

## EDITORIAL NOTE

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*Aastha Malhotra*\*

In 2020, the COVID-19 pandemic has brought its own set of unique challenges. One of these challenges has been a permanent alteration in the way the law is understood and applied across the world. It has forced lawyers, academics, policymakers and students alike to rethink what once seemed the norm, and has prompted us to open ourselves up to fresher and newer perspectives. At the NUJS Law Review, we have always taken pride in the fact that we are able to facilitate academic discourse of contemporary relevance in India. Especially in the current circumstances, it has become increasingly important for stakeholders and policy-makers to engage in effective dialogue. With this aim, we present to you Issue 4 of Volume 13 of the NUJS Law Review.

In this Issue, we have four Articles, one Note, and will shortly include a dialogue piece of a video-conference hosted by us. Contributors for this Issue include academics, experts, and students. All works in the Issue engage with crucial questions of law, and bring forth unique perspectives in order to encourage discussion.

In his Article titled *Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14*, Dhruva Gandhi has analysed disparate impact or indirect discrimination in Indian discrimination law jurisprudence. Even as this discussion has been absent for a long time, recently, some decisions by the Supreme Court and the High Courts have recognised this type of discrimination. Even in this nascent jurisprudence, however, he argues that there exists a dichotomy. While some judges situate indirect discrimination under Article 14, others have located it under Article 15(1). In this essay, Gandhi contends that indirect discrimination is textually, evidentially and normatively incompatible with Article 15(1). Article 15(1) must only cover cases of direct discrimination. Nevertheless, discrimination along the lines of certain prohibited markers which are tied to individual dignity and autonomy ought to be treated differentially even under Article 14, says Gandhi. He argues for a heightened standard of review under Article 14.

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Ravitej Chilumuri & Aaditya Gambhir, in their Note, *Invocation of Arbitration Clauses in Shareholder Agreements for Disputes under Articles of Association*, discuss the enforceability of shareholder covenants not incorporated in the articles of association of a company, including covenants on matters of internal governance. They explore how this dissonance has carried over to the specific context of arbitration clauses, as it appears to be quite common (from the sheer amount of case law on this particular point) for parties to leave out the Shareholder Agreement's arbitration clause while incorporating its other provisions verbatim in the articles of the subject company. Expectedly, this substantial body of case law is also divided into two irreconcilable views on whether such an arbitration clause will govern the violations of a Company's articles without being incorporated into the same. Of the two predominant views—the contractual view and the incorporation view—Chilumuri & Gambhir argue that the contractual view is preferable, being consistent with the principle of party autonomy as well as settled law in arbitration-friendly jurisdictions such as Singapore and Hong Kong.

In their Article, *Exclusion Clauses Under the Indian Contract Law: A Need to Account for Unreasonableness*, M.P. Ram Mohan & Anmol Jain discuss how Indian Contract Law continues to follow the classical contract law model under which parties may, in exercise of their autonomy, limit or exclude their liability for breach of contract. As long as parties have freely contracted, an exclusion clause remains effective. Because of this, parties have started drafting wide exclusion clauses, heightened unreasonableness in contracting practices. In the absence of any statutory law governing the same, they argue that the only way by which a party could be relieved from the performance of an onerous contract in India is by arguing procedural unconscionability. They comprehensively trace the development and understanding of exclusion clauses as they have evolved under Indian Contract Law, and through the adoption of common law by the Courts. This being a time series study, they have examined all the Indian Supreme Court and High Court decisions reported until early 2020, and found that Courts have attempted to instil just-contracting by adopting ad-hoc mechanisms against the unfair use of the exclusion clauses. However, uncertainty continues to prevail regarding the enforceability of unconscionable exclusion clauses, as per Mohan & Jain. Therefore, taking a comparative approach, they argue in favour of adopting certain legislative reforms in the Indian contract law towards empowering the Court to adjudicate on claims based on substantive unconscionability. A first step in this direction, specifically for consumer contracts, is the statutory recognition of 'unfair contract terms' under the new Consumer Protection Act, 2019.

Deepti Pandey & Harishankar Raghunath, in their Article *Stationing Smart Contract as a 'Contract': A Case for Interpretative Reform of the Indian Contract Act, 1872* discuss how smart contracts have garnered indubitable

popularity as a disruptive technology that provides an effective digital alternative to traditional contracts. Summed up pithily as ‘automated digital contracts’, smart contracts gain significant ground in terms of efficiency and transparency over their traditional counterparts, and are increasingly moving into the mainstream in several jurisdictions, as emphasised by Pandey & Raghunath. The benefits of smart contracts by no means exclude India—various domestic and international forums have acknowledged that employing smart contracts could transform contract enforcement and harness economic growth in the country. In this backdrop, they find it imperative to ascertain precisely where the Indian Contract Act, 1872 (‘ICA’) positions smart contracts. Placing smart contracts into the uncharted waters of autonomous and anonymous digital contracting in India entails testing them for contractual validity as provided under the Indian Contract Act. Several concerns crop up during this exercise, particularly in the context of a rigid procedural framework under the law, as recognised by them in this Article. Pandey & Raghunath rebut the argument of ‘self-regulation’ frequently mooted as the best regulatory response to smart contracts. Instead, they favour an approach that harmonises smart contracts within the ICA through a liberal interpretation of substantive contractual law, in line with the flexibility offered by common law. They illustrate that a smart contract is constituted of the same building blocks as that of a traditional contract under common law, and subsequently refine their analysis in the context of Indian laws and attendant precedent. This interpretation is strengthened through reference to similar approaches adopted in foreign jurisdictions. Notwithstanding the need for reform across a broad spectrum of statutes, they argue that a law catering specifically to the legitimisation and regulation of smart contracts is not necessary. Pandey & Raghunath conclude by suggesting remedies to the potential challenges that arise from their approach.

Chandrika Bothra and Mehak Kumar, in their Article *Determining the Reasonability of Conditions under §3(5) of the Competition Act: Analysing the Intellectual Property Law Exemption* discuss crucial questions of law that exist at the intersection of competition law and intellectual property rights (‘IPR’). Reasonable conditions under §3(5) of the Competition Act, 2002 exempt a person with a valid, registered IPR from the application of Indian competition law. They provide a limited exemption, allowing an IPR holder to take steps that are reasonable and necessary for the protection of his rights. The position, though, on how the reasonability of such a condition is to be assessed still remains unsettled. This leads to ambiguity for IPR holders involved in antitrust litigation, argue Bothra & Kumar. It also creates a direct conflict between the objectives of competition law and intellectual property. They highlight the need for determining the extent of reasonability, undertaking an analysis of the trend of interpretations in this regard. In contrast to some sections of opinion and analysis, Bothra & Kumar propose a development-oriented approach to ensure pro-competitive usage of IPRs.

## NUJS LAW REVIEW

Amita Dhanda and Saurabh Bhattacharjee were hosted by the NUJS Law Review for a conversation on the pedagogy of Law and Poverty. Dhanda & Bhattacharjee teach Law and Poverty, and Law and Impoverishment at NALSAR University of Law, Hyderabad, and WBNUJS, Kolkata respectively. In this dialogue piece, they reflect on their approaches to teaching the subject, and various challenges they have encountered therein. This publication is the first of its kind in our Journal, and we hope to continue to create spaces for faculty to discuss their courses.

We hope that you enjoy reading this Issue as much as we have enjoyed curating it. We also extend our gratitude to all contributors for their association with the NUJS Law Review, and welcome any feedback from our readers!

Truly,

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