect to energy sector is predicted to reach USD 35.2 billion by 2025, at a CAGR of 11.8% (2020-2025)[36]**.**

As a greater number of households are getting connected to the 'smart grids' and 'smart meters', better are the consumers adjusting their patterns of energy consumption. With increasing number of IoT devices that are connecting to the households, consumers can monitor their behaviour of consuming energy. An example of this is the Zigbee

[34] Avinash Aslekar & Pramod Damle, *Improving Efficiency of Data Centres in India: A Review,* 8 IJST REV.1, 44-49 (2015), https://indjst.org/articles/improving-efficiency-of-data-centres-in-india-a-review.

[35] Joao Marques Lima, *Data centres of the world will consume 1/5 of Earth's Power by 2025*, BroadGroup, (Sep. 1,2021), https://data-economy.com/data-centres-world-will-consume-1-5-earths-power-2025/.

[36] *Internet of Things (IoT) in Energy Market by Solution (Asset Management, Data Management and Analytics, SCADA, Energy Management), Service, Platform, Application (Oil and Gas, Smart Grid, Coal Mining), and Region - Global Forecast to 2025*, Markets and Markets, (Sep. 1,2021), https://www.marketsandmarkets.com/Market-Reports/iot-energy-market-251659593.html.

technology. This application, which majorly caters to personal area network, can be applied for building and street lighting, smart grids, electric meters, home automation systems, resulting in efficient use of energy for the consumer.[37]

Fintech or Financial Technology includes the market of those companies which use technology to introduce innovative financial services. There always have been identified privacy concerns in the financial sector, thus, it remained content with the traditional ways of business to protect data from looming threat of data leak. However, fintech sector seems to be gaining a footing in the present-day scenario. According to Jim Marous, a fintech expert and publisher of 'The Financial Brand', IoT is set to improve the customer experience and consequently, its relationship with its customers, by increasing agility and response time towards changing market needs.[38] Hence, in future, the financial sector may not accept its position at a lower end of employing IoT and venture more into it.

As IoT penetrates our everyday lives, IoT has not remained at bay from education sector. **Education**, no

[37] Erol-Kantarci & Hussein Mouftah, *H.T. Wireless Sensor Networks for Cost-Efficient Residential Energy Management in the Smart Grid*, 2 IEEE Communication Surveys and Tutorials 314–325 (2011), (Sep. 1,2021), https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6861946.

[38] *Security and Privacy Concerns Need to be Addressed When it Comes to IoT in the Financial Industry*, Fintech News Singapore, (Sep. 1,2021), http://fintechnews.sg/9235/iot/iot-security-privacy-concerns-need-addressed-comes-iot-financial-industry/.

doubt, plays a rooting role in any society. The rigid education system has become a thing of a past with the introduction of 'fun and creative learning' processes introduced in the school. Such systems not only enable one to learn meaningfully but also apply the creative part of their mind to inculcate abilities of innovation in students. In a developing country like India, where all resources are not equally and readily accessible, IoT in education will lead to uniformity in providing education with resources being outsourced through audio-visual provisions.

IoT is also making the information sharing more accessible in **law enforcement**, providing policing authorities with real-time language interpretation, virtual criminal records etc.[39] IoT has proved its potential in law enforcement with applications such as 'Shot Spotter' (helps detecting perpetrator in shorter span of time by locating gun and firing pattern)[40], electronic driving licenses (introduced in France to reduce counterfeit of licenses)[41], connected fleet

[39] Brian Chidester, 7 ways that IoT is transforming law enforcement, (Sep. 4,2021), https://blogs.opentext.com/7-ways-that-iot-is-transforming-law-enforcement/.

[40] *About ShotSpotter*, Shot Spotter, (Sep. 1,2021), https://www.shotspotter.com/company/; Elizabeth MacBride, *The Scientist, The Investor And The CEO: How 'Shots Fired!' Technology Turned A Profit*, Forbes, (Sep. 1,2021), https://www.forbes.com/sites/elizabethmacbride/2018/10/30/the-scientist-the-investor-and-the-ceo-how-shotspotter-turned-a-profit-after-22-years/#197a3cc9468c.

[41] *The new French electronic driving license*, Thales, (Sep. 1,2021), https://www.thalesgroup.com/sites/default/files/gemalto/gov-new-driving-license.pdf.

systems (including license plate readers, dashcams, gun sensors to enhance connectivity and coordination among the fleet and speed tracking, location and fuel consumption monitoring for patrol cars)[42], etc. Again, the challenge remains the same, notwithstanding the separate vulnerable points of cyber security, that is understanding the use of cloud analytics to make collection and analysis of the data an effective and secure mechanism.

4. PROFOUND DATA PROTECTION RELATED CONCERNS FOR CONSUMERS USING IOT

The IoT applications involve numerous smart devices connected to each other over the Internet, enabling the aggregation of unparalleled amounts of information-data. Such collection of data means that devices connected in an individual's home are, in a frequent manner, providing millions of discrete vulnerable data points. This increases the possibility of an ambient data collection by the IoT devices, of which an individual-consumer is not aware. The ubiquitous application of these devices is also what intensifies the volume and variety of non-personal and personal data which can be exploited in unauthorised ways, raising concerns about the huge task of maintaining

[42] Shilpa Kolhatkar, *Super Vehicles: Connected Fleet IoT Solutions for Fire, Police, and Emergency Services*, Cisco Blogs, (Sep. 1,2021), https://blogs.cisco.com/digital/connected-fleet-iot-solutions.

integrity of consumers' data in the data-driven era of IoT.[43] Therefore, while the IoT devices are providing the greater efficiency in processes like automating tasks, collecting and disseminating information-data, updating performance, etc., it is also amplifying the traditional legal risks for consumers as inherently associated with the usage of Internet-technology enabled services.

1. The consumer related privacy concerns and the popularity of IoT applications

The companies are gleaning large amount of information-data from consumers' devices to make certain inferences about consumers' behaviour and plan economic decisions accordingly. This leads to increasing concerns of privacy. One of the serious privacy concerns associated with IoT devices is the possibility of different kinds of data related to an individual somehow ending up in the hands of unauthorised persons, which could be enriched by such persons by combining data sets from myriad of IoT devices. Even if such data is non-personal data, the combination of such data from different sources could lead to identification of personal data or personal profile of a consumer.[44] For instance, sensors generally present in

[43] Supra note 3.

[44] *Personal Data Protection for Internet of Things Deployments*, European Large-Scale Pilot Programme, (Sep. 1,2021), https://european-iot-pilots.eu/wp-content/uploads/2020/06/Personal-Data-Protection-for-IoT-Deployments_2020.pdf.

an IoT enabled room, like temperature monitors, air quality and CO2 sensors, humidity sensor and light sensors can work in coordination to track the presence and number of occupants in that room with surprising precision.[45] More specifically, companies like Amazon, by combining a number of data inputs from sources like various Alexa enabled devices and devices connected to such Alexa enabled devices, cameras, its streaming services, internet browsing and other web services, can easily create a virtual profile of the user, who can then be targeted with personalized recommendations and advertisements.[46]

Further, the IP addresses of the multiple IoT devices can be linked together to create a unique 'digital fingerprint' that is attributable to a single individual.[47] In other words, the significant personal data pertaining to an individual may be derived through collection of different sets of non-personal data as processed by different IoT devices used by the individual. Such personal data may lead to

[45] Nashreen Nesa & Indrajit Banerjee, *IoT-based sensor data fusion for occupancy sensing using Dempster–Shafer evidence theory for smart buildings*, (Sep. 1,2021), https://ovic.vic.gov.au/privacy/internet-of-things-and-privacy-issues-and-challenges/#easy-footnote-bottom-5-22883.

[46] Matt Burgess, *All the Ways Amazon Tracks You—and How to Stop It*, (Sep. 1,2021), https://www.wired.com/story/amazon-tracking-how-to-stop-it/.

[47] Northern Kentucky Law Review, Mauricio Paez & Mike La Marca, *The Internet of Things: Emerging Legal Issues for Businesses*, 43 NKLR 29 (2016), https://heinonline.org/HOL/LandingPage?handle=hein.journals/nkenlr43&div=6&id=&page=.

manipulation in the hands of unauthorised persons, and data losing the value it was originally collected for. More specifically, the concept of 'quantified self' could expand enormously to create rich behavioural profiles.[48] Hence, the *sui generis* concern related to the application of IoT applications is the massive aggregation of data that can lead to the database of behavioural profiles storing the sensitive details about patterns, preferences, habits, and other information that are unique to an individual.

Issues of privacy arise when the data is shared between sources without the consent or information of the person. Adding to the complexity and novelty of IoT is the fact that traditional approach to the 'Notice and Consent' is difficult for service providers to be adopted in the context of IoT enabled devices. Each end-point of the IoT environment, things, sends data automatically and communicates with other endpoints and works in conjunction.[49] For instance, there are devices such as Fitbit Tracker that does not have interface or if there is one, then it is a small display which makes the incorporation of digital notification and consent, a difficult concept according to the traditional approach. Similarly, as noted before there are numerous stakeholders in an IoT

[48] *Id.*

ecosystem- sensors manufacturer, device assembler, third-party applications, data centre, and cloud service providers, inter alia - which makes it more difficult, in the absence of any standardization, to discern which stakeholder's privacy policy is applicable to the contentious piece of data.

2. The increasing number of novel Internet-related cyber-security issues

As the number of Internet-connected objects expand, the more serious issues of interoperability and interdependence develop as potential attacks surface. Since, IoT industry has begun to thrive on personal information, security concerns in the recent times have increased manifold. According to the Hewlett Packard's ("**HP**") study, one IoT device has an average of 25 vulnerabilities.[50] The threats such vulnerabilities pose can be illustrated through an incident that occurred in the US, exposing the vulnerability of IoT devices. White supremacists in 2017 hacked into networked printers and fax machines at numerous of universities, including the University of California, Berkeley, causing the machines to print out racist propaganda.[51] Some of the other infamous

[50] K. Rawlinson, *Hp study reveals 70 percent of internet of things devices vulnerable to attack*, HP, (Sep. 1,2021), https://www.hp.com/us-en/hp-news/press-release.html%3Fid=1744676#.YS9sS05R3IU.

[51] Carl Straumsheim, *More Anti-Semitic Fliers Printed at Universities*, Inside Higher Ed, (Sep. 1,2021), https://www.insidehighered.com/quicktakes/2017/01/27/more-anti-semitic-fliers-printed-universities.

incidents include the Tesla car accident in 2016[52], NotPetya attack in the transport industry causing a loss of over USD 300 million[53], etc. such incidents have confirmed that people's control over environment has become subdued with increased dependency on IoT that are vulnerable and prone to hacking.

Such vulnerabilities as associated with IoT applications coupled with the fragile state of the Indian cyber-security infrastructure portends the need of initiating an informed public conversation among consumers about the responsible use of IoT solutions. Indian Computer Emergency Response Team ("**CERT-in**") reported almost 4 lacs cyber security incidents in 2019, which rose to around 11.5 lacs in 2020. James Cook, sales director South Asia, upon analysis of India-specific data, stated

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[52] Anjali Singhvi & Karl Russell, *Inside the Self-Driving Tesla Fatal Accident*, The New York Times, (Sep. 1,2021), https://www.nytimes.com/interactive/2016/07/01/business/inside-tesla-accident.html. [See also, Ashley Thomas, *States Take the Lead on Securing IoT,* Law Journal Newsletters (01/04/2020) https://www.lawjournalnewsletters.com/2020/04/01/states-take-the-lead-on-securing-iot/ last seen on 01/10/2021. Amazon introduced Ring Camera with made news headlines after hackers breached the devices. There were numerous accounts of hackers obtaining access to the cameras and taunting and yelling obscenities at children, and threatening adults for bitcoin ransomware through the cameras. As a result of these hacks, Amazon is now facing a **class action lawsuit** claiming that the Ring camera security vulnerabilities were a result of Amazon's negligence and that it led to an invasion of privacy. *See*, *John Baker Orange v. Ring LLC and Amazon .Com LLC*, No. 2:19-cv-10899 (2019)]

[53] Lee Mathews, *NotPetya Ransomware Attack Cost Shipping Giant Maersk Over $200 Million*, Forbes (16/08/2017), (Sep. 1,2021), https://www.forbes.com/sites/leemathews/2017/08/16/notpetya-ransomware-attack-cost-shipping-giant-maersk-over-200-million/#5e7b5ef84f9a.

wrong channelizing of resources to be the reason for such occurrences-

> '*Security breach is higher in India because they have been spending their budget either at wrong places or were more focussed only at the end points. According to the study, 81% respondents lay emphasis on endpoint or mobile defences - which is ranked at the top in terms of spending plans, while data-at-rest stood at the bottom with 54%.* [54]

3. The curious case of 'dark patterns'

The term 'dark pattern' was coined by Harry Brignull, who defines them as interface designs that *'trick users into doing things that they might not want to do, but which benefit the business in question*'[55]. For instance, until recently it was common for online travel booking portals to use the pre-checked consent boxes at the payment stage to default the users into buying insurance cover, even when the user had no active interest in purchasing the product. Insurance and Regulatory Development Authority of India ("**IRDAI**") raised concerns that such clever in-app defaults impede

[54] *Data breach incidents in India higher than global average*, The Economic Times (23/07/2018), (Sep. 1,2021), https://economictimes.indiatimes.com/articleshow/65107118.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[55] Harry Brignull, *About Us*, Dark Patterns, (Sep. 1,2021), https://www.darkpatterns.org/about-us..

consumers' *'informed choice'*.[56] In the example, the use of 'pre-checked boxes' is a classic example of a dark pattern. The dark pattern assumes the user's default preference as to purchase an add-on financial service even when it is not the case. Here the users are expected to be attentive to uncheck the box and opt-out. But as the UK's Financial Conduct Authority has submitted[57], often consumers use digital services under time constraints and are less likely to opt-out or be aware of existing defaults.

Beset by their cognitive vulnerabilities, limited rationality and the constraints on the time and attention, a sizeable proportion of consumers' end-up buying services without an informed consent. Therefore, dark patterns-based interfaces are manipulative in sharp contrast to persuasive marketing efforts. More worryingly, research suggests that individuals with lower levels of education and in urgent need of money make for easy targets for clever service providers.[58] This has significant implications for India, which is characterized by low income, low levels of digital

[56] Insurance Regulatory and Development Authority of India, *Circular on Travel Insurance Products and operational matters*, IRDAI (Sep. 1,2021), https://www.irdai.gov.in/ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo3913&flag=1.

[57] *General Insurance Add-Ons Market Study – Remedies: banning opt-out selling across financial services and supporting informed decision-making for add-on buyers*, Financial Conduct Authority, (Sep. 1,2021), https://www.fca.org.uk/publication/policy/policy-statement-15-22-general-insurance-add-ons.pdf.

[58] Journal of Legal Analysis, Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 JLA 43 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205.

literacy and a sizeable proportion of first-time users of Internet. Such consumers having subscribed for services unintentionally and unknowingly also get severely exploited in terms of collection of data pertaining to them. These learnings are also significant in the cases of IoT and voice assistance and other device types.[59]

The distinction between personalization and manipulation has been at the heart of policy issues that stem from the use of personal information during supply of digital services. It is crucial that a legal framework must be incorporated to identify manipulative dark patterns in the context of consumer's choice, value-system, and socio-economic background.

4. Non-Personal Data Generation and Associated Risks

Non-personal data may be defined in a negative sense as the set of data which excludes personally identifiable information is non-personal data.[60] In general, in contrast to personal data, non-personal data is anonymous. It can

[59] *Dark Patterns Workshop Transcript*, Federal Trade Commission, (Sep. 1, 2021), https://www.ftc.gov/system/files/documents/public_events/1586943/ftc_darkpatterns_workshop_transcript.pdf.

[60] Government of India, *Report by the Committee of Experts on Non-Personal Data Governance Framework*, Ministry of Electronics and Information Technology, (Dec 2020), https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf; The Indian Express, Aashish Aryan, Explained: What is non-personal data?, (Sep. 26,2021), https://indianexpress.com/article/explained/non-personal-data-explained-6506613/.

also include the data that has been converted from personal to anonymous data.[61]

Non-personal data can be either public, community, or private.[62] The data collected by the government or other authorities based on surveys, sampling, and similar collected methods is public non-personal data. Regular censuses, data regarding air pollution of a particular area, etc. are good examples. Community non-personal data relates to any data in its raw form, collected from a community of persons. Finally, private non-personal data is anonymous data collected from a particular individual. This can include anonymous data collected by fitness apps, an automobile company collecting data about the condition of its vehicle through sensors, etc. It can thus be concluded that the data generated as a by-product of use of IoT is primarily private non-personal data.

Therefore, the constant concern attached to non-personal data is the risk of re-identification of individuals through anonymous data. Re-identified data can pose a serious threat on various levels, prominent being the privacy

[61] *Report by the Committee of Experts on Non-Personal Data Governance Framework*, Ministry of Electronics and Information Technology, Government of India, (Sep. 26,2021), https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf.

[62] Government of India*, Report by the Committee of Experts on Non-Personal Data Governance Framework*, Ministry of Electronics and Information Technology, (Dec 2020), https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf.

concerns of an individual.[63] Non-personal data can also pose risks related to companies / government identifying or targeting specific communities based on the analysed community data in its anonymous form and using non-personal data for manipulative marketing or policies. The body corporates might deploy discriminatory policies based on such analysis[64], targeting selective highly profitable areas and leaving out others. It is unclear how such practices would be in line with goals like public or community benefit. This can take an even more aggravated form if the data is re-identified, opening ways to exploit the religious, political, economic, or other focal points in the community data.

5. REGULATORY APPROACH FOR BALANCING IOT AND DATA PROTECTION: INDIAN SCENARIO

At a grander-scale in IoT ecosystem there are different industries in coalition dedicated to promoting automated collection and dissemination of data as always available for analytics. It is a critical time now for these stakeholders to

[63] *Report Summary, Non-Personal Data Governance Framework*, PRS Legislative Framework, (Sep. 26,2021), https://prsindia.org/policy/report-summaries/non-personal-data-governance-framework.

[64] Aishwarya Girdhar, *Regulate non-personal data*, The Pioneer, (Sep. 26,2021), https://www.dailypioneer.com/2020/columnists/regulate-non-personal-data.html. ("Even seemingly benign data on communities can lead to collective harm, such as if data on average income is used to decide interest rates for those living in a certain area, or demographic census data is used to target communities based on social or religious lines")

work on uniform standards and flexible protocols that can harmonise collaborative development of the IoT technology without any prejudice to the private and public concerns. In a new world of IoT artefact design, it is necessary to follow an intensive participatory design approach that actively involves the data privacy and security needs of multiple users and stakeholders in the IoT design process.[65]

1. The proposed legal regime to govern IoT in India

Currently, Indian government's approach is not focussed on regulating the risks associated with expansive usage of IoT. It is rather focussed on scaling up the usage of IoT at the industrial level. It is also determined to involve IoT at the larger scale in its aspiring 'Smart Cities Mission'. In 2015, the MeitY formulated **the 'Draft IoT Policy'** to propose the plan of 'smart cities' that will be comprised of all kinds of smart facilities – parking, transportation, lighting, etc.[66] The Draft IoT Policy sets out the approaches for the development of the capacity building

[65] Rachelle Bosua, Megan Richardson, Karin Clark, Sean Maynard, Atif Ahmad & Jeb Webb, *Privacy in a world of the Internet of Things,* Networked Society Institute, University of Melbourne, (Sep. 9,2021), https://apo.org.au/sites/default/files/resource-files/2018-01/apo-nid131656.pdf.

[66] *IoT Policy Document*, Ministry of Electronics and Information Technology, (Sep. 9,2021), http://meity.gov.in/sites/upload_files/dit/files/Draft-IoT-Policy%20(1).pdf.

and incubation, R&D and innovation, incentives and engagements, demonstration centres, and human resources development, in relation to boost the IoT scaling. Apart from mentioning the 'requirement of standards' and 'governance structure', the Draft IoT Policy avoids charting out any further details in terms of regulatory approach of India to govern IoT.

Thus, the Draft IoT Policy clearly fails to take into account the need of basic regulations that any consumer-friendly ecosystem must have before the roll out of a disruptive technology like IoT. The privacy breach risks are the foremost concerns which most of the advanced international regulators are addressing in respect of IoT. The Draft IoT Policy does not mention anything about measures to protect integrity of consumers' data. This warrants immediate attention given the fact that India still does not have any comprehensive legislation on data protection. It is further important to note that the Draft IoT Policy is only at the draft stage which has not been finalised and, therefore, even after five years of its release, India has not recognised any standards or SOPs in respect of IoT.

In 2018, the Department of Telecommunications ("**DoT**") issued **guidelines for implementing restrictive features for SIM cards used only for M2M communication services and related KYC instructions for issuing**

M2M SIM cards to organizations providing M2M communication services.[67] These guidelines covered registration and technical requirements in respect of M2M service providers that are engaged in providing M2M services through SIM embedded M2M devices. Pursuant to this, the Department of Telecommunications has recently also put out a set of Draft Guidelines for Registration Process of M2M Service Providers (M2MSP) & WPAN/WLAN Connectivity Provider for M2M Services.[68]

It is important to note that the guidelines describe M2M services as the "services offered through a connected network of objects/devices with identifiers in which M2M communication is possible with predefined back-end platform(s)" collecting and analyzing the information from these devices / objects. These guidelines do not cover

[67] Government of India, *Instructions for implementing restrictive features for SIMs used only for Machine-to-Machine (M2M) communication services (M2M SIMs) and related You're your Customer (KYC) instructions for issuing M2M SIMs to entity/organisations providing M2M Communication Services under bulk category and instructions for Embedded-SIMs (e-SIMs)*, Department of Telecommunications, (June 2018), https://dot.gov.in/sites/default/files/M2M%20Guidelines.PDF?download=1%20.

[68] Government of India, Draft Guidelines for Registration Process of M2M Service Providers (M2MSP) & WPAN/WLAN Connectivity Provider for M2M Services, Department of Telecommunications, (June 2021), https://dot.gov.in/sites/default/files/Inviting%20Public%20comments%20on%20Draft%20Guidelines%20for%20Registration%20Process%20of%20M2M%20Service%20Providers%28M2MSP%29%20and%20WPANWLAN%20Connectivity%20Provider%20for%20M2M%20Services.pdf?download=1 .

precisely the IoT as they regulate specifically the communication among machines such as machines involved in supply chain management or fleet management, whereas the regulation of IoT entails the regulation of communication between machines as well as machines and humans, such as voice-controlled smart home features. Therefore, both the guidelines as discussed in the preceding paragraphs do not provide any guidance on security measures to be considered for the protection of data of consumers using commercial IoT services.

Against this background, it is noteworthy that a working group of Telecommunication Engineering Centre prepared a technical report on the subject of **IoT/M2M security** ("**TEC Report**") which also focused on the solutions pertaining to IoT.[69] This TEC Report was introduced in 2019. The TEC Report adequately recognized the need of having guidelines specific to IoT other than the M2M from the security point of view with respect to challenges posed by IoT in terms of ensuring data ownership and protection of sensitive data of consumers. As mentioned in this paper in the preceding chapters, the TEC Report specifies how the IoT will

[69] TEC is a technical body representing the interest of Department of Telecom, Government of India: *Technical Report Recommendations for IoT/M2M Security*, Telecommunication Engineering Centre, Government of India, (Sep. 26,2021) https://tec.gov.in/pdf/M2M/TECHNICAL%20REPORT%20Recommendations%20for%20Iot%20M2M%20Security.pdf.

"exacerbate the problem because many applications generate traceable signatures of the location and behavior of the individuals". It asserts the importance of balancing the 'anonymity' and the 'liability' in the context of IoT applications. It emphasizes that an application to be accepted, "the user requires the guarantee to have a certain degree of protection of its personal (or other) information". In furtherance to this, liability is a "deeply related requirement".

On the lines of the TEC Report, the TEC recently released a **'Code of Practice on Securing Consumer Internet of Things' ('TEC Code of Practice')** to provide a draft of the voluntary security standards and guidelines for manufacturers and service providers of consumer IoT devices.[70] The draft of the TEC Code of Practice largely incorporates the standards from the UK's 'Code of Practice on Consumer IoT Security' and the Australian 'Code of Practice on Security of Internet of Things for Consumers', as discussed in next part of this paper. Both the codes of practice are voluntary and, therefore, the TEC Code of Practice as well, and is due for implementation. The TEC Code of Practice acknowledges the possibility of leakage of data as a major threat due to ineffective and

[70] *'Code of Practice for Securing Consumer Internet of Things (IoT)'*, Telecommunication Engineering Center, (Oct. 1,2021), https://tec.gov.in/pdf/M2M/Securing%20Consumer%20IoT%20_Code%20of%20pratice.pdf.

poor design of IoT devices and services. Therefore, the code as addressed to IoT device manufacturers, IoT service providers, mobile application developers and retailers suggests the standards that the IoT end points shall comply with in order to protect the users and the networks that connect these IoT devices. The TEC Code of Practice proposes to be applicable on consumer IoT devices that are connected to the internet such as watches, speakers, doorbells or baby monitors. It recognizes that different applications will require different security assurance levels, but does not provide a risk-based framework.

The TEC Code of Practice reiterates (moreover *clarifies*) that the IoT devices are required to "undergo mandatory testing & certification prior to sale, import or use in India, in compliance to the Mandatory Testing and Certification of Telecommunication Equipment (**"MTCTE"**) guidelines issued by Department of Telecommunications ("**DoT**"), Government of India under the Indian Telegraph (Amendment) Rules, 2017".[71] It proposes the

[71] *Mandatory Testing and Certification of Telecom Equipments (MTCTE)*, Telecommunication Engineering Centre, (Oct. 1,2021), https://www.tec.gov.in/mandatory-testing-and-certification-of-telecom-equipments-mtcte. ["The Indian Telegraph (Amendment) Rules, 2017, provides that every telecom equipment must undergo mandatory testing and certification prior to sale, import of use in India. The final detailed procedure for Mandatory Testing and Certification of Telecom Equipments (MTCTE) under these rules has been notified separately. The testing is to be carried out for conformance to Essential Requirements for the equipment, by Indian Accredited Labs designated

guidelines such as the requirement of deploying the IoT devices in market with a default password that is unique per device and the need of providing a dedicated channel to the public for reporting security issues or vulnerabilities. The draft code covers the aspect of data protection as well such that it proposes to call out the manufacturer to disclose information about the personal data processing to consumers in clear and transparent manner. It further requires the consumers' consent obtained in "a valid way" with the capability to withdraw the same. Finally, the draft code suggests the collection of minimum data as necessary for IoT device functionality. As the TEC Code of Practice is still in its draft stage and due for implementation.

2. Applicable legal framework for protection of consumers' data

The Information Technology Act, 2000 ("**ITA**")[72] and the 'Reasonable practices and procedures and sensitive personal data or information rules, 2011'[73] ("**IT Rules**") therein, provide the legal provisions that are currently applicable on the 'body corporates' in respect of data

by TEC and based upon their test reports, certificate shall be issued by TEC"]

[72] The Information Technology Act, 2000.

[73] Reasonable Practices and Procedures and Sensitive Personal Data or Information Rules, 2011.

protection. Section 43A[74] of ITA read with the IT Rules provides the basic protection against mishandling of sensitive data by a body corporate.[75] It aims at providing compensation to the affected persons for the negligence or failure of the body corporate in '*implementing reasonable security practices and procedures*' in handling sensitive data or information. However, being a generally worded provision, this provision does not effectively cover the concept of IoT and related issues. This highlights the need for a comprehensive privacy legislation that can catch up with the speeding technological advancements.

3. Status of data protection legislation for India

The Indian government had set up the Committee of Experts on a Data Protection Framework for India ("**Srikrishna Committee**") in 2017, which was chaired by Justice B. N. Srikrishna. The Srikrishna Committee released its report titled 'A Free and Fair Digital Economy' in 2018 along with the draft of the Personal Data Protection Bill, 2018. However, the proposed bill lapsed in the Parliament and the Personal Data Protection Bill, 2019

[74] S. 43(A), he Information Technology Act, 2000; R. 4, Reasonable Practices and Procedures and Sensitive Personal Data or Information Rules, 2011.

[75] *Internet of Things Legal & Tax Issues*, Nishith Desai Associates, (Sep. 9,2021), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Internet_of_Things.pdf.

(**the 'Bill'**) thereafter was introduced. The Bill not only addresses the concerns which earlier were not covered under existing law that provides data protection in India but also brings into the picture certain pre-requirements that are required before any firm begins to collect, analyse and disseminate data in India. It also seeks to establish a Data Protection Authority. However, there are certain aspects of the Bill which require attention of legislators so as to pass a privacy legislation that is comprehensive enough to adequately regulate disruptive technologies like IoT.

The bill explicitly defines validity of '*consent*' as one which is 'free, informed, clear, specific and capable of being withdrawn'. Section 11[76] also lays down conditions under which consent will not be held to be a valid consent and expressly states that the burden of proof to prove consent is on data fiduciary. However, in case of IoT devices, which continuously communicate with the environment in its functioning, the systems do not obtain the consent every time while initiating any actions. Moreover, the procedure for consent is a fatigue process. The procedure as specified in the Bill could deter in smooth functioning of IoT due to lack of consent at various occasions or lag in functioning due to waiting period for the obtainment of consent. As emphasised in the paper above, the traditional

[76] S. 11, The Personal Data Protection Bill, 2019 (Pending).

consent model will not work and there is a need to propose an IoT specific procedure. Such a procedure must allow manufacturers and service providers with flexibility to collect data for the purposes of enhancing provision of services and it must be strict enough to deter them from collecting excessive data.

Another obscure provision with respect to firms engaging in provision of data-driven services is the definition of '*harm*'.[77] Amongst various parameters as written down in the Bill as to what causes 'harm', it further includes 'any observation or surveillance that is not reasonably expected by the data principal.'[78] The use of the word 'reasonably' creates a grey area for the IoT solutions provider to decipher and may also be at times subjected to very different interpretations by the users or the manufacturers of IoT. The use of word 'reasonably' is one such instance in the Bill which leaves the same to be interpreted over a period of time by judiciary or complementing regulations and rules. Hence, it creates a dwindling standard for the IoT stakeholders. This requires more specific and certain regulatory guidelines with respect to IoT and similar type of other services where data is collected, processed and analysed continuously.

[77] S.3(20), The Personal Data Protection Bill, 2019 (Pending).
[78] S. 3(20)(x), The Personal Data Protection Bill, 2019 (Pending).

Section 15 of the Bill gives the power to the Central Government to classify any other personal data as '*sensitive personal data*' apart from what already has been listed down under section 3(36).[79] The firms dealing with sensitive personal data has more stringent provisions to be adhered to as they are considered 'significant data fiduciaries' ("**SDFs**"). The Bill envisages the framework where firms are categorized as SDFs if engaged in processing of sensitive personal data or significant volume of personal data.[80] SDFs are subject to additional compliance requirements and higher fines for violations.[81] However, there lies no provision for the firms to appeal to another authority regarding their stance if the categorisation is in fact appropriate or not. Hence, small firms may hesitate from venturing into the IoT industry due to subjective norms and immediate compliances needed after

[79] Ss. 93, 15 & 3(36), The Personal Data Protection Bill, 2019 (Pending). S. 93 read with s. 15 lays down factors to be considered while categorizing data as 'sensitive personal data', which are, the risk of significant harm, the expectation of confidentiality attached to such category of personal data; whether a significantly discernible class of data principals may suffer significant harm from the processing of such category of personal data; and the adequacy of protection afforded by ordinary provisions applicable to personal data.

[80] S. 26, The Personal Data Protection Bill, 2019 (Pending); S. 38, The Personal Data Protection Bill, 2018 (Pending). The criteria for categorization of SDFs are to be determined by DPA by taking into account following factors: (a) volume of personal data processed; (b) sensitivity of personal data processed; (c) turnover of the data fiduciary; (d) risk of harm by processing by the data fiduciary; (e) use of new technologies for processing; and (f) any other factor causing harm from such processing.

[81] Ch. VII, XI, The Personal Data Protection Bill, 2019 (Pending); Ch. VI, X, The Personal Data Protection Bill, 2018 (Pending).

categorisation as SDFs to save themselves from the strict penalties. The Bill also nowhere explains the meaning of 'critical personal data' but categorises the same as data which is notified so by the Central Government.[82] This leaves an arbitrary vacuum for the government to fill in as per what it deems fit rather than a judicial authority.

MeitY appointed a committee of experts to recommend a **framework to regulate the flow of non-personal data** in India. Since then, the Committee has released two **reports** on the topic of regulation of non-personal data, with the later one[83] (the 'Revised Non-personal Data Framework') being the revision of the original report.[84] However, the stakeholders have voiced major concerns in relation to framework on the governance of non-personal data. The concerns are around the existing lack of regulations on personal data in India that leads to the ambiguity about the appropriate authorities and the scope of their powers. For example, the proposed non-personal data Authority in the revised report might conflict with the regulatory purview of the proposed Data Protection

[82] S.33(2), The Personal Data Protection Bill, 2019 (Pending).

[83] *Report by the Committee of Experts on Non-Personal Data Governance Framework*, Ministry of Electronics and Information Technology, Government of India, (Sep. 26,2021), https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf.

[84] The Original Report: *Report by the Committee of Experts on Non-Personal Data Governance Framework*, Ministry of Electronics and Information Technology, Government of India, (Sep. 26,2021), https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf.

Authority of India or the Competition Commission of India on different subject-matters of data usage and its nature.[85] Finally, another challenge to the successful implementation of the proposed non-personal data regulation is allowing corporations to become 'data trustees.' Such trustees are responsible for 'creation, maintenance, and data-sharing of HVDs (High-Value Datasets).' Not having ample restrictions on the eligibility might put such HVDs at risk.[86] It goes without saying that a well-balanced regulation is required for effective utilization of non-personal data to achieve the twin objectives of public good and economic profitability. However, the aforementioned challenges need to be addressed and their elimination is a prerequisite to rolling out any successful regulation on the subject.

4. Other applicable legislations to safeguard consumers' data protection interests

The inadequate definition of *'harm'* and *'consent'* pose similar challenges in other applicable legislations as well. The Consumer Protection Act 2019 includes the concept

[85] Nikhil Pahwa, *Event Report: Governance Of Non Personal Data*, Medianama, (Sep. 26,2021), https://www.medianama.com/2021/01/223-event-report-governance-of-non-personal-data/.

[86] Ayush Tripathi & Gautam Kathuria, *Changes and challenges in the revised regulatory framework for non-personal data*, The Print. (Sep. 26,2021), https://theprint.in/theprint-valuead-initiative/changes-and-challenges-in-the-revised-regulatory-framework-for-non-personal-data/586117/.

of '*product liability*'[87], and for an action to be raised under the provision, some '*harm*' must be caused to the consumer. However, both the definitions of '*harm*'[88] and '*injury*'[89] miss out breach or leak of sensitive non-personal or personal data, and, hence, doesn't explicitly cover harm to privacy by IoT related devices and services. It is important to note that the Consumer Protection Act 2019 also includes "disclosing to other person any personal information given in confidence by the consumer" as an unfair trade practice, except otherwise mandated under law.[90] This raises the concern of having regulatory overlaps once a comprehensive data protection legislation comes into force. This leaves the judicial authority with the task to determine the regulatory purview of the Consumer Protection Act 2019 in comparison to other regulators.

6. REGULATORY APPROACHES IN INTERNATIONAL ARENA: BEST PRACTICES

Concerns regarding the usage of the IoT technology and the policy that governs it, call into question key norms of established regulatory regimes, globally. This also presents a question over the objective of achieving interoperability and universal networking, and the aim to avoid Internet

[87] Ss. 2(34), 2(35), 82-87, The Consumer Protection Act, 2019.
[88] S. 2(22), The Consumer Protection Act, 2019.
[89] Ss. 2(23), The Consumer Protection Act, 2019.
[90] Ss. 2(47)(ix), The Consumer Protection Act, 2019.

fragmentation. Given that the cyber-threat landscape is continuously evolving and adapting in a dynamic and unpredictable manner, there arises a concern whether regulators should continue in near term to commit with comprehensive cyber-security legislations or not.[91] The IoT is redrawing the boundaries of what constitutes 'personally identifiable information' and, fundamentally, challenges the way we address to cope with this evolution.[92] In order to understand the needed legal requirements, it is important to identify the best practices that have been adopted around the world to maintain the integrity of data of consumers using IoT.

1. European Union

The **European Union** ("**EU**") passed the **General Data Protection Guidelines** ("**GDPR**")[93] in 2016, replacing

[91] Allison Grande, *House Republicans urge FCC to curb Cybersecurity Measures*, Law360, (Sep. 9,2021), http://www.1aw360.com/articles/549350/house-republicans-urge-fcc-to-curb-cybersecuritymeasures.

[92] Carl Straumsheim, *More Anti-Semitic Fliers Printed at Universities*, Inside Higher Ed, (Sep. 9,2021), https://www.insidehighered.com/quicktakes/2017/01/27/more-anti-semitic-fliers-printed-universities.

[93] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Communities*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679, last seen on 01/09/2021 (hereinafter 'GDPR').

the EU Data Protection Directive 95/46/EC.[94] The GDPR went into effect from May 2018. Though GDPR is not free of loopholes, it leaves IoT industries in water-tight compartments for its loopholes to be as little exploited as possible. It has come as a revolutionizing step for the data-thriving industries, empowering the users alongside creating awareness among them regarding their data. It is interesting to note is that GDPR was passed in the year 2016, it took two years to come into enforcement, and the time given to the companies to adjust their policies. This left a whole new scenario and a formalised channel of benchmarks in the IoT industry. GDPR harmonizes with the EU data protection laws and provides the institution of a single comprehensive legislation that is applicable to all the members of the EU.

Most of the legal compliances laid down in the GDPR are going to raise a significant burden over the IoT entities. Among the compliances for IoT entities, one is the 'right to be forgotten' under Article 17[95] of the GDPR, which provides strict requirement for data controllers to erase any personal data of a consumer that is unnecessarily being processed and when there are no overriding legitimate

[94] *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, Official Journal of the European Communities, (Sep. 9,2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN.
[95] See GDPR, Article 17.

grounds to do so by the IoT entities. Further, the 'right to portability', under Article 18[96] of the proposed GDPR, for example, gives data-subjects the right to receive from data controllers their personal data in a commonly used electronic and structured format that allows for further use by other data controllers.[97] Further, the Article 25(1)[98] of the GDPR obliges the data controller to take appropriate technical and organizational measures for the protection of personal data into account during the development of the product.

All the above-mentioned principles related to data protection are already being followed in the Bill 2019 as it follows the GDPR as template. The most significant takeaway from the EU regime is the IoT specific regulatory approach. The EU has introduced the draft of **the regulations supplementing the Radio Equipment Directive 2014/53/EU** ("**RED**")[99] **to provide regulations in respect of 'Internet-connected radio equipment and wearable radio equipment'** ("**Draft**

[96] See GDPR, Article 18.
[97] Omar Tene & Christopher Wolf, *Overextended: Jurisdiction and Applicable Law under the EU General Data Protection Regulation*, Future of Privacy Forum, (Sep. 9,2021), https://fpf.org/wp-content/uploads/FINAL-Future-of-Privacy-Forum-WhitePaper-on-Jurisdiction-and-Applicable-Law-January-20134.pdf.
[98] See GDPR, Article 25(1).
[99] *Radio Equipment Directive (RED)*, European Commission, (Sep. 9,2021), https://ec.europa.eu/growth/sectors/electrical-engineering/red-directive_en.

RED Law").[100] This draft of the regulations aims at strengthening the security of internet-connected devices, most of which are expected to be part of the IoT, and of wearable radio equipment. The draft once passed shall act as the delegated act required to enforce article 3.3(e) of the RED[101], which lays down essential requirement of incorporating safeguards to ensure that the personal data and privacy of the user and of the subscriber of the device are protected. The draft covers a wide range of IoT enabled devices, from wearables to childcare devices and all internet connected radio equipment, if that radio equipment is capable of processing, trafficking and locating personal data.[102] The proposed delegated act suggests the approach of introducing a primary law i.e., GDPR, that provides the broad based principles and a secondary law that provides the substantive provisions for

[100] *Internet-connected radio equipment and wearable radio equipment*, European Commission, (Sep. 9,2021) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2018-Internet-connected-radio-equipment-and-wearable-radio-equipment_en.

[101] *Radio Equipment Directive (RED)*, European Commission, (Sep. 9,2021), https://ec.europa.eu/growth/sectors/electrical-engineering/red-directive_en.

[102] *Internet-connected radio equipment and wearable radio equipment*, European Commission, (Sep. 9,2021) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2018-Internet-connected-radio-equipment-and-wearable-radio-equipment_en, (The delegated act ensures that RED provide certain essential market access requirements for "smart appliances, smart cameras and a number of other connected radio equipment like mobile phones, laptops, dongles, alarm systems and home automation systems" or other such equipment that is at risk of "hacking and of privacy issues when they are connected to the internet".)

implementation of the given principles i.e., Draft RED Law.

2. United Kingdom

In addition to the GDPR like data protection regulations, the additional step that the United Kingdom ("**UK**") regime has taken is the introduction of the code of practice applicable to IoT specific industry stakeholders. The Code of Practice for Consumer IoT Security[103] requires manufacturers and IoT service providers within the UK to comply with a set of guidelines to ensure that products are secure by design and to make it easier for people to stay secure in a digital world. The Code of Practice outlines following key principles that such entities must comply with:

1) IoT devices must not be sold with universal default usernames;

2) The service providers must have a vulnerability disclosure policy;

3) The IoT software must be kept updated;

[103] *Code of Practice for Consumer IoT Security*, Department for Digital, Culture, Media and Sport, (Sep. 9,2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/971440/Code_of_Practice_for_Consumer_IoT_Security_October_2018_V2.pdf.

4) Ensure secured storage of credentials and security-sensitive data;

5) All communication, including remote management and control, must be encrypted;

6) Risk minimising measures must be adopted when attack surfaces including unused ports and superfluous code;

7) Ensure software integrity; and

8) Compliance with GDPR if any personal data is processed by IoT devices.

3. United States

In the United States ("**US**"), there is no single and comprehensive self-regulating legislation related to the protection of privacy or personal data, generally. However, the US has a collection of separate federal and state laws and regulations, with the common-law principles. A thing to be noted from privacy regulations in the US is that the laws and regulations in the country are specific to the industries which use processing of data in their facilities. **The Gramm-Leach Bliley Act, 1999**[104] governs the regulation of the financial institutions that collect public information. At the same time for regulating flow of health

[104] 15 U.S.C. Ss. 6801-09 (United States); 16 C.F.R. Ss. 313.1-.18 (United States); 16 C.F.R. Ss. 314.1-.5 (United States).

data of consumers, there is the Health Insurance Portability and Accountability Act of 1996 ("**HIPAA**"),[105] as amended by the **Health Information Technology for Economic and Clinical Health Act of 2009** ("**HITECH**")[106], which protects the personal data-information held by healthcare sector and certain entities. The industries which do not come in the ambit of the specific limits of the aforesaid statutes, but collect and process consumer personal data, falls under the **Federal Trade Commission Act of 1914** ("**FTC Act**"), in furtherance to prohibiting unfair or deceptive commercial practices.[107]

The US law understands that it is practically unrealistic for the businesses to provide consumers with notice and choice every time they want to change their use of data, particularly in the age of constantly connected devices and ever-shifting consumers. As it is not possible to control the interaction of myriad objects or create virtual boundaries, it will be equally impossible to control data flows and subsequent uses of data.[108] Therefore, section 5 of the FTC

[105] 45 C.F.R. Ss. 160.101-.552 (United States); 45 C.F.R. Ss. 162.100-.1902 (United States); 45 C.F.R. Ss. 164.102-534 (United States).
[106] 42 U.S.C. Ss. 300jj-jj5l (United States); 42 U.S.C. Ss. 17921-53 (United States).
[107] 15 U.S.C. Ss. 41-58 (United States).
[108] *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, Federal Trade Commission, (Sep. 9,2021), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

is an authority as it seeks to prevent potential violations of data privacy that are the result of 'unfair or deceptive acts or practices in or affecting commerce'.[109] The language of section 5 although does not refer to data privacy, but the FTC is using it as a statutory instrument to police potential data privacy violations. The US is also one of the few jurisdictions that has understood the need to regulate dark patterns. FTC also regulates dark patterns by using its power to punish *'unfair and deceptive practices'* under section 5 of the Federal Trade Commission Act. *AMG Capital Management v. FTC*[110] is an important ruling on dark patterns where AMG, a payday lender, deployed dark patterns in its digital loan agreement to auto-renew (instead of close) expensive payday loans as a default option. The FTC found AMG Capital Management guilty of unfair and deceptive practices.

Recently in the US**,** the Internet of Things Cybersecurity Improvement Act of 2020 was enacted. It lays down certain mandatory provisions and guidelines to be followed by the federal government for the use of IoT enabled devices.[111] However, the Act only aims at regulating the

[109] Branden Ly, *Never Home Alone: Data Privacy Regulations for the Internet of Things*, 2017 Journal of Law, Technology and Policy 539 (2017), (Sep. 9,2021), http://illinoisjltp.com/journal/wp-content/uploads/2017/12/Ly.pdf.

[110] *AMG Capital Management v. FTC*, No. 19-508 (U.S. April 22, 2021).

[111] *H.R.1668 - Internet of Things Cybersecurity Improvement Act of 2020*, Congress.gov, (Sep. 9,2021), https://www.congress.gov/bill/116th-congress/house-bill/1668/text.

use of IoT devices by the government contractors manufacturing or providing IoT services to the federal government[112], i.e., it is not a comprehensive self-regulating legislation related to the protection of privacy or personal data generally. Further, the California's 'Security of Connected Devices' law, which became effective in January 2020, is a state legislation that focuses on providing obligations for manufacturers to equip the IoT devices or other connected devices with reasonable security measures.[113] It is worth noting that the law seeks to determine certain liability of the 'manufacturer' in case of mishap while also delimits the scope by creating exceptions to the same.

4. Australia

IoT in **Australia** is regulated through the **Privacy Act, 1988** and the **Telecommunications Act, 1997**. Under this regime, collectors of personal information are supposed to notify the concerned person about particular matters, including what information is being collected, how it is collected, and how it will be used and disclosed.[114]

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[112] Brian G. Cesaratto & Alexander J. Franchilli, *New Internet Of Things (IoT) Cybersecurity Law's Far Reaching Impacts*, Mondaq, (Sep. 9,2021), https://www.mondaq.com/unitedstates/security/1047166/new-internet-of-things-iot-cybersecurity-law39s-far-reaching-impacts-.

[113] "Security of Connected Devices," Cal. Civil Code §§ 1798.91.04-1798.91.05(b).

[114] *The Internet of Things and Australian Privacy Law*, Primerus, (Sep. 9,2021), http://www.primerus.com/wp-content/uploads/2016/06/HHG-IoT-article.pdf.

However, the reality differs from the idealised laws. Though the Telecommunications Act mandate all the firms to comply with the privacy provision (unlike Privacy Act which mandates only those firms with turnover more than USD 3 million), the Act is not as detailed as the Privacy Act is. Moreover, it does not regulate collection and storage of personal information. The Telecommunications Act is now being realised to not be flexible enough to include in itself the wide arena of IoT. However, Australia has recognised protection of personal data, there still remains ambiguity regarding what pertains to be 'privacy' and how IoT would be regulated.

The **Code of Practice**[115] (Securing the Internet of Things for Consumers) is a voluntary set of guidelines set out by the Australian government in 2020 with the objective of providing manufacturers and service providers with information regarding appropriate cybersecurity features and measures that must be complied with by their IoT devices. Principle 5 of the same lays down essential guidelines for device manufacturers, IoT service providers, mobile application developers and retailers. It provides that in case where the consent is an essential requirement for the processing of user's data, the same should be obtained in a legal and express manner, with the option to

[115] *Code of Practice (Securing the Internet of Things for Consumers)*, Australian Government, (Sep. 9,2021) https://www.homeaffairs.gov.au/reports-and-pubs/files/code-of-practice.pdf.

cancel and withdraw the same at any time. A year after the release of the voluntary guidelines, the government of Australia published a discussion paper[116] which aimed at achieving domestication of international standards for privacy and data protection, especially the European ones, suggesting government's plan to roll out a full-fledged IoT specific legislation and replacing the voluntary one.

7. BALANCING THE INTERESTS: RECOMMENDATIONS

The open and ubiquitous nature of the IoT technology may significantly increase its vulnerability to suspicious attacks that target private or personal data / information. This is a challenge for IoT service providers to maintain the integrity of consumers' data during the provision of data-driven services. As the gap exists in respect of public conversation about the IoT stakeholders' accountability in India, the government intervention is important to provide a mechanism to correct for market failure and ensure accountability. Therefore, a specific regulatory policy, model or framework ("**Proposed Law**") is needed to guide the stakeholders to guarantee trust and liability determination in respect of the consumers' data-information or private information as recorded by the IoT

[116] *Strengthening Australia's Cyber Security Regulations and Incentives (A Call for Views)*, (Sep. 9,2021), https://www.homeaffairs.gov.au/reports-and-pubs/files/strengthening-australia-cyber-security-regulations-discussion-paper.pdf.

devices. The same has been observed as the best practice in the international jurisdictions that have started to regulate IoT. Although, India is considering to introduce the TEC Code of Practice for IoT stakeholders, it remains voluntary and at a draft stage. Further, the standards in it mostly are taken from the existing code of practices of the UK and Australia that are themselves is intending to build on these code of practices with a set of legally binding requirements.

The long-established norms of Internet governance are now required to be placed on the table for reconsideration. Following are the certain measures that may be considered by the appropriate regulator alongwith the standards provided under the TEC Code of Practice to regulate and, also, the industry stakeholders to self-regulate.

i. The primary legal measure that is needed to be standardised in the application of IoT technology is that to have **unambiguous 'terms of use'** or **'terms of service'** ("**ToS**") as well as privacy policies that are enforceable against the end-users of the IoT devices. If the product does not have a user interface where the end-user can check a box or otherwise agree to terms i.e., in click-wrap agreements, then such agreement should be provided on a website to be agreed before enabling the functionality of the IoT product i.e.,

browse-wrap agreements. The need to have proper disclosure – specifically, about the possible additional data collection, data sharing with third parties, vulnerabilities and liabilities – is required to be introduced as a substantive provision in for the implementation of the broad-based principle of informed consent. The law may suggest specifics for privacy policy such that it should delineate details of personal data retention and time-period.

ii. The Proposed Law may also require an IoT service provider to report the efforts it is making in following 'privacy by design' principle so as to design interfaces that are better for in respect of privacy. It is suggested that the appropriate regulator may conduct a yearly review of IoT device manufacturers / service providers to assess whether they are investing in designs of IoT devices that are useful and convenient with respect to privacy controls.

iii. The TEC Code of Practice does not reflect the risk-based approach. There is a requirement for improved notification practice in respect of networked toys, devices and services that collect children's data. The tighter regulatory scrutiny may be implemented for child-specific products where the data subject is itself not competent

enough to understand the kind of data it is sharing during an interaction with a device. While there may be flexibility in other cases given the IoT service provider is transparent and open about its processing of data and the use of same is for the better provision of services to the data subject that is major and to the great extent aware about what it is sharing.

iv. The essence of the IoT technology is to gain the access to and analyse the voluminous data recorded by IoT devices. The ownership of that data then vests in the consumer who owns the device or the service provider who has gained the access to the data recorded. Therefore, an aspect worth noting is that since there are numerous channels of dissemination of the data / information and multiple stakeholders involved, the IoT service provider (data controller) at all times should ensure that the line between data controller and data processor does not get obscured.[117] It is required that the Proposed Law mandate the IoT service providers to specifically state the '**allocation of risk**' such that a certain

[117] Anirudh Sarin, *India: Legal issues pertaining to the IoT*, Mondaq, (Sep. 9,2021), http://www.mondaq.com/india/x/691560/Data+Protection+Privacy/Legal+Issues+Pertaining+To+Internet+of+Things+IOT.

party will bear the responsibility / liability for any breach of data protection obligations that IoT services assure to a consumer.

v. The corporate entities that are leading IoT ventures are facing strong challenge to manage the processing, storing, and securing the consumer related data. As the IoT technology is growing in its reach, the enterprises are outsourcing the data-management to the different cloud service providers.[118] To some extent, ceding the management of the 'sensitive' data of consumers to the third parties poses questions with respect to the current legal framework. In the absence of any contract, the liability for any data protection violations will remain with the contracting company, even if the third party is at fault. In such transactions there is a need to carefully define **legal obligations** of stakeholders involved in IoT value chain in a broad manner in the Proposed Law but without the use of vague words. Another obligation could be of providing clarity to the consumer in any manner possible in respect security measures that

[118] Mike Kavis, *The Internet of Things Will Radically Change Your Big Data Strategy*, Forbes, (Sep. 9,2021), https://www.forbes.com/sites/mikekavis/2014/06/26/the-internet-of-things-will-radically-change-your-big-data-strategy/?sh=43c893c61d45, l

will be implemented throughout the product lifecycle. This will provide clarity to consumers about when the device will no longer receive security updates or the user will fail to update the device.

vi. The Proposed Law must envisage the need of providing a collaborative space for innovators, manufacturers or service providers to test their products under the supervision of regulators and identify vulnerabilities. Such a cooperation between the regulator and stakeholders will ensure that the pre-launch of a product must be done along with the proper disclosure about the possible vulnerabilities. When the TEC Code of Practice talks about the proper disclosure of vulnerabilities, it is a broad-based principle which must be strengthened by providing substantive provisions for implementation of such a disclosure practice.

vii. The Proposed Law must be technology friendly such that it must be futuristic enough to comprehensively govern the advancements in the field of IoT. There must bea review mechanism for reassessing and amending the existing policies specific to IoT as the technology evolves and new products are introduced.

viii. In India, dark patterns such as *hidden costs* or *hidden contractual terms* could fall under the remit of the Consumer Protection Act 2019 and the Central Consumer Protection Authority ("**CCPA**") to redress such issues. The consumer protection legislation could be amended to allow CCPA to regulate dark patterns comprehensively within the scope of the term *'unfair and deceptive practices'*. The Proposed Law must provide that such issues related to dark patterns will be specifically dealt with by the CCPA in order to avoid the possibility of regulatory arbitrage or overlapse.

These recommendations are meant to provide standards to nudge companies to take a meaningful first step towards greater transparency regarding how they manage consumers' data and the degree to which consumers have any say in how their data is used.

8. CONCLUSION

The IoT technology is a very complex and unexplored phenomenon when viewed in the context of legal and policy challenges. IoT is contributing remarkably in the transformation and upgradation of standard of lives of people as a technological innovation. However, IoT is facing strong challenges against it due to lacunae in the legal frameworks. It is in the best interest of concerned

stakeholders to create a proper regulatory regime to ensure a balance between the interests of IoT stakeholders and data-privacy concerns of consumers of IoT products. The paper sought to explore and classify sector-specific policy challenges associated with IoT technology and its application in industry, with an aim to provide standards that can be followed as a solution to the challenges interface of law and IoT face in India.

IoT devices are rapidly integrating as indispensable architectures into different industries' infrastructure such as Healthcare, Transport, Education Sector, Fintech and Banking, Energy Sector, Law-enforcement etc. IoT technology has contributed heavily in the aforesaid sectors which is going to have a big impact on these industries. Therefore, it is imperative to find out the issues as well as solutions as soon as possible and keep the interests of stakeholders in balance.

There is no doubt that legal framework is lagging behind than the growth of application of IoT technology. There is a dire need for standardizing the process such that to have a comprehensive privacy policy in order to have a proper liability management in consequences in respect of data protection breach. The standards are needed to balance the interests of innovators as well as consumers at the same time. IoT, along with numerous benefits, will realize its potential to transform the lives in a uniform manner only

when the legal framework for it will evolve dynamically, keeping the incentive-promoting approach.

COMPARATIVE ANALYSIS OF KELSEN'S THEORY OF GRUNDNORM AND INDIA'S BASIC STRUCTURE DOCTRINE

[*]Rimcy Keshri & Samarth Nayar

ABSTRACT

Grundnorm is a title that is granted to the highest form of the law of a country due to the fact that this title is also known as the basic or fundamental norm. Hence, any law to be made legitimate must have an underlying legal system. This essentially means that no law in the said system can be legislated whose essence is violative of the highest norm

The article begins by outlining legal theories that are essential to determining whether a contemporary legal system, such as India's, can be described without the presence of a supreme norm or authority. The theories are John Austin's command theory of law, as discussed under legal positivism, and Hans Kelsen's discussion on the term Grundnorm under the pure theory of law. These two theories are relevant for the question as they are the ones that deal with a legal system being governed by a supreme norm. However, with both the theories being contrasting in nature, only one can be compatible with the Indian legal system.

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The article further advances by elaborating the said concept by finally contending that the Articles envisaged under the Constitution of India should not be recognized as the Grundnorm of the country, instead, the Basic Structure, i.e., the doctrine identified as the crux and foundation of the Constitution should be acknowledged as the same.

I. NEED FOR A SUPREME NORM?

Initiating the examination of this question by scrutinizing Austin's theory who defined law as a command of the sovereign backed by a sanction, it is essential to break down this definition into its fundamentals for a better understanding of its relevance in the Indian legal system.

1. Austin and the Need for a Supreme Norm

Austin's Command Theory refers to commands as directives given by the political superior i.e., the Sovereign to the political inferiors. Any person or group of people who commands the obedience of the majority of a political society but does not himself command the obedience of others can be recognized as the sovereign. Lastly, any system of imperative law is enforced through sanction, which is a form of coercion. The state's sanction in the administration of justice is physical force.[1]

[1] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, 60-72 (Lawbook Exchange Ltd., 2012).

By examining the command theory given by Austin, the authors find it evident that the theory lays strong emphasis not just on the State but also on the definition of law. It can be observed that the command theory of law accords the sovereign with the position of ultimate supremacy, implying that the sovereign's authority is absolute and unfettered, as the latter is not answerable to anyone, but the entire country is required to obey its orders. Moreover, as per the said theory, the sovereign's powers are indivisible, essentially meaning that only the sovereign has the authority to establish, execute and administer the laws.[2] Further, a sanction can be perceived as the evil force that is applied to an individual who refuses to accept the sovereign's commands, as Austin states a sanction to be a physical force used by the state to repress people who do not abide by the commands.[3]

These observations lead to the denouncement of the fact that Austin's theory paints a picture of a framework that is completely opposite to the constitutional structure that governs India. The above-mentioned definition implies that the sovereign is politically superior, which goes against the essence of democracy, as the latter grants civil and political rights to every citizen, regardless of them being the President or a regular wage worker.

[2] *Id.*
[3] *Id.*

Moreover, the command theory of law considers courts and judges to be mere delegates of the sovereign.[4] Hence, it can be ascertained that the said theory ignores other sources of law, such as precedents established by judges. The authors observed Austin's theory to be untenable when it comes to laws that do not have sanctions, such as preambles, defining clauses, repealing sections, and beneficial and welfare legislation. Another criticism that follows is that the said theory assumes that the people would obey every command directed by the sovereign without ever questioning it. This stance does not float well with the concept of democracy, as it grants the people the right to protest, criticize, and question any government policies that they deem to be unfit.

India, being a quasi-federal country does not have all the power concentrated in just one political sovereign. The power is decentralized and distributed between Union and the States, and after the 73rd Amendment, with the Panchayats and Municipalities. This is again contrary to Austin's theory.

Further, the element of the sovereign having indivisible power does not sit in conformity with the Rule of law and Separation of Power as it does not permit any authority to wield complete power. The Constitution of India clearly

[4] John Dewey, *Austin's Theory of Sovereignty*, 9(1) POLITICAL SCIENCE QUARTERLY, 31, 49 (1894).

defines the jurisdiction of three organs, i.e., the executive, the legislative, and the judiciary, and expects them to be implemented within their respective authorities without going beyond their limits.[5]

Even the validity of law is although presumed to be valid, if challenged, must pass the challenge of Judicial Review. And in case it falls foul of the Constitution, it can be declared invalid by the Court. However, it is pertinent to note that a glimpse of Austin's view was seen in India in the case of *A.K. Gopalan* v. *State of Madras,*[6] a case from the early 1950s, in which the petitioner was detained under the Preventive Detention Act, 1950. When the Act's constitutionality was questioned, the Supreme Court affirmed its legitimacy, stating that law is "lex" rather than "jus." As a result, even if the legislature's decision is unjust, it is considered the law of the land. This aligns with Austin's idea of law as "what is" rather than "what ought to be." The criminal justice system in India where breaking the law results in punishment is an example of Austin's theory in action.

In modern times, as the Constitution is viewed as a living body, evolving over time, Austin's theory would hold little to no relevance to the Indian legal system. Hans Kelsen,

[5] INDIAN CONST. Art. 50; Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1, 305-306, 519, 598-608.
[6] AIR 1950 SC 27.

on the other hand, does not consider law to be a sovereign command but believes that laws gain legitimacy from certain supreme norms. He rejected the concept of command because it adds a psychological element into what he considered to be a pure philosophy of law.[7]

II. INTRODUCING KELSEN'S GRUNDNORM

The term Grundnorm was first introduced by Kelsen, who, by applying his analysis on Pure Theory of Law, coined the said term, and further scrutinized it into being referred to as the source of positive law.[8] He found the essence of the legal order by excluding the ethical, political, and historical factors. In contradiction to the views of Austin who perceived law to be a command backed by sanction, Kelsen considered law to be pure, i.e., without any psychological factor affecting the theory of law.[9] Moreover, Kelsen further dismissed Austin's operation of sanctions by stating that the said operation is dependent on the operation of other rules of law, indicating the difference between a law and a sanction.[10]

[7] HANS KELSEN, PURE THEORY OF LAW 5 (Lawbook Exchange, 2009).
[8] UTA BINDREITER, WHY GRUNDNORM? A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 58 (Springer, 2003).
[9] KELSEN, *supra* note 7.
[10] RWM DIAS, JURISPRUDENCE, 361 (Aditya Books Pvt. Ltd., 5th ed. 1994).

Based on the definition of the term norm, which means to have instituted a set of rules in order to regulate the behavior of the people, interpretation of positive law has been derived from the said norms to regulate human conduct in a definite way. A norm suggests what ought to be, and not what is or must be. As per Kelsen, 'ought 'does not refer to moral obligation, but simply to normative forms of legal propositions.[11] The legal philosopher periodically noticed that the formation of any legal norm was dependent on other legal norms, as the latter had the power to authorize and validate the former.[12] Kelsen claimed this peculiar trait to be of most significance.[13] Hence, for discerning the legitimacy of a legal norm, the process would always lead the tracer higher on the norm chain and would end with him finally reaching the peak, i.e., the highest norm on the chain. The tracer can recognize the highest norm if the said norm is standing valid solely on the presupposition that the people ought to behave in accordance with it, and not because it has been constructed under the authority of its superior valid norm. This presupposition of the highest norm is called the

[11] 57 HANS KELSEN, WHAT IS JUSTICE?, ESSAYS IN LEGAL AND MORAL PHILOSOPHY, 235-244 (Dordrecht Springer, 1973)
[12] ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 104 (Lexis Nexis, 2nd ed. 2003).
[13] *Id.*

Grundnorm.[14] Kelsen's pure theory of law has a pyramidical hierarchy based on the Grundnorm as the foundational norm which got its meaning from the German language.[15] It is defined as the assumed ultimate rule by which the norms of any order are constituted and annulled, and their validity is received or lost. The Grundnorm determines the content and verifies additional norms that are derived from it. Although, the question regarding the origin from which it received its legitimacy was never answered by Kelsen, as he claimed the said question to be a meta-physical one. He further stated that the proposed theory was a work of fiction, rather than a hypothesis.

Moreover, the society accepted the concept of presupposition and Grundnorm to give validity to all the other norms, because without it, the country would have no order. Furthermore, any norm can be identified as the Grundnorm if it authorizes or validates the norms underneath it.[16]

As a law regulates its own production, the study of law of dynamics is a necessity. Thus, as per Kelsen, the existence of a Grundnorm will always be present in some form in

[14] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (Routledge, 1st ed. 2005).
[15] William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CAL. L. REV. 617, 618 (1971).
[16] KELSEN, *supra* note 7.

every legal order.[17] It goes without saying, after due analysis of both the theories, that in a democratic country like India, application of Kelsen's pure theory of law remains much more relevant in comparison to that of Austin's command theory of law. It is utmost essential for any legal system to have a supreme norm or authority in order to be legitimate.

Accordingly, it is extremely essential to mention that the Indian community has embraced the concepts of presupposition and Grundnorm in order to give validity to all other norms because the country would be chaotic without them.

III. THE INDIAN CONSTITUTION SHOULD NOT BE CALLED THE GRUNDNORM

Through the medium of this section of the article, we shall argue as to why the Constitution of India should not be held as the Grundnorm of the Indian Legal System, as popularly suggested in *Keshavananda Bharti v. State of Kerala.*[18]

As it is essential for every land to have a Grundnorm in order to establish the validity of the rest of the norms, the question that arises is in respect to the Grundnorm of

[17] *Id.*
[18] (1973) 4 SCC 225, 833-846.

India. In most cases, the Constitution of the country is said to be the highest norm as all the other laws need to confer with the criterion mentioned in the said Constitution in order to be declared valid. However, the situation prevalent expresses a different picture.

1. Generally, even the established practice does not envisage the Constitution as the Grundnorm. The authority from which law derives legitimacy keeps on shifting between the two organs of the governments namely, the Judiciary and the Legislature.

When a judge, through his/her decision, creates a norm regarding a situation, it is authorized and validated by the norms governing the court's jurisdiction. Thus, the decision of the court becomes the Grundnorm, instead of the written word inside the Constitution. It essentially means that the judgements rendered by the Supreme Court while interpreting the various provisions of the Constitution and other laws become the law of the land. For example, the Indian Supreme Court in the *Keshavananda Bharati* judgement limited the powers of the Parliament to amend the Constitution although no such limitation was prescribed in the provision.[19]

[19] INDIA CONST. art. 368

Significantly, the Supreme Court in that very judgement also declared the Constitution as the highest norm, i.e., the Grundnorm.[20]

However, the situation reverses when the Legislature tries to overrule the judgement of the Court through the introduction of constitutional amendments as seen in the case of *Indira Gandhi* v. *Raj Narain*[21] wherein Indira Gandhi brought in a constitutional amendment to overrule the High Court judgement cancelling her election. Although the enactment of such constitutional amendment or a legislative enactment may be in line with the procedural norms which, prima facie, are in accordance with the Constitution. But in doing so, the entire scheme of what is the Grundnorm, i.e., the authority from which laws derive legitimacy, shifts from the Constitution to the Judiciary and then to the Legislature. It can, thus, at least be said that the situation becomes ambiguous.

This tussle between the two organs came out in the open during the Indira Gandhi era. The Supreme Court, in *IC Golaknath* v. *State of Punjab,*[22] modified the definition of law as under Article 13 to include constitutional amendments as well. This judgement severely reduced the power of the Parliament to amend the Constitution. In retaliation, the

[20] *Supra* note 18.
[21] (1976) 2 SCR 347.
[22] (1967) 2 SCR 762.

Parliament passed the Twenty Fourth Amendment Act, 1971[23] to nullify the court's decision by adding sub-clause (3) to Article 368 excluding the application of Article 13 on constitutional amendments. Now, this amendment itself was challenged before the Supreme Court in the *Keshavananda Bharati* case. Although the court upheld the validity of the 24th Amendment, it brought into picture the doctrine of inherent limitations: the Basic Structure Doctrine. The Parliament, again, responded by passing the Forty Second Amendment Act[24] thereby including sub-clauses (4) and (5) to Article 368 to invalidate the Supreme Court judgement. This was, lastly, rendered invalid by the *Minerva Mills* v. *Union of India*[25] and the matter in regard to the Parliament's power to amend the Constitution has been laid to rest, however, the tussle between the two organs continues to exist.

1. The premise that the Constitution of India can be widely accepted as the Grundnorm, as according to the plethora of cases,[26] is flawed due to the fact that the Constitution itself grants the ability to be amended.[27] Hence, if the provisions of the

[23] The Constitution (Twenty-fourth Amendment) Act, 1971, Sec. 3(d) (w.e.f. 05.11.1971).
[24] The Constitution (Forty Second Amendment) Act, 1976, Sec. 55 (w.e.f. 03.01.1977).
[25] (1980) 3 SCC 625.
[26] Indira Gandhi v. Raj Narain, (1976) 2 SCR 347; Government of Andhra Pradesh v. P. Laxmi Devi, (2008) AIR SC 1640, 1728.
[27] INDIAN CONST. art. 368.

> Constitution are substantially amended or repealed, its authority would cease to exist as it would no longer be in a position to confer validity to the laws that have been legislated in accordance with it, as the grundnorm can only be altered by a political revolution.[28] Therefore, it would be incorrect to recognize the Constitution as the grundnorm of the country.[29]

Interestingly, during the Review hearings of the *Kesavananda Bharati* case,[30] Justice Beg (as he then was) asked Nani Palkhivala, the lawyer from the Petitioner's side, that he doesn't understand what the basic structure doctrine is, according to him every article is basic? Palkhivala replied that if Justice Beg takes that view then he would be the happiest man in the world since the Constitution would remain as is.[31]

Moving to the topic at hand, there have been, and still are several laws in different Indian statutes that should be declared unconstitutional due to their lack of conformity with the Articles of the Indian Constitution. Some, like Section 377 of the IPC have been read down[32] to bring them in conformity with the Constitution, but others like

[28] KELSEN, *supra* note 14.
[29] T. C. Hopton, *Grundnorm and Constitution*, 24 MCGILL L.J. 72 (1978).
[30] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.
[31] SOLI SORABJEE & ARVIND DATAR, NANI PALKHIVALA THE COURTROOM GENIUS, 143 (Lexis Nexis, 2012).
[32] Navtej Singh Johar v. Union of India, (2018) AIR SC 4321, 4371.

the second exception to Section 375 of the IPC which legalizes marital rape also violates the Constitution[33] but still continues to exist. Hence, as evident from above, there are laws that have and continue to prevail in contravention to the Indian Constitution and in that condition, the same cannot qualify as the Grundnorm of the country.

Interestingly, during the period after the promulgation of the Constitution and before the First Amendment, the provision of Sedition[34] was also on the verge of being declared unconstitutional[35] but the amendment recused it. Not just that, the first amendment also brought in the infamous Ninth Schedule which protected the Acts in it from Judicial review.[36] Essentially meaning that they could not be declared invalid even on the ground that it contravenes the Constitution.[37] Thus, it can be argued the vision of the Constitution though pompous, is not at all the reality. It is seen to be dismantled and amended to the convenience of the elected forces, even from the ones who drafted the Constitution.[38]

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[33] Anirudh Pratap Singh, *The Impunity of Marital Rape*, THE INDIAN EXPRESS (Dec. 20, 2020), https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/.
[34] Section 124A, Indian Penal Code, 1860
[35] Tara Singh Gopi Chand v. State, (1951) Cri LJ 449.
[36] TRIPURDAMAN SINGH, SIXTEEN STORMY DAYS: THE STORY OF THE FIRST AMENDMENT OF THE CONSTITUTION OF INDIA, 218 (Penguin Vintage Books 2020)
[37] I.R. Coelho v. State Of Tamil Nadu, (2007) AIR SC 861
[38] SINGH, *supra* note 36

Fortunately, the Supreme Court in *Waman Rao v Union of India*[39] saw no justification in continuing the 'blanket protection' on the laws included in the Ninth Schedule and held that "…The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution."[40]

IV. EQUATING KELSEN'S THEORY OF GRUNDNORM AND INDIA'S BASIC STRUCTURE DOCTRINE

The comparative analysis of Kelsen's theory of Grundnorm and India's Basic Structure Doctrine shows the intricacies of structure of both theories. It should be noted that the latter is the foundation of the Constitution, and it is on this foundation that the legitimacy of the Constitution's provisions as well as ordinary legislation are assessed. If a provision contradicts the Constitution's Basic Structure, the provision is deemed invalid. The notion was developed in the form of theory in the landmark *Keshavananda Bharti* case[41] wherein it was ruled that the essential elements of the Constitution, being the basic

[39] Waman Rao v. Union of India, (1981) 2 SCC 362, 397.
[40] *Id*., at 397.
[41] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

Structure, is un-amendable and embraces the essence of the Constitution.

Kelsen says that the Grundnorm has to be the highest norm that dictates all the norms that are constituted below it. Hence, by carefully interpreting the said statement, it can be deduced that the Grundnorm cannot be changed or altered, as the ultimate law, if changed, would lead to nullification of all the laws that it previously granted legitimacy to. By analyzing this interpretation on the touchstone of the Indian Constitution, it can be observed that the latter grants the Parliament the power to amend it as per Article 368, it, therefore, makes it possible for the subordinate laws to lose their validity.

It is pertinent to note that the Basic Structure Doctrine is an unamendable norm.[42] Herein unamendable means that the basic structure of the Constitution can be changed, but cannot be substantially altered or destroyed. In the *Minerva Mills judgement*,[43] Bhagwati J. stated that

> [T]he Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features: basic and circumstantial. The basic constituent remained constant, the

[42] Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933, 953-955 (Mudholkar J. Dissenting).
[43] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

> circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features.[44]

Furthermore, Courts have now interpreted the said doctrine to be the final norm that any ordinary legislative enactments need to be in consonance with.[45]

Hence, from the Basic Structure's inherent nature and the cited case laws, it can be discerned that the people of India have accepted the said doctrine as a presupposition that they 'ought' to follow it in order to give meaning to all the other laws that have already been enacted or might be enacted in the future. Therefore, it is suggested that by being an unamendable norm that authorizes the alleged highest norm, it is the Basic Structure that is actually the highest law of the land, whose essence further lies in accordance with the definition of Kelsen's theory of Grundnorm.

[44] *Id.*, at 640.
[45] Madras Bar Association v. Union of India, (2015) SCC OnLine SC 388.

V. THE LEGITIMACY OF THE BASIC STRUCTURE DOCTRINE AS THE GRUNDNORM

The existence of the Basic Structure doctrine has been criticized by various critics,[46] calling its presence unreal, constitutionally illegitimate while some have gone so far as to call it a "*vehicle for judicial aggrandizement of power*".[47] However, relying on the case of *Ashok Kumar Thakur v Union of India,*[48] Senior Advocate Arvind Datar has written that negating the basic structure doctrine would create a scenario wherein it would not be difficult for populist figures to create a totalitarian regime.[49] "When judicial review is barred, democracy evaporates."[50]

By analyzing the judgement of *Manoj Narula v. Union of India,*[51] it is inferred that the existence of the said Structure is justified through the doctrine of Implied Limitations as the Constitution of India has been laid down in a written form, it is not a common occurrence to have everything expressly stated. That is why the doctrine of Implied Limitation is a necessity as it grants life to certain implied

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[46] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE USA 46-47 (Little, Brown and Co., 3rd ed. 1891).
[47] District Bar Association v. Federation of Pakistan, (2015) PLD SC 401 (Pakistan).
[48] (2008) 6 SCC 1.
[49] SANJAY S. JAIN ET AL., THE BASIC STRUCTURE DOCTRINE - A 37-YEAR JOURNEY, IN BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI 370 (1st ed. 2011).
[50] *Supra* note 48 at 668.
[51] (2014) SCC OnLine SC 640.

powers and conditions in a Constitution which cannot be avoided or amended as it is the foundation on which the said Constitution is built.

As it has been laid down in the *Keshavananda Bharti* case, the basic structure is the foundation of the Constitution of India which not only validates its provisions but also the amendments made. It argues that the Constitution, through its written and unwritten provisions, contains a 'solemn and dignified' structure that is fundamental to the Constitution.[52] Though the Parliament has drastic powers to amend the Constitution, it also has certain implied limitations. These implied limitations point out that even though the Constitution can be changed, its core, its essence, its basic structure must be retained.

Such foundations or values that the constitution exhibits have categorically been laid down to mean different things such as Secularism[53], Democracy[54], Federalism[55], etc. as per different benches of the Supreme Court. These values, also known as Constitutional Morality, acts as a response to the controversial debate between Critical morality and Conventional morality, wherein Critical morality is universally applicable, regardless of which society or time

[52] Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933, 953-955 (Mudholkar J. Dissenting).
[53] SR Bommai v. Union of India, (1994) AIR SC 1918, 2216.
[54] Indira Gandhi v. Raj Narain, (1976) 2 SCR 347.
[55] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

period an individual life in,[56] however, following and accepting society's norms and thinking about those rules to distinguish good and evil is what conventional morality entails.[57]

VI. UNDERSTANDING CONSTITUTIONAL MORALITY AS THE BASIC STRUCTURE DOCTRINE

Moving back towards the discussion on Constitutional Morality, it can be argued that Constitutional Morality can be comprehended to mean the Basic Structure of the Constitution. This statement emerges from the argument that the values occupying both these doctrines such as rule of law, democracy, freedom of speech and expression, etc. are largely the same. Both of these doctrines talk about the crux of the Constitution, the morals of the Constitution, the essence of the Constitution.[58] Thus, it would be not incorrect to equate the said doctrines.

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[56] Arjun Singal, *Critical Morality & the Hivemind*, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Dec. 31, 2018), https://lawschoolpolicyreview.com/2018/12/31/critical-morality-the-hivemind/.

[57] *Id.*; Ronald Dworkin '*Social Rules and Legal Theory* ,81 YALE L.J. 855-890 (1972).

[58] AMBEDKAR,'SPEECH DELIVERED ON 25 NOVEMBER 1949', THE CONSTITUTION AND THE CONSTITUENT ASSEMBLY DEBATES 107-131, 171-183 (Lok Sabha Secretariat, Delhi, 1990).

This can be best exemplified by comparing the *Sabarimala* case *(Original[59] and Review[60])* and the *SR Bommai* case.[61] Gogoi CJ. in the *Sabarimala review* case explained that that "'Constitutional Morality' is nothing but the values inculcated by the Constitution, which are contained in the Preamble read with various other parts, in particular, Parts III and IV thereof."[62] Chandrachud J. (in the *Sabarimala* case) further explained that the fundamental principles which emerge in the preamble along with basic postulates of Liberty, dignity, equality, etc. are infused with Constitutional Morality in its contents. "These are the means to secure Justice e in all its dimensions to the individual citizen."[63] In the SR Bommai case, Ramaswamy J. categorically laid down that "the preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."[64] On analyzing the above stated two judgements, it becomes clear that the values being

[59] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.
[60] Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) v. Indian Young Lawyers Assn., (2020) 2 SCC 1.
[61] S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[62] Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) v. Indian Young Lawyers Assn., (2020) 2 SCC 1, 28.
[63] Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 157.
[64] S.R. Bommai v. Union of India, (1994) 3 SCC 1, 205.

occupied by both the doctrines are largely the same. Both the theories talk about the integral nature of the preamble, the values of Judicial Review, Social Justice, etc. can be said to be located within Part III and Part IV of the Constitution.

Though, it can be argued that the Basic Structure is said to be a Doctrine that limits the powers that the Parliament can exercise, whereas, constitutional morality is a principle that is directive in nature and both are independent of each other. However, it should be noted that constitutional morality being a directive does essentially indicate that it holds certain limitations over the powers of the Parliament as well as any principle that commands the government to follow a specific route, inherently restricts the same from going off of it. Hence, even though the two theories might seem different from afar, deeper observation of the same portrays that their essence remains synonymous.

The principle of constitutional morality has remained in the constitutional scheme of India since the 1950s, with due credits to Dr. Ambedkar. Unfortunately, it has largely remained dormant in practice. It states that it is essential for a person to follow and consider the norms of the Constitution as supreme and should further avoid acting in an inconsistent manner so as to violate such rules.[65] It

[65] Manoj Narula v. Union of India, (2014) SCC OnLine SC 640.

makes the evaluation of even non-constitutional structures including social practices (evils) 'through the prism of Constitutional Morality.'[66] This approach would render the concerns surrounding critical and conventional morality redundant as the validity of any given law could be established by testing its essence on the touchstone of the Constitution, which, as per the Indian context, is required to be in conformity with the Basic Structure.

Therefore, it is contended that the premise of calling the Basic Structure the Grundnorm of the country should, instead of being dismissed, rather be established to mitigate the adoption of unconstitutional practices such as critical or conventional morality for testing the constitutional legitimacy of laws.

VII. LIMITATIONS AND SOLUTIONS TO THE BASIC STRUCTURE DOCTRINE AS THE GRUNDNORM

It is pertinent to mention that the Supreme Court in the case of *Kuldip Nayar* v. *Union of India*[67] limited the scope of basic structure doctrine by disallowing any challenge to ordinary enactments on the basis of it violating the said doctrine. This essentially implies that although the basic structure doctrine can be invoked to nullify constitutional

[66] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, 145; Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 242.
[67] (2006) 7 SCC 1.

amendments, but fails in case ordinary laws violate the basic structure. This has been a severe impediment in the establishment of the Basic Structure Doctrine as the Grundnorm. However, the Supreme Court has subtly altered its stand in the *Madras Bar Association* case[68] wherein the Court, though only through its obiter, accepted that ordinary enactments could be challenged on the ground of violating the Basic Structure doctrine.

Even in certain previous judgements, the Supreme Court had held ordinary laws or their provisions unconstitutional on the ground that they violated the basic structure. Notably in the *DC Wadhwa* case[69], the Supreme Court, while quoting *SP Gupta* judgement[70], the Supreme Court struck down the re-promulgation of ordinances in Bihar and stated that "The rule of law constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitations."[71] In this particular case, the term 'constitutional limitations' can be understood to include the Basic Doctrine as well.

[68] Madras Bar Association v. Union of India, (2015) SCC OnLine SC 388, 189-190.
[69] D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378.
[70] S.P. Gupta v. Union of India, 1981 Supp SCC 87, 218.
[71] *Supra* note 69 at 383.

In the case of *L. Chandra Kumar* v. *Union of India*,[72] the Supreme Court declared invalid Section 28 of the Central Administrative Tribunals Act, 1985 which excluded the jurisdiction of high courts as under Article 226/227 against the decisions of the Central Administrative Tribunals on the ground that it violated the principle of Judicial review, which is a 'part of the inviolable basic structure of our Constitution.'[73] Lastly, the Supreme Court in the case of *Indra Sawhney* v. *Union of India*[74] declared the Kerela Law regarding the on reservation for the 'creamy layer' violated the doctrine of basic structure. The Court went so far as to state that the Kerela government's 'virtual defiance' to the earlier *Indira Sawhney* judgement[75] was a violation of the "concept of Separation of Powers which has also been held to be a basic feature of the Constitution."[76]

These aforesaid judgments open the grounds of challenge as against ordinary Acts to basic structure doctrine, but their value as a precedent cannot completely be accepted in the presence of the *Kuldip Nayar* judgment. Nevertheless, the principle of constitutional morality has been gaining much traction. It was cited by the Delhi High Court in the case of *Naz Foundation* v. *Government of NCT of*

[72] (1997) 3 SCC 261.
[73] *Id.,* at 311.
[74] Indra Sawhney (2) v. Union of India, (2000) 1 SCC 168.
[75] Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.
[76] *Supra* note 75 at 208.

Delhi[77] to invalidate Section 377 of the IPC. This judgement was, at last, validated by the Supreme Court, while again quoting constitutional morality. These principles of Constitutional Morality have also been followed in a catena of Supreme Court judgements such as the *GNCTD* case[78] and the *Sabarimala* verdict [79]as well.

In the *GNCTD* case, the Supreme Court while ruling that the Lieutenant governor of Delhi exercised "complete control of all matters regarding National Capital Territory (NCT) of Delhi" stated that:

> The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy. … In discharging his constitutional role, the Lieutenant Governor has to be conscious of the fact that the Council of Ministers which tenders aid and advice is elected to serve the people and represents both the aspirations and responsibilities of democracy.[80]

In the *Sabarimala* case as well, Chandrachud J. said that that "It is the duty of the courts to ensure that what is protected (by the constitution) is in conformity with fundamental

[77] (2009) SCC OnLine Del 1762.
[78] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.
[79] Indian Young Lawyers Assn.(Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.
[80] *Supra* note 78, 740.

constitutional values and guarantees and accords with constitutional morality."[81]

Thus, if the equivalence between constitutional morality and Basic Structure is permitted, the grounds for challenging ordinary enactments shall become open to the Basic Structure Doctrine. This will further establish the credence of the Basic Structure as Kelsen's Grundnorm.

VIII. CONCLUSION

It is summarized that the Basic Structure should be identified as the Grundnorm of not just the Indian legal system but the entire country instead of the Constitution of India as the former validates the latter, making itself the highest norm of the country. It also transforms the age-old rivalry between critical and conventional morality unnecessary by establishing constitutional morality or the basic structure theory as an unrivalled norm. The argument equalizing constitutional morality and the Basic Structure doctrine will open up vast avenues for challenge in the upcoming Constitutional cases disputing the legitimacy of Electoral Bonds and Citizenship Amendment Act where Petitioners have argued the violation of the Basic Structure doctrine.

[81] Indian Young Lawyers Assn.(Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1, 188.

Lastly, the Basic Structure lies above the problems faced by the Constitution regarding its ability to be amended and the existence of laws that are not in compliance with the Constitution. As substantiated above, the authority of the Basic Structure is unfettered in being residuary of the values inherent of the Constitution and in granting legitimacy to the ordinary legislations as well as Constitutional amendments.

GENOME EDITING AND THE LAW – AN ANALYSIS OF THE EXISTING LEGAL REGIME IN NEED OF CHANGE

[*]Naitrika Bahal & Rubina Singh

ABSTRACT

The world of biotechnology has grown by leaps and bounds in the past few years. Most of the growth can be attributed to the fascination of the scientists with correcting what they perceive to be nature's mistakes. It also has to do with the growing demands of the human race and nature's limited resources being over utilised. However, when it comes to human genomics, efforts towards changing defects in the human genome or the susceptibility towards diseases have raised ethical and legal concerns regarding the manipulation of the human genome and the subsequent implications of the same. While the discipline of it is yet to develop completely, the application of human genome editing technology to real subjects has raised controversy not just in the scientific community but also in political and legal circles. The main concern, therein, is how the practice can be regulated and whether the consequences flowing from the practice of human genome editing can be reined in under existing international legal instruments. This paper shall delve into the existing frameworks regulating human gene editing and its application. It will discuss the positives and negatives of the same. It will also discuss the hurdles in adopting an

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international regime and the means to rectify the same. Suggestions will be made as to how the current laws can be made better and whether entirely new laws are required.

I. INTRODUCTION

With the advent of growing technology, biomedicine and biotech have seen rapid development. This unforeseen growth has also attracted the attention of ethicists and legislators who look at the field as a ripe opportunity for mismanagement and human rights violations. Whether it is correcting defects in Deoxyribonucleic Acid ("**DNA**") or creating pest-resistant crops, the aim of biotechnology is to improve the already existing. However, this gives rise to certain concerns when the same ideology is applied to the manipulation of the human genome.

In 2018, the news of the birth of the world's first genetically edited babies brought much concern and censure from the international scientific community.[1] Chinese biophysicist He Jiankui and his two colleagues Zhang Renli and Qin Jinzhou illegally conducted human genome editing using the Clustered Regularly Interspaced Short Palindromic Repeats ("**CRISPR**") - CRISPR

[1] Preetika Rana, *How a Chinese Scientist Broke the Rules to Create the First Gene-Edited Babies*, THE WALL ST. J., May 10, 2019, https://www.wsj.com/articles/how-a-chinese-scientist-broke-the-rules-to-create-the-first-gene-edited-babies-11557506697.

associated gene ("**Cas9**") technology.[2] They violated Chinese regulations and ethical principles by practising genome editing in assisted reproductive medicine, by altering embryos in vitro and implanting them into two women.[3] They were consequently convicted for their illegal acts. However, the incident raised concerns regarding the widespread use of human genome editing as well as the lacking legal framework to deal with its consequences. The occurrence of such rogue actions is bound to increase as the CRISPR technology becomes more readily available. It can lead to unforeseen human rights violations considering the unpredictable nature of how the edited gene will manifest in human subjects in the future.

The rapid development in human genome editing has raised concerns regarding unpredictable mutations and the alterations it may cause to the human nature itself. This technology promises improvement to human life by eliminating diseases and enhancing the capacity of human beings. International law has not specifically addressed the situation but, the issue can be resolved by interpreting

[2] Beverley A. Townsend, *Human Genome Editing: How to Prevent Rogue Actors*, BMC MEDICAL ETHICS, 2020, https://bmcmedethics.biomedcentral.com/track/pdf/10.1186/s12910-020-00527-w.pdf (Last visited Mar, 29,2021).

[3] *China Focus: Three jailed in China's "gene-edited babies" trial*, XINHUA NET, Dec. 30, 2019, http://www.xinhuanet.com/english/2019-12/30/c_138667350.htm (Last visited Mar. 29, 2020).

international trade law, intellectual property law and human rights law to address specific incidents that arise. This gives rise to the question whether a specific international framework is required to protect humans from the potential harms that may result from genetic editing as well as to protect the financial interest of significance to international commerce.

The current international legal mechanism when it comes to human genome editing is in its nascent stage owing to the recent and quick evolution in technology. Clinical research for the most part is prohibited in all jurisdictions. In some countries the ban is absolute whereas in others, certain exceptions are provided. Two regional human rights treaties that regulate genetic interventions directly, namely the 1997 European Convention on Human Rights and Biomedicine ("**Oviedo Convention/Convention**")[4] and the European Union ("**EU**") Charter of Fundamental Rights ("**EU Charter/Charter**")[5] assume prime importance. The 29 States party to the Oviedo Convention are all members of the Council of Europe. The principles enshrined herein have therefore not gained widespread general acceptance and cannot be said to have become a

[4] Council of Europe, Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine Apr. 4, 1997, E.T.S. No. 164 [hereinafter Convention on Human Rights and Biomedicine].
[5] Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364). [hereinafter Charter of Fundamental Rights].

part of the customary international law governing genome editing. The Oviedo Convention imposes on States to protect the dignity, identity and human rights of all human beings when it comes to application of biotechnology. The EU Charter is considered to be a part of the Founding Treaties of the EU and as such enjoys primacy over domestic law in case of any conflict amongst statutes or rules, as well as a direct effect, meaning that it can be relied upon by individuals directly before domestic courts.

The surge in biotechnology advancements surrounding human genome editing call for an international policy which establishes a regulatory mechanism for research into human genome editing and the limits of the application of any such research to human subjects. The paper aims to study the ethical and legal implications of human genome editing. To this end, the article begins by studying the laws dealing with human genome editing internationally and in select domestic jurisdictions. Subsequently, this article looks at the need for a comprehensive international legal framework governing human genome editing and institutionalised support for the same. Finally, this article makes suggestions as to how reforms can be brought about by suggesting changes to existing regulations, identifying gaps in regulations and providing recommendations for new regulation.

II. THE EXISTING LEGAL REGIME AND ITS INTERSECTION WITH HUMAN RIGHTS

The growing developments in the field of genetic modification have raised legitimate concerns regarding its application to human genome editing. The ethical and humanitarian concerns of the process have created hurdles in the further growth of the procedure as well as its acceptance by the public at large. It is hard to process the exact effects such modifications can result in because a genetically modified human genome can beget enumerable manifestations, which don't possess a set pattern and are rather unpredictable in nature. The results of such a science has not been truly fleshed out. However, this does not preclude its application in real-world circumstances as has already been undertaken in China in 2018 by Chinese biophysicist He Jiankui and his two colleagues Zhang Renli and Qin Jinzhou using the CRISPR-Cas9 technology.

With growing developments that bring fresh opportunities for experimenting, the application of human genome editing technology to real subjects has raised controversy not just in the scientific community but also in political and legal circles. The regulation of the practice has become the paramount concern and the existing international framework has been brought into question regarding its ability to control the consequences flowing from such real-world application. To answer this question, it is necessary

that we first examine the standards, both ethical and legal, by which human genome editing and its consequences shall be evaluated and the existing legal instruments which uphold these standards.

2. The International Scenario

The two primary international legal instruments that specifically address human genetic modification are the Oviedo Convention,[6] and the EU Charter.[7] It is in examining these instruments that we will be able to correctly address any gaps that remain unregulated in the use and application of genome editing technologies to human subjects.

3. The Oviedo Convention

The Oviedo Convention was the result of work of the Committee of Experts on Bioethics and the Council of Europe to confront the problems arising due to the advances in medicine and biology.[8] The Explanatory Report to the Convention addressed that even though they may start with worthy aims, the distortion of the original objectives of such procedures may have extensive

[6] Convention on Human Rights and Biomedicine, *supra* note 4.
[7] Charter of Fundamental Rights, *supra* note 5.
[8] Convention on Human Rights and Biomedicine, *supra* note 4, Explanatory Report.

ramifications that need to be managed at the outset.[9] The report also acknowledged that most of the ethical and legal efforts made to address the situation had, for the most part, become restrained to a certain geographical area and that it is apparent that an international instrument had become the need of the hour. Ratified by just 29 State parties, out of the 47 States that are members of the Council of Europe, the Convention is of regional application. Notably neither the United Kingdom ("**UK**") nor Germany have signed the treaty; nor has any technologically advanced non-member nor international organisation has signed or ratified the treaty.

The principles enshrined in the Oviedo Convention, while not yet accepted as customary international law yet, do merit scrutiny as they consolidate the accepted international standards with regards to biomedicine. The Oviedo Convention imposes upon signatory States the obligation to protect the dignity, identity and human rights of all individuals and take legislative action to enforce the same in the application of biomedicine.[10] It also enumerates that human life takes precedence over the interests of society and science.[11] The human genome is specifically addressed in Chapter IV of the Convention where discrimination on grounds of genetic heritage is

[9] *Id.*
[10] Convention on Human Rights and Biomedicine, *supra* note 4, Article 1.
[11] Convention on Human Rights and Biomedicine, *supra* note 4, Article 2.

prohibited.[12] The Convention addresses predictive tests that identify genetic diseases and predisposition to a disease and states that such tests may only be undertaken for health purposes or for scientific research.[13] Perhaps the most important provision is Article 13. This provision is important because it delineates widely accepted ethical principles that have become the foundation of human genome modification law. The three pronged approach given in the same, can be understood as follows:

1. The use of genome editing can be done only for preventive, diagnostic or therapeutic purposes;
2. Germline editing or editing that can be passed down to future generations is prohibited;
3. Research involving modifications of the genome is, however, not prohibited.

The Oviedo Convention also prohibits the creation of human embryos for the sole purpose of research along with monetary gain from the human body and its parts.[14] Thus, in this manner the Convention protects genetic material under its ambit. Article 28 imposes on State Parties, the duty to conduct public consultation before

[12] Convention on Human Rights and Biomedicine, *supra* note 4, Article 11.
[13] Convention on Human Rights and Biomedicine, *supra* note 4, Article 12.
[14] Convention on Human Rights and Biomedicine, *supra* note 4, Article 18 and 21.

laws are made for the application of such developments in biomedicine.[15] The four Additional Protocols to the Oviedo Convention prohibit the cloning of human beings, regulate transplantation of human organs and tissues, restrict the ambit of biomedical research and genetic testing to health purposes. The Convention and its Protocols are a landmark in the evolution of human rights and biomedicine. At the core, it essentially just sets up basic principles that protect human dignity and integrity in the application of human gene editing practices. It sets common standards and leaves the specifics up to the Member States to handle.

4. The EU Charter of Fundamental Rights

The EU Charter consolidates the fundamental rights enjoyed by the citizens of the EU into one legally binding document. The Charter imposes on States the obligation to protect the personal freedoms and human rights of individuals within the EU. It came into force in December 2009 and is meant to reaffirm the rights as taken from the constitutional traditions and international obligations common to the Member States. It also brings together the rights enshrined in the EU Treaties, the European Convention for the Protection of Human Rights and in the

[15] Convention on Human Rights and Biomedicine, *supra* note 4, Article 28.

precedents as set by the Court of Justice of the European Union and of the European Court of Human Rights.[16]

The Charter is binding on Member States of the European Union and enjoys supremacy over domestic laws when there arises any conflict. The first Chapter of the Charter which talks of right to dignity contains Article 3 which directly references biomedicine and its applications to humans. Article 3 states that:

1. "Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
    a. the free and informed consent of the person concerned, according to the procedures laid down by law;
    b. the prohibition of eugenic practices, in particular those aiming at the selection of persons;

[16] Convention on Human Rights and Biomedicine, *supra* note 4, Preamble.

c. the prohibition on making the human body and its parts as such a source of financial gain;

d. the prohibition of the reproductive cloning of human beings."[17]

The Commentary to the Charter explains that Article 3 of the Charter relies on the principles already proposed in the Oviedo Convention. It maintains that the right to personal integrity does not allow interference with the bodily autonomy of an individual and this includes medical treatment without consent.[18] Therefore, genome editing without the consent of an individual would violate their right to physical integrity.

The Explanatory Report provides that Article 3 of the Charter reiterates what has already been mentioned in the Oviedo Convention, and therefore, prohibits reproductive cloning. It also prohibits eugenic practices such as "campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court."[19] The term "*eugenic*" was left

[17] Charter of Fundamental Rights, *supra* note 5 Article 3.
[18] *Id.*
[19] Explanations (1) Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/02), https://eur-lex.europa.eu/legal-

undefined and the Commentary does not clarify the term. It, rather, references eugenic practices as carried out is Nazi Germany, Bosnia and Herzegovina and those recognized under the Rome Statute to give context for the use of the term.[20]

The drawback of the Charter is its limited scope of application. Article 51 of the Charter states that it applies "to the institutions, bodies, offices and agencies of the Union" and "to the Member States only when they are implementing Union law."[21] This means that only where there is already an existing Union law pertaining to genome modification will the Charter and the right protected therein be applicable.

5. Domestic Regulations from different States and their Practical Implications

In the last decade, the discussion on gene modification and methods of insemination has expanded as scientists across the world make contentious arguments on approval and benefits of gene editing. This has given rise to conflicts concerning the international framework falling somewhat

content/EN/TXT/?uri=celex%3A32007X1214%2801%29 [hereinafter Explanations].

[20] EU Network of Independent Experts On Fundamental Rights, Commentary of The Charter of Fundamental Rights of the European Union, June, 2006, https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf (Last visited Sept.14, 2021).

[21] Explanations, *Supra* Note 19.

short. The fragmented and non-specific system allows states to implement and undertake a variety of approaches when it comes to formulating their domestic regulations on genome editing.

Domestic regulations are scanty with most countries lacking the scientific know-how and the technology to have well-informed laws. The United States of America ("**USA**") is one key player, alongside China and the EU. The USA has no specific prohibition on research or methods of conducting gene editing. Rather, it is the funding limitations imposed that prohibits states to grant financial support to any research in human embryos without assessing and assuring that the risk level is low.[22] It does not explicitly ban genome editing, hence, allowing clinical development to take place with private funding and approval. The USA Food & Drug Administration ("**FDA**") has the authority to regulate drugs produced for genome editing.[23] The authorities have not, in any of their guidelines, stressed on support or clarity over the use of gene editing to be limited to disease prevention or treatment, hence broadening the scope of methods and gene editing with human interference. Although the US Supreme Court did speak on the patentability of gene-

[22] Omnibus Appropriations Act, Pub. L. No. 111-8, (Dickey-Wicker Amendment, 1996), Sec. 509 (a), 123 Stat. 524 (2009).
[23] Food and Drug Administration, Cellular and Gene Therapy Guidances,https://www.fda.gov/vaccines-blood-biologics/biologics-guidances/cellular-gene-therapy-guidances (Last visited Sept. 14, 2021).

editing, it did not touch the subject of validity or legality of gene-editing.[24] It must be noted that since the USA treats their domestic laws at par with international treaties, it is not of surprise that the topic of genome editing is restrictive and not completely banned.

It is important to understand that terms such as gene-editing, genome modification, germ-line editing and gene therapy are all part of the definition of genetic engineering. When it comes to the human gene modification, the scientific approaches are so far limited to the modification of embryos in most countries unlike Russia, wherein a certain ambiguity exists as to gene editing in humans. It doesn't prohibit human genome editing but prohibits biomedical interference with creation or development of the embryo.[25]

Israel, on the other hand, has completely prohibited the practice of genetic modification on humans since these are considered to be morally and scientifically implicating the human dignity. They have in place the 'Prohibition of Gene Intervention (Human Cloning and Genetic

[24] Association for Molecular Pathology v. Myriad Genetics, 133 S.Ct. 2107 (2013).
[25] Federal Law on Biomedical Products, Jun. 23, 2016, No. 180-FZ (Russ.).

Manipulation of Reproductive Cells) Law', specifically prohibiting gene-editing in reproductive cells.[26]

On the other approaches of the world, countries such as China, India and Japan have non-binding guidelines which place a ban over the methods of genome editing in humans but are legally unenforceable. The National Bioethics Committee[27] and Central Ethical Committee[28] guidelines are responsible for the genetic regulations in India. The guidelines issued by them imply two fundamental considerations to be kept in mind, first being the present knowledge in science and second being the level of risk the method or practice imposes while engaging in such a process.[29] The stem cell research guidelines[30] allow permissibility on a case-by-case basis for genetic manipulation in areas of research, and have several ethical and scientific restrictions under the non-binding guidelines. It is known that India is not part of the Oviedo

[26] Prohibition of Genetic Intervention (Human Cloning and Genetic Manipulation of Reproductive Cells) Law, 5759-1999, art. 3, SH No. 1697, p. 47 (Isr.).

[27] National Guidelines for Gene Therapy Product Development and clinical Trials (2019). Available at https://www.nhp.gov.in/NHPfiles/guidelines_GTP.pdf Last seen on 14/09/2021.

[28] INDIAN COUNCIL OF MEDICAL RESEARCH, NATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL AND HEALTH RESEARCH INVOLVING HUMAN PARTICIPATION (Roli Mathur, ed., 2017), (Last visited Sept. 14, 2021).https://main.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf (Last visited Sept. 14, 2021).

[29] INDIAN COUNCIL OF MEDICAL RESEARCH, ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH ON HUMAN SUBJECTS (ICMR, 2006), http://www.icmr.nic.in/ethical_guidelines.pdf.

[30] *Supra* note 25 and 26.

Convention and has no binding restrictions in place which makes it even more difficult to have records and supervision over such activities. On the other hand, with the same non-binding guidelines Japan has an express prohibition on human, animal embryos genetic interference.

The most legally forward stand is taken in the case of Mexico where the laws criminalize genetic intervention, with penal punishments.[31] The scientific and research exception is to be in accordance with the laws and any illicit or illegal act by a person will qualify for criminal activity.[32] Australia is similar in the sense of an action-based approach. The state has domestic criminal laws in place for cloning as a method of reproduction under which it penalizes the offense of gene alteration.[33] It has also criminalized the trading of embryos as per the requirements under the provisions.[34] That being said, most of the EU powers such as France[35] and Germany[36] have also classified, as per their requirement, gene-editing or

[31] Art. 7, CÁMARA DE DIPUTADOS DEL H. CONGRESO DE LA UNIÓN, LEY GENERAL DE SALUD, http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_General_de_Salud.pdf (Last seen on 14/09/2021).
[32] *Id*, Art. 103 bis 5.
[33] *Prohibition of Human Cloning for Reproduction Act 2002* (as amended 2008) (Cth) art. 15 (Austl.).
[34] *Id,* Art. 20.
[35] CODE PÉNAL [C. PÉN.][PENAL CODE] art. 214-1 (Fr.).
[36] EMBRYONENSCHUTZGESETZ [ESCHG][EMBRYO PROTECTION ACT], https://www.rki.de/SharedDocs/Gesetzestexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile (Ger.).

genetic alteration of human reproduction process as a criminal offense. The domestic law approaches are changing with different jurisdictions, genetic modification being the next most anticipated medical research area as seen in scientific discussions. It becomes more and more prominent that there exists a need for an international mechanism for genetic engineering that could provide the nations with guidelines and ideas that they can apply as per their domestic standards and implement them while keeping up the balance between scientific studies and human rights. One must emphasize on the urgent need for addressing these issues and securing the human rights.

6. Gene-Editing and the Issue of Human Rights and Ethics

The interest of the international community was at its peak when He Jiankui made the world aware of his experiment of gene-edited babies in 2018. This made a drastic impact on China's efforts and the international forums which obliviously led to scientists propagating for a global framework. Genome editing is viewed from two sides – the scientific and the ethical. The main goal is to provide the freedom for science and research to take place without violating anyone's rights but the question to consider is what exactly constitutes violation and how can people be secured, and their grievances remedied.

In Mexico, the case of a baby from three parents raised concerns on the issues of ethical standing and limitation of legislations domestically and internationally in 2016. Here, it was the first baby born after a mitochondrial replacement technique, but this was only possible after the federal regulations were broken by the scientists.[37] It wasn't too long before the advancement of heritable genome editing in 2018 initiated a discourse on the capability of this particular technology and its development. It called together a group of experts from both science and legal fields to collaborate and produced a report recommending consideration for safety and efficacy in genome editing and a mechanism of legal oversight for assurance of state and person's accountability. Several risk factors and consideration of element of human health before pursuance with any method of gene modification interference have been emphasized in the 2020 report on *Heritable Human Genome Editing*.[38] While tremendous efforts have been taken by the panel to push the legalisation for methods of genetic engineering in humans, the human element in itself prompts many issues relating to the level of protection for human rights including the

[37] Palacios-González et. al, *Mitochondrial replacement techniques and Mexico's rule of law: on the legality of the first maternal spindle transfer case* 4 J. LAW BIOSCI. 50 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570699/ (Last visited Sept. 14, 2021).

[38] NATIONAL ACADEMY OF MEDICINE ET. AL,, HERITABLE HUMAN GENOME EDITING (National Academies Press, 2020).

right to information and privacy, all of which can't be contractually waived off.

The context in which human rights are being inferred is the aspect of physical integrity, although the main conflict is with respect to the protection of such rights of a person at the time of and after birth. The question of rights of the embryo and of the violation of said human rights is a key debate in regulating genome editing. Hence, it becomes even more urgent to address the interpretations and the extent of application of human rights in the area of gene editing. The point of worry for the human rights framework is somewhere in the middle of these arguments. The Oviedo Convention, at the time, was a major milestone in the development of biomedicine law. Even though its signatories were few, the principles enshrined in the Convention have come to be the bedrock for modern jurisprudence regarding human genomics. The shortcoming of the Conventions was its limited application with states such as UK, USA, Russia, Germany, Japan, Australia, who possess advanced scientific and rising technologies to access genetic engineering, not becoming signatories to the treaty.[39]

Human rights are integrated to be a part of every legislation all over the world and even then, there is so much more to

[39] Convention on Human Rights and Biomedicine, *supra* note 4.

be learned as to what is to be understood as human rights. It is an evolutionary process of inclusion of many unknown rights and so as the world moves towards advancing in different fields, varied forums need to work collectively in safeguarding individual human interest along with public interest. Human dignity, as we know it, forms the basis of the majority of human rights. The same is reflected in the conventions mentioned in this paper and this is the reason for reluctance from the states in regularisation by allowing human gene-editing. The courts from different jurisdictions have something similar to address, in Germany, the federal constitution court held that the form of life doesn't need to be aware of dignity attested to it, it exists from the moment life is formed.[40]

The ethical complexities and severity lies with the uncertainty gene editing brings, the long term effects would have to be monitored for clinical research. It is important to remember that gene editing will be a business opportunity directly falling under the prospect of both business and human rights where the interest will be weighed against the insurance and contractual obligations which are all together against the core of human rights. There is a basic deductive theory which proposes the

[40] Bundesverfassungsgerichts [BVerfGe] [Federal Constitutional Court] Feb. 25, 1975, BVerfG, Order of the Second Senate of 28 May 1993 - 2 BvF 2/90 -, paras. 1-434.

consequences of allowing one form of genetic engineering in humans would eventually lead to the evolution of another. The theory is known as the slippery slope argument. The theory elaborates upon the consequences of creation and evolution through a chain reaction by performance of an act in genetic interference, "if one form is allowed the other will soon follow".[41]

In India, researchers such as Pandya have pointed out such violations of the right of genetic inheritability by generations of unconsented participation of embryo involved in trial, usage of alteration methods not associated with treatment and an open door for experiments.[42] There are several challenges with genetic modifications in humans, whether that be the right to physical body, human dignity, privacy, racial and generational equity. The impact of gene-editing will initiate action on a person's life just after they are born. One of the other ethical and human rights factors is that of informed consent; people having the right to know of the implications and effect on health before and during the process, having the right to free themselves from the same if genetic engineering is ever allowed. Human rights waivers may even become a part of settlement agreements amongst parties which itself stand

[41] T. McGleenan, *Human Gene Therapy and Slippery Slope Arguments,*21 J. MED. ETHICS 350 (1995).
[42] S.K Pandya, *Ethical Aspects of Clinical Trials in Gene Therapy*, 8 ISSUES MED. ETHICS 122 (2000), https://pubmed.ncbi.nlm.nih.gov/16323376/ (last visited May 26, 2021).

as a violation of the standards of human rights as we know today.

III. CHALLENGES TO EFFICIENT GOVERNANCE OF GENOME EDITING

There are significant challenges to overcome before an effective international regime governing genome editing and its application can be formulated. The process of getting States to sign and ratify such a regulation will be a herculean task in itself. This is why it is crucial that the intricacies of the technological and scientific aspects of the gene editing process is carefully and completely laid down before the States are even brought to the table. There are significant hurdles that prevent the current regulations from being efficient tools in the governance of genome editing.

1. The Uncertain Terminologies

The problem with regulating a nascent science is the unpredictable nature of its results. This is the case with genome editing. There have been innumerable efforts made to formulate a law regarding the science but the primary hurdle is the vagueness of the definitions. Take for example the EU's Biotech Directive which mentions 'germline genetic identity' and prohibits patenting of the process for modifying the same as well as those for cloning

of human beings.[43] The term itself is ambiguous. It is also uncertain how a germline intervention shall affect the genetic identity of the individual in the future. The prohibition does not specify whether all germline interventions are covered by the provision or only the ones that affect identity or pre-determined characteristics of future individuals.[44]

The scientific process in itself is so complex and has various facets that use vague terminologies in regulatory frameworks and are bound to give rise to future conflicts. The process of Human Nuclear Genome Transfer ("**HNGT**"), for example, is different from gene editing. Therein the dysfunctional mitochondrial DNA is replaced by healthy mitochondrial DNA.[45] It can be argued that HGNT would not fall under the ambit of the above-mentioned provision as it does not affect the genetic identity of an individual. However, it still comprises modification of the person's DNA and "is not substantively different from modification of the nuclear DNA in terms of its effects on the identity of the future

[43] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.7.1998, p. 13–21, 40.

[44] Bredenoord AL et. al., *Ethics of Modifying the Mitochondrial Genome*, 37 JOURNAL OF MEDICAL ETHICS 97 (2010), https://www.researchgate.net/publication/47755512_Ethics_of_modifying_the_mitochondrial_genome/link/0f317536b95743b325000000/download(last visited Sept. 14, 2021).

[45] Falk et. al., *Mitochondrial Replacement Techniques — Implications for the Clinical Community,* 374 N. ENGL. J. MED. 1103 (2016).

person."[46] However, countries have created significant distinction between how both of the process are regulated. While in the UK[47] editing of nuclear embryonic DNA is banned, the same ban does not include nuclear mitochondrial DNA as used in HGNT.[48] This ambiguity is not limited to the above-mentioned countries. This advanced process has given rise to the application of HGNT procedures on humans resulting in many 'three parent babies' being born around the world with the first baby being born in 2016.[49]

Similarly, other terms remained undefined leading to a wide scope being given to the laws. The term "eugenic practices" as mentioned in the EU Charter, discussed above, lends to the understanding that only organized 'selection programs' involving a large number of people shall be considered a eugenic practice and not that of individuals who voluntarily undertake such reproductive methods. The same provision contains the words 'among others' which also indicates that there are a variety of eugenic practices that have not been mentioned in the

[46] A.L. Bredenoord et. al., *Ethics of Modifying the Mitochondrial Genome,* 37 JOURNAL OF MEDICAL ETHICS 97 (2011).
[47] The Human Fertilisation and Embryology Act 2008, c. 22, Section 3 (UK).
[48] The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, SI 2015/572, Explanatory Note (UK).
[49] Jessica Hamzelou, *Exclusive: World's First Baby Born with New "3 Parent" Technique*, NEW SCIENTIST, Sept. 27, 2016, https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/ (last visited May 26, 2021).

Charter giving rise to uncertainty. There is also a question of ethical objections raised by third parties. If parties undertaking the procedure give informed consent, such third-party objections should have no legal ground.

Even the terms 'clinical trials' and 'subjects' have raised considerable debate. This is because the EU law centres on the 'subject' of the clinical trials. Scholars argue that germline editing is performed on embryos and not persons, because of which, it does not qualify as a clinical trial.[50] Objecting to this, is the argument that it is not the rights of the embryo that are in concern, rather the rights of the individual that shall be born of such procedure should be the subject.

2. Overcoming the Existing Legislative Structure

Regulatory differences exist as countries have different methods of approaching each issue. When it comes to making laws, countries formulate them keeping in mind the risk level involved.[51] In the United States, drug regulations are treaties with the same level of risk for all

[50] NUFFIELD COUNCIL ON BIOETHICS, GENOME EDITING AND HUMAN REPRODUCTION: SOCIAL AND ETHICAL ISSUES (Nuffield Council on Bioethics, 2018), https://www.nuffieldbioethics.org/assets/pdfs/Genome-editing-and-human-reproduction-report.pdf (last visited Sept. 14, 2021).

[51] R. Alta Charo, *Legal and Regulatory Context for Human Gene Editing,* 32 ISS. SCI. TECH. (2016) https://issues.org/legal-and-regulatory-context-fhuman-gene-editing/ (last visited May 26, 2021).

drugs whereas when it comes to clinical trials, there is efficacy and safety levels considered before regulations are placed and all are detrimental to the fact 'what does the states consider as low, medium or high risk?'. As discussed before, some consider genome modifications as high risk while others treat it as medium.[52] The major issues are regulations permitting gene editing, the ambiguity of present regulations which exists over its scope of use on human genome and therapeutic purposes which definitely needs to be addressed with authority.

To this extent, it is to be noted that approach to structural changes in genetic reforms is differing among states with some states such as Mexico and France providing penal provisions for violations whereas some, such as UK and USA consider them as just violations of guidelines with no human rights security. Getting states to agree on the same lines of penalisations and protection would only be possible by establishing the same understanding of risk level as uniformly as possible. One of the other things associated is privatisation, which can result from stopping state funds for this purpose as it leaves the door open for the private sector to invest. States have vague regulations such as the National Guidelines given by the Indian medical council for Research in India and its counterpart

[52] The Regulations on Administration of Human Genetic Resources, July 1,2019 (China).

in the UK that don't clearly prohibit private funding for clinical trials and research. Heath care is one of the biggest sectors that involves a lot of keeping up when legislations are to be implemented and states not having bioethical restrictions in their laws serves to form loopholes that allow for breakthroughs.

3. Criminalisation and Accountability

The major challenge is the degree of crime to determine if ethical and human rights are violated in genetic modifications. Even after assessing and establishing the risk factor,[53] the states would be conflicted with criminalisation as the classification of illegal practices have lesser implications when weighed-in against human rights violations. Scientific methods such as gene editing require complete technological and financial support, and that would require the states to implicate even those stakeholders as offenders who are involved. This would require for states to enter into bilateral treaties for cooperation since investors could be from any other states, and to hold them accountable under one countries legislation without it being an offense in another is highly unlikely without an understanding between the countries' themselves. Take for example the case cited of the first 'three-parent baby' born to Jordanian parents treated by a

[53] *Id.*

US-based team in Mexico. Therein, the stakeholders have three distinct nationalities and their consequent jurisdictions have differing levels of accepted standards when it comes to human gene editing. Finding and establishing a regime with accountability of cross-border stakeholders would again become challenging without an international regime directing for accountability and state cooperation.[54] It would require changes in the extradition acts and treaties amongst nations that could possibly take years after getting legislations approved in their own nations. Some countries could see this as a possible limitation towards advancing science and not implement any regulations as they have done till date due to lack of understanding and uncertainty.

IV. A PROPOSED SOLUTION

The revision of the existing frameworks seems to be the need of the hour with many people from the scientific communities calling for significant reform. Keeping in mind the human rights concerns, the laws must be revised and the bans and moratoria need to be reconsidered. It calls for an international regime to be established which learns from the short comings of the existing laws to gain widespread acceptance.

[54] Xiaomei Zhai et. al, *No Ethical Divide Between China and The West In Human Embryo Research*,16 DEV. WORLD BIOETH.116 (2016).

1. Prohibition v. Regulation

There is consensus among the scientific community that an international treaty that bans all clinical use of germline editing, like the Oviedo Convention, is not desirable.[55] This would be a restrictive and rigid path. Rather the focus should be on effective governance of the technology. While bans work for the moment, they should be lifted when the clinical requirements are met. This presupposes that extensive research is facilitated by the States which is closely monitored so as to ensure that safe methods are undertaken. This means that provisions like Article 18 of the Oviedo Convention which prohibit creation of embryos for research purposes must be scrapped. When safety and clinical requirements are met, the bans and moratoria must be lifted. To ensure safe practice, the regulations must contain provisions that state that gene editing processes can only be undertaken for therapeutic purposes much like the Oviedo Convention. These purposes must be clearly defined and must exclusively include elimination of serious genetic diseases and conditions. Other non-medicinal uses like for aesthetic purposes must remain prohibited. The regulations must be explicit to ensure the same. The method of public

[55] E.S. Lander et. al., *Adopt a Moratorium on Heritable Genome Editing*, Nature, Mar. 13, 2019, https://www.nature.com/articles/d41586-019-00726-5(last visited Sept. 14, 2021).

consultation must be resorted to determine the requirements for allowing reproductive gene editing in humans. These public debates can weigh the human rights issues of the processes as well.

2. The Distinction between Treatment and Enhancement

The argument for a progressive legal regime for human genome editing seems logical when it allows for the application of the technology for therapeutic processes and to prevent diseases. Most of the existing regimes also ban genetic modification for 'enhancement' of any type. Here it becomes very important that a clear distinction between treatment and enhancement is established.

This should not be a hard task to accomplish. As mentioned most existing laws ban genome editing where it alters genetic identity or is used for eugenic purposes. A similar approach has already been successful in the case of non-invasive prenatal testing and pre-implantation genetic diagnosis where the doctors can test embryos "to identify genetic abnormalities in embryos created through in vitro fertilization ("**IVF**") before pregnancy."[56] The said process is undertaken according to predetermined medical

[56] Molina Dayal et. al., *Preimplantation Genetic Diagnosis: Overview, Indications and Conditions, Process*, Medscape, Aug. 29, 2018, https://emedicine.medscape.com/article/273415-overview (last visited May 26, 2021).

guidelines and a regulatory framework that so far has created no issues.

However, the process is vastly different from human genome editing. There is more of a risk involved with gene editing such as introduction of genes that have never been observed in humans as has been done in the case of the Chinese genetically modified babies. The aim therein was to create babies resistant to HIV rather than to cure a disease. Therefore, it becomes necessary that whichever regulation is formulated defines explicitly the terms "serious disease or condition" as well as "therapeutic purposes."

3. Attachment of Liability

Gene-editing is progressive and a risk driven practice, one that will have impact on both social and health evolution. There is still much to be learned about it scientifically for therapeutic purposes itself, yet there are few extremist scientists such as the ones involved in the Mexico and China cases who initiate experiments in the stages that are non-therapeutic, especially for genetic identity engineering in embryos. Hence, calling for enthusiasm to participate in activities and trials, endangering life of people and encouraging others in that same sense. Since the 2020 report, there were a few recommendations made by the panel and the major call was for states to have an

international mechanism to guide them. Also having an established panel of international scientific advisors to monitor such activities. Although, all these are suggestive towards the presumption of being allowed to carry out HHGE in states.

One thing is true, there needs to be an address through international community in the form of another convention that regulates and provides binding consequences and provisions for criminal investigation by an established panel for this specific task and which will ensure a higher standard of security to the public and practitioners. The regulatory responsibility should be with this panel, being branched out in partied states assisting in domestic legal frameworks' formation and implementation. Having experts from social, scientific and legal fields from States to act in accordance of the convention having to report back annually, the progress and events to the main panel of the UN.

The safe development of genome research invariably is through the medium of legislations that can govern in accordance with human rights and yet allow for scientific advances to be experimented. The balance can only be achieved, when like any other offense, these violations of regulations carry severe consequences. If a panel is set up to deal with the specific purpose of recognising genetic editing not in accordance with the convention or those not

for approved purposes like therapeutic, disease prevention or treatment to save lives, then discrepancies in law and execution can be corrected instantly. This will ensure that practices of human gene editing outside the ambit of existing legislations is declared illegal and appropriate penal punishments for human rights violations are issued.

V. CONCLUSION

The modification of genetic identity is a daunting reality. There has been much resistance to the developing technology with many countries placing complete bans on the use of gene editing in the case of humans. The primary concern has been how such procedures can violate human rights of the person born out of such experiments. The human genome editing process used for reproduction is said to be against human dignity and freedom. Understandably, society has been vary of such technology being used to undertake eugenic practices and make "*designer babies*."

CRISPR has gone into wide use and application since then, as more and more individuals have become aware of the availability of such technologies. The existing frameworks, that once were cutting edge, seem outdated now. Since the technology is now readily available, the bans and moratoria have been unable to stop those curious, daring and industrious deviants who experiment. Today the generally

accepted standard for application of gene editing to humans is for therapeutic purposes and with a preventive aim.

The only approach is one centred on human rights. Both the human right to dignity as well as that to benefit from scientific advancement and research should be the goal of a regulatory framework designed for the governance of human gene editing. The human rights discourse will facilitate the development of an ethical perspective to a science which has the potential of having an extraordinary impact on the future of humanity.

It is widely accepted that there exists a distinction between human germline editing for therapeutic and non-therapeutic purposes. Thus, there exists a place where the application of human gene editing shall be in consonance with human rights laws, i.e., to prevent serious diseases and conditions. All that remains is to make an international regulation that takes all these suggestions into consideration to achieve a law that aids the scientific process and does not hinder it. Rarely do complete prohibitions inhibit the curious minds who wish to undertake such processes. The best we can do is to make a regulation that defines what is permissible and what is not as well as attaches liability to those breaking such rules. The establishment of international governing authority will also aid in overlooking this burgeoning field in its early

days. While it may seem that human rights and gene editing shall forever remain at loggerheads that may not necessarily be the case. Human rights, like its subjects, are living principles evolving with time and circumstance. Gene editing is just one such circumstance.

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