

EDITORIAL NOTE

*Chandrika Bothra & Ravi Shankar**

Volume 13(1) occupies a special place in the lineage of the NUJS Law Review. All the articles featuring in this issue have been published amidst the COVID-19 pandemic. This required us to fulfil our editorial responsibilities in the qualified comfort of our homes, under stringent lockdowns stipulated by the Government. For us, the experience of working for the journal remotely has given us an insight as to how the NUJS Law Review, as an institution, transcends the physical precincts of the college campus into something much broader, more ethereal, and perhaps more enduring. This insight holds true not just for the NUJS Law Review, but also for institutions across the legal fraternity, such as courts,¹ tribunals,² law firms,³ and even universities.⁴ With the justice delivery system being under heavy duress due to the COVID-19 pandemic, these institutions have all transitioned to function remotely in order to eliminate the use of their physical infrastructure. Such a transition has only been possible because of the motivated adoption of internet and technology.

Depending on technological innovation to adapt to the challenges mounted by the pandemic almost seems paradoxical in the Indian context. We are after all, a country grappling with an astronomical degree of poverty and inequality. Equitable access to justice has been a formidable challenge that has haunted our legal system throughout its history. In such a paradigm, the technological drift of Courts would arguably be to the detriment of the marginalised. However, it would be difficult to unearth any other solutions that could achieve even a semblance of a balance between the spatial exigencies levied by the pandemic and the accessibility of courts to the public.

* Members: Board of Editors, NUJS Law Review.

¹ In Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic (April 6, 2020), ¶6.

² Suo Motu, In re, 2020 SCC OnLineNCLAT 206.

³ BAR & BENCH, *Coronavirus: India's Law Firms Allow Work from Home; Updates from JSA, Trilegal, Khaitan, Veritas, CAM, AZB, SAM, C&M, S&R, ELP, Vertices*, March 16, 2020, available at <https://www.barandbench.com/news/coronavirus-indias-law-firms-are-allowing-work-from-home-updates-from-jsa-trilegal-khaitan-sam> (Last visited on June 18, 2020).

⁴ ASIAN NEWS INTERNATIONAL, *Top 100 Indian Universities to Start Online Courses: UGC Chairman*, June 11, 2020, available at <https://timesofindia.indiatimes.com/home/education/news/top-100-indian-universities-to-start-online-courses-ugc-chairman/articleshow/76326054.cms> (Last visited on June 19, 2020).

The willingness to constructively usher in technological reforms is visible in the highest echelons of the judiciary. Courts in India have not been averse to the conception of using technology. In the past, the Supreme Court,⁵ as well as various High Courts have made use of video conferencing facilities.⁶ However, the use of the same has been limited to recording evidence and has not extended to conducting hearings, allowing e-filing and even broadcasting proceedings live like in current times. On April 6, 2020, in exercise of Article 142 of the Constitution of India, the Supreme Court stressed on the need to adapt to video conferencing to conduct hearings during the pandemic and issued directions to the same effect.⁷ During an online demonstration of the Supreme Court’s ‘e-filing’ module, Chief Justice Bobde emphasized the need for the Courts to curate a new working environment to keep pace with the extraordinary circumstances at play.⁸ He further underscored the need for technological solutions to be simple, inclusive, and inexpensive.⁹ In the same vein, Justice Chandrachud, the Chairman of the Supreme Court’s E-Committee, imaginatively affirmed that “we must enhance our TEST values, where T stands for trust, E stands for empathy, S for sustainability and T for transparency.”¹⁰ The seamless adoption of technology for the functioning of courts is not only limited to the Supreme Court, but also has been taken up by various High Courts across the country.¹¹ While there are sizeable hurdles that still remain in achieving a full transition to the virtual system of functioning of the judiciary, all in all, such a system, though necessitated by access related issues unleashed by the pandemic, has made justice more accessible to the masses. The COVID-19 pandemic appears to have finally elicited a wave of long-awaited technological reforms at the Courts – most of which are expected to outlast the pandemic.

The rapid technological disruptions appear to be a distinctive feature of life in a pandemic. AarogyaSetu, a ‘contact tracing’ app created by the Government to track down those infected with the virus,¹² has swiftly become a

⁵ State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601; Mahender Chawla v. Union of India, (2019) 14 SCC 615; Santhini v. Vijaya Venketesh, (2018) 1 SCC 1.

⁶ International Planned Parenthood Federation (IPPF) v. Madhu Bala Nath, 2016 SCC OnLine Del 85.

⁷ In Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic (April 6, 2020), ¶6.

⁸ Soni Mishra, *Supreme Court Unveils E-filing Module to Facilitate Online Filing of Cases*, THE WEEK, May 15, 2020, available at <https://www.theweek.in/news/india/2020/05/15/supreme-court-unveils-e-filing-module-to-facilitate-online-filin.html> (Last visited on June 19, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Registrar General of the High Court of Telangana, Directions Issued by the Hon’ble Supreme Court with regard to Video Conferencing Guidelines during COVID-19 Lockdown, ROC NO. 394/SO/2020/SCI ORDER (Notified on April 7, 2020).

¹² MyGov, *Aarogya Setu Mobile App*, available at <https://www.mygov.in/aarogya-setu-app/> (Last visited on July 22, 2020).

EDITORIAL NOTE

common place among the citizens, public health workers, employers, and places of commerce.¹³ With ‘work-from-home’ becoming the new normal, a litany of video conferencing applications have emerged in the market for facilitating a newer working environment, analogous to what Chief Justice Bobde alluded to above.¹⁴ The emergence of these novel applications in the backdrop of COVID-19 implies novel constitutional concerns.¹⁵ The introduction of the AarogyaSetu was met with vigorous arguments contesting its legality and mandatory nature.¹⁶ There are good reasons to believe that the adverse response of the legal fraternity towards the application propelled the Government to relax its policy by not making the app mandatory anymore.¹⁷ This concession however in no way resolves the deeper constitutional questions at the heart of AarogyaSetu. These questions primarily revolve around the fundamental right to privacy recognised in the seminal case of *K.S. Puttaswamy v. Union of India*.¹⁸ Owing to its extensive personal data requirements and surveillance capabilities, it is not an unfounded belief to expect the AarogyaSetu app to become the next frontier on which the right to privacy shall be contested.

Although work-from-home is most certainly a luxury many of us in the legal fraternity have the privilege to enjoy, we must acknowledge the troubling humanitarian crises that have been unfolding contemporaneously over the last few months. The migrant labour crisis is a somber illustration of how the pandemic can summarily render a significant portion of India’s workforce desolate – stranded far away from their homes with no employment or income.¹⁹ The plight of our college staff and those running their small businesses in the premises of college mirrors

¹³ INDIAN EXPRESS, *Unlock 1.0: What Changes for You in Malls, Religious Places from Today*, available at <https://indianexpress.com/article/india/unlock-1-0-coronavirus-guidelines-malls-religious-places-6447443/> (Last visited on June 19, 2020).

¹⁴ Suhita Roy, *Will Work from Home be the New Normal for India?*, ECONOMIC TIMES, May 8, 2020, available at <https://economictimes.indiatimes.com/small-biz/sme-sector/will-work-from-home-be-the-new-normal-for-india/articleshow/75592738.cms?from=mdr> (Last visited on July 22, 2020).

¹⁵ Andrew Clarence, *AarogyaSetu: Why India’s Covid-19 Contact Tracing App is Controversial*, BBC, May 15, 2020, available at <https://www.bbc.com/news/world-asia-india-52659520> (Last visited on June 18, 2020).

¹⁶ Megha Mandavia, *New Plea in Kerala HC against AarogyaSetu App*, ECONOMIC TIMES, May 11, 2020, <https://economictimes.indiatimes.com/news/politics-and-nation/new-plea-in-kerala-hc-against-aarogya-setu-app/articleshow/75676487.cms?from=mdr> (Last visited on June 19, 2020).

¹⁷ Neetu Chandra Sharma, *Government Climbs Down on AarogyaSetu by Removing Mandatory Provision*, LIVE MINT, May 30, 2020, available at <https://www.livemint.com/news/india/government-climbs-down-on-aarogya-setu-by-removing-mandatory-provision-11590850319300.html> (Last visited on June 19, 2020).

¹⁸ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹⁹ Harish Pullanoor, *The Internal and External Migrants, Together, Pose a Refugee Crisis that India is Ill- Prepared for*, THE PRINT, May 19, 2020, available at <https://theprint.in/theprint-profile/indias-battling-its-biggest-migrant-labour-crisis-and-labour-minister-gangwar-is-missing/425693/> (Last visited on June 20, 2020).

such tribulations. This beckons us to examine the humanitarian and economic fallout through the lens of the law.

On a daily basis, courts have been facing consequential questions that has necessitated adjudication on critical issues such as the price of the testing kits,²⁰ the payment of wages,²¹ the availability of buses,²² among several other issues. The orders passed by the Courts have drawn passionate responses from the legal fraternity, especially via legal blogs and social media. The arguments feature an eclectic mix of constitutional law, jurisprudence, and administrative law, amongst others. A close inspection of the discourse however, reveals something quite unsettling. Regardless of how consequential the issues at hand are, the arguments seem to be founded upon a terrain of uncertainty. This is principally because of the unpredictable and unprecedented scale of the pandemic, which casts a long shadow upon any debate that seeks to conclusively answer ascertain any question of law.

The invocation of the Disaster Management Act, 2005 and the Epidemic Diseases Act, 1897 coupled with the constraints imposed by the pandemic seem to have left us in a condition of unfamiliarity with the legal landscape. The extensive powers bestowed upon the executive under the above statutes have guaranteed that the orders passed by the courts under judicial review are viewed with a degree of skepticism, since they ostensibly involve the Court entering the domain of policy-making.²³ However, the lack of parliamentary or legislative accountability on the executive, owing to aforementioned statutes, leaves the judiciary as the only institution capable of holding the actions of the executive accountable.²⁴ The judicial review of courts often acts as a ‘dialogic’ process - where the levers of the State, the Court, and the citizens engage in a dialogue that would explore the decision-making rationale. This process could then lead to better decision-making since errors of the State are open to scrutiny and are more transparent to the public.²⁵ While such a view could account for questions related to contest

²⁰ NDTV, *Supreme Court Calls for “Uniform Fee” for COVID-19 Testing Across India*, June 19, 2020, available at <https://www.ndtv.com/india-news/coronavirus-supreme-court-says-there-should-be-uniform-fee-for-covid-19-testing-across-the-country-says-centre-can-fix-upper-limit-2248869> (Last visited on June 20, 2020).

²¹ *Ficus Pax (P) Ltd. v. Union of India*, 2020 SCC OnLine SC 503.

²² *Suo Motu v. State of Gujarat*, 2020 SCC OnLineGuj 718.

²³ See Gautam Bhatia, *Coronavirus and the Constitution –XVIII: Models of Accountability*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, April 16, 2020, available at <https://indconlawphil.wordpress.com/2020/04/16/coronavirus-and-the-constitution-xviii-models-of-accountability/> (Last visited on June 20, 2020).

²⁴ *Id.*

²⁵ Gautam Bhatia, *Coronavirus and the Constitution –XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 24, 2020, available at <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii->

EDITORIAL NOTE

between the judiciary and the executive, it does not answer the substantive legal and constitutional concerns of the nature referred to above. Such questions, at this juncture at least, remain unanswered by the Courts and are suspended in a state of uncertainty.

Major pandemics throughout history have been known to trigger abrupt, lasting changes in society.²⁶ Presently (a term whose notions alter drastically by the hour), the unprecedented adoption of technology in governance and commerce appears to be the mode in which the society seems to be evolving.²⁷ What must also be acknowledged is that there is no clarity as to the time line of the pandemic. It appears that the worst is still ahead of us. Restrictive measures that were originally envisaged to be stopgap solutions have now become integral rules around which our lives are structured.²⁸ This leads us in the NUJS Law Review to ask ourselves what the future of the journal looks like. Our answer to this question is surprisingly optimistic, contrary to the tenor of much of this note.

We believe that at its essence, academic writing is an endeavor to interrogate uncertainty. It is an exercise that asks questions that haven't been asked before; a pursuit of answers that have so far remained unanswered. The consequences of undertaking such an exercise are incredibly rewarding; quality scholarship is employed by the courts, governmental bodies, NGOs and activists to frame informed, comprehensive policy and ensure the due recognition of rights. The unprecedented nature of the pandemic necessitates an interrogation of the law in a way that has never been done before. The NUJS Law Review could therefore prove to be an avenue for pioneering scholarship in the months or years ahead. It is an ordained responsibility for our journal to produce quality scholarship, particularly during testing times such as these. With an editorial board and a dedicated team of associate members spread across the country, we believe we can live up to the high standards that we set for ourselves, building upon the valuable contributions from the authors and the previous editorial boards. Keeping up with our commitment of advancing quality scholarship in Indian we present to you these six quality articles in the current issue.

dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/ (Last visited on June 20, 2020).

²⁶ John Gray, *Why this Crisis is a Turning Point in History*, NEWSTATEMENT, April 1, 2020, available at <https://www.newstatesman.com/international/2020/04/why-crisis-turning-point-history> (Last visited on June 20, 2020).

²⁷ See Seth Colaner, *AI Weekly: The Sudden Speed of Technological Change in a Coronavirus World*, VENTURE BEAT, April 10, 2020, available at <https://venturebeat.com/2020/04/10/ai-weekly-the-sudden-speed-of-technological-change-in-a-coronavirus-world/> (Last visited on June 20, 2020).

²⁸ See *supra* note 13.

Pratik Datta, Varun Marwah and Ulka Bhattacharyya, research fellows at the New Delhi office of Shardul Amarchand Mangaldas & Co, in their article *'Resolving Financial Firms in India: The Way Forward'* map the legal framework on the resolution of Financial Service Providers ('FSP') in India. They do so by contextualising the theoretical set-up surrounding the Financial Resolution and Deposit Insurance Bill, 2017 ('FRDI Bill') as well as the Insolvency and Bankruptcy Code, 2016 ('IBC') in light of its application to Non-Banking Finance Companies and Housing Finance Companies. They argue that while provisions in the IBC are apt for companies in the real estate sector, they are not equipped to seamlessly address specific issues arising out of resolution of FSPs owing to their unique attributes. They further examine the suitability of various global standards of FSP resolution to the Indian legal framework and conclude by recommending the need to revise the previously withdrawn FRDI Bill as a special law for resolution of FSPs.

Shinoj Koshy and Purvi Khanna, Partner and Associate at L&L Partners, New Delhi, in their article *'An Examination of the Inapplicability of Limitation to Claims Under the Micro, Small and Medium Enterprises Development Act, 2006'*, analyse whether claims made by vendors under the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act') can be equated to the status of commercial claims and whether they would consequently be barred by limitation. They contextualise this discussion by outlining the applicability of the Limitation Act, 1963 to claims made by vendors under the MSMED Act. They cite the unique features of the MSME sector including its need for availability of credit and shorter working capital cycles in the backdrop of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 ('IDP Act') as well as the MSMED Act in 2006. They argue that the non-applicability of a limitation period on delayed payments with interest rate three times of the rate compounded by the RBI under Chapter V of the MSMED Act foists an unfair burden on the buyers. In their article, they also contrast the dispute resolution mechanisms as present in the MSMED Act with its predecessor, the IDP Act. They recommend adopting an approach that balances interests of vendors with those of their buyers in resolving claims under the MSMED Act. They also suggest the exercise of Central Government's rule making power as enshrined in §29 of the MSMED Act to clarify that claims under the MSMED Act are commercial claims and hence must be barred by limitation.

Sara Jain, a final year student at Maharashtra National Law University, Mumbai, in her article *'Analysing the Overriding Effect of the Insolvency and Bankruptcy Code, 2016'* evaluates the applicability of the non-obstante clause as present under §238 of the Insolvency and Bankruptcy Code, 2016 ('IBC') in light

EDITORIAL NOTE

of the paradigm shift from the ‘debtor- in-possession’ regime to a ‘creditor-in-control’ regime brought forth by the legislation. She argues that the non-obstante clause must be used upon satisfaction of ‘inconsistency test’ – a product of evolution of case-law on the area. She discusses the scope and overriding effect of the provision on the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, Companies Act, 2013, Securities and Exchange Board of India Act, 1992, Advocates Act, 1961, Prevention of Money-Laundering Act, 2002, Arbitration and Conciliation Act, 1996, Real Estate (Regulatory and Development) Act, 2016 and Electricity Act, 2003. She concludes by recommending a model to aid the interpretation of the non-obstante provision. The basic features of this model include – *first*, allowing the non-obstante provision to have an overriding effect on similar provisions in cases of unresolvable inconsistency between two statutes, *second*, a harmonious interpretation of the conflicting statute, and *third*, using the provision as a last- resort mechanism.

Shivam Singh and Harpreet Singh Gupta, Counsels at the Supreme Court of India, in their case comment ‘*Hilli Multipurpose II- Supreme Court Ends Humpty Dumpty Jurisprudence on Nature of §13(2)(a) of the Consumer Protection Act*’ trace the developments surrounding the interpretation of §13(2)(a) of the Consumer Protection Act. They primarily base their analysis on the case of *New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd.* where the Supreme Court held that the timeline for filing reply by the opposite party is mandatory.²⁹ They explain the importance of the provision to the fabric of consumer dispute resolution as it is the sole opportunity for the opposite party to file a reply in consumer cases in absence of a similar provision for the appellate stages. They also demonstrate how the series of conflicting decisions on the area not only hampered the process of effective adjudication of consumer disputes but also created ambiguity for lower courts and litigants.

They conclude that the decision of the Supreme Court was in sync with the aims and objectives of the legislations on the area and conclusively ends the debate on the effect of the provision.

Atul Alexander and Ridima Sinha, Assistant Professor of Law and LLM Candidate at WBNUJS, Kolkata respectively, review the book ‘*Refugee Law in India: The Road from Ambiguity to Protection*’ by Shuvro Prosun Sarker. They contextualise the contribution of the book to ongoing debates on the legality of the Citizenship Amendment Act, 2019. In their chapter-wise review of the book, they highlight the contours of refugee law in India and assess Saker’s proposal for

²⁹ *New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd.*, 2020 SCC OnLine SC 287.

the need of a legislation codifying refugee rights in India. They conclude that this book effectively highlights the need for a regulated segregation of different classes of refugees. They add that the book is instrumental in giving its readers a holistic overview of the situation of refugees in India and effectively paints the inadequacy of the legal framework governing the same.

Muskan Arora, a fourth-year student at the West Bengal National University of Juridical Sciences, Kolkata, in her article '*A Commentary on the Kulbhushan Jadhav Case – Explaining the Rules of the Vienna Convention on Consular Relations*' assesses the contours of the doctrine of consular law in light of the detention of Kulbhushan Jadhav. She identifies various hurdles in the implementation of the aforesaid doctrine as embodied in the Vienna Convention on Consular Relations ('VCCR') by tracing its development through judicial precedent before the International Court of Justice. The paper also discusses the rules of international law which govern the assignment and legitimacy of military trials as well as ensure due process rights. In her concluding remarks, she notes that the law on consular relations as codified in the VCCR is insufficient and ambiguous in its application. This prevents states from effectively fulfilling their obligations under the VCCR, as was also witnessed in the Kulbhushan Jadhav case. While highlighting the various inconsistencies in the VCCR, she proposes narrowing down the scope of the law or codifying the loose ends of the same.