LEGISLATIVE
TESTIMONY

The Advocates Act, 1961

Recommendations for Reform

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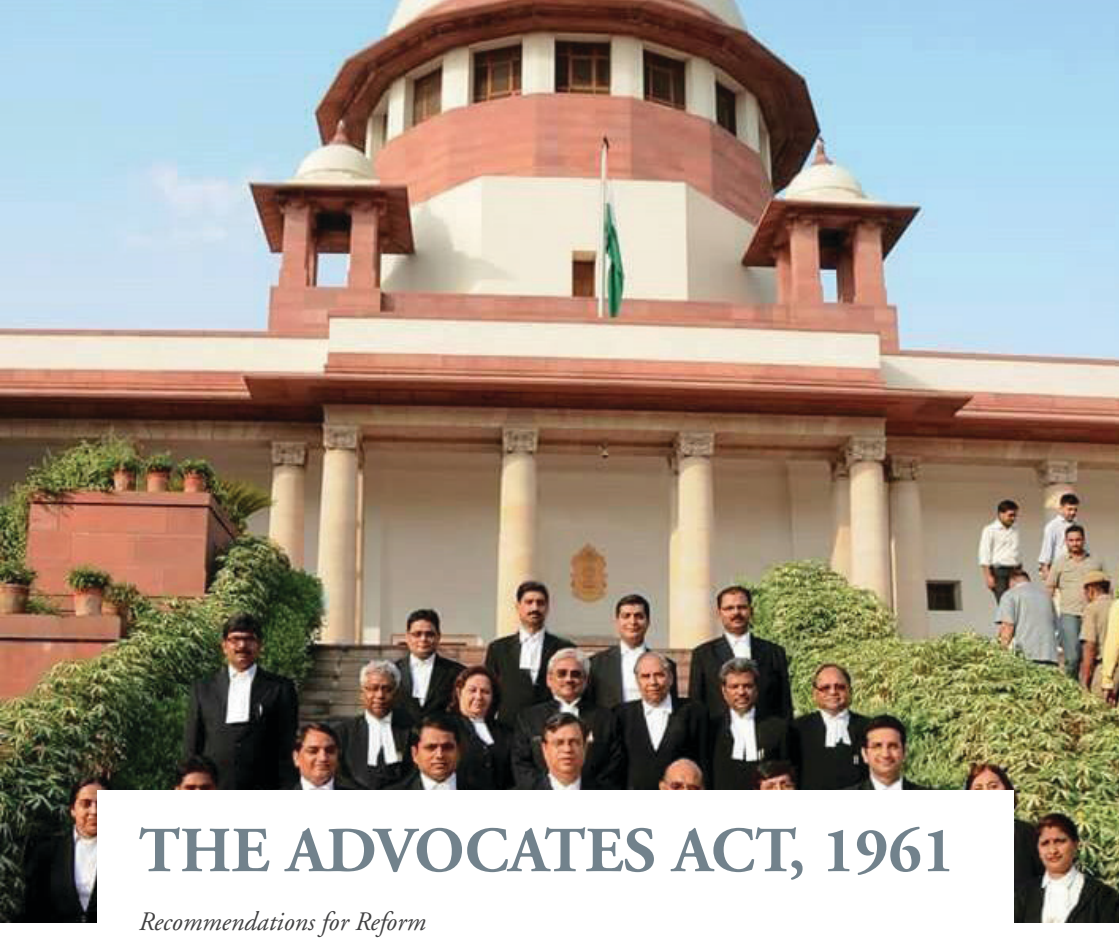

THE ADVOCATES ACT, 1961

Recommendations for Reform

This report highlights key issues litigants face in India due to regulatory gaps in the legal services sector. This paper puts forward an agenda for reform in the regulatory framework, for consideration of the Law Commission.

Legal services in India are regulated by the Advocates Act, 1961 (hereafter, Advocates Act), which constitutes the Bar Council of India (BCI) and respective State Bar Councils. The paper identifies two key areas that put litigants availing legal services at a disadvantage:

1. Information asymmetry
2. Remedies against misconduct

INFORMATION ASYMMETRY AND WAYS TO ADDRESS IT

Information asymmetry is defined as the difference in the level of information between two parties engaged in a transaction with each other (The Economist 2016). As legal services require a transaction between the advocate and litigant, it contains contractual obligations. There is, thus, said to be information asymmetry in the system if the litigant is at an information disadvantage.

Like healthcare, legal service is a credential good, that is, good with qualities that the consumer cannot observe after availing the service. This makes it hard for the consumer to assess the utility of the service. Usually, the service provider— in this case, the lawyer— has more knowledge than the litigant. This results in information asymmetry. Although corporate clients are not so vulnerable to information asymmetry since they are "repeat users" of such service, household litigants are. Information asymmetry in legal services broadly stem from three avenues:

1. Lack of information about the competence of the lawyer.
2. Lack of information about the quality of service (legal representation or legal opinion) received and propriety of course of action chosen by the lawyer.
3. Lack of information about fee comparison before availing the service.

Current regulations on legal services in India restrict the advocate to publicise their qualifications and area of expertise in the field of law and does not allow for sharing of information regarding previous cases handled. Second, it is not clear whether advertising other than posting on a website is permitted. Third, regulations do not also allow advertising fees or consultation charges. The information asymmetry arising out of this ban on advertising does not allow the client to compare different advocates and make the best decision in her interest. Evidence suggests that restriction on advertisements increases the fees charged for the profession's services. That is, more the advertising, less the fees charged. More advertisement in the market, then, leads to lower fees (Chanda and Gupta 2015). The literature also presents evidence suggesting that without advertisement of professional services, litigants will be unable to correctly approximate the value of the specific service. This kind of information asymmetry in the service poses a high risk to the market of the service. Market failure resulting from information asymmetry can lead to a weakening of the market product or service, and can lead to a decrease in the quality of service, while decreasing employment levels in that particular service sector (Akerlof 1970).

Advertising as a tool to address information asymmetry

As per the BCI, "advertisement and publicity measures lead to commercialization of the profession and lower ethical standards and quality of service provided" (Narang 2011; Rai 2010). To the contrary, evidence suggests that information barriers— such as regulation of advertising— are against competitive principles and lead to an oligopoly of certain

players in some cases (Mehta 2006). This has a negative effect on the aggregate quality of the service in the industry. Advertisements reduce the problem of information asymmetry and increase competition amongst the service providers, benefiting the client encouraging quality service and lower price. In addition, a European Commission report has found a negative correlation between regulation on advertisement and the productivity in legal services (Canton, Ciriaci, and Solera 2014). The report further found that in countries with fewer regulations on legal services, 1 euro (roughly equivalent to Rs. 73) worth of demand in the legal service industry resulted in the generation of 1.8 euros (approx. Rs. 131) of gross production.

There is, therefore, a need for legalisation of advertising in the legal sector in India. The Supreme Court of India has placed commercial speech under Article 19(1)(a) of the Constitution of India, which is a fundamental right protecting freedom of speech[1]. Yet, strangely, it has expressed, along with the BCI, concerns regarding unethical professional conduct amounting from "commercialization" of the legal profession[2] which are clearly not informed from the empirical research. Evidence unequivocally supports advertising and competition. Hong Kong[3], Israel[4], Malaysia[5], Singapore[6], United States[7] and United Kingdom[8] have greatly benefitted by allowing advertising in the legal service sector. All the aforementioned countries, and their respective Bar Associations and Councils, legalised advertisements in the legal sectors. However, the required regulations for advertisements have been enacted to safeguard the general public from malpractices and unethical conduct, and are reviewed at regular intervals to remain in step with the socio-economic conditions of the country.

Service aggregators to ensure transparency and credibility

Like Practo (healthcare), Uber (transportation) and Airbnb (accommodation), there are a number of online platforms for searching and rating lawyers. These platforms such as myadvo.in and lawrato.com provide detailed lawyer profiling, including information on specialisation, qualification, client reviews, consultation fee and other dynamic variables, updated automatically by an algorithm. Clients and litigants can find the lawyers matching their requirement, book a consultation, and even rate the lawyer after consultation. These platforms can potentially foster transparency and trust in an otherwise opaque legal service sector in India. As per the Bar Council rules, these platforms may be covered under the category of 'Touts' and may not be allowed any commission from the lawyer since charging a commission from the lawyer is also prohibited under the rules. This should be allowed.

Contingent fee to align the incentives of lawyers with the client

1. Tata Press Ltd. v Mahanagar Telephone Nigam Ltd., 5 SCC 139 (1995).
2. Bar Council of Maharashtra v. M. V. Dabholkar, 2 SCC 291, 23 (1976)
3. Solicitors' Practice Promotion Code (1992).
4. Bar Association Law, 5721 (1961).
5. Legal Profession (Publicity) Rules (2001).
6. Legal Profession (Professional Conduct) Rules (2015).
7. Legal Profession (Publicity) Rules (2001).
8. Solicitors' Code of Conduct (2011).

A contingent or conditional fee is any fee provided in professional services where the fee is payable only if there is a favorable result. While the collection of contingent fees for legal services is prohibited in India, it has advantages upon implementation.

First, contingent fee offers an incentive to the service provider and serves as a risk-sharing device between the advocate and the litigant. Second, it is an automatic financial support to litigants, who do not have the financial means to pay for their services. In cases where litigants seek damages but lack the financial support to avail legal services, contingent fee serves as an automatic mechanism for the litigant to press forward with legal claims. Third, contingent fee shifts the risk from the litigants to the advocates. Advocates will hence better assess the prospects of success and discourage meritless claims. Contingent fee, therefore, helps reduce frivolous cases. Particularly because advocates with a financial conflict of interest will not take such a case in the first place (Cabrillo and Fitzpatrick 2008). Contingent fee offers the litigant a choice—both in terms of financial aid and the advocate—thus, satisfying the litigant's utility.

More choice, better quality of legal services for litigants and clients

There is a ban on multidisciplinary partnerships in India, prohibiting registered advocates to partner with non-advocates or to serve as managing directors of companies, partnerships, and consultancies (which have non-advocates as partners or stakeholders). Such a ban, or regulation, on multidisciplinary partnerships creates limitations on the services a litigant or a client can avail. The benefits of cost may not be realised, and a litigant or client may have to pay extra to avail different services (Cabrillo and Fitzpatrick 2008). For example, 'international taxation' is a specialised service and may require both advocates and accountants. Without firms specialising in multidisciplinary domains, the burden of the cost is completely levied on the client or the litigant to seek services from multiple sources. In case of multidisciplinary partnerships, the client or litigant would neither have to incur extra costs for availing different services nor would they have to incur the cost of searching for a different service provider for the various services required (Cabrillo and Fitzpatrick 2008).

Moreover, there is no reason why law firms should not be allowed to register as companies under the Companies Act, 2013, as a private limited company. Australia and the UK both have allowed for law firms to be listed on the stock exchange.

Further, there should be no limit on the partners a firm can have. Neither is there any empirical rationale for such a restriction, nor any intuitive reasoning against going big.

Recommendations

1. Allow lawyers to advertise their fees for services, achievements and all other information they wish to advertise.
2. Allow service aggregators to offer search-and-review applications/platforms for legal services and receive commission.
3. Legalise contingent fee for commercial cases and accident claims to stop

unethical contingent fee payments by clients and to increase incentives for advocates.

4. Allow multidisciplinary partnerships so that clients can avail complex levels of services involving interdisciplinary issues under the same roof.

5. Allow law firms to be registered as limited liability partnerships and companies, and allow them to be listed on stock exchange so that they can raise capital and expand.

REMEDIES AGAINST LEGAL MALPRACTICE

Responding to an RTI filed in 2014, the State Bar Council of Maharashtra and Goa revealed that it receives an average of over 250 complaints against advocates for misconduct or unethical practices each year (over the course of the last decade). However, the response to the RTI also revealed that no action had been taken against any of the advocates since 2005 (Deshpande 2014). Further, the Central Information Commission's Information Commissioner M. Sridhar in June 2016 reported that BCI has been in non-compliance with the RTI Act. As per Commissioner Sridhar, the BCI neither posts details of their meetings, information regarding disciplinary hearings against advocates accused of misconduct, and their decisions, nor reveals inspection reports regarding law school inspection committees (Shrivastava 2016). Moreover, there are rampant strikes in many district courts across the country for frivolous reasons despite express ban on such strikes by various courts including the Supreme Courts (Choudhary 2015). Strikes by advocates are perceived as an unethical practice and despite its frequent occurrence, the Bar Councils have not taken the requisite disciplinary action. These instances indicate a severe accountability deficit.

The Advocates Act, 1961 has two fundamental flaws in the regulatory structure which contribute to an accountability deficit in the BCI:

» Regulatory bodies such as the BCI and the State Bar Councils are elected bodies. As per the Advocates Act, 1961, every State Bar Council maintains a roll of all advocates, legally qualified to practice in that state. The advocate then has a single transferable vote for the elections of the State Bar Council. The State Bar Council elects one member to the BCI to constitute the regulatory bodies created under the Act. The election of the state bar councils creates a direct conflict of interests for the regulatory bodies' members. Elected representatives cannot be expected to act harshly on their constituencies. This is why judges are not elected by lawyers or litigants anywhere in the world. Strangely, this principle is blatantly violated in the Advocates Act, 1961 by vesting disciplinary powers in an elected body. It is not as if the regulator is being elected by litigants or clients, it is being elected by every constituency—that is, lawyers—it is supposed to regulate and discipline. The elected members want to be re-elected and maintain their popularity, and therefore, have an inherent incentive to

support their voters irrespective of malpractice or malfeasance. Clearly, this is a fundamental flaw.

- The problems of self-regulation have been highlighted in the literature and support the following implications (Mehta 2006; OECD 2015). Self-regulation has a higher risk of leading to regulatory capture[9] in cases where the regulatory body is closely connected to the industry it is regulating. It can lead to significant loss to the professional service sector by removing the benefits of cost, efficiency, and quality that would exist in competitions. In some instances, it may lead to nepotism and distortion of competition. While this also contributes to a distortion in competition, where certain entry barriers might discriminate against certain types of businesses. Also, self-regulation poses a risk to accountability and effect costs. Self-regulatory bodies often lack proper mechanisms for review and evaluations for the aforementioned reasons. There is a negative effect on cost, where the sector and the self-regulatory body might transfer its operating costs to the consumer of the product service (Hepburn 2006; Mehta 2006; OECD 2015).

The evidence suggests that the constituted self-regulatory bodies have inclined towards regulatory capture.

Recommendations

Based on the discussion above, this paper presents the following recommendations:

1. There should be a "National Bar Commission"—a regulatory body to govern the legal service sector and legal education in India. This body should have at least 50 per cent members from outside the legal fraternity in order to offset the problems arising out of self-regulation. Even within 50 per cent representation from the legal fraternity, some members should be from the bench and academia. One may argue that representation from the bench and academia should be adequate to offset the disadvantages associated with self-regulation. This will not work, given the close networks within the legal fraternity. 50 per cent non-legal representation is the only solution to balance vested interests. There can be 20 members out of which 10 non-legal members and 4 representatives from the Bench (retired judges) and academia can be nominated by the Ministry of Law and Justice, Union Government.

The constitution of National Bar Commission should be as follows:

- Bar Representatives from the BCI: Not more than 6 members (on rotational basis; yearly members);
- Representatives from the Bench (retired judges) and Legal Academia: 4;
- Bureaucrats: 2 bureaucrats nominated by the Ministry of Law and Justice, State

9. Regulatory capture is a theory propounded by George Stigler, a Nobel laureate economist. It implies domination of the regulatory agency by the very group/ sector it is supposed to regulate. For instance, Bar Council is dominated by special interest groups of lawyers. Instead of protecting litigants' interests, the regulatory agency starts acting in ways that benefit the lawyers it is supposed to be regulating.

Government;

- Former senior police officer: 2;
- Consumer Affairs panelists or former presiding officers: 2;
- Civil Society: 4 should be eminent personalities, non-lawyers from other fields such as journalism, accountancy, social work etc. nominated by the Ministry of Law and Justice.

2. National Bar Commission shall strive to achieve the following regulatory objectives:

- Protecting and promoting the interests of the clients and litigants;
- Promoting healthy competition amongst the lawyers for improving the quality of service;
- Certifying the rating of lawyers, quality of legal educational institutions and foster innovation in the legal education field;
- Improving access to justice and promoting rule of law.

3. The National Bar Commission shall be vested with the powers to regulate the legal service sector and legal education.

4. State Bar Councils and the BCI shall act as advisory bodies to the National Bar Commission.

5. The National Bar Commission shall appoint not less than one Disciplinary Committee for every state and if required, for the district as well. This committee may comprise of not more than 5 members. The Disciplinary Committee shall have no lawyers and shall have more representation from the non-legal field (including consumer forum officer or panelist) than representation from the bench or law academia. The Disciplinary Committee concludes hearings and gives a decision within eight weeks which is binding and non-appealable. The disciplinary committee can direct payment of damages/ impose fine, order suspension and even cancellation of license. Constitutional courts can review the decision on limited grounds and not reappraise the facts. In the case of a possible criminal offense, matters will be forwarded to the respective high court with the preliminary report.

6. State Bar Councils shall register all lawyers and have representation from all kinds of lawyers as defined by the National Bar Commission. State Bar Commission shall maintain a register of all lawyers category-wise on its website and be updated periodically.

7. National Bar Commission shall constitute a “Legal Education Board” which shall:

- Define outcome-based standards for legal education institutions and courses for certification;
- Suggest curricula, pedagogy without impinging on the autonomy of the legal

educational institution;

- Encourage various international and domestic public and private bodies to undertake assessments and publish ratings of the legal educational institutions;
- Certify various general and specialized courses;
- Certify and specify standards for conducting law entrance exams, exit exam or bar exam and other kinds of certification exams;
- Constitute a 3-member tribunal for redressal of complaints related to any legal educational institution.

8. No rule or by-law framed by the National Bar Commission shall be anti-competitive as per the Competition Act, 2002. NBC Rules shall be amenable to the jurisdiction of the Competition Commission and Competition Appellate Tribunal.

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Prashant Narang has been in the sphere of policy ideas for nearly 15 years. A regulatory researcher in the area of education and livelihood, he speaks often on the Rule of Law, K-12 education, street vending, and public policy issues at top law schools and Centre for Civil Society (CCS). He currently serves as a Senior Fellow, Research and Policy Training Programs at CCS.

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He co-authored "NEP 2020: One Time Comprehensive Evaluation" and contributed to quality assessment of all state-level Education Laws. He co-drafted the Model State School Code - a Model Law to implement the NEP 2020 and an amendment to the Right to Education Act 2009.

Prashant has a Doctorate degree from Center for the Study of Law and Governance at Jawaharlal Nehru University, where he submitted his thesis on the Constitutional Right to Trade and Business. He led a team of 15 people to conduct a process audit of 24 public services across five departments in Punjab. This work has been instrumental in reforming the public services in the state.

Prashant has taught Constitutional Law at the Faculty of Law, University of Delhi. While he enjoys legislative drafting, he finds law and economics, and empirical legal research fascinating.

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