COMPARATIVE SOCIOLOGY OF THE LAW PROFESSION

Debasis Poddar*

ABSTRACT

A sui generis cult of its own, courtcraft appears diversified with wide variation across the world; even with the same genesis of common law legacy. The way profession set a standard of its own as an enviable watershed for professionalism in North American courtcraft is hardly the case in its South Asian counterparts. As a continent of cosmopolitan settlers with aspiration fortune-seekinging entrepreneurship, Canada and USA did away with the bankruptcy the of given common law legacy while, as a region of indigenous colonized ignorant of the Occidental juridical life-world, South Asian countries are but reduced to scapegoats of their colonial past and continue to grapple with the legacy of a foreign cult, not at all meant for jural soil of the subcontinent. By courtesy want of regional relevance, the present legal profession suffers from an identity crisis and thereby succumbs to a systemic subversion for a little stake of its own to this end. Profession, in public perception, is reduced to one producing parasites. In forthcoming paragraphs, the author is scheduled to explore the positioning of the legal profession in North American and South Asian regions with resort to international comparative study the as methodology of (t)his proposed work and thereby decipher the underlying variables contributing to such diversity vis-à-vis end results in two regions while being adhered to same old legacy of common law derivatives from the country of the origin- United Kingdom. Also, the intra-regional diversity in legal profession constitutes one among the research foci of (t)his effort.

Keywords: settlement, colony, transplant, code of conduct, subversion, etc.

> "*Europe has her subtle habits of mind and her conventions. But America, as yet, has come to no conclusions. I realize how much America is untrammelled by the traditions of the past, and I can appreciate that experimentation is a sign of America's youth. The foundation of her glory is in the future, rather than in the past.*"

*Professor, National Law University and Judicial Academy, Assam.

> "*Europe has her past. Europe's strength therefore lies in her history. We, in India, must make up our minds that we cannot borrow other people's history and that if we stifle our own we are committing suicide. When you borrow things that do not belong to your life, they only serve to crush your life.*"
> - *Rabindranath Tagore.*[1]

I. INTRODUCTION

About a century back, the way Tagore identified may well be held as the best point of distinction between North America and South Asia in general. While the former runs prognostic in its approach, the latter stands to look back at glory- whatever left- in its antiquity. Thus, once something practiced, the South-Asian subcontinent suffers from static inertia to get stuck to the same in a way or other. As a country of settlers, despite following the common law legacy, the North American countries, e.g. Canada and the United States of America- by and large carry forward virtues of legal system they inherited from the United Kingdom. The South-Asian countries following liberal democratic system of governance, India, Sri Lanka, and Maldives in particular, get stuck to vices of legal system imposed by British colonizers with close connivance of the then Crowns seating in the United Kingdom. In course of constitutional regime, law and profession hardly transcend colonial legacy in vogue since colonial regime. Consequently, despite the same old legacy, Professionalism in North America and South Asia thereby takes diverse turns, by courtesy a set of variables, accordingly. In the forthcoming paragraphs, mapping of these variables along with consequent discursive diversities will be dealt with in vivid details.

Since the US Constitutional Convention at Philadelphia way back 1787, legal system along with the legal profession was never like ever before. No wonder that the first written constitution came into existence while UK is run by unwritten conventions, federalism was introduced while UK follows unitary system of governance, royal institution was supplanted by elected head of the state, elected judge took over power of adjudication in lower judiciary, separation of powers forced the erstwhile oligarch hegemony to take backseat, and the like. In a nutshell, from the beginning, USA initiated a *de novo* innings and thereby got rid of the cliché British common law suffered from. Being from the same legacy, the people of USA identified loopholes of the legal system. Also, out of its heterogeneous demographic character, US people did away with the icons of common law legacy as insignia of the United Kingdom since the

[1] Rabindranath Tagore, *Nationalism in India* (1917). Available at: http://www.gutenberg.org/files/40766/40766-h/40766-h.htm

same was perceived as hurdles for aspirant settlers who constituted the then US population. After all, despite being fellow countrymen, British army did indulge in full-fledged war with settlers mostly of British origin. In a way or other, American war of independence thereby graduated to revolution in technical sense of the term. After the war, thus, change ushered in every sundry sphere including law profession. Professionalism, as movement, made a mark of its own in USA.

On the contrary, in the South-Asian front, scene was poles apart. Transition, at least in final count, was amicable enough with a ceremony during the merrymaking midnight while India- along with its neighbours- initiated almost together a tryst with destiny. Unlike what happened in North America, it was evolution and in no count revolution South Asia won freedom. Also, what cannot be ignored is character of the struggle. In case of North America, struggle was against repression of their own government with its seat in their own country of origin while the struggle here- in South Asia- was against colonizers later taken over by their foreign government albeit in the name of good government. Thus, so far as historical background is concerned, the genesis of common law legacy in these two regions stands apart.

In particular, international comparative study between Canada and Sri Lanka seems imperative since both of them run their respective systems in *sui generis* combination of civil law and common law. USA and India, however, offer space for international comparative study as two giant legal systems of the world run by mainstream common law tradition albeit in ways of their own. Besides, a brief study of Maldivian system is meant to take stock of the state of affairs in affairs of the state. A rationale behind such international comparative study lies in inquiry on the professionalism in law between the same (liberal democratic) systems of governance situate in strategic geopolitical positioning of *the Global North* and *the Global South* besides being seats of the oldest and the largest modern democracies respectively.

II. COMMON LAW PROFESSION IN NORTH AMERICA

Like federalism, no two common law systems stand alike and same is the case in case either of the North American continent or the South Asian subcontinent. While USA and India by and large follows mainstream common law system, both of them differ from genesis of the legal system in the United Kingdom and, at the same time, from one another as well. Thus, so far as legal profession is concerned, such a divergence is extended by default. Likewise, despite being civil law-common law

combination, both Canada and Sri Lanka differ from one another since they follow the common law system of governance in *sui generis* ways of their own. Consequently, law profession continues to follow the same legacy of being unique in a(ny) country or/ and region in ways of its own- including the maintenance of standard, discipline, etc. *inter se*- toward professionalism. Thus, besides intercontinental diversity, intra-continental and sub-continental diversity do constitute issues and challenges.

Back to professionalism, initiatives to attain professional discipline in the law profession vis-à-vis ancient common law system may be traceable way back since thirteenth century:

> Throughout the medieval period, complaints about lawyers were common. A familiar litany emerged: there was excessive litigation caused by an excessive number of lawyers who either created a demand for their services or produced litigation through their misconduct or incompetence. In fact, these medieval hostile attitudes were some of the best evidence that a legal profession existed and they played a role in producing the initial regulation of the legal profession in medieval England. Commentators generally agree that a legal profession emerged during the reign of Edward I, probably at the end of the thirteenth century; and that this group of professionals included two primary types of lawyers: *serjeants*, who functioned as pleaders, and attorneys, who appeared on behalf of litigants and managed litigation for their clients. At this time, the regulation of lawyers also began. In this initial period, three critical regulations were adopted: the Statute of Westminster I, Chapter 29; the London Ordinance of 1280; and the Ordinance of 1292, *de Attornatis et Apprenticiis*. Later in the medieval period, further regulations were enacted, including: the 1402 Statute, 4 Henry IV, Chapter 18; and the 1455 Ordinance, 33 Henry VI, Chapter 7. In addition, judges used their inherent power to control the admission of lawyers and to sanction their misconduct.[2]

These initiatives, however, could do little. Shakespeare portrayed the lawyer as *Shylock*- a vampire in disguise in rhetoric sense of the term-

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[2] Jonathan Rose, Medieval Attitudes toward the Legal Profession: The Past as Prologue, Stetson Law Review, Vol. XXXVIII, p. 346-347. Available at: http://www.stetson.edu/law/lawreview/media/medieval-attitudes-toward-the-legal-profession-the-past-as-prologue.pdf

way back in the late sixteenth century.[3] Even in the golden age, the Victorian age as it is so called, frustration of the then society on the common law tradition in vogue stands apparent on the face of record; by courtesy Charles Dickens who portrayed the then temple of justice through rhetoric of 'bleak house' to characterize the same in terms of its evil practice and procedure inside:

> This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to moneyed might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give- who does not often give- the warning, "Suffer any wrong that can be done you rather than come here!"[4]

Thereafter, in the early twentieth century, Kipling blew off the institutional aura vis-à-vis pseudo justice in "Bleak House" through his words with fateful cutting edges like swords:

> No King will heed our warnings,
> No Court will pay our claims-
> Our King and Court for their disport
> Do sell the very Thames![5]

While such is the state of affairs in affairs of the state for the country of origin itself, as the continent of settlements, North America stands way ahead toward excellence. One- but not only- reason behind the same lies in introspection of all its stakeholders to identify and do away with the lacunae from the profession. Thus, in specific heads, USA provides for nine canons of professional responsibility to be observed by the bar for all its members:

> CANON 1. A lawyer should assist in maintaining the integrity and competence of legal profession.

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3 *Vide* William Shakespeare, The Merchant of Venice (1598).

4 Charles Dickens, Bleak House (1852). Available at: http://www.gutenberg.org/files/1023/1023-h/1023-h.htm

5 Rudyard Kipling, The Dutch in the Medway (1911). Available at: http://www.poetryloverspage.com/poets/kipling/dutch_in_medway.html

> CANON 2. A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.
> CANON 3. A lawyer should assist in preventing the unauthorized practice of law.
> CANON 4. A lawyer should preserve the confidences and secrets of a client.
> CANON 5. A lawyer should exercise independent professional judgment on behalf of a client.
> CANON 6. A lawyer should respect a client competently.
> CANON 7. A lawyer should represent a client zealously within the bounds of the law.
> CANON 8. A lawyer should assist in improving the legal system.
> CANON 9. A lawyer should avoid even the appearance of professional impropriety.[6]

Within the North American soil, as neighbour state, Canada provides for twenty two rules of professional conduct with more specific heads of professional conduct with nitty-gritty:

> There are rules on twenty two areas of concern, e.g. integrity, competence and quality of service, advising clients, confidential information, impartiality and conflict of interest between clients, conflict of interest between lawyer and client, outside interest and the practice of law, preservation of clients' property, the lawyer as advocate, the lawyer in public office, fees, withdrawal, the lawyer and the administration of justice, advertising, solicitation and making legal services available, responsibility to the profession generally, responsibility to lawyers and others, practice by unauthorized persons, public appearances and public statements by lawyers, avoiding questionable conduct, nondiscrimination, the lawyer as mediator, and independence of the Bar.[7]

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[6] ABA (American Bar Association) Model Code of Professional Responsibility, 1969 as amended till 1980. Available at: http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf
The document mentioned above ought to get read with 2012 amendments to Model Rules. Available at: http://isb.idaho.gov/pdf/sections/pro/pro_abamodel_rpc.pdf

[7] Code of Professional Conduct, adopted by Canadian Bar Association in 2004 and 2006. Available at: https://www.cba.org/cba/activities/pdf/codeofconduct.pdf

In a nutshell, institutional framework of the profession poses strong commitment in favour of what all are provided for. Not without reason that, despite want of success in terms of statistics, the level of trust remained constant with occasional increase as well since public perception is positive toward professional integrity of the bar:

> Despite the existence of many high-profile ethical standards within the profession over last decade, none has succeeded in capturing the public agenda and driving change within the profession. Perhaps somewhat surprisingly, the level of trust in lawyers remained constant over the decade and, in fact, increased during the period in which there was arguably the most negative attention focused on lawyers' actions. There is no question that such events have had an effect within the legal profession and the academy, and have helped to motivate many significant changes in recent years.[8]

Indeed, as movement, professionalism found its momentum way back in the mid-nineteenth century to launch a crusade against unscrupulous crowd to subvert the system from within:

> Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a friend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.[9]

What attracts attention is the absence of complacence till date. Even within the castle professionalism, and that also being the worldwide condemned one of law, aspiration rises to the extent of bringing in renaissance vis-à-vis professional conduct well within the cliché of common law tradition as legacy behind:

> Efforts have been underway to meet this aspiration drive since the adoption of the Model Rules. Today, there is a proliferation of ethics courses in law schools and ethics

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[8] Adam M. Dodek, Canadian Legal Ethics: Ready for the Twenty-First Century at Last, German Law Journal, Vol. 10, No. 07, 2009, p. 1085. Available at: https://www.germanlawjournal.com/pdfs/Vol10No07/PDF_Vol_10_No_07_SI_1047-1086_Dodek.pdf

[9] Abraham Lincoln's Notes for a Law Lecture. Available at: http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm

> articles in law journals; according to the Association of American Law Schools, there has been a six-fold increase in the number of law professors teaching courses in legal ethics in the past ten years. Twenty years ago, the Georgetown Journal of Legal Ethics was created, which was the first legal periodical dedicated solely to the topic of ethics. There are currently four other journals dedicated to ethics.
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> … … …
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> While the Model Rules are expected to be carried out as law, the Lawyer's Creed, with its aspirational undertones, is not. The Lawyer's Creed is meant to influence and persuade lawyers to elevate their professional ethical standards. If this is the intention, it begs the question as to whether the creeds are actually persuasive. Although a definitive answer is impossible, most would agree that, the rise of these creeds has failed to create an ethical renaissance in the legal profession.[10]

As its target, rather than overarching aspiration, a set of basic issues were insisted upon; those customary norms since time immemorial and to continue their legacy in time ahead:

> In the arena of professional standards, the ABA (read American Bar Association) has created four different codes since Lincoln's time. Specific areas of practice now have their own standards for conduct. Yet despite the many changes in the law and the many changes in its appurtenant professional standards, little else has changed in regard to legal ethics *per se*. All of the codes now existing, and those existed since Lincoln's time, express the same basic principles. At least six core duties of attorneys remain unchanged in the professional standards of the legal profession dating back 800 years to England: litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service. … In the legal profession, obstacles for ethical action abound; otherwise, ethics would not be so heavily discussed and fought for. Because these hindrances are always changing, their specifics are secondary. Far more important is learning and being motivated to overcome

[10] William T. Ellis and Billie J. Ellis, Beyond the Model Rules: Aristotle, Lincoln and the Lawyer's Aspirational Drive to an Ethical Practice, Thomas M. Cooley Law Review, Vol. 26, Issue 3, 2009, p. 600-602. Available at: http://www.cooley.edu/lawreview/_docs/archive_volumes/volume26_3/ellis.pdf

> whatever particular obstacles stand between an individual and an ethical practice.[11]

Also, there was emphasis upon pedagogic tools and techniques in the law schools of USA:

> Undoubtedly, many law schools will attempt to respond to these pressures by increasing their focus on core legal competencies in an attempt to demonstrate that their graduates are "ready to work on day one." But if law schools do nothing more than respond to the pressures of the marketplace without also insisting on the importance of the broader ethical values that have- however imperfectly- defined the lawyers' role in the minds of many lawyers and law students, then it is difficult to see why law should exist as a profession at all, or why the best and the brightest should continue to have any interest in sinking their human capital into law as a career. Norms of independence, craft, and public service- and their partial realization in the lived experience of real lawyers as experts, counsellors, and leaders- are central to the identity, prestige, and the power of the legal profession, and just as importantly, to the attractiveness of law as a career for the best and brightest students. The loss of these ideals threatens the recruitment of talent, and the fundamental trust upon which our shared economic, political, and social order is based. The forces that caused this transformation in other professions and occupations- skyrocketing costs, internal expertise developed by sophisticated clients, disaggregation along global supply chains, and disruptive innovation by alternative providers- are, as we have indicated above, now present in the legal profession.[12]

Besides mainstream teaching-learning methods, few alternatives stand identified, e.g. informal ways for dissemination of information through continuous adult education, means of political socialization for professional practitioners to constitute a built-in political culture, and the

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[11] *Ibid*, p. 610-611.

[12] Ben W. Heineman, Jr. *et al*, Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century, Center on the Legal Profession at Harvard Law School, Cambridge, 2014. Available at: https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf

like. The text of professional responsibility, therefore, ought to get read in given context:

> First, recognize that ... law schools can also prepare students for the realities of practice by preparing students for both ethically supportive contexts, as well as contexts that undermine the profession's fundamental purposes and standards. The increased focus on experiential learning within some law schools is a positive and supportive step toward providing students with some understanding of the practice setting.
> Second, many of the current initiatives support teaching and learning of professionalism. However, it is problematic that the Bar Admission Course continues to decrease the amount of time devoted to learning professionalism in the context of relationships; and that apart from articling there appear to be limited transitional opportunities for learning through work.
> Third, organizations devoted to promoting professionalism- regulators, insurers, bar associations, judiciary, CPD providers, and others- should focus on both formal and informal learning opportunities. Consideration should be given to supporting and celebrating lawyers (and judges) as teachers, mentors, coaches, and role models, as part of the social contract. The organizations should continue to develop programs and enhanced supports for coaches, mentors and supervisors to understand and develop as teachers within an apprenticeship. That is, they should consider programs that support a version of faculty development within law firms.[13]

As part of mainstream pedagogic policy matter in the law schools, resort to legal writing for better understanding of professionalism deserves credit.

> If we include issues of professionalism in legal writing, we can teach the students that professionalism is not an occasional grand gesture but an everyday commitment. Professionalism entails a commitment to call adverse authority to the court's attention even though one's client might lose; a commitment to be courteous to an

[13] Shelley M. Kierstead, Learning Professionalism in Practice, Comparative Research in Law and political Economy, Research Paper No. 59/2013, p. 77-78. Available at: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1301&context=clpe

> obnoxious opponent; a commitment to return a client's phone call at the end of a long, hard day. In other words, we can show students that professionalism is neither abstract nor esoteric; rather, it is concrete and practical. If we tie professionalism to the everyday tasks a lawyer performs, we can teach students to practice what we preach.[14]

Rather than being restraint to present predicaments, in recent past, the Canadian Bar Association went prognostic enough to address the conundrum of professionalism ahead, e.g. law firm ownership, law firm regulations, multi-jurisdictional practices, regulation of lawyers v. regulation of services, self-regulation (read restraint), and the like:

> One of the objectives of future initiative is to examine some of the regulatory issues that may arise for the legal profession in the future. As the legal industry is pressured by forces from within and from beyond, the latter seeking to change it from closed, protected industry to one that is more open, there will inevitably be calls from governments, clients, and the industry itself to examine current regulatory systems to verify that they are still effective.[15]

In market economy, preparedness appears imperative for prospect of the legal profession; more so for livelihood interests of professionals involved therein. Accordingly, in USA and Canada alike, the legal profession is known as glorious one with professional status of all its stakeholders in general getting higher than elsewhere. In reverse side of the coin, the legal profession is getting reduced to nullity in India and in its neighbourhood alike; so far as social audit of institutionalized justice and players involved therein are concerned.

III. COMMON LAW PROFESSION IN SOUTH ASIA

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[14] Margaret Z. Johns, Teaching Professional Responsibility and Professionalism in Legal Writing, Journal of Legal Education, Vol. 40, No. 4 (December 1990), p. 507-508. Available at: http://www.jstor.org/stable/pdf/42898126.pdf?acceptTC=true

[15] The Future of Legal Services in Canada: Trends and Issues, Canadian Bar Association (CBA) Legal Future Initiative, Ottawa, 2013, paragraph 11, p. 36. Available at: http://www.cbafutures.org/cba/media/mediafiles/pdf/reports/trends-isssues-eng.pdf?ext=.pdf

On the contrary, South Asia had historical settings of its own since time immemorial. Before colonization of the subcontinent, existing legal system evolved by the people served them till foreign regime took over. Albeit not fortified, the erstwhile system but had roots in its indigenous soil. The foreign regime could not sense the same and, with enthusiasm of doing good, opened a Pandora's Box by introducing common law in vogue in the then United Kingdom:

> The common law … was transferred to the subcontinent not by reception but by codification. For a good portion of the nineteenth century a good many Englishmen interested in the law devoted themselves to the framing of codes. India was considered sufficiently devoid of law that it did not seem analogous to transfer wholesale large elements of British law.[16]

With introduction of the foreign legal system, allied foreign profession was introduced and '*vakeel*' was born as fateful counterpart of lawyer being offshoot in the adversarial judicial process; by courtesy, Cornwallis.

> The 1793 Regulations decided by Cornwallis, which included establishment of the organization of people, who by profession were '*vakeel*' (already known in Mughal times) to plead on behalf of Indian suitors (with the model of English solicitors …).[17]

In Sri Lanka, however, circumstance stood poles apart.

> "… a historical Secretary survey of Sri Lanka laws shows that there is indication between indigenous and western laws. The first such law from the Portuguese in the 16th century had little significant influence; and the Dutch law which followed had such a profound influence that today, the Roman-Dutch law, which is regarded as the Common Law of Sri Lanka, fills in the gaps in the customary laws. The last such law received was the English law, which has permeated through the existing

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[16] Lloyd I. Rudolph and Susanne Hoeber Rudolph, Barristers and Brahmans in India: Legal Cultures and Social Change, Comparative Studies in Society and History, Vol. 8, No. 1 (October, 1965), p. 43. Available at: https://historytoo.files.wordpress.com/2009/08/rudolph-barristers-and-brahmans.pdf

[17] Jean-Louis Halperin, Western Legal Transplants and India, Jindal Global Law Review, Vol. 2, Issue 1 (2010), p. 9. Available at: https://hal.archives-ouvertes.fr/file/index/docid/559118/filename/Western_Legal_Transplants_and_India_2.pdf

> laws, while the various phases of indigenous and assimilated laws remain valid".[18]

The island meanwhile did receive a heavy dose of civil law system- at least in lion's share of its coastal region- besides indigenous legal system of its own at the *Kandyan* kingdom in central region. Consequently, unlike mainland India, the legal system fortified its castle not to get washed away by such invasion despite British political supremacy in the then Ceylon. It is, therefore, referred to as a "Legal Museum" because different kinds of law have affected the development of the law in Sri Lanka.[19] Compared to these two systems, development in Maldivian legal system and its law profession are still *de minimis* and thereby lack underpinning in the present effort.

Indeed there are other stakeholders in South Asia, e.g. Bhutan, Nepal, Afghanistan, Pakistan and Bangladesh, in the present effort, these are set aside on following counts. First, Bhutan is run by indigenous legal system of its own and never came in contact with common law. Second, Nepal, just like Afghanistan, Pakistan and Bangladesh, is a religious state and follows no secular liberal democratic system until recent past. Third, rest three Islamic states experience political ruptures at frequent intervals and consequent series of setback for rule of law to get their legal professionalism reduced to otiose from within the system concerned.

Back to India, in technical sense of the term, law profession got introduced by the *Raj* through enactment of the Legal Practitioners Act, 1846. Earlier, however, *vakeel* did exist on informal count, i.e. like client representative rather than like professional one:

> The history of the legal profession in India can be traced back to the establishment of the First British Court in Bombay in 1672 by Governor Aungier. The admission of attorneys was placed in the hands of the Governor-in-Council and not with the Court. Prior to the establishment of the Mayor's Courts in 1726 in Madras and Calcutta, there were no legal practitioners.[20]

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[18] Fathima Azmiah Bary, The Legal System of Sri Lanka, No. 26, 2003, p. 179. Available at: http://klibredb.lib.kanagawa-u.ac.jp/dspace/bitstream/10487/4132/1/kana-14-26-0009.pdf

[19] *Supra*, p. 165.

[20] The Bar Council of India website; about the history of legal profession in India. Available at: http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/

Since then the legal system in general, and legal profession in particular, underwent metamorphosis to turn bizarre enough and thereby distinct from its genesis; as in the UK:

> Ordinarily an English Transplant with Anglo-Saxon roots, the legal system in India has grown over the years, nourished in Indian soil. What was intended to be English oak has turned into a large, sprawling Indian banyan tree, whose serial roots have descended to the ground to become new trunks.[21]

In colonial India, profession went counterproductive to leave the national leadership including Gandhi- himself a lawyer- weary of the legal system and warn countrymen about its irrelevance to South Asia.

> The economic drain that the law courts cause has at no time been considered. And yet it is not a trifle. Every institution founded under the present system is run on a most extravagant scale. Law courts are probably the most extravagantly run. ... The best legal talent must be available to the poorest at reasonable rates. But we have copied and improved upon the practice of the English lawyers. ... We fancy that, in order to feel the equals of these English lawyers, we must charge the same killing fees that the English do. It would be a sad day for India if it has to inherit the English scale and the English tastes so utterly unsuitable to the Indian environment.[22]

Gandhian talisman, however, fell on deaf ears. Thus, India won freedom from the *Raj*- earned *Swaraj*- yet remained subject to the common law tradition while getting transcended to Republic of India with whole lot of colonial laws to rule British India as its legacy. Thus, internal colonialism took over while all the rest remained the same out of static inertia; by courtesy, unshaken colonialism entrenched in its system, legal profession and the law as instrument of intervention. The cliché of archaic laws still in vogue stood as stumbling blocks before the Constitution- as a cart does while put before the horse. In course of tryst with destiny, legal transition thereby turned stagnated and still continues to grapples with the legal system including the parasitic professionals involved therein. The crowd

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[21] Fali S. Nariman, India's Legal System: Can it be saved? Penguin Books, New Delhi, 2006, p. xx. Available at: https://books.google.co.in/books?id=MfxYOQgJ3JUC&printsec=frontcover#v=onepage&q&f=false

[22] M. K. Gandhi, Young India, dated 6-10-1920, p. 3, as quoted in S. B. Kher (ed.), M. K. Gandhi, The Law and the Lawyers, Navajiban Publishing House, Ahamdabad, 1962, p. 131. Available at: http://www.mkgandhi.org/ebks/law_and_lawyers.pdf

nearer to the temple remains farther from the God! The oft-quoted wisdom often than not appears befitting to the professional priesthood of justice in both sides of the adversarial lifeworld of so called Bleak House jurisprudence.

IV. PROFESSIONAL LEGACY IN THE POST-COLONY OF SOUTH ASIA

With independence, India inherited the yoke of its colonial past vis-à-vis legal system and the profession. Immediately, after a decade of minute exercise, professional code of conduct found expression of codification and a long-pending need stood served.[23] The then euro-centric trajectory for professional conduct was by and large plagiarized- albeit not in technical sense of so called intellectual property regime- on apparent face of the record. Indeed the initiative worked a lot toward disciplining errant players as and whenever they traverse beyond the least threshold of professional responsibility:

> "… no judge, nor lawyer will be in doubt, even without study of case law, that snatching briefs by standing at the door of the court house and in fighting for this purpose is too dishonourable, disgraceful and unbecoming to be approved even for other professions. Imagine two or three medical men manhandling a patient to claim him as a client. … Lest there should be lingering doubts we hold that the canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is no trade, briefs no merchandise, and so the leaven of commercial competition or procurement should not vulgarize the legal profession."[24]

In recent past, there is similar illustration in Sri Lanka as well.[25] Professional codes, however, fell too short to address the built-in

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[23] *Vide* the Advocates Act, 1961; read with Bar Council of India Rules, as amended to date (India). Available at: http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/

[24] Bar Council of Maharashtra v. M. V. Dabholkar etc. etc. [1976 SCC (2) 291], dated 03/10/1975. Available at: http://judis.nic.in/supremecourt/imgst.aspx?filename=5853

[25] *Vide* Bar Association of Sri Lanka, Colombo v. Mr. Nimal Jayasiri Weerasekara, judgment of Supreme Court of the Democratic Socialist Republic of Sri Lanka at

systemic subversion- carefully crafted by vested interest- that put the administration of justice in real peril:

> Senior lawyers, in whose hands the work is heavily concentrated, contribute to delay and arrears by their non-availability and unpreparedness; what is more they seem to obstruct, in a variety of specialized ways ... the expeditious handling of the cases. The substantial influence they must wield over the courtroom bureaucracy is still a matter for examination. If the ILS (read Indian Legal System) is to be made to pursue the goals of equity as well as expedition, the Bar must be made more amenable than it seems to be to judicial control… A consideration of this aspect of the matter cannot be said, with any degree of integrity, to threaten the independence of the legal profession or the rule of law. If anything, such an examination would be oriented to restore the rule of law within the Indian legal profession and in its dealings with the Indian judiciary and the Indian litigating public.[26]

The Bar seating in the steering wheel, the Bench is pushed to backseat with its professional wisdom.[27] In the common law system, judges get stuck between two mutually competing- and at times conflicting- professional responsibilities, e.g. keeping the Bar in humour along with attaining justice; like reconciling oxymoron, which is meant to set options exclusive of one another anyway. Likewise, in given circumstance of aggressive Bar, the Bench has hardly had role but to get played in tune with the humour of players (p)leading the court to travesty of justice. Defiance to unwritten rules of the game is likely to attract punitive posting, if not roadblock to elevation, for the radical judge. Appeasing the Bar, therefore, stands as unwritten rule for judges while few- too few- can afford hostility of the Bar; albeit, occasional exceptions apart.

Besides such insider insight, like that of *Baxi*, outside opinions are no less critical, if not caustic, for the Bar to initiate introspection of the

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Colombo, on 28.6.2013. Available at: http://www.supremecourt.lk/images/documents/SC_RULE_03_11_final.pdf

[26] Upendra Baxi, The Crisis of the Indian Legal System, Vikas Publishing House Pvt. Ltd., Delhi, 1982, p. 75.

[27] Reprimanding the rhapsodizing of a youthful attorney, the (US) Supreme Court Justice (Oliver Wendell Holmes, Jr.) said, "This is a court of law, young man, not a court of justice. Available at: https://books.google.co.in/books?id=E9AiGE--OsAC&printsec=frontcover&dq=reconstructing+justice:+an+agenda+for+trial+reform&hl=en&sa=X&ei=xO-PVZeyIJGOuASZ9IOwBQ&ved=0CB0Q6AEwAA#v=onepage&q=reconstructing%20justice%3A%20an%20agenda%20for%20trial%20reform&f=false

same. Be the same observation of Galanter,[28] or of Mendelsohn,[29] there is no space for complacence for the Bar at all. In theory, for the sake of its independence, a(ny) profession ought to have autonomy and therefore deserves self-government. In practice, however, theory stood overturned across the world. In USA, for instance, profession reached enviable benchmark despite the same put to supervision of the judiciary. Presence of American Bar Association as concerned professional forum appears no hardship for the court to impose sanction on errant players since the Bar and the Bench march together as sibling stakeholders of the legal profession:

> Federal judges in the US enjoy lifetime tenure and they operate their courts to a greater extent than in Canada. They are more independent from government justice departments. American judges admit and sanction lawyers who bring cases before them, and deal with the unauthorized practice of law, not leaving this to state authority.[30]

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[28] To the lawyer, modern Indian law is notwithstanding its foreign roots and origin … unmistakably Indian in its outlook and operation. There is little sentiment within (or outside) the profession for the revival of "indigenous law". The attempt to revive traditional village justice in the form of *panchayats* had its impetus outside the profession and is … ignored and disdained by the lawyers. While lawyers are critical of some features of the present system, they are wholly committed to it. My own observations confirm … that lawyers are quite unable to visualize any basic change in either the legal system or the organization of professional services.
Marc Galanter, Introduction: The Study of the Indian Legal Profession, p. 215-216. Available at: http://marcgalanter.net/Documents/papers/scannedpdf/studyoftheindianlegalprof.pdf

[29] There is ample evidence, then, that the judicial system has become a complex social structure in itself. The various specialists in legal administration … have entrenched themselves so as to be capable of operating as a force independent of the will of the parties to the dispute. Clearly, this trend to make the judicial process more unwieldy, less predictable, and even less just than it otherwise might be. At the same time, neither the procedures nor the third-party professionals are the root problem of the judicial system. A large part of the reason for the emergence of such an unsatisfactory legal profession is the opportunities offered by conflicts which are essentially beyond the competence of the courts to resolve. If the disputes had been more tractable, then it is doubtful that the lawyers would have had so great a room to manoeuvre in their own interest.
Oliver Mendelsohn, The Pathology of the Indian Legal System, Modern Asian Studies, Vol. 15, No. 4 (1981), p. 858-859. Available at: http://mja.gov.in/Site/Upload/GR/3.pathoogy.pdf

[30] Peter Bowal, Ten differences (between Canadian and American law), LawNow 26.6, (June-July 2002). Available at: http://prism.ucalgary.ca/jspui/bitstream/1880/48043/1/Bowal_Tendifferences2002_LawNow.pdf

On the contrary, in South Asian subcontinent, external (read political) supervision caused irreversible damage to the law profession and in turn put liberal democracy to jeopardy. Maldives stands exception to this end:

> A law society exists but it not compulsory for lawyers to join it. Most practitioners are not members and the society is now short of funds and ineffective.
> As a consequence, there is no regulation of the legal profession, an unsatisfactory registration and licensing system through the Ministry of Justice, and no code of ethics or discipline. If lawyers misbehave in Court (contempt of court) in a judges' opinion, the judge can order summary house arrest or even jail without trial.[31]

Indeed legal profession there is operative under supervision of the Maldivian court, like USA, still there is concern left to this end. While an independent institutional framework of the American Bar Association is operative in USA, checks and counter-checks often than not balance two divergent sides of the profession, e.g. independence and indiscipline. In Maldives, due to absence of institutional framework of its own, the legal profession but stands vulnerable to the potential threat of judicial feudalism.

Professionalization, in final count, serves the purpose of institutionalization of individuals groomed by the state to serve the society at large. Not without reason that professionals are given the status of officers in the court to assist the given system in its quest for truth and justice. Through creative construction of Article 12 under the Constitution, advocacy appears appurtenant to the state apparatus. Indeed, those with black robes have had duty toward their clientele and toward their fellow professionals. In final count, however, larger professional duty toward the court and toward the community ought to transcend their livelihood interests and parochial professional interests. Nobility is the litmus test for professionals and they ought to clear the test as and whenever they may be called upon to do so. Again, with creative construction, professional service may at ease get construed as national service; a fundamental duty under Article 51A(d) of the Constitution of India. Also, in public service, professional duty reflects in a maxim: *salus populi suprema lex*.

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[31] The Hon Justice Marcus R Einfeld, Strengthening the Maldivian Judicial System, Draft Discussion Paper, paragraph 8.6, 2005. Available at: http://www.mvlaw.gov.mv/pdf/publications/9.pdf

V. TOWARDS PROFESSIONALISM: A SOCIOLOGIC MOVEMENT

Looking ahead- for prognostic resolution- few developments carry weight to mention as being worthwhile to bring in far-reaching progress well within the legal system and all its stakeholders including the profession. The rest being hypothetic in their essence are moot points with the rationale behind. First, imperative of strong professionalism as movement from within the Bar- either through intervention of statutory institution or through inspiration of pleader association- in whatever means and methods is left to the Bar. Professionalism refers to an attitude that preaches professionals to pierce through veil of subjective appearance and thereby identify the objective truth behind. Long-term interests of the profession thereby receive priority over short-term ones. Collective interests thereby prevail over individual ones. Also, professionalism offers one to transcend petty self-interest and thereby look beyond with less interest- if not with interest-less- attitude to do public good; whatever plausible for the community:

> We must act in the hope that by strengthening the best of what remains within our craft we can somehow return to the larger society that which it cannot provide for itself. I am not suggesting that this will improve the image of our profession, prevent outside regulation of it, increase our purses or our honor, or even salve our troubled consciences. But I am suggesting it is what we should do.[32]

Since time immemorial, want of professionalism is evident in peace-building process and humanity happens to be the soul casualty. To quote from ancient Greece literature:

> In Sophocles' *Antigone*, Creon as the city's representative was charged with enforcing the law that prevented the burial of Polynices, Creon's relative, within the city of Attica. The law prevented polynices' burial because Polynices was a Thebian traitor to the city fighting against his own brother, Eteocles. Antigone, sister of both Eteocles and Polynices feels that she must

[32] Jack L. Sammons, The Professionalism Movement: the Problems Defined, Norte Dame Journal of Law, Ethics and Public Policy, Vol. 7, Issue 1 (February 2014), p. 303. Available at: http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1456&context=ndjlepp

> break the law for the sake of her brother Polynices and out of duty to the family dead.
>
> Creon recognizes only the single good of the well-being of the city, and Antigone that of family. The chorus sees both Creon and Antigone as makers of their own law and the value commitments they serve as matters of their own choosing. In their choices both have corrupted their feelings for other humans and they see only what they want to see and hear what only they want to hear.
>
> What Creon and Antigone both need is a good lawyer. … They need the moral distance and moral vision that one not committed to narrow views of the world could bring.
>
> This is what the craft of lawyering can do. … Neither practicing attorneys nor legal ethicists have ever articulated well this moral authority of our craft; we have never done an adequate job of telling those we serve how we serve them and what we have come to understand of the world through our craft. This, too, then is part of the project of professionalism.[33]

Similar is the reflection in contemporary non-narrative North American literature as well:

> As political pundits know, crises are useful because they convey messages- in simple, powerful terms- that expose underlying vulnerabilities, highlight the urgency of reform, and mobilize outrage to effectuate change. Reformers of the US legal profession have long followed this piece of political wisdom. Watergate helped spawn the American Bar Association (ABA) Model Rules of Professional Conduct and the modern system of professional ethics training in law school. Enron brought significant changes to the professional rules governing when lawyers can break corporate client confidences.[34]

There is no dearth of similar illustrations across the world. Be the same an apocalyptic armed conflict during armed conflict in *the Mahabharata*

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[33] *Supra*, p. 292-294.

[34] Scott L. Cummings, What Good are Lawyers? In Scott L. Cummings (ed.), Introduction, The Paradox of Professionalism: Lawyers and the Possibility of Justice, Cambridge University Press, 2011, p. 3. Available at: https://escholarship.org/uc/item/32z767zn

in ancient India, or countrywide carnage during the partition of mainland South Asia in modern India, a great lesson learnt was poor professionalism *inter se* well within leadership of given time. Diplomatic law poses another area of concern where professionalism conduct appears a need of the hour. Indeed, professionalism is imperative for global public good.

Back to the world of profession vis-à-vis law practice, distinction ought to get clear for practitioners between professional call and mercantile goal to strike functional balance.[35] The law and society movement in USA[36]- albeit academic in its essence- demonstrates underlying strength to support professionalism as sibling movement in time ahead. Resort to critical legal pedagogy, at least in public institutions, may serve the purpose to pursue catch-them-young policy. In India, newer public law schools with National Law School' brand ought to usher *pro bono* professionalism for larger public interest rather than corporate careerism for incorporated private interest.

Professionalism, however, does not necessarily means blunt sacrifice of pleader interests for public interests, etc. Rather the same insists on balance between interests- sometimes collective and individual interests alike; otherwise individual stakeholders *inter se*, e.g. professional and client, between or among professionals, etc. Also, it needs to spearhead quality of public service as part of the larger project:

> Despite some notable initiatives and the increasing use of quality rhetoric, the bar has lagged in the embrace of the quality reforms that have transformed other professions. The inhibitions on reform protect clients and lawyers from the dangers that reform might compromise client interests or lawyer morale. But they also preclude the benign potential of reform, including the fostering of

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[35] There needs to be a right and strict balance between the profession of law and the business of law. The needle has swung too far.
Cyril Shroff, Globalization and the Legal Profession: A Blue Paper, Harvard Law School Program on the Legal Profession, Cambridge, 2012, p. 9. Available at: https://clp.law.harvard.edu/assets/Shroff_Blue_Paper.pdf

[36] For details, refer to Susan S. Sibley, "Law and Society Movement" in *Legal Systems of the World: A Political, Social and Cultural Encyclopedia* (ed. by Herbart M. Kritzer), Vol. II, Santa Barbara, California, p. 860-863. Available at: http://web.mit.edu/ssilbey/www/pdf/law_soc_movt.pdf

> service that is more reflective, adaptive and transparent to clients.[37]

All these needs to get accomplished despite few predictable odds to all its stakeholders. In the age of good governance, transparency appears as tangible scribbling upon the wall and can no longer get set aside on the count of confidentiality to remain opaque and thereby open floodgate of errant practices the legal profession suffers from since antiquity. Confidential information vis-à-vis client apart, transparency is *sine qua non* for practice. Besides the Bar, another least explored area of concern is the Bench; suffering no less than other professional domains; yet unwittingly avoided- rather than ignored- out of archaic legal fiction that at least the judiciary ought to remain sacrosanct. In contemporary world, however, so called judicial aura cannot be held judicious since the same offers more harm than help. In liberal democratic system of governance, despite its autonomy, the judiciary ought to get subjected to accountability and the same stands codified by the documentation of a *pro bono* initiative as well with great persuasive force behind:

> A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.[38]

The hitherto movement toward professionalism, until the same covers those in the Bench, ought to spread pervasive parochialism around and thereby put the movement on the dock. Non-professionalism anywhere in the system is detrimental to professionalism everywhere across the system. Those is the Bench are but meant to offer public service; nothing more and nothing else. Thus, in final count, commitment to transparency optimizes conundrum between inconvenience and integrity.

The legal profession includes both the Bar and the Bench and two ought to work hand-in-hand. In other professions, for instance medical profession, surgeon needs support and cooperation of nurse; but qualifications for these two stand poles apart. In legal profession, however, qualification for both of them is same. Graduate degree in Law, along with enrolment in the statutory authority, serves the purpose for both. Common law court cannot function in the absence of either and here lies the catch. Under the (dis)guise of professional independence,

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[37] William H. Simon, Where is the "Quality Movement" in Law, Wisconsin Law Review, 2012, p. 406. Available at: http://wisconsinlawreview.org/wp-content/files/6-Simon.pdf

[38] The Bangalore Principles of Judicial Conduct, 2002; paragraph 6.2; on competence and diligence. Available at: http://www.unrol.org/files/Bangalore_principles.pdf

professional associations may and do indulge in evil practices to arm-twist the Bench, judicial administration and even state to bow down before whim and fancy of the profession. In its methodology, without questioning the rationale of issues- whatever the same may be- collective professional indiscipline like these stands self-defeating exercises to gross detriment of the profession. The same is the case in case of the Bench as well.

VI. TOWARDS PROFESSIONALISM: A SYSTEMIC MOVEMENT

Adversarial process of litigation being a foreign concept, professionalism in the court- the way the same is conceived in the Occident- stands absent in South Asia the way prevalent in North America. In its ancient antiquity, however, South Asia advanced its civilization toward an altogether divergent trajectory of professionalism and count of its brief account, therefore, seems imperative for a comparative study to this end. Scattered in diverse texts, the concept stands encapsulated in *Srimad Bhagavadgita*; a mythological conversation between humanity and divinity on professional pursuit in larger sense of the term along with edicts to prescribe and proscribe the conduct. Spiritualism apart, plenty of these edicts have had great potential to get constructed toward professionalism in administration of justice as well.

The narrative constitutes a sub-text well within the epic context of *the Mahabharata* where, on the eve of war, two belligerent powers stand face-to-face before one another and await final bell to initiate combat and consequent mutual damage to one another. The protagonist *Arjuna* stands visibly shaken by the appearance of his kith and keen queued in reverse side with anticipation of the consequence of such armed conflict. The anchor of his chariot *Krishna*- mortal embodiment of the almighty then appears before *Arjuna* to clear his confusion and thereby motivates him to take resort to arms for waging the war once again- happening as destiny- and perform his part as puppet of his given time and space. It is in this context that Krishna does preach the lessons of professionalism- albeit in its sui generis form and content- for *Arjuna* to motivate words of wisdom inside him. While the sacred text stands sacrosanct for the followers of Hinduism, here there is a secular academic reading of such otherwise sacred text: on professional performance without passion,[39]

[39] *Arjuna*, he who does not follow the wheel of creation thus set in motion in this world, i.e. does not perform his duties, leads a sinful and sensual life, he lives in vain. *Srimad Bhagavadgita*, Chapter 3, verse 16; Gita Press, Gorakhpur (India).

pleasure,[40] affinity,[41-42] ill will,[43] etc. to resemble prophesy (read professional wisdom) as is expected from the priesthood of justice in the constitutional courts of India.[44-45] In technical sense of the term, therefore, the South-Asian setting has had legacy of its own in professional prudence with indigenous cultural heritage; and no lesser than its North-American counterpart. Thus, in recent times, *sui generis* professional legacy of the ancient regional settings is apparent in the rise of pro-bono advocacy to spearhead fundamental human rights, including critical issues like those of environment in general and climate in particular, to safeguard public interest- more so for those who belong to commons- the profession is meant for in final count.

On the spur of moment, while globalization is getting consolidated in the South Asia, professionalism in the administration of justice is approaching the crossroads ahead. While traditional professional jurisprudence fell short of getting professionalism defined,[46] in its

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[40] Shutting out all thoughts of external enjoyments, with the gaze fixed on the space between the eye-brows, having regulated the outgoing and incoming breaths flowing within the nostrils, he who has brought his senses, mind and intellect under control- such a comprehensive soul intent for liberation and free from desire, fear and anger, is ever liberated.
Srimad Bhagavadgita, Chapter 5, verse 27-28.

[41] Arjuna, as the unwise man act with attachment, so should the wise man, with a view to maintain the world order, act without attachment.
Srimad Bhagavadgita, Chapter 3, verse 25.

[42] Better is one's own duty, though devoid of merit, than the duty of another well-performed; for, performing the duty ordained by his own nature, man does not incur sin.
Therefore, *Arjuna*, one should not relinquish his innate duty, even though it has a measure of evil; for all undertakings are beset by some imperfection or the other, as is fire covered by smoke.
Srimad Bhagavadgita, Chapter 18, verse 47-48.

[43] Desire, anger and greed- these triple gates of hell, bring about the downfall of the soul. Therefore, one should shun all these three.
Srimad Bhagavadgita, Chapter 16, verse 21.

[44] "I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India do solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws".
Form IV: oath or affirmation to be made by the judges of the Supreme Court of India, Schedule III to the Constitution of India, 1950. Available at: http://lawmin.nic.in/coi/coiason29july08.pdf

[45] For the provincial counterpart, refer to Form VIII: oath or affirmation to be made by the judges of High Courts, Schedule III to the Constitution of India, 1950.

[46] … set of rules that govern their professional conduct arise out of the duty that they owe the court, the client, their opponents, and other advocates.
Vide Bar Council of India vis-à-vis rules of professional standards. For details, refer to relevant provisions of the Advocates Act, 1961 along with relevant paragraphs of the Bar Council of India Rules as amended till date. Available at:

prescribed amendment Bill for the Advocates Act, Law Commission has suggested a definition of professional misconduct, thereby initiated public debate on the imperative for the State to have eye contact with otherwise mighty stakeholders of the legal profession:

> Professional misconduct refers to disgraceful or dishonourable conduct, not befitting to the profession concerned. Legal profession is not a trade or business. Therefore, it must remain a de-contaminated profession. Advocates have a duty to uphold the integrity of the profession and to discourage corruption so that justice may be secured by the citizenry in a legal manner. A lawyer must strictly adhere to the norms of profession which make him worthy as an officer of court. Dignity of the judiciary is to be maintained, failing which the institution itself will collapse. Indulging in practices of corrupting the judiciary or offering bribe to the Judge; retaining money deposited with the advocate for the decree holder even after execution proceedings; scandalizing the Judges; constant abstention from the conducting of cases; misappropriation of the amount paid; attesting forged affidavit; failure to attend trial after accepting the brief; taking money from client in the name of the Judge; gross negligence involving moral turpitude; indecent cross-examination; breach of trust; conducting fraud and forgery by the advocates, have been held to be serious misconduct by the Supreme Court.
>
> In light of the above decisions, the Law Commission considered and provided the definition of "Professional Misconduct" in the Amendment Bill recommended by it.[47]

In larger public interest, the rule of law genre needs subordination of all to the institution of law- including all (sic.) those in professional service within the court- before the law; the bar and the bench hereby taken together.[48] In the absence of intelligible difference between professionals

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http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/

[47] Paragraphs 15.3 and 15.4. Available at: http://lawcommissionofindia.nic.in/reports/Report266.pdf

[48] The State may require special training for some employments and forbid persons engaging in them who have not proved their fitness on examination and been duly licensed. Such are cases of practitioners of law, dentistry, medicine, and in fact of any employment which involves the safety and health of the general public.

and the rest,[49] discrimination ought to offend the dictate of reason, to the travesty of good governance; thereby offend the rule of law genre: a basic feature under the Constitution of India; non-negotiable in any circumstance. Individual members of the Bench have had no privilege over and above those in the Bar. Whatever safeguards available to the judiciary are but meant for the institution concerned.

Before the conclusion is drawn, in lieu of getting conclusive on the law professionalism, the author hereby cites definitions of General Agreement on Trade in Services (GATS):[50]

> *"Supply of a service" includes the production, distribution, marketing, sale and delivery of a service*.[51]
>
> *"Commercial presence" means any type of business or professional establishment, including through*
> *(i) the constitution, acquisition or maintenance of a juridical person, or*
> *(ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service*.[52] *"Sector" of a service means,*
> *(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,*
> (ii) *otherwise, the whole of that service sector, including all of its subsectors*;[53]
> *"Monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service*;[54]

The definitions, cited above, have had coverage of the law profession and professionals alike in technical sense of the term since justice is a

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Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America, 4th ed., Little, Brown & Co., Boston, 1931, Indian reprint by Hindustan Book Co., Calcutta, 1994, pp. 300-301.

49 The statutes which provide for such tests must consider moral and intellectual qualifications alone and must be free from unreasonable class discrimination. *Supra*, n. 45, p. 301.

50 General Agreement on Trade in Services. Available at: https://www.wto.org/english/docs_e/legal_e/26-gats.pdf

51 Article XXVIII(b), GATS.

52 Article XXVIII(d), GATS.

53 Article XXVIII(e), GATS.

54 Article XXVIII(h), GATS.

subject of delivery and the same constitutes nothing but one among the professional services; so far as law profession and the professionals enrolled and engaged in the delivery of procedural justice is concerned.[55] Therefore, as a party to the WTO regime, India cannot defy the jurisprudence in services; something deliberated by the official literature under the auspices of the GATS regime:[56]

> *Presence of natural persons consists of persons of one member entering the territory of another member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.*

Irrespective of such a clear position of the international trade regime, India has resorted to unilateral declaration of its poles-apart position; something inconsistent with GATS:[57]

> *In view of above, we uphold the view of the Bombay High Court and Madras High Court in para 63(i) of the judgment to the effect that foreign law firms/companies or foreign lawyers cannot practice profession of law in India either in the litigation or in non-litigation side. We, however, modify the direction of the Madras High Court in Para 63(ii) that there was no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.*

in particular context of likely accession by the globalized India in time ahead and consequent entry of the foreign professionals with global standards to get the pseudo-professionals just washed away in their own castle (read court premises) so far maintained by the want of professionalism. Indeed, professional legal service sector is yet to get

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55 For details, refer to sections 29-30 of the Advocates Act, 1961.

56 Available at: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

57 *Vide* consultation document on the WTO negotiations under the General Agreement on Trade in Services (GATS); released by the Ministry of Commerce, Government of India. Available at: https://commerce.gov.in/writereaddata/trade/Consultation_document_on_the_WTO_negotiations.pdf

open to foreign lawyers, India cannot afford to play protectionist for long with cliché defence vis-à-vis statutory regime under the institutional governance of the Bar Council of India:

> *We hold that the expression "fly in and fly out" will only cover casual visit not amounting to "practice". In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was doing practice which is prohibited can be determined by the Bar Council of India. However, the Bar Council of India or Union of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases.*[58]

In the time ahead, however, reversal in the given position appears just a matter of formality; more so while rest of the world increasing getting tuned to the international trade regime. The recent institutional initiatives, therefore, ought to get construed as protectionist care from the welfare state and not otherwise. Regrettably, words of wisdom fall on deaf ears followed by unprofessional militancy propagated by the institutionalized (read vested) interests in so called Bleak House. The doomsday but looms large with its peril in time ahead. Sooner these professionals (sic.) read the writings upon the wall appears better for themselves and the profession. A willy-nilly attitude is likely to be proved too late to lament for. Instead, it is time for sensible and sensitive stakeholders to get well prepared with sanity and sincerity to serve the knowledge profession and thereby get the professional interests fortified by the quality of service. If the purpose of liberalization-privatization-globalization stands served by internal service providers, the prospect for external counterparts' stands reduced by default. Timely turn of these service providers to professionalism, therefore, sounds no sermon but strategy for survival; more so for all those in the Bar rather than those in the Bench. For potential incumbents to judicial service, however, spectre of the GATS regime appears intimidating enough since foreign professionals have had better candidature with their professional track record.

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[58] Bar Council of India v. A. K. Balaji and Others, Civil Appeal 7875-7879 of 2015, Supreme Court, March 13, 2018; paragraph 44. Available at: https://www.sci.gov.in/supremecourt/2012/13890/13890_2012_Judgement_13-Mar-2018.pdf

To sum up information articulated and arguments advanced, conclusion may be drawn with the following heads. First, such widespread divergence vis-à-vis legal profession between the North American continent and the South Asian subcontinent resembles an underlying dichotomy between the Global North and the Global South respectively. Second, despite being offshoots of the same original system, divergence in these two demonstrates variable trajectories in legal systems of the settlers and of the colonized. Third, besides inter-regional, intra-regional divergence- between USA and Canada or among India, Sri Lanka and Maldives- demonstrates widespread variable trajectories in legal systems since, as an instrument of intervention, the law derives its strength from the society concerned and thereby constitutes altogether divergent legal systems with the divergent societal factors. Fourth, rather than loyalty to the profession, unlike popular perception, professionalism refers to overarching life-world of professionals to cover every sundry side anyway conceivable in course of their life and livelihood respectively. Fifth, in the age of globalization, professionalism also refers to strategy toward survival of professionals in the market-driven economy; more so in the wake of likely accession of South-Asian states to the GATS regime.

Even in the intra-national regime, contradiction went apparent in India with recent news headlines vis-à-vis relaxation in an otherwise compulsory requirement of research degree; so far as regular appointment in senior faculty position is concerned.[59] With due respect to underlying wisdom of the regulatory regime, members of the faculty in legal education deserve entitlement in law practice; something proscribed by the Bar Council of India.[60] In a corollary innuendo, one in fulltime faculty position is construed *ipso facto* debarred from engaging law practice; something devoid of reciprocity, followed by the Bar Council in course of professional diplomacy with counterparts of other countries across the world. While the academic domain is getting

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[59] In a major move to rope in industry experts and professionals, the University Grants Commission (UGC) is doing away with the mandatory PhD requirement to teach in central universities. Special provisions- professor of practice and Associate Professor of practice- are being created.
Manash Pratim Gohain, *UGC to allow experts without PhD to teach*, TNN, March 12, 2022. Available at: https://timesofindia.indiatimes.com/home/education/news/ugc-to-allow-experts-without-phd-to-teach/articleshow/90159313.cms

[60] Professional faculty means a faculty appointed from among the law practitioners (practicing Advocates) for teaching/guiding clinical law courses on the basis of Part time or fulltime faculty assignment. However, when a law practitioner intends to join full time faculty, he/she shall surrender his/her certificate of practice.
The Bar Council of India, Part IV, Rules of Legal Education- 2019, Section 2(XXVI). Available at: http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCI-65-2020-LE-All-VC-Registrar-Reg-Draft-Rule-of-Legal-Educaiton-2019.pdf

liberalized by the University Grants Commission, similar gesture is desired by getting the professional domain liberalized in time ahead. Bar Council of India owes the onus of reciprocity to this end. In the absence of exchange, accessibility of practitioner to legal academics and vice versa, a long-pending challenge vis-à-vis want of resource for teaching procedural laws and clinical laws remains alive; followed by hitherto disconnect between professional legal education and law practice. The Bar Council is required to respond to the clarion call of the WTO and the UGC alike; thereby get law profession liberalized from its protectionist coverage.

As a stakeholder of international trade regime, access for qualified foreign professionals to regular practice in the law courts of India is a matter of time; something knocking door of the law profession in time ahead. Within the domestic front, liberalization of academics by the University Grants Commission ought to be taken as a wake-up call for the Council to resort to reciprocity; thereby allow enrolled faculty to engage law practice by default. Among others, reasoning behind decadence of the law profession lies in the incompetence and the genesis of ailment may at ease be traced to want of competitiveness; much more so among rank-n-file members of the Bar. Consequently, dominated by representatives of these backbenchers, the Bar Council is left with no option but to extend its patronage to protectionism; something anathema to the foreign trade policy of Republic of India and the national education policy of Government of India. Let the legal profession of India leave the lawmen to 'tryst with destiny'; with other laymen of India. Thus spoke Gandhi:[61]

> "The best South African lawyers- and they are lawyers of great ability- dare not charge the fees the lawyers in India do. …There is something sinful in a system under which it is possible for a lawyer to earn from fifty thousand to one lakh rupees per month (the amount counted more than a century back). Legal practice is not- ought not to be- a speculative business. The best legal talent must be available to the poorest at reasonable rates."

VII. CONCLUSION

Final conclusion may be derived, taking cue from documented developments available, the way professionalism emerged as

[61] M. K. Gandhi, *Young India*, 6-10-1920, pp. 2-3, as quoted in S. B. Kher (ed.), M. K. Gandhi, The Law and the Lawyers (1962), fourth edition, Navajivan Publishing House, Ahmedabad, 1984, pp. 247-248. Available at: https://www.mkgandhi.org/ebks/law_and_lawyers.pdf

overwhelming movement in the North America fell severely short of being initiated in the South Asia so far. Professionalism stems from within the US profession as spontaneous movement while its Indian counterpart continues to lag far behind to this end. No wonder that, after the publication of the relevant report, pseudo-professionals pounced upon the then Law Commission Chairman with otherwise unprofessional gesture in all courtrooms and premises across the country.

To take stock of professionalism even beyond the legal profession, academics in USA contributed a lot through its law and society movement in leading law schools to bring in political socialization with *pro bono* advocacy as a way of living with livelihood. On the contrary, under statutory compulsion for law schools to follow the Bar Council recommended curriculum, Professional Ethics stands offered through semester course in final year while learners are occupied with the quest of opportunity to get placed. Consequently, being an otherwise potential area of concern in USA, professionalism as a movement appears yet to take its take-off in South Asian states.

Last but not least, amidst the heart of darkness, judiciary but played decisive role in India. In one among its landmark judgments- cited above[62]- the Apex Court of India has dared to call a spade a spade. Late Mr. Justice *Krishna Iyer*, the then sitting judge and one among foremost crusaders against professional impropriety vis-à-vis law practice thereby declared beginning of the end for unscrupulous court practice in the 'Bleak House'; as deciphered by Charles Dickens.

With cue from Iyer, judicial enterprise to bring in reform in legal profession fell too short to put its footprint on two counts. First, all objectives remain limited to mere proscription of evil practices while professionalism also deserves prescription of best practices worthy of conduct that suits to public service. Second, introspective indeed, those in the Bench, taken together, need miles to go for professional reform of its own as counterpart of the Bar in the court before the same brings in professionalism as movement in the courtroom and its premises. Both sides in the court ought to work together to reach desired end of the movement toward professionalism, i.e. commitment to the community at large rather than to the professional crowd in isolation. Also, in the contemporary era of professional non-litigation service in practice beyond courtroom, stakeholders engaged in diverse domains of advocacy, e.g., corporate office practitioner, *pro bono* practitioner, tax practitioner, etc., even law professors engaging law practice, all ought to get included with the jurisprudent purpose to get them into wider net of statutory

62 *Supra*, n. 24.

accountability for better professionalism in time ahead. In the given context, conservative proposition- not to allow entry of lawyers engaged in tertiary sector into legal profession- deserves professional review by lawmen- through judicial review or otherwise- to attain judicious position in larger public interest. In contemporary practice, professionalism needs wide edge; within and without the robe.