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Ensouth

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N South

Advocates

C 62B Super Mart – I,
DLF Phase 4, Gurgaon, Haryana 122009

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Managing Partner's message

Happy New Year!

Welcome to the fifty first issue of Ensouth. Indians consider 51 an auspicious number!

This issue largely builds on major legal events occurring in the last few months.

In **Triple Equality Before God**, we examine how the 'Talaq' judgment fails the nation. As it has subsequently turned out, the Triple Talaq Bills fails the nation as well but that will be the subject of the next Ensouth.

In **Why India Can't Afford Rohingya Refugees**, we explore the genesis of the ethnic cleansing in Myanmar, review India's international obligations and ask ourselves if we should have allowed such large numbers of aliens to settle in India instead.

Finally, in **Fee Fixation**, we confront the issue of placing ceilings on professional charges in the legal world and subject the idea to a critique.

We do love feedback, and look forward to reading more of it!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: Triple Equality Before God The Triple Talaq judgment fails the nation.

Ranjeev C. Dubey

Judges often confront colliding ideologies with the law standing on one side, religion on the other and human empathy in the middle. In 2014, an 18 year old Muslim eloped with a 15 year old and married her. The girl's mother filed a case of kidnapping, rape and sexual assault. Since the girl was under 18 at the time, the boy stood accused of a heinous crime under POSCO (The Protection of Children from Sexual Offences Act 2012). Yet, Muslim girls can legally marry at the age of 15 so the lovesick child was entitled to run off. Then again, do you really have it in you to condemn out-of-control puppy love between people unable to resist the call of their raging hormones, whatever their age?

If you were running the court, which of three possible positions would you like to take? If you are a member of the new Hindu radical right, you will no doubt argue that the law is the law for everyone and no religious community ought to cherry pick the rules they choose to follow. If you are a member of the old secular vaguely left, you will likely believe that religion is a private thing and India ought not to make up laws to mess with it. Finally, if you are a sentimentalist with a Bollywood fetish, you could argue that it's plain silly to set up an arbitrarily age below which kids can't legally fall in love!

When it comes to Triple Talak (or 3T!) though, the truth is that not many Muslims venerate their God mainly because He guarantees a painless divorce. Inevitably, the only customers waxing eloquent in favour of this tradition are those who have something political to gain from it. This is not because we Indians are losing our appetite for ideological incompatibility. The same ultra-right Hindu storm troopers who rail against 3T want meat shops shut during navratras for "sentimental reasons" even while Haryana's khap panchayats want girls to stop wearing jeans and using mobile phones since it's against Indian culture. The same secular pinkos who want minorities to have their "religious freedom" also want Hindu girls to be allowed into men-only temples. From the bemused viewpoint of the distant observer, it seems everyone wants to control everyone else's behaviour for legal, religious or cultural reasons! What remains unchanged in all this is the same old cynical political calculation. Like the best detergents, the last UP elections have proven that getting rid of 3T has triple action benefits: it pits Muslim woman against Muslim men fragmenting this vote bank while simultaneously quenching the fire that burns in the resentful (and possibly polygamous!) hearts of the radical Hindu right!

In truth, the judiciary doesn't usually care too much about the politics of any legal problem. That said, judges are after all a bunch of normal everyday Indians, only somewhat smarter in certain ways. Their judgments generally try to find the mean in the state of the art, the middle passage between colliding views as best reflected in the spirit of the times. Naturally, you would expect that when it came to 3T, they would go with the dominant national mood. So what is the current spirit of the times? Inescapably, be it the Shani Shingnapur temples in Ahmednagar or the Haji Ali Dargah in Bombay, Indians are increasingly inclined to push for the equal treatment of women. That's not all there is to it. A majoritarian wave is sweeping the land also pushing the judiciary into rejecting the idea of plurality of religious practice. Clearly, killing off 3T is an idea whose time had finally come. In rendering judgment in Shayara Bano v Union of India [CWP118 of 2016], the Supreme Court has merely delivered what Parliament should have. Seen thus, would you say that the judges have done enough to achieve a fairer, more balanced modern India?

I am afraid not. Chief Justice Khehar (with Justice Nazeer) held that the practice of Triple Talak is definitely a religious practice and is not contrary to public order, morality or health. He held that religious practice has the same status as constitutionally guaranteed rights, that courts cannot interfere with them and that only the legislature can! Mercifully, all that said, he stayed the practice for six months during which time legislation could be passed, if the legislature so chose. It is difficult to agree with Chief Justice Khehar. To understand his logic is above all to understand that he applied not enough of it. In his own words, "Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion." I do wonder how the 'religious practice' of Sati and Hindu polygamy fits into this stream of non-logical consciousness. Even more, the idea that personal law has the same status as fundamental rights is, to put it politely, unprecedented in Indian legal history! Still, in passing the buck to parliament, at least he did not slam the door shut on reform.

In contrast, Justice Kurian balanced his decision riding on this essential question: Since the Quran does not sanction Triple Talak, can what is Quran-ically wrong be legally right? He ruled that divorce practice is not integral to religion nor can religious practice override fundamental rights. In his view, what is bad in the Holy Quran cannot be good in Shariat and what is bad in theology is also bad in law. That takes us to Justice Nariman with whom Justice Lalit concurred. He ruled that Triple Talak is not 'essential religious practice'. He then held that Triple Talak is whimsical, arbitrary and therefore void. Thus it has come to be that what should have been a slam-dunk has scraped through by a whisker.

This judgment is dissatisfactory in more ways than one. Given the energy and judicial time that has gone into it, the judgement is above all an opportunity lost. It is an opportunity lost because India is struggling to contain the worst excesses of its religious lunatic fringe gone mainstream. We think a loudspeaker atop a temple or a procession

on the street is 'religious practice' thus sanctifying bedlam. We 'worship' our cows creating room for contexts carrying surreal consequences. This is tosh. We need our jurisprudence to take its next substantial step to eliminate religion as an acceptable public practice. If you buy it, keep it at home, and don't mess with the rights of those who don't. In failing to do this, the judgment fails us.

Even from the narrower perspective of gender justice, there is insufficient reason to celebrate. If you are a married but insecure Muslim woman, you may have reason to be somewhat relieved but from where I sit, we have merely touched the surface of the problem. A slightly more elaborate divorce procedure doesn't provide financial security to a rejected wife or her tiny children. Muslim girls don't have the same liberties as the guys and they don't get paid if abandoned like the Hindu girls do. There is so much yet to be done but this is where we hit the wall of legislature's abdication of responsibility. This takes us back to the same frustrating question that we have we asked ourselves for two decades. Are we going to ask our judges to do just judging, or do we want them to do our legislating because the legislature won't, and then moan about judicial overreach?

Comment-2

Fine Print: Why India Can't Afford Rohingya Refugees

Ranjeev C. Dubey

George Bush once quipped that India lived in a very dangerous neighbourhood. He failed to add that moral ambiguity was consequently built into its foreign policy. The Rohingya refugee crisis is only the latest example of this inescapable reality.

Not that Rohingya 'crisis' is new. The Rohingyas are 100 per cent Bengali and speak a Chittagong dialect. Most were forcibly settled in Burma by the British in an attempt to more easily control the Arakan, today known as the Rakhine State in Myanmar. Ne Win evacuated out the Rohingyas from much of Burma in 1962 but those in Arakan, remained. Efforts have continued since to move out the rest. Thus, Burman Buddhists displaced 200,000 Rohingyas in 1978, 250,000 in 1991, 14000 in 2012 and are at it again. Unofficial figures now put the refugees at 600,000.

The Burman have fortified this ethnic cleansing through the Burma Citizenship Law of 1982, which recognizes only eight 'national races' but not the Rohingyas. This puts the Rohingyas in the impossible position of being required to "conclusively establish" that their ancestors settled in Burma before 1948. As you can imagine, farmers dwelling in forest clearings in mud huts are not very good at storing written records to prove where their ancestors lived seventy years ago.

In August 2017, the Rakhine Commission was established by the government to recommend 'solutions' to the ethnic conflict. It recommended measures to improve security for the Rohingyas. These measures had the effect of pushing them across the border to the north! By September 2017, the flow into India was out of control.

The Union Ministry of Home affairs responded to the security challenge on August 8th, 2017. It empowered the States and UTs to identify and deport illegal aliens. To be fair, India is not a signatory to any international convention on refugees. The NHRC did not like this, observing that "refugees are no doubt foreign nationals but they are human beings and have a fear of persecution once they are pushed back to their native country". It was only a matter of time before two Rohingyas - Mohammad Salimullah and Mohammad Shaqir - filed a petition on this subject before the Supreme Court.

It's a simple case. Article 14 of our constitution requires India to "not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 21 prevents the state from allowing any person to be "deprived of his life or personal liberty except according to procedure established by law." What else does a foreigner need to obtain basic shelter in India?

There's more too. Article 51(c), a Directive Principle of State Policy, enjoins the state to foster respect for International law. Deportation surely is against the widely recognized principle of non-refoulement (i.e. expel or return a refugee if his life or freedom is threatened on account of his race, religion, nationality, social grouping or political opinion). India has ratified, or is a signatory to, several Conventions affirming the 'Principle of Non-Refoulement'.

Seen purely as a legal issue, it's all quite straight forward. The Delhi High Court has held in *Dongh Lian Kham v. Union of India* [226(2016) DLT 208] that the principle of non-refoulement is part of the guarantee under Article 21 of the Constitution of India irrespective of nationality. The Supreme Court has held in *NHRC vs Arunachal Pradesh* [AIR 1996 SC 1234] that, the state is bound to protect the life and liberty of every human being, citizen or otherwise. Where is the doubt on what India needs to do?

But then, is anything ever so simple? Alternative narratives demand equal hearing. J&K has a famously xenophobic law, which prevents practically any Indian from owning property there. It's so tight that many refugees, who crossed over during partition, when Pakistan was created in 1947 (such as the Mirpuria Sikhs) and have been in Jammu ever since still don't have state subject certificates. Yet, 30,000 Rohingyas have been permitted to settle in and around Jammu city.

Jammu Hindus see this as a conspiracy to alter the demographic character of the area. Such is the composition of the state government that key decision making posts are largely dominated by those from the Vale of Kashmir, making it possible for them to issue residence certificates to 30,000 Rohingyas even as they deny certificates to refugee Sikhs dating back to 1947.

The Rohingyas rubbish these conspiracy theories. They claim that they were helped to board trains in Bengal and told to get off at the last station, which turned out to be Jammu. How they got residence certificates remains unexplained. To round out the rival narrative, the incontrovertible fact of the matter remains that these guys are illiterate, unskilled, do not speak the local lingo and basically hang around markets aggressively harassing visitors for handouts. Their nocturnal activities are also the subject of much complaint. Last I was in Jammu, a very smelly lady in rags practically crawled through the car window demanding money as I waited for my wife to finish her grocery shopping in Gole Market. The human dimension of the tragedy is as heart breaking as the absurdity of being required by the mandate of common decency to become the world's garbage pit. The absurdity cuts deeper when we realize the J&K has its own constitution (Article 370, remember?).

No law requires J&K to take in refugees. If we cannot settle refugee Kashmiri Pundits back into the valley, who can resist the compelling logic of a conspiracy theory when 30,000 Muslim Rohingyas have ended up 'settled' in Jammu?

This brings me to the humanitarian argument, the best elucidation of which I probably heard on a Mayo college Whatsapp group! The Rohingyas are Chittagong Bongs. They have a historical right to return to Bangladesh. We got plenty of Bangladeshi maids and their rickshaw puller husbands all over India. The 2001 census disclosed that an estimated 3.1 million Bangladeshis lived in India. They are not alone. We can't be sure but some 4 million Nepalis live here too.

Decency (and dare I say, equal treatment?) requires that we let in the Rohingyas too. Would we be equally aggravated if the Rohingyas had been Hindus? The problem with this argument is that the additional unwashed million carry a long term economic cost. If we can do nothing about the poverty of our own landscape, do we have the financial and administrative bandwidth to allow ourselves the luxury of being "crazy for phoreign?" This is where idealism confronts economic common sense. Regrettably, as we know, never the twain shall mate!

As I ponder this vexed issue, I hasten to recall that Insurance companies don't like to provide 100% cover on a car crash. They want car owner to pay for the first Rs. 10,000/- of damage. There is logic to this. It's called Moral Hazard. A Moral Hazard is a situation that alters behaviour such that a person takes an otherwise unacceptable risk because someone else bears the burden when things go wrong. If you know someone will pay for the damage caused, how carefully will you drive a car? Insurance companies think this is why youngsters financially dependent on their parents crash cars more often than employed youngsters.

You see such moral hazard everywhere. My colony has several dog lovers who will feed the meanest of street mutts. They know that these mutts maul toddlers around neighbouring construction sites while their mothers haul bricks up rickety bamboo ladders. Would these dog lovers still feed the street mutts if the animals routinely

entered their plush bungalows and mauled their own infant children? Is this why dog lovers aren't also mosquito lovers? That said, in feeding the dogs, the cynophilist are at least paying for the food. That's not true for the refugee-lovers.

As I think through this issue, images of starving refugee toddlers, their bellies distended, flies buzzing around their noses and lips, refuses to leave me. At the same time, I think of all the starving toddlers who are inescapably Indian. It seems to me that this is a classic case of Moral Hazard. Who would I like to see helped first? And so a thought emerges. We should put our money where our mouth is. I would feel far more comfortable if each of us who argue in favour of the Rohingyas assign at least one bedroom in their sprawling mansions to house these refugees and pay for the food themselves in some sort of sponsored scheme. Till that day comes to pass, I must shake my head and say, "I know we should, but boss, we can't afford it". And that's that.

Comment-3

Fine Print: fee Fixation

Though the Supreme Court has asked the centre to bring in a law to cap lawyers' fees, there is a reason why top advocates are paid so much and why such restrictions are not the best way to secure justice.

Ranjeev C. Dubey

"Can't you see," Pink Floyd's singer songwriter Roger Waters berated us in 1984, "it all makes perfect sense, expressed in dollars and cents." This must be why Supreme Court senior counsels aren't celebrities till they make Rs 10 lakh a hearing! This is easy to understand: if you are that good, why isn't someone putting their money where your mouth is? In this case, life mimics perception. We have recently appointed several superb lawyers directly to the Supreme Court as judges. They used to cost as much as the best lawyers before their elevation. So why has the Supreme Court expressed concern over the "astronomical fees" charged by lawyers and said that "the commercialization of the legal profession is in violation of the fundamental right of the poor to get equal justice"?

The Supreme Court is right, of course. It has always held its judicial conscience close to the heart of its pronouncements. But do fee caps even begin to address the issue? You can stop lawyers earning money, but can you force them to serve the poor? Then again, isn't this a case of Freudian Displacement? When girls get molested in cars, we don't deal with the complex of social, psychological and cultural factors at play. Instead, we ban cars from sporting darkened windows. No doubt, when girls get raped in homes, we will ban domestic walls too. What we need to do is to ask a fundamental question: Why are top lawyers being paid so much?

Are all lawyers actually equal? Of course not! But more than that, brilliant lawyers can hash up an argument in court but still get better orders than average lawyers arguing a case exactly right. The difference is in brand image and equity.

RIDICULOUS LAWS

Snipped off the trimmings, I would say it comes down to the cumulative impact of three reasons. At the root of it all sits a pertinacious legislature dispensing (like Lord Tennyson's Achilles) "unequal laws to a savage race". I am not being bitter. The main purpose of many laws is a kind of perverse "wealth re-engineering". As if that wasn't bad enough, we have an enviable bouquet of ridiculous laws that the Law Commission can't see. The internet is awash with such lists but here is a quick sampler. At 18, you are old enough to elect your political representative, but it is another seven years before you are old enough to drink.

Regulate legal profession: SC

The Supreme Court recently expressed concern over growing commercialisation of the legal profession with lawyers demanding "astronomical" fees from litigants, making it difficult for the poor to access justice. The Court asked the Centre to bring a law to regulate the field and to prescribe "floor and ceiling of advocates' fees".

A bench of Justices Adarsh K Goel and UU Lalit said it was high time the centre brought a law to ensure that the poor are not deprived of legal assistance from competent lawyers due to lack of funds. "Undoubtedly, the legal profession is the major component of the justice delivery system and has a significant role to play in upholding the rule of law. (The) Significance of the profession is on account of its role in providing access to justice and assisting citizens in securing their fundamental and other rights. Can justice be secured with legal professionals failing to uphold professional ethics?" the bench asked.

On a more serious note, we have in our statute books a plethora of laws that criminalise a CEO of a company because the drinking water supply isn't up to scratch or the walls of the worker's canteen are not smooth enough or women worked there at night (try the Factories Act 1948).

The Industrial Disputes Act 1947 is a whole lot worse. Not only can't you start an industry without a dozen approvals and permits, you can't fire any but the last employee to be hired, modernise a plant without a 21-day "Change of Conditions of Service" notice or shut down the place without a *babu's* approval. Here's the bottomline: when you make impractical laws that fly in the face of the times in which we live, you are going to end up with people who can neither follow the law nor run a business that makes commercial sense. Courts then become the magic wands that cure political diseases.

BUREAUCRACY'S ROLE

That brings up Reason No. 2. Our fabled "functioning anarchy" has allowed the political classes to use the government to further their own acquisitive agendas. India's democracy is now a vast criminal enterprise where political groups combine to capture power so that they can strip the nation and convert public resources into private wealth. As all governance yields political funding, administrators can't take any decision at all without permission from the political classes. Government jobs are now sold, with the result that an entire class of civil servants is looking for ways to recover their entry investment into bureaucracy. This is not a polity where you expect to be treated fairly. To get justice, you have to go to court.

When you put these two factors together, you get a system of administration which funnels disputes at very high volumes into the justice machine, clogging it, resulting in an irremediable logjam. That is our problem number 3. It has become so absurd now that the government is a litigant in 65 percent of all civil cases, sometimes on both sides of the dispute. As former Chief Justice HL Dattu so candidly acknowledged in 2015, India has more than three crore pending cases. One estimate claims that at current disposal rates, we will need 466 years to clear the backlog. This is easy to believe because with 15 judges per million, we have one-seventh as many judges as the US (100 judges per million) in a society that is at least seven times as dysfunctional. In a world where 30 million cases are up for decision, what makes a plaintiff's cry of anguish so evocatively heartrending and why should the court care to give you priority time? Some cases will never be decided, or so it seems.

In the world of paralysed time and frozen turbulence of courts, let us redefine our expectation from a lawyer. You want the guy to move the system that you know moves very little. You also want to use the system to fight a predatory state that has legislated perfectly "legal" but immoral laws designed to unfairly victimise you.

In this crazy state of dysfunction, what can you possibly achieve by going to court with your grievance? The truth is that most people wouldn't go to court if they can possibly avoid it: those that do, have no choice. Those who understand how the racket works simply "take the law in their own hands". When the warring parties do get to court, the whole game is about getting interim orders because the actual case isn't decided for decades. In this world of paralysed time and frozen turbulence, let us redefine our expectation from a lawyer. You want the guy to move the system that you know moves very little. You also want to use the system to fight a predatory state that has legislated perfectly "legal" but immoral laws designed to unfairly victimise you. You are probably going to court asking them not to apply a bad law. You can take it that all things considered, the court would not be super-enthused about doing that for you.

LAWYER'S ROLE

In this environment, when the justice machine is being relentlessly ground into the dust till it risks being reduced to a wasteland, if you can actually get a lawyer to deliver you any kind of justice in terms of interim arrangements, what will you not pay him for the privilege of representing you?

The larger issue is what you can possibly do about it. You could argue it's not too big to fix. You can take each element of the three problems described above and start addressing them one at a time. But till those big ticket problems get fixed, what is the immediate short-term strategy the courts can adopt?

To me, it's very simple. If courts treat all lawyers as equal in all respects, there is no reason for anyone to pay more for one than the other. Are all lawyers actually equal? Of course not! But more than that, brilliant lawyers can hash up an argument in court but still get better orders than average lawyers arguing a case exactly right. The difference is in brand image and equity. Perception is reality, and that is the incentive that drives high professional fees.

If the Supreme Court wants to reduce lawyer's fees, it has to change the incentives of the environment. This requires the judges to meticulously read the files supported by teams of chamber juniors and then render sagacious judgments without relying on much help from senior lawyers. Instead, merely capping fees won't change the behavior; it will merely drive the business underground.

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