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Judge-In-Charge

Hon'ble Mr. Justice
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TOPIC OF THE MONTH

About Marginalised Communities

Who are 'Marginalised'

Individuals or group who are driven to the fringes or edge of society i.e. do not or are not able to participate in the mainstream of society can be termed as 'marginalised'. Deprivation of rights is both a cause and an effect of marginalisation. Marginalisation is compounded by lack of access to justice.

Persons or groups may be marginalised due to a 'class condition' which has come about due to certain social or sociological factors, such as that experienced by women, or *dalits*, or sex workers. It can also be because of being 'different' in terms of physical capacity or condition, such as persons with physical or mental disabilities, old person or persons with different sexual conditions or preferences such as transgenders, homosexuals or lesbians, or persons with HIV/AIDS.

A person may be generally marginalised due to his or her condition of poverty. Entire communities could also be marginalised due to poverty, loss of land and livelihoods due to development, natural disasters etc. they could also face marginalisation due to their exploitation, such as *adivasis* or tribal communities. People may also be marginalised because of being in religious or cultural minority. People could be marginalised for their political beliefs or for expressing dissent.

Effects of Marginalisation

Marginalised persons need protection from all the State agencies. The marginalised person or group facing is so mired in the situation of helplessness that the avenues for justice available for the ordinary citizen may not be the obvious choice for him or her. Such people lead a poor quality of life and would invariably be in situations of dire want and exploitation, contrary to the Constitutional goals. To enable and encourage people to approach the avenues of justice, they need to be made more accessible and friendly to the person approaching it. This can be done only by the judiciary appreciating the real situation of the marginalised person when he or she is before it, and giving relief and succor through using the powers encapsulated in the legal framework.

Marginalised Communities and the law

In democratic regimes, generally there are Constitutional provisions which protect the rights of marginalised communities while attempting to enhance their status. In India, the Constitutional provisions give good coverage and are supported by legislation in the form of special provisions in laws as well as special statutes. Yet, it appears that Marginalised communities are not getting the benefit of these laws due to the incapacity of the justice delivery system in having a fuller understanding of the provisions. While the Constitutional Courts and Courts of Appeal have given meaning to the laws and protections, it is at the level of the subordinate judiciary that these provisions must be given effect to in order to give true access to justice.

Various forms of marginalisation need attention and relief and protection from all the State agencies. The person or group which faces marginalisation is so mired in the situation of helplessness that, very often, he or she may not even be able to approach the avenues for justice that are presumed to be available for the ordinary citizen. The person pushed to the extremes then would lead a poor quality of life and would invariably be found in situations of dire want and exploitation, weighing down the entire social, economic and political system and going contrary to the Constitutional goals. To avoid the huge cost involved, the avenues of justice need to be made more accessible and the experience of trying to access justice needs to be made more friendly to the person approaching it. This can be done only by the judiciary appreciating the real situation of the marginalised person when he or she is before it, and giving relief and succor through using the powers encapsulated in the legal framework.

Women

Women face disabilities at various levels whether within the family, at the workplace or in matters of public space such as physical security or access to employment. Within all spheres of marginalisation, women have always been a segment which bears an additional burden because of the vulnerability born from harmful practices against them. This is a phenomenon universally. India is not exception and its women are victims of several harmful practices resulting in their marginalisation. These harmful practices occur all around us and are unfortunately, not just ignored but are

not even noticed. They spring from practicing gender inequality in various forms, resulting in control, denial of rights and violence ranging from verbal abuse to extreme form such as rape, disfiguration and murder.

India is very favourably placed in the matter of Constitutional provisions and legislation. There are several laws protecting the rights of women in almost every sphere. The law has also developed exponentially in the matter of feminist jurisprudence at the level of superior courts. The lacuna exists in the full understanding and application of these developments by the functionaries and institutions at the cutting edge the subordinate judiciary being one of them. Besides equal protection of all laws, there are several special legislations enacted for women. These laws will be effective in combating gender inequality only when the essence of these laws is absorbed into the judicial system, resisting the tendency of Courts to give in to cultural inhibitions which almost veer towards finding ways out to mitigate the gravity of offences committed against women by holding them responsible in some way such as the offence of rape or domestic violence, or resenting the tendency to demand rights such as equality in employment or the right to property.

Children

Children often face a range of issues which makes them vulnerable to abuse and exploitation, thereby creating an extremely debilitating environment for their growth and development, which at times could even be life-threatening. This entails not just an individual human cost but also stunts the development of society and the nation.

Children are in a special category requiring special protections under the law. Although several Constitutional provisions and statutes guarantee this protection, the incidence of child abuse and exploitation whether within the home, at school, at the workplace or in society at large is increasing alarmingly. More and more children are being physically and emotionally attacked, trafficked for sex, organ trade, sports or terrorism and inducted into drug abuse and crime. Apart from offences committed against them, denial of physical and emotional care, health and nutrition, education and recreation results in a child being a victim of neglect, incapable of developing into a happy adult and a good citizen. Children are also the worst hit in situations of family illness, unemployment, natural disasters, riots and displacement.

The failure to protect children from abuse is generally the result of an inability of the duty-bearers to be cognitive of their situation and to take appropriate or timely action.

The judiciary needs to be very conscious of the fact that children are one segment of our society who lack the ability and even standing to approach or represent themselves before the Courts. Since they will be before the judiciary through a State authority or through a next friend or guardian, the judiciary has to take on the mantle of testing the situation independently on the paramount principle of 'best interest of the child'.

(Abstracted from the book "Removing Barriers through the Bench, A Training Manual for Judges on Laws and Issues Related to Marginalised Communities" by Justice V. R. Krishna Iyer)

Ubuntu Linux Awareness-cum-Training Programme:

On the instructions of Hon'ble Mr. Justice M. M Kumar, Chief Justice, High Court of Jammu and Kashmir and Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge Incharge e-Court Committee, training on "Ubuntu Linux Awareness-cum-Training Program under Change Management" was provided to Judicial Officers of the State at State Judicial Academy, Srinagar and Jammu respectively under the aegis of e-Court to bring proficiency in Computer usage. The training was imparted by Master Trainers, which was commenced by the end of March, 2013 and completed by the third week of May, 2013. All the Judicial Officers of the State were imparted training on the use of Ubuntu Operating System. The training was co-ordinated by Mr. Khalil Choudhary, Central Project Coordinator, e-Courts, High Court of Jammu and Kashmir.

Oath Taking Ceremony of Advocates:

Srinagar, May 22, 2013 In a simple but impressive function, Jammu and Kashmir State Judicial Academy, High Court of Jammu & Kashmir held Oath Taking Ceremony for distribution of Advocates Licence for new entrant to the legal profession in the State Judicial Academy at High Court Complex, Srinagar on 22nd of May 2013.

The function was presided over by Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge-in-Charge, State Judicial Academy. Before delivery of enrolment certificates, 59 Advocates were administered oath by Shri Abdul Wahid,

Director, Jammu and Kashmir State Judicial Academy.

In his speech, Hon'ble Mr. Justice Mansoor Ahmad Mir congratulated newly enrolled Advocates and welcomed them to the fraternity of legal profession. His Lordship enlightened them on the professional ethics and conduct.



Newly enrolled Advocates taking oath

His Lordship stated that the first duty which the counsel owes to the court is to sustain its honour and dignity. A conduct, therefore, which is unworthy of him as an officer of justice cannot be justified by stating that he did it as the agent of his client. His status as an officer of justice does not mean he is subordinate to the judge. It only means that he is an integral part of the machinery for the administration of justice. His Lordship emphasized upon the newly enrolled Advocates to work hard and to improve knowledge of law, to keep themselves update on the law and in particular the development thereof both legislatively and judicially so as to become excellent and successful lawyer. A lawyer should not have any personal interest in the litigation he is carrying out. It will be misconduct on his part to stipulate with his client to share in the results of litigation. Advocates in

their professional capacity address each other as brothers. This spirit of fraternity at Bar is one of the noblest traditions of the legal profession and is many centuries old. Lawyers stand for common ideals of order, justice and rule of law in the community and have common rules of etiquette and professional observance.



Hon'ble Mr. Justice Mansoor Ahmad Mir delivering enrolment certificate to the Advocate after oath ceremony

Elaborating further the qualities of Advocate, His Lordship stated that the Advocate should not display temper in court. He shall not indulge in any kind of insinuation in the court against the Judge. He should convince the Judge by argument and reason and not by appeal to his sentiments. The Advocate must not do anything which is calculated to obstruct, divert or corrupt the stream of Justice. His Lordship stated that lawyers as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with the function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

NEWS AND VIEWS

1. Inauguration of ADR Centre in Anantnag District

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India, inaugurated Alternative Dispute Resolution (ADR) centre in the District Court Complex, Anantnag on 23rd of May, 2013 in presence of Hon'ble Mr. Justice M. M. Kumar, Chief Justice (Patron-in-Chief), State Legal Service Authority, Hon'ble Mr. Justice Virender Singh, Executive Chairman, J&K SALSA and Hon'ble Mr. Justice Mansoor Ahmad Mir, Chairman Mediation Monitoring Committee.



Hon'ble Mr. Justice R. M. Lodha, Judge Supreme Court of India, inaugurating ADR Centre in District Court Complex, Anantnag in presence of Hon'ble Mr. Justice M. M. Kumar, Chief Justice (Patron-in-Chief) State Legal Services Authority, Hon'ble Mr. Justice Virender Singh, Executive Chairman J&K SALSA and Hon'ble Mr. Justice Mansoor Ahmad Mir, Chairman Mediation Monitoring Committee

The inaugural function was attended by all the officers of District Administration, members of Bar Association, para-legal volunteers, media persons and respectable citizens of Anantnag district.

The two storied building equipped with all modern facilities has been constructed at an estimated cost of Rs. 1.18 crores. The construction was



L to R : Hon'ble Mr. Justice Mansoor Ahmad Mir, Hon'ble Mr. Justice R. M. Lodha, Judge Supreme Court of India and Hon'ble Mr. Justice M. M. Kumar, Chief Justice J&K High Court on Dais during Inaugural Session



View of audience at the Inaugural Session

started in March 2011 and with the best efforts of the executing agency R&B, the building has been completed and handed over to the Judiciary for the general benefit of the people.

In his welcome address, Hon'ble Mr. Justice Virender Singh reiterated the commitment of J&K State Legal Service Authority to reach out to the poor and marginalized sections of the society with free legal service.

Speaking on the occasion, Justice Lodha told that the aim in establishing these ADR's is to shorten the time required for the resolution of disputes among the litigants. His Lordship emphasized upon the need of giving a wide area for the litigants for reaching out at the end point of any resolution. His Lordship urged the lawyers and facilitators to have utmost patience while listening to the parties so that a satisfactory solution can be reached out in the best interests of the parties at a



L to R : Hon'ble Mr. Justice R. M. Lodha, Judge Supreme Court of India, Hon'ble Mr. Justice M. M. Kumar, Chief Justice, J&K High Court, Hon'ble Mr. Justice Virender Singh, Judge, J&K High Court and Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge, J&K High Court addressing the Inaugural Session



very low cost. His Lordship terms such clinics as justice at the doorsteps.

His Lordship stated that settlement of disputes through mediation has become a movement. The quality and personality of a Mediator, his neutrality and patience are of utmost importance for successful mediation. His Lordship urged all stakeholders including Judges, Lawyers and litigants to change the mindset, so that settlement of disputes through mediation are facilitated successfully.

Hon'ble Mr. Justice M. M. Kumar, Chief Justice, High Court of Jammu & Kashmir in his thoughtful provoking speech referred to the different modes of ADR for amicable and peaceful settlement of disputes. His Lordship explained the concept of mediation and urged all the stakeholders to use ADR centres to the maximum. His Lordship stated that the Judges of District Judiciary have now been directed to focus their disposal of cases, which are pending between three to five years. Earlier focus was placed on disposal of cases, which were above five years old.

While reacting to the demands put forward by the President, Bar Association, Mr. Riyaz Ahmad, Hon'ble Chief Justice told that efforts are already being made for the identification of land for new Court complex at Anantnag. His Lordship also informed that out of 43,000 cases pending in subordinate courts 14,000 cases were disposed of during the last three months by the subordinate courts.

Hon'ble Mr. Justice Mansoor Ahmad Mir, speaking on the occasion threw light on the background, aims and objectives of ADR centres in the State. He congratulated the young lawyers of the District, who are acting as Mediators and facilitators between the

innumerable litigants in getting a satisfactory end of the problem in which they are involved. His Lordship in his speech gave a detailed account of mediation and conciliation activities going on in the State and assured full support to ADR centre in making mediation success.

Bar president, Mr. Riyaz Ahmad also spoke on the occasion and expressed happiness over the setting up of the ADR centre and thanked Hon'ble Mr. Justice R. M. Lohda, for His Lordship's presence in the inaugural function as the Chief Guest.

Principal District & Sessions Judge, Mr. Abdul Rashid Malik, presented the vote of thanks and expressed his gratitude to the Hon'ble dignitaries for their Lordships kind presence at the inaugural function.

Can't charge man with rape over consensual sex even if marriage eludes: SC

A man cannot be prosecuted for rape for being in a sexual relationship with his major woman friend, if he intended to marry her but the wedlock could not take place due to some circumstances, the Supreme Court held.

A Bench of Hon'ble Mr. Justice B. S. Chauhan and Hon'ble Mr. Justice Dipak Misra said that a person cannot be accused of rape, if the girl agrees to have sexual intercourse with him on account of her love and passion and he did not have any *mala fide* intention.

"The court must examine whether at an early stage, a false promise was made of marriage by the accused and whether the consent involved, was given after wholly understanding the nature and consequences of sexual indulgence."

"There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of misrepresentation made to her by the accused or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently," the Bench said.

It said that there is distinction between rape and consensual sex and "an accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was *mala fide* and that he had clandestine motives".

The Apex Court set aside Punjab and Haryana High Court order which had upheld a trial court verdict sentencing a man to a seven-year jail term for rape. It delivered the judgment after finding that he intended to marry his 19-year-old girl-friend and there was no evidence that his promise of marriage was false.

[*Indian Express* 21.05.2013]

Promiscuous character of woman can't be ground of defence in rape case: SC

Promiscuous character of a woman is irrelevant in rape cases and a rapist cannot take it as ground of defence for his heinous act, the Supreme Court has ruled saying even a female of easy virtue has a right to life.

Holding that rape is not only an offence against a woman, but a crime against the entire society, the Apex Court said that courts should deal with such cases sternly and severely.

"Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape her. It is the accused who was on trial and not the victim. So as to whether the victim is of a promiscuous character is totally an irrelevant issue altogether in a case of rape," a Bench of Hon'ble Mr. Justice B. S. Chauhan and Hon'ble Mr. Justice F. M. Ibrahim Kalifulla said.

The Bench passed the order on an appeal filed by a rape convict challenging his conviction on the ground that the victim was of promiscuous character and had been habitual to sexual activities.

It, however, refused to grant relief to the accused saying that it is not material that the rape victim was accustomed to sexual intercourse.

"Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone," the Bench said.

"The courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well," the Bench said.

"It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity," it said.

[*TOI*: 04.05.2013]