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Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

SUBMISSIONS ON THE REGULATION OF THE LEGAL PROFESSION IN INDIA

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I. INTRODUCTION

A. Preface

The Supreme Court of India highlighted the importance of the legal profession and its invaluable contribution to the justice delivery mechanism in *Mahipal Singh v. Union of India*,[1] in which the court has also noted the declining standards of professionalism amongst legal practitioners. In this background, the Law Commission of India was referred the task of undertaking a review of the regulatory framework in place for the legal profession. The present paper highlights some areas of reform that may be studied and analysed in greater detail by the Law Commission.

B. Contextual framework

The legal profession is presently regulated under the framework established by the Advocates Act, 1961 (**"Act"**). The Act constitutes State Bar Councils (**"SBCs"**), along with the Bar Council of India (**"BCI"**), as the primary regulators of advocates and the legal profession. In theory, such a regulatory framework may be designed and operated by the state/sovereign,[2] by the regulated entities themselves, or through a combination of the two. Regulation for most activities moves away from exclusive state control to self-regulation, when the activities and the issues to be regulated become more complex, and when it becomes easier to entrust regulation to experts from the field or industry being regulated.[3]

A regulatory framework which embodies a hybrid of private and state regulation is recognised as a co-regulatory structure. Most regulatory frameworks for the legal profession operating in different jurisdictions operate in this hybrid form.[4] Even in India, the Act establishes a co-regulated structure, rather than a completely self-regulatory framework, laying down several checks and balances against the powers and authority of Bar Councils.

For instance, the BCI has supervisory powers and authority to oversee the functioning and operations of the SBCs, e.g., the BCI has powers to issue rules and regulations,[5] review audit statements of SBCs,[6] determine the procedure for the disciplinary committees of SBCs,[7] exercise

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[1] 2016 SCC OnLine SC 663.

[2] Hans J. Kleinsteuber, 'The Internet between Regulation and Governance', in *Self-Regulation, Co-Regulation, State Regulation* <http://www.osce.org/fom/13844?download=true> accessed 15 September, 2016.

[3] Hans J. Kleinsteuber, 'The Internet between Regulation and Governance', in *Self-Regulation, Co-Regulation, State Regulation* <http://www.osce.org/fom/13844?download=true> accessed 15 September, 2016.

[4] Richard F. Devlin and Heffernan P., 'The End(s) of Self Regulation?', (2008) Alberta L. Rev., <www.lsuc.on.ca/media/twelfth_colloquium_devlin.pdf> accessed 15 September, 2016.

[5] Section 7(g) of the Act stipulating the supervisory functions of the BCI over the SBCs, read with Section 49 (i) empowering the BCI to make rules *inter alia* for the guidance of SBCs.

[6] Advocates Act 1961, Section 12.

[7] Advocates Act 1961, Section 7(c).

appellate powers against decisions of the SBC,[8] withdraw proceedings pending before disciplinary committees of SBCs,[9] etc.

There is some oversight by the higher judiciary, as well as the Central Government, over the BCI. For example, a High Court may lay down rules allowing or disallowing an advocate from appearing before such High Court, or subordinate courts within its jurisdictions.[10] Further, the Central Government has been conferred with rulemaking powers for matters governed by the BCI and SBCs, thereby establishing a co-regulatory framework.[11]

The judiciary also has a growing influence in regulating the legal profession, which is evident from numerous judicial pronouncements. In *Harish Uppal v. Union of India*,[12] the Supreme Court drew a distinction between the right to practise law, and the right to appear in court, making the latter a subcategory of the former. It stated that the Courts must have major supervisory and controlling powers for regulating who appears before them and practises law, which is not an interference with the regulatory functions of the Bar Councils.[13] Additionally, in *Mahipal Singh*, the Supreme Court has also read a *suo motu* invocation of its appellate powers (under Section 38 of the Act), in cases where a complaint or reference has been made to a SBC or the BCI, and where the SBC or the BCI have failed to take action.[14] The Supreme Court has also upheld the power of the High Courts to regulate the people appearing before them in its recent decision in *Jamshed Ansari v. High Court of Allahabad*.[15] These judgments clearly reflect the concerns regarding the inadequacy of the Bar Councils in exercising regulatory powers.

This regulatory framework for lawyers as contained in the Act has been found is wanting for several reasons:

a. As seen in the figure below, the BCI and SBCs comprise the very lawyers these bodies are intended to regulate. This is an obvious conflict of interest which has been sustained in the garb of self-regulation. Different jurisdictions the world over are reducing the degree of self-regulation because of these inherently conflicting interests.[16] In India, the problem of conflicts of interest is obvious in the manner in which the Bar Councils are constituted – the very lawyers who are subject to regulation of the SBCs are the people vested with the right to vote and elect members of the SBC. Hence, the regulator operates at the pleasure of the very advocates it is constituted to oversee, govern, reprimand and punish, if needed. As a

[8] Advocates Act 1961, Section 37.

[9] Advocates Act 1961, Section 36 (2).

[10] Advocates Act 1961, Section 34.

[11] Advocates Act 1961, Section 49 A.

[12] (2003) 2 SCC 45.

[13] (2003) 2 SCC 45, ¶ 34.

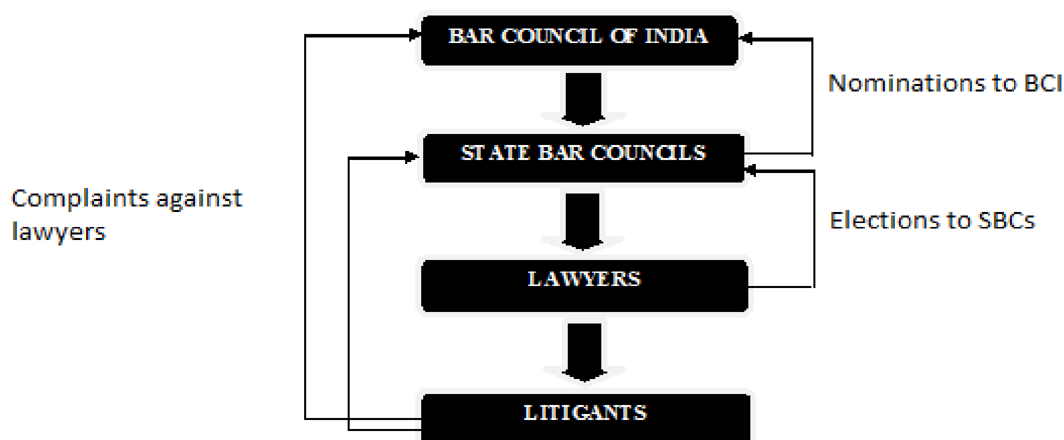
[14] *Mahipal Singh Rana v State of UP*, 2016 SCC OnLine SC 663.

[15] (2016) SCCOnLine SC 868.

[16] Richard F. Devlin and Heffernan P., 'The End(s) of Self Regulation?', (2008) Alberta L. Rev. <www.lsuc.on.ca/media/twelfth_colloquium_devlin.pdf> accessed 15 September, 2016.

result, Bar Councils do not have the right incentives to regulate the advocates who are their members. India needs to review the existing regulatory framework and seek a more balanced and logistically enforceable mechanism, where such evident conflicts of interest are done away with.

Figure 1: Framework under the Advocates Act, 1961



b. The Act itself has several drafting flaws that require amendments. This has led to ambiguity over the scope and ambit of the regulatory powers of the Bar Councils, the class of lawyers, subject to regulation, and the punitive action that may be pursued against individuals guilty of illegally practising law. These have been discussed in greater detail in subsequent sections.

c. The Act only permits advocates to practice law.[17] However, the legal profession in India has evolved, opening avenues for a diverse array of professionals who are engaged in niche practice areas of law. In fact, the Supreme Court has interpreted the practice of law to include litigious and non-litigious forms of practice.[18] The possibility of a regulatory framework for lawyers who are not enrolled as advocates on a State roll needs to be evaluated as well.[19] Regulation of the legal profession must also consider adequate punishments for lawyers practicing illegally. While the Act prescribes punishment for illegal litigious practice, no such provisions exists for illegal non-litigious practice of law. This issue of possible regulating non-enrolled lawyers is discussed in greater detail in the subsequent portions.

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[17] Advocates Act 1961, Section 29.

[18] Bombay High Court and Supreme Court judgments.

[19] Section 45 of the Act does talk about criminal penalty for non-advocates appearing in courts and tribunals, but not for non-litigious practice.

Revamping the regulatory framework for lawyers is imperative. The reforms can have a two-fold approach – firstly, identifying the areas needing reform under the existing framework by amending provisions of the law, and secondly, to regulate non-enrolled lawyers who are practicing the legal profession in violation of the law. The latter may also require an overhaul of the present regulatory framework. For this purpose, the present paper discusses eight areas for reform which are as follows:

a. Amendment to the provisions of the Advocates Act, 1961;
b. Strikes by litigating lawyers;
c. Regulation of non-enrolled lawyers;
d. Enhancing accountability of Bar Councils;
e. Advertising by legal professionals;
f. Ceiling on legal fees;
g. Free legal services; and
h. Legal education standards and accreditation of universities.

These areas cover the different stages in the professional trajectory of a lawyer, beginning from the stage of gaining educational qualifications to practice law, to the stage of actually entering into the practice of law (either as a litigator or otherwise), and the stage of exit from the profession, which may be due to suspension or revocation of license of practice. In this background, the present paper seeks to set the agenda for a greater discourse reviewing and upgrading the regulatory mechanism for the legal profession.

II. AMENDMENTS TO THE PROVISIONS OF THE ADVOCATES ACT, 1961

A. Introduction

The provisions under the Act which might require amendment have been identified, at a minimum, along with reasons warranting an amendment, as below:

a. Section 2 (1) (i) defining the term 'legal practitioners'.
b. Sections 6 and 7 listing the functions of the SBCs and the BCI, respectively.
c. Section 24-A listing out disqualifications which can bar an individual's enrolment for two years.
d. Sections 35 and 36 stipulating the disciplinary powers available to the SBCs and the BCI, respectively.
e. Section 36B prescribing a time period of one year for the disciplinary committee of the SBC to dispose of a complaint or a proceeding initiated *suo motu* against an advocate, failing which the matter shall stand transferred to the BCI under Section 36(2).
f. Sections 37 and 38 listing the appellate powers of the BCI and the Supreme Court of India, respectively.
g. Section 34 bifurcating the disciplinary jurisdiction by empowering the High Courts to *inter alia* issue rules determining conditions for advocates to practice before the High Courts, or courts subordinate to them.
h. Section 45 stipulating the penalty for persons illegally practicing in courts and before other authorities.

B. Regulatory concerns

1. Definition of legal practitioners

The practice of law now means much more than mere court practice. As interpreted by the Supreme Court,[20] the term encompassed both litigious and non-litigious forms of practice. In this context, the definition clause may be amended to introduce the definition of legal practice. Further, the definition of legal practitioners at present covers only litigating practitioners, and may be amended to bring it in conformity with an expansive definition of legal practice. Using 'legal practice' as the unit of regulation, which shifts the regulatory framework from being person-centric to becoming activity-centric, could potentially ensure flexibility in the scope and ambit of regulation. If kept broad-based, this shift could help the regulatory framework keep pace with rapidly evolving nature of legal practice.

2. Limitation on disqualifications

Section 24-A of the Act disqualifies an individual from being enrolled as an advocate if such a person has been convicted of an offence involving moral turpitude, or for an offence under the Untouchability (Offences) Act, or has been dismissed or removed from employment or office under

[20] *Harish Uppal v UOI*, (2003) 2 SCC 45.

the State on any charge involving moral turpitude. The Supreme Court in its judgment in *Mahipal Singh*[21] has read this provision to be applicable even to advocates already enrolled on a State roll. The *proviso* of Section 24-A of the Act, limits the application of these disqualifications only for a period of two years.

The Supreme Court has identified this proviso as an area of concern - firstly, whether an individual corrupted in his ways and means can be trusted simply with the passage of time without any scrutiny of his persona, and secondly, the period of two years being arbitrary and containing no guarantee of reform of an individual's temperament and character.[22] In view of the Supreme Court's observations, Section 24-A may be amended by deleting the *proviso* and giving effect to the disqualifications in permanence. Additionally, a new *proviso* may be added to introduce a standard of scrutiny to determine if the disqualified individual or advocate has actually overcome their disqualification by performing some form of reparation for the misdeeds originally committed; and if so, then it may be condoned in a prescribed manner. Additionally, Section 24-A should be amended to apply these disqualifications to enrolled advocates as well, as interpreted by the Supreme Court of India.

3. Disciplinary powers of the BCI

Section 36 of the Act confers disciplinary powers on the BCI, but the provision speaks of the BCI's jurisdiction over '*advocates not enrolled on any state roll*' which contravenes the definitional framework of the Act. The usage of 'not' enrolled seems erroneous; as such, it must be deleted to extend the jurisdiction of the BCI over all advocates enrolled on any roll maintained under the Act.

4. Powers of the Supreme Court

Section 36B empowers the BCI to withdraw any proceeding(s) pending before the disciplinary committee of a SBC, if the same has not been disposed of within a period of one year. The Supreme Court, in *SCBA v. UOI* and in *Mahipal Singh,* has read such power to be implicit within its appellate powers. This expansion of the scope of appellate power of the Supreme Court is problematic for multiple reasons. First, a literal reading of Section 38 requires the Supreme Court to exercise its appellate power only if a concerned person, or the Attorney General, or the Advocate General of the concerned state prefer an appeal against an order passed by the disciplinary committee of the BCI. Further, unlike the BCI, which under Section 36(2) can withdraw a proceeding pending before the disciplinary committee of any SBC and place it before itself, the Supreme Court has no such powers.

In this background there are two points warranting consideration – firstly, given the growing problem of backlog in the Supreme Court, reading this expansion into its appellate powers under Section 38 of the Act may prove to be more deleterious than helpful, adding a whole new array of cases to its existing backlog. Secondly, in the event it is deemed necessary to still expand the scope of supervisory powers of the Supreme Court, the appropriate manner is to amend Section 38 and provide for a power to withdraw proceedings pending before the BCI, to the Supreme Court. Further, Section 36B of the Act must also be amended prescribing time limit for the completion of

[21] *Mahipal Singh Rana v State of UP*, 2016 SCC OnLine SC 663.

[22] *Mahipal Singh Rana v State of UP*, 2016 SCC OnLine SC 663.

disciplinary proceedings before the BCI, failing which the Supreme Court may withdraw proceedings before the BCI.

5. Power of the High Courts to formulate rules

High Courts are empowered to *inter alia* determine and regulate the advocates that appear before them, and before subordinate courts within their jurisdictions. It is pertinent to note here that the Supreme Court has upheld this power under Section 34 of the Act, read with Article 225, in its judgment in *Jamshed Ansari*.[23] The Apex Court clearly held that the right to practise is a statutory right under Section 30, which is subject to the provisions of the Act, including the regulatory powers of the state High Courts. As long as regulations are not absolutely prohibitory, but regulatory in nature, accomplishing the ends of bettering justice delivery, rules under Section 34 of the Act are constitutionally valid. While the final decision on the rules of practice vests with the High Court, it may be valuable to seek the opinion of the concerned SBC, as well bar associations of the said High Court, to transform this process into a more collaborative effort. This point becomes self-evident in light of the ongoing impasse between the Madras High Court and numerous members of its Bar Association (i.e. the MMAA) who have been on strike since the High Court amended its rules of practice pertaining to the advocates permitted to appear before the High Court. The High Court has reportedly also constituted a five-judge committee to review the amended rules by coordinating with representatives of the bar.[24] Therefore, incorporating this step of coordinating with the bar to amend rules of practice might be more amenable to the overall regulatory framework.

[23] (2016) SCC OnLine 868.

[24] Apoorva Mandhani, 'Amended Advocate Rules on hold for all practical purposes: Madras HC', Live Law <http://www.livelaw.in/amended-advocate-rules-hold-practical-purposes-madras-hc-read-order/> accessed 15 September, 2016.

III. STRIKES BY LAWYERS

A. Introduction

The legality of lawyers calling strikes in courts and its ramifications for such lawyers, as well as the whole justice delivery framework, is of significant concern. For this paper, the issue of strikes has been reviewed only with respect to the role of litigating advocates and in the context of boycotting courts. In its 131st Report, the Law Commission termed strikes by lawyers as a '*nauseatingly recurring phenomenon*'.[25] Strikes by lawyers are criticised for constraining the judicial machinery and hampering the ability of courts to dispense justice. The Supreme Court dealt with the question of legality of strikes by lawyers in *Ex. Capt. Harish Uppal v. Union of India*.[26] In this judgment, a constitutional bench of Supreme Court unanimously declared the act of going on strike by an advocate as *ex-facie* bad in law, for which there must be consequences.[27]

The only exception where strikes by lawyers may be accepted are rarest of cases involving the dignity, integrity, and independence of the bar and the judiciary, and in such instances, the strike may be called for a day as a token gesture of protest. Despite the exceptional nature of this right, strikes by lawyers have become epidemic. For instance, in 2015 in Delhi, district courts reportedly lost more than a fifth of their total working days due to strikes.[28] Similarly, Calcutta High Court witnessed a court wide strike which was reported as an 'additional holiday'.[29] In none of these instances did the strikes last only for a day, as permitted by the law. For example, in the run-up to the amendment to increase the pecuniary jurisdiction of the Delhi High Court from Rupees twenty lakhs to Rupees two crores, both the Delhi High Court Bar Association, as well as the Coordination Committee of the Delhi district courts, gave repeated calls for strikes.[30]

Thus, the situation pertaining to strikes by lawyers remains of concern, despite the unequivocal dictum of the Supreme Court. The Supreme Court also iterated the role of Bar Councils and Bar Associations in ensuring the smooth functioning of courts and not advocating or passing resolutions for general strikes or court boycotts by lawyers. To this effect, the Supreme Court issued an

[25] Law Commission of India, 131 Report on 'Role of the Legal Profession in Administration of Justice', at ¶ 2.11 <http://lawcommissionofindia.nic.in/101-169/Report131.pdf> accessed 15 September, 2016.

[26] (2003) 2 SCC 45.

[27] See also *Mahabir Prasad Singh v Jacks Aviation (P) Ltd.*, (1999) 1 SCC 37.

[28] Prachi Shrivastava, 'Can the SC do anything about frequent strikes by lawyers', (*Live Mint,* 6 October, 2015) <http://www.livemint.com/Politics/DIQyJ9qcsdrC9k99DDO0VJ/Can-the-SC-do-anything-about-frequent-strikes-by-lawyers.html> accessed 15 September, 2016.

[29] R. Balaji and Tapas Ghosh, 'Chance missed to call lawyers' bluff' (*The Telegraph*, 8 March, 2015) <http://www.telegraphindia.com/1150308/jsp/frontpage/story_7493.jsp#.V7qttfl96M8> accessed 15 September, 2016.

[30] A PIL was filed by Common Cause in the Supreme Court last year, seeking contempt action against four respondents who are all officials in different bar associations in Delhi. Se also, Prachi Shrivastava, 'Can the SC do anything about frequent strikes by lawyers', (*Live Mint,* 6 October, 2015) <http://www.livemint.com/Politics/DIQyJ9qcsdrC9k99DDO0VJ/Can-the-SC-do-anything-about-frequent-strikes-by-lawyers.html> accessed 15 September, 2016.

ultimatum that unless greater self-restraint was exercised by the bar, the courts would have to effectuate rules to debar lawyers guilty of '*contempt and/or unprofessional or unbecoming conduct*'.[31]

Substantial reform must be carried out to overcome this problem. Section 49(1)(c) of the Act empowers the BCI to draft rules regarding standards of professional conduct and etiquette. The same are enlisted under Chapter II of the BCI Rules,[32] and are broadly divided into duty to the courts, duty to the client, duty to the opponent, and duty to colleagues. Crucially, none of these classifications impose any duty on an advocate to ensure that she appears in a matter, once she has filed a *vakalat*. Further, no duty is imposed on advocates to facilitate the smooth functioning of courts without boycotting or going on strike.

B. Regulatory concerns

1. Amendments to the Rules governing professional conduct and etiquette

The Act already empowers BCI to ensure that minimum professional standards are observed by all advocates. To this effect, the rules on professional conduct and etiquette set down minimum standards. These rules must be amended to incorporate a duty towards courts, as well as towards clients, to facilitate the justice delivery mechanism and not act in a manner impeding the same.

2. Separate rules regarding strikes

Under Section 49 (1)(c), the BCI can also issue a separate set of rules specifying the nature, scope and extent of the right to go on strike by advocates. The principles stipulated by the Supreme Court in *Harish Uppal* and other judgments discussed hereinabove, can be the guiding benchmarks for these rules. Such rules should treat striking lawyers at par with lawyers who have committed misconduct, and take necessary action against such advocates under the regulatory framework.

[31] *Harish Uppal v UOI*, (2003) 2 SCC 45, ¶ 2.

[32] BCI Rules on professional conduct and etiquette <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf> accessed on 15 September, 2016.

IV. REGULATORY FRAMEWORK FOR NON-ENROLLED LAWYERS

A. Introduction

The Act permits only advocates to practice the profession of law, subject to the provisions of the Act, and other conditions prescribed by related rules.[33] An elaborate regulatory framework has been set out for overseeing and governing advocates. The Act empowers the disciplinary committees of SBCs to initiate proceedings against an advocate enrolled on the State roll, if it believes that such an advocate is culpable of misconduct after receiving a complaint against him, or as a *suo motu* action.[34] The process of filing a complaint is set out in Part VII, Chapter I, of the BCI Rules,[35] and allows consumers or litigants to file complaints against misconduct of advocates. Once a complaint is filed, the Act and rules set out a detailed procedure for examining the complaint. The SBCs are empowered to even suspend or revoke the license of practice of an advocate, if the advocate is found guilty of misconduct.

It must be reiterated that the only people legally authorised to practice law in India are advocates as defined under the Act. Therefore, any person seeking to practice law must be first enrolled on a State roll. The right to practice has been read to incorporate litigious and non-litigious practice.[36] Therefore, any lawyer rendering legal services even while not practicing in courts, tribunals or before any other authority prescribed under law, must be enrolled as an 'advocate' on a State roll. Arguably, by extension, the practice of law by any non-enrolled lawyer could be regarded as illegal and in direct violation of the Act and the regulatory framework.

B. Regulatory concerns

In this background, some issues for consideration and possible rectification, are listed below:

1. Definition of legal practitioner

The existing definition of legal practitioner is antiquated and obsolete, and not in conformity with the inclusive understanding of legal practice that has been interpreted by the Supreme Court and numerous High Courts. When 'legal practice' has been interpreted to include non-litigious forms of practice, the Act, too, should be amended to reflect this in the definition of a legal practitioner.

2. Penalty for illegal practice

The Act at present only lays down penalty for persons illegally practicing before courts or any other authorities or person,[37] and evidently only applies to individuals engaged in illegal 'litigious'

[33] Advocates Act 1961, Section 29.

[34] Advocates Act 1961, Section 35 (1).

[35] BCI Rules <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf> accessed 15 September, 2016.

[36] *Harish Uppal v UOI*, (2003) 2 SCC 45, ¶ 34.

[37] Advocates Act 1961, Section 45.

practice of law. However, if any practice of law by a non-enrolled lawyer is considered to be in contravention of the Act, penalties would need to extend to individuals pursuing non-litigious practice illegally as well.

3. Professional standards and etiquettes

The BCI Rules on professional standards and etiquette is also focussed on litigating advocates, rather than the legal profession as a whole. Consequently, the rules may be insufficient to effectively regulate professional standards of non-litigating lawyers. These rules, therefore, may be adequately amended to comprehensively define standards of litigious and non-litigious practice.

4. Heterogeneity in Bar Councils

Bar councils were created to bring together various practitioners into a single category of advocates, allowing them the right and freedom to practice in any courts across India. Bar Councils are predominantly represented by litigating lawyers, despite regulating the larger class of advocates which include litigators and non-litigators. The structure of the Bar Councils needs an overhaul, as well, with representation from non-litigating lawyers and even members of the legal academia.

The issues discussed here indicate some deficiencies in the existing regulatory framework, from the constitution of Bar Councils to the actual implementation of the scheme of the Act. While the BCI is *de facto* the primary regulator, the Act under Section 49A, also confers rule making powers on the Central Government. The Central Government may issue rules to carry out the purpose of the Act, and may issue rules on all matters for which the Bar Councils have rule-making powers. Therefore, exercising its powers under this provision, the Central Government is competent to bridge or fill up any loopholes in the regulatory framework as it exists today. It may be favourable for the Central Government to pursue a more active role in ensuring the performance of duties and functions by the BCI and the SBCs by enacting rules under the Act, fulfilling this purpose.

V. INCREASED ACCOUNTABILITY FOR BAR COUNCILS

A. Introduction

The state bar councils operate with very limited accountability, and the BCI, none. An illustration of this is seen in the Supreme Court lament over the inaction of the BCI and the UP SBC in its judgment in *Mahipal Singh*. In this case, the counsel appearing on behalf of the BCI informed the Supreme Court that despite a direction from the Allahabad High Court, no information was available on the status of the consequential action initiated by the Uttar Pradesh Bar Council against the errant advocate.[38] The Supreme Court has also made strong remarks on the inaction that plagues bar councils.

While the supervisory powers of the BCI establish some scrutiny over the actions of SBCs, no system of supervision exists over the BCI itself. In fact, as a consequence of the failure of the Bar Councils as the main regulators of the legal profession, the Supreme Court has extended its powers under Section 38 (i.e. appellate powers of the Supreme Court) in a manner that is not entirely in conformity with the plain reading of the statute. This issue has already been highlighted earlier and the arguments are not being reproduced to avoid repetition.

Another significant concern is the failure of the Central Government to exercise its rule making powers under the Act and close the loopholes in the regulatory framework. The Central Government has rule making powers under Section 49A, for all purposes of the Act, including rules with respect to all matters over which the Bar Councils have the power to make rules. The Act also provides that the rules made by the Central Government would prevail over the rules instituted by the Bar Councils, in the case of a conflict. Therefore, in circumstances where the Bar Councils have failed to discharge their regulatory functions by instituting adequate rules under the Act, the Central Government can potentially fill the regulatory void. This interdependence is the foundation of a co-regulatory framework, as discussed earlier.

The situation however, warrants a greater review of the regulatory framework in place, to discern reasons for the brazen impunity with which lawyers often operate, with no deference to or compliance with a regulatory framework. In part, this problem stems from the lack of accountability of the Bar Councils when they fail in their roles as regulators of the legal profession. Pursuant to its powers under the Act,[39] the BCI has drafted rules listed under Part IX of the BCI Rules, where *inter alia* the supervision and control by the BCI over SBCs are stipulated.[40] Rules 18 to 24 explicitly list the supervisory functions, including:

a. Power to summon information from SBCs, as required;
b. Duty of the SBCs to intimate the BCI of any legal proceedings instituted against a concerned state council, and update the BCI on this information whenever it is required;

[38] *Mahipal Singh Rana v State of UP*, 2016 SCC OnLine SC 663, ¶ 15.

[39] Advocates Act 1961, Section 49 (i).

[40] BCI Rules, <http://lawmin.nic.in/la/subord/bcipart9.htm> accessed on 15 September, 2016.

c. Duty of the SBCs to maintain the audited accounts in a manner prescribed in the rules framed under the Act;
d. Duty of the SBCs to provide information of the advocates enrolled on the State rolls, including updates on the status of an advocate if he or she has been removed from the State roll.

The rules for supervision do not contain a mechanism to counter inaction on the part of the SBCs. Further, Section 10B stipulating disqualifications against an elected member of a Bar Council empowers the BCI to enact rules setting out additional conditions to disqualify an elected member. Towards this, the BCI has enacted rules which set out disqualifications for members of Bar Councils. Interestingly, none of these disqualify or remove any member from the SBCs for dereliction of their duties and functions as officials of the SBCs.[41] Even the Central Government, which has rule making power under the Act, has failed to reign in the situation by filing this gaping regulatory void. There is also no recourse in the law to initiate an inquiry into the inaction of a SBC.

This situation is reflective of the inadequacy of self-regulation that mars the overall efficiency of the regulatory framework. This situation may be rectified through legislative reform and a more effective implementation of the supervisory powers.

B. Regulatory concerns

1. Amending the BCI Rules

The BCI Rules, specifically Parts III and IX, must be amended to accomplish a two-fold objective. Firstly, under the supervisory powers, BCI should be empowered to initiate inquiry against inaction on the part of any SBCs, or even its own members and officials. Secondly, such an inquiry must be completed in a time bound manner, and if found guilty, the concerned officials in the SBCs must be reprimanded. In this regard, the rules enacted under Section 10B stipulating additional grounds for disqualification of a member of a Bar Council, a reprimand from the BCI should be ground to disqualify and discharge the concerned member or official, with a prospective prohibition on re-election.

2. Maximum duration for disposing of disciplinary proceedings

To enhance accountability of the disciplinary committees of the Bar Councils, a mechanism must also be introduced to curtail delay in action or utter inaction on the part of the SBCs and the BCI in initiating disciplinary proceedings. Such a process may consider the possibility of removing/replacing members of the concerned disciplinary committee.

[41] Part III of the BCI Rules, under Rule 2, lists out the disqualifications for members of Bar Councils, in exercise of the BCI's power under Section 10B.

VI. ADVERTISING

A. Introduction

Commercial speech, of which advertising is a facet, has been exalted to the status of a fundamental right for all citizens under Article 19(1)(a) by the Supreme Court.[42] That being the case, the question to be asked is not why advertising should be permitted in connection with legal services but rather, why not. Moreover, the market for legal services being as dynamic as it is, with new forms of legal services fast emerging, prospective consumers could benefit greatly from greater publicity.[43] Advertising could also be key in addressing the information asymmetry that already exists between lawyers and prospective clients.[44]

The regulatory *status quo* on advertising, which pertains solely to advocates (as defined under the Act), prohibits advertising and is codified in Rule 36 of the BCI Rules, under the head of 'Duty to Colleagues'.[45] It proceeds to lay down parameters that need to be complied with respect to an advocate's sign-board, name-plate, and stationary. While the constitutionality of these Rules was challenged in a Writ Petition before the Supreme Court in 2000, which resulted in the BCI relaxing the absolute prohibition in 2008, the question of law remains open.[46] Subsequent to the amendment, however, the Rules permit advocates to furnish limited website information, after intimation and approval from the BCI as an exception to Rule 36. The inappropriateness of lawyers resorting to advertising has been reaffirmed by the Supreme Court over the years, most notably in *Bar Council of Maharashtra v. M. V. Dabholkar,*[47] which pertained to alleged misconduct pertaining to solicitation. The Court reiterated that the canons of ethics and propriety for the legal profession taboo conduct by way of soliciting and advertising, scrambling and other obnoxious practices. It further stated that that the law is no trade and briefs no merchandise, and, therefore, commercial competition and procurement could vulgarise the legal profession.

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[42]*Tata Press Ltd. v Mahanagar Telephone Nigam Ltd.,* (1995) 5 SCC 139. The court also highlighted that the Article 19(1)(a) protection to commercial speech does not extend to misleading and false advertisement. Interestingly, the ambit of the Consumer Protection Act, 1986 is sufficiently wide in scope to address consumer grievances against such false advertisements.

[43]Malathi Nayak, 'India debates letting lawyers advertise' (*Live Mint,* 21 October, 2007) <http://www.livemint.com/Consumer/zouTfhtQIGwVuEYbIiv24H/India-debates-letting-lawyers-advertise.html> accessed 23 August, 2016.

[44]Rupa Chandra, Pralok Gupta, 'Regulatory Environment for Legal Services: A Cross-country Analysis' in Globalization of Legal Services and Regulatory Reforms: Perspectives and Dynamics from India <https://books.google.co.in/books?id=vFolDAAAQBAJ&pg=PT47&lpg=PT47&dq=lawyer+advertising+information+asymmetry&source=bl&ots=U_NwqNlb6q&sig=m4izQT3tcIlkvp07gCIw3pifIXs&hl=en&sa=X&ved=0ahUKEwj2ipCjvLvOAhWCq48KHc3BCPQQ6AEIJjAB#v=onepage&q=lawyer%20advertising%20information%20asymmetry&f=false> accessed 23 August, 2016.

[45]BCI Rules, Part VI <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf> accessed 23 August, 2016.

[46]*V. B. Joshi v Union of India and Ors.,* WP (Civ.) 532/2000, Order dates April 5, 2013 <http://courtnic.nic.in/supremecourt/temp/53220003542013p.txt> accessed 23 August, 2016.
[47](1976) 2 SCC 291, ¶ 23.

B. Regulatory concerns

1. The need for legalisation

On the legality of advertising by legal professionals, many countries have, over the years, progressively moved towards a more liberal stand. The United States[48], the United Kingdom[49], Hong Kong[50] and Malaysia[51] have removed complete bans on the practice and have resorted to varying degrees of regulation of such advertising instead. For instance, the American Bar Association's Model Rules of Professional Conduct provide a skeletal regulatory framework covering only a few core issues. In comparison, the Malaysian Legal Profession (Publicity) Rules, 2001 are significantly more detailed and regulate the usage of business cards, interviews with the press, radio or television, publicity outside Malaysia and usage of greeting cards, among other things.[52] Given the documented benefits of such an approach,[53] it is time for India to rid the legal profession of Victorian undertones of nobility and liberalise its stand on the issue of advertising to bring its regulatory framework in line with international best practices.[54]

2. Amendments to the BCI Rules for consistency

Although the fact that the BCI has softened its stand on the issue, as reflected in the 2008 amendment, is encouraging, it raises certain issues. An amendment triggered by court proceedings on an issue as crucial as this reflects *ad hocism* in regulatory decision making, which is a problem. Moreover, the amendment creates an arguably false distinction between usage of different media in advertising by lawyers without providing sufficient basis for it by allowing advertisements only

[48]*Bates v State Bar of Arizona*, 433 U.S. 350 (1977); Model Rules of Profession Conduct, Rule 7, American Bar Association <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html> accessed 23 August, 2016.

[49]Solicitors' Code of Conduct, 2011 <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 23 August, 2016.

[50]Solicitors' Practice Promotion Code <http://www.hklawsoc.org.hk/pub_e/professionalguide/volume2/default.asp?cap=25> accessed 23 August, 2016.

[51]Legal Profession (Publicity) Rules, 2001 <http://www.malaysianbar.org.my/legal_profession_publicity_rules_2001/> accessed 23 August, 2016.

[52]Model Rules of Profession Conduct, Rule 7, American Bar Association <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html> accessed 23 August, 2016; Legal Profession (Publicity) Rules, 2001 <http://www.malaysianbar.org.my/legal_profession_publicity_rules_2001/> accessed 23 August, 2016.

[53]'Legal Marketing Stats Lawyers Need to Know', October 1, 2015, The National Law Review <http://www.natlawreview.com/article/legal-marketing-stats-lawyers-need-to-know> accessed 23 August, 2016; Prof. Kara Chan, 'Attitudes towards advertising by lawyer's among Hong Kong consumers', <http://www.coms.hkbu.edu.hk/karachan/file/AJBR_lawyer_ad.pdf> accessed 23 August, 2016; Malathi Nayak, 'India debates letting lawyers advertise' (*Live Mint*, 21 October, 2007) <http://www.livemint.com/Consumer/zouTfhtQIGwVuEYbIiv24H/India-debates-letting-lawyers-advertise.html> accessed 23 August, 2016.

[54]Malathi Nayak, 'India debates letting lawyers advertise' (*Live Mint*, 21 October, 2007) <http://www.livemint.com/Consumer/zouTfhtQIGwVuEYbIiv24H/India-debates-letting-lawyers-advertise.html> accessed 23 August, 2016.

through websites. These issues only reiterate that the time is ripe for the question of legality of advertising by advocates be revisited and that suitable regulatory intervention, as opposed to prohibition, be the way forward. This regulatory intervention must not only be aimed at addressing issues of information asymmetry while taking into account concerns of false advertising, et al, but must also take into account the role of advertising in lowering barriers to entry into the profession in India, as discussed below.

3. Breaking barriers to entry into the profession

The legal profession in contemporary India is marked by peculiar characteristics, and barriers faced by lawyers aspiring to practice in courts constitute one of them.[55] Family connections, being part of social networks, and being part of the same social milieu as established litigators have significant benefits for new entrants and a disproportionate reliance on connections and wealth for establishing legal practice acts as a barrier for numerous meritorious lawyers.[56] In this unique context, with entrenched hierarchies that are difficult to permeate, a ban on advertising serves as an additional barrier rendering entry or meritorious lawyers into the legal profession prohibitively difficult.[57] Any regulation on advertising must, therefore, be cognizant of the peculiarities of the Indian legal profession and the larger impact that advertising can have on the quality of legal services in the country.

[55]Marc Galanter and Nick Robinson, 'India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization', 16-19, HLS Program on the Legal Profession Research Paper Series, November 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348699> accessed 2 September, 2016.

[56]Marc Galanter and Nick Robinson, 'India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization', 16-19, HLS Program on the Legal Profession Research Paper Series, November 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348699> accessed 2 September, 2016.; Also, a recent survey conducted by Daksh revealed that over 80% of the surveyed litigants found their lawyers through reference from a family/friend. See 'State of the Indian Judiciary: A Report by Daksh', 153 <http://dakshindia.org/state-of-the-indian-judiciary/08_contents.html> accessed 2 September, 2016.

[57]Prashant Narang, 'Regulatory Barriers to Litigation in India', Asian Journal of Law and Economics: Vol 2: Iss 3, Article 4, 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960315> accessed 2 September, 2016.

VII. CEILING ON LEGAL FEES

A. Introduction

The concept of payment of fees for rendering of legal service essentially entails valuation of the legal service through an assessment of its worth, in monetary terms. While such value is decided by market forces of demand and supply in a *laissez faire* scenario, many argue in favour of regulatory intervention and setting of a ceiling for legal fees in the Indian context.[58]

Despite certain existing regulatory frameworks, the determination of legal fees in India has, in reality, largely been determined by market forces.[59] While most arguments in favour of setting of a ceiling are premised on issues of access to justice and the inability of many to afford legal services at prices determined by market forces,[60] arguments against it are diverse. First, the determination of an upper limit for legal fees necessarily entails determining the monetary value or worth of the said legal service. However, the term 'legal service' itself is acquiring new meaning with time, due to which predicting the monetary value or worth of each new form of legal service would not only be impossible, but any attempt to this end would necessarily hinder the emergence of newer and more dynamic forms of legal services. Second, a ceiling for legal fees could have the effect of leading to a levelling of prices towards the maximum fees, and thus have an effect equal to that of fixed price.[61] Third, even when considering 'legal services' as they are currently perceived, i.e., as services rendered by advocates, the varying complexity of cases and the varying levels of skill required for legal practice are not in line with setting such a ceiling.[62] Fourth, a framework to address access to justice issues already exists in the Indian context under the Legal Services Authorities Act, 1987, where those unable to afford legal services are eligible for free legal services. In the circumstances, placing a ceiling on legal fees would only result in bringing in place a parallel regulatory mechanism to address an issue already addressed by regulation. From a cost-benefit standpoint, therefore, undertaking measures to ensure effective implementation of the existing regulatory framework would certainly be a more beneficial and solution to issues of access to justice.

[58] 131st Law Commission of India Report, 20 <http://lawcommissionofindia.nic.in/101-169/report131.pdf> accessed 23 August, 2016.

[59] The existing frameworks are discussed in greater detail below.

[60] 131st Law Commission of India Report, 20, <http://lawcommissionofindia.nic.in/101-169/report131.pdf> accessed 23 August, 2016; Roger Van den Bergh, 'Towards Better Regulation of the Legal Professions in the European Union', Rotterdam Institute of Law and Economics (RILE) Working Paper Series, No. 2008/07, 22 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113310> accessed 23 August, 2016.

[61] Roger Van den Bergh, 'Towards Better Regulation of the Legal Professions in the European Union', Rotterdam Institute of Law and Economics (RILE) Working Paper Series, No. 2008/07, 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113310> accessed 23 August, 2016.

[62] Rule 11 of Chapter II, Part VI of the BCI Rules states that the "An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practice at a fee consistent with his standing at the Bar and the nature of the case..." <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf> accessed 23 August, 2016.

B. Regulatory concerns

1. International best practices

Regulation of legal fees across jurisdictions has taken vastly different approaches. One commonly adopted alternative to setting of a ceiling for legal fees is prescribing of recommended legal fees.[63] Certainly, whether any recommendatory fee structure is effectively charged is a crucial enquiry to determine the benefits of even such minimal regulatory intervention. Listing of factors that could be utilized to determine reasonableness of legal fees in cases where the recommended fee does not capture the nuances of a particular case, such as complexity of the case, out of station requirements, etc., is another useful approach.[64] Given the documented benefits of deregulation,[65] the multitude of regulatory approaches in use and the peculiarities of the Indian market for legal services, an understanding of regulatory practices in other jurisdictions must certainly inform the approach adopted in India.

2. An evaluation of the existing framework

Currently, there exist certain state level regulatory frameworks so far as legal fees is concerned.[66] However, as also noted by the Law Commission in the 240th report, most such rules are archaic and not reflective of the prevailing fees charged by lawyers.[67] Given that most such rules have not been revised in decades, they are of no help[68] so far as reducing information asymmetry in the market for legal services, which is unlike most others because the consumers and providers are highly dispersed. The extreme information asymmetry heightens consumers' bounded rationality, leaving

[63]Roger Van den Bergh, 'Towards Better Regulation of the Legal Professions in the European Union', Rotterdam Institute of Law and Economics (RILE) Working Paper Series, No. 2008/07, 16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113310> accessed 23 August, 2016.

[64]The Florida Bar, in their Rules of Professional Conduct, regulate fees and costs for legal services. To this end, it prohibits 'clearly excessive fee or cost' and prescribes a list of factors to be considered in determining reasonable fees and costs. Making such rules mandatory and judicially enforceable could certainly result in a flood gate of litigation, with clients approaching the court each time a lawyer demands a 'clearly excessive fee or cost', including such factors as recommendatory, being a softer regulatory approach, may be preferable. Rules of Professional Conduct, The Florida Bar <https://www.floridabar.org/divexe/rrtfb.nsf/FV/A8644F215162F9DE85257164004C0429> accessed 23 August, 2016.

[65]See, for example, Denmark, where deregulation from fixed to unregulated fees has led to cost based prices, innovation and increased market transparency, Roger Van den Bergh, 'Towards Better Regulation of the Legal Professions in the European Union', Rotterdam Institute of Law and Economics (RILE) Working Paper Series, No. 2008/07, 20, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113310> accessed 23 August, 2016.

[66] For instance, legal fees in Tamil Nadu is determined by the Legal Practitioners' Fees Rule, 1973, see Mohomed Imranullah S., 'Court ruling on advocate fee' (*The Hindu, Tamil Nadu,* 27 October, 2012) <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/court-ruling-on-advocate-fee/article4036946.ece> accessed 23 August, 2016; The Bar Council of Kerala Rules, 1979, contain 'Rules regarding fees payable to advocates' <http://barcouncilkerala.org/PDFs/bck%20rules.pdf> accessed 23 August, 2016.

[67] 240th Law Commission Report, 32-36 <http://lawcommissionofindia.nic.in/reports/report240.pdf> accessed 5 September, 2016.

[68] In fact, the existing frameworks have greater potential to mislead potential litigants in estimating the cost of litigation than benefit them.

them with little real choice to avail of legal services at suitable prices. A major purpose that these regulations sought to serve was to equip consumers with information about the approximate price of obtaining legal services.[69] The existing framework, therefore, needs closer examination as to its relevance and usefulness in the contemporary market for legal services, and suitable reform, of which regular updating of the fees scales could be a part, ought to be initiated.

[69] This is in tune with economic theory that underlies pricing and how pricing is a manner of conveying information about the worth of the good or service concerned. See Donald J. Boudreaux, 'Information and Prices', The Concise Encyclopedia of Economics <http://www.econlib.org/library/Enc/InformationandPrices.html#abouttheauthor> accessed 3 September, 2016.

VIII. FREE LEGAL SERVICES

A. Introduction

Legal aid or free legal services have, traditionally, been envisioned in the context of 'access to justice', representation by lawyers in courtroom proceedings and legal advice by advocates (as defined under the Advocates Act, 1961). The 131st Law Commission Report that recommended measures to be taken to set up public sector clinics, operated by members of the legal profession, also referred to legal aid in the context of advocates. However, as discussed earlier, we ought to be mindful that services being offered by legal professionals today have evolved significantly. This merits a deeper inspection of how we envision legal aid and the notion of 'justice', how lawyers help clients access justice, and whether 'securing justice' is limited to matters of litigation and court proceedings or permeates rendering of every legal service. Crucial to this exercise is an assessment of the kind of legal services that need to be made more affordable, and an enquiry into whether all lawyers are sufficiently equipped with the requisite skills to fulfil these consumers' needs with quality services.

Given that arguments in favour of legal aid are premised on the lack of affordability of legal services, two equally important facets of free legal services by lawyers encapsulate the regulatory *status quo*- one addressing the supply side and the other addressing the demand side of legal services. On the supply side, a scheme by the BCI imposes a *duty* to render legal aid to indigent and oppressed persons as one of the highest obligations an advocate owes to the society.[70] On the demand side, the Legal Services Authorities Act ('LSAA'), which came into force in 1995, lays down a mechanism that entitles persons who fulfil certain criteria[71] to free legal services. Interestingly, the definition of 'legal service' under the LSAA is very broad[72] and the framework within the LSAA pertains to not only services rendered by advocates but also envisions services by way of legal advice, consultation, drafting and conveyancing.[73]

B. Regulatory concerns

1. International best practices and their application in India

Many countries have addressed the issue of lack of affordability of legal services in diverse ways. While some jurisdictions recommend that lawyers spend a certain number of hours providing pro

[70]Scheme for Financial Assistance to State Bar Council and Individuals, Rule 46, 13 <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf> accessed 23 August, 2016.

[71]Legal Services Authorities Act 1987, Sections 12 and 13.

[72]Legal Services Authorities Act 1987, Section 2(1) (c).

[73]National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, Rule 9, <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjl2a-okM_OAhWMNI8KHZrwChMQFggeMAA&url=http%3A%2F%2Fnalsa.gov.in%2FSchemes%2FNALSA%2520(Free%2520and%2520Competent%2520Legal%2520Services)%2520Regulations%25202010.doc&usg=AFQjCNF1kPHCT8WC0p7Jq3kC34oXwdxjhQ&sig2=HnRG9hjSDTFbHvAosQBlGQ&bvm=bv.129759880,d.c2I&cad=rja> accessed 23 August, 2016.

bono services[74] or, in the absence of the necessary time or expertise, make an annual payment to a fund[75], a few jurisdictions have also made such time or monetary contributions mandatory[76]. In the Indian context, however, since there already exists a framework for the provision of free legal services, it is difficult to argue for any further mandatory or recommended rendering of free services.

2. Reforms in the existing framework

The LSAA, which has been in operation for nearly two decades, allows indigent and oppressed persons to avail of free legal services and lays down an adequate legislative framework to solve demand and supply issues. The problems lie in the effective implementation of these provisions. Despite the regulatory framework in place, for instance, the quality of legal aid lawyers has often been cited as a systemic problem,[77] among others, in the Indian legal aid framework. Thus, even as mandatory pro bono hours or payment of an amount may seem like ready solutions, it is crucial to refrain from acting on the urge to implant provisions from other jurisdictions as a quick fix to such indigenous problems.[78] A thorough examination of the existing legal aid framework, at both national and state levels, aimed at identifying reasons for some of the failures of the framework is a necessary first step before any meaningful regulatory reform with regard to free legal services in India is contemplated.

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[74]Pro Bono Public Service, Rule 4-6.1, Florida Bar <https://www.floridabar.org/divexe/rrtfb.nsf/FV/BF60AF4C185D99D085256BBC00533761> accessed 23 August, 2016.

[75]Twelve State Bar Associations in the United States specifically provide for financial contributions as an acceptable means to discharge pro bono obligation. Rowena Maguire, 'Reconsidering Pro Bono: A Comparative Analysis of Protocols in Australia, the United stated, the United Kingdom and Singapore' UNSW Law Journal Vol. 37(3) 2014, 1178 <http://www.unswlawjournal.unsw.edu.au/sites/default/files/t5_macguire_shearer_and_field.pdf> accessed 23 August, 2016.

[76]Pro Bono Bar Admission Requirements, State Unified Court System, <https://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml> accessed 23 August, 2016.

[77]U. Sarathchandran, 'Bringing Legal Aid a Step Closer to Home', (*The Hindu*, 9 November, 2011) <http://www.thehindu.com/todays-paper/tp-opinion/bringing-legal-aid-a-step-closer-home/article2610220.ece> accessed 23 August, 2016; 'Victims lack confidence in legal aid lawyers: Justice Lokur', (*Times of India*, Delhi, 6 May, 2016) <http://timesofindia.indiatimes.com/city/delhi/Victims-lack-confidence-in-legal-aid-lawyers-Justice-Lokur/articleshow/52157933.cms> accessed 23 August, 2016.

[78]Suggestions for mandatory pro bono obligations have not been received well among most law firms. See Lubna Kably, 'Legal Fees are on the house' (*Times of India Business*, 24 July, 2013), <http://timesofindia.indiatimes.com/business/india-business/Legal-fees-are-on-the-house/articleshow/21293375.cms> accessed 23 August, 2016.

IX. LEGAL EDUCATION

A. Introduction

The state of legal education in India and the many issues plaguing the system has attracted much attention in the recent past. Be it inadequate standards for legal education, non-availability of faculty or non-compliance with basic infrastructure facilities, even the most prestigious of institutions for legal education have failed to meet prescribed standards.[79] These issues are far from new, and the Law Commission, in its 184th Report in 2002, addressed several of them, including the relations between the BCI and the University Grants Commission ('UGC'), standards of legal education by appropriately constituted bodies, accreditation and Alternate Dispute Resolution ('ADR') training, among others.[80] The 184th Report is still pending consideration by the Government[81], and the issues covered by that report will not be discussed in this submission for the sake of brevity. Instead, two aspects which appear to have escaped the Law Commission's attention are highlighted here.

B. Regulatory concerns

1. Quality of legal education and accountability within the Bar Councils

There is a crucial link between standards of legal education and accountability of the Bar Councils. Despite the regulatory framework aimed at quality control in place[82], there is a lack of sufficient checks and balances within the system. The recent case of bribery with respect to granting of "favourable reports" to certain law colleges[83] is evidence of a larger problem connected with

[79]Shradha Chettri, 'Bar council comes down on DU's evening law classes, poor facilities' (*Hindustan Times,* 8 August, 2016) <http://www.hindustantimes.com/education/bar-council-comes-down-on-du-s-evening-law-classes-poor-facilities/story-lcVhPiyVnD16FyIyg5Bj7K.html> accessed 23 August, 2016; Priyanka Sahoo, 'Mumbai: Law colleges in demand but short of teaching faculty' (*The Indian Express, Mumbai,* 6 August, 2016) <http://indianexpress.com/article/education/mumbai-law-colleges-in-demand-but-short-of-teaching-faculty-2956467/> accessed 23 August, 2016; Prof. Raja Mutthirulandi, 'Accreditation of Legal Education in India: Crucial Issues' (*Legally India,* 17 March, 2016) <http://www.legallyindia.com/blogs/accreditation-of-legal-education-in-india-crucial-issues> accessed 23 August, 2016.

[80]Other issues covered in the report include membership of the legal education committee of the BCI, adjunct teachers from the bar and bench, permissions and inspections, examination system, education on legal education literature, disaffiliation of colleges and universities, training and apprenticeship and disqualification of employees. 184th Law Commission of India Report, <http://lawcommissionofindia.nic.in/reports/184threport-parti.pdf> accessed 23 August, 2016.

[81]Status of Reports of the Law Commission of India, Ministry of Law and Justice, <lawmin.nic.in/status%20of%20law%20commission%20report.docx> accessed 23 August, 2016.

[82]BCI Rules, Part IV <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> accessed 23 August, 2016.

[83]Kian Ganz, 'Bribery case exposes the rot in legal education' (*Live Mint,* 26 July, 2016) <http://www.livemint.com/Politics/oS1lH3Hf1bc5dSMmD4fYVP/Bribery-case-exposes-the-rot-in-legal-education.html> accessed 23 August, 2016.

increasing mushrooming of law colleges[84] with inadequate facilities. Thus, before amendments are made to the extant regulatory framework, instituting measures to enhance accountability (as discussed in Chapter V) within the Bar Councils will be a crucial step to accurately assess the need for any such changes.

2. Continuing legal education

The second aspect that has escaped regulatory attention thus far is that of continuing legal education ("CLE") or continuing professional development for lawyers. Given the dynamic nature of the legal profession, regardless of the nature of the legal service a professional is engaged in, continuing legal education certainly merits attention, especially in light of rising concerns regarding quality of legal professionals in the country.[85] Several jurisdictions across the world have instituted mandatory CLE requirements. In the United States, the need for more systematic approaches to attorney competence resulted in implementation of first mandatory CLE requirements in Minnesota.[86] Currently, the American Bar Association prescribes Model Rules for Continuing Legal Education[87] and CLE requirements differ among states.[88] Similarly, the Solicitors Regulation Authority has also laid down CLE requirements for solicitors admitted in England and Wales.[89]

In the Indian context, the M. K. Nambiar Academy for Continuing Legal Education, established by the Bar Council of Kerala, in association with the M. K. Nambiar Trust in 2016 is an acknowledgment of the importance of continuous legal education.[90] However, in order for CLE to make a significant impact to the quality of legal professionals, a shift from *ad hoc* philanthropic ventures towards institutional initiatives for continuous learning is crucial. Moreover, the quality of continuous education must ensure that compliance meaningfully contributes to better quality legal services in the country, and easy access to good quality continuing education opportunities ought to be a condition precedent to any mandatory requirements being put in place. Lastly, any such institutional initiative should take into account the range of legal services currently being provided

[84] 'Bar council conference: Lawyers stress role of legal education, better infrastructure', (*The Indian Express, Chandigarh,* 14 August, 2016) <http://indianexpress.com/article/india/india-news-india/bar-council-conference-lawyers-stress-role-of-legal-education-better-infrastructure-2974113/> accessed 23 August, 2016.

[85] A Subramanil, '30% of lawyers in India are fake, Bar Council chief says' (*The Times of India,* 26 July, 2015) <http://timesofindia.indiatimes.com/india/30-of-lawyers-in-India-are-fake-Bar-Council-chief-says/articleshow/48215119.cms> accessed 23 August, 2016.

[86] The Honourable Robert J. Sheran, Laurence C. Harmon, 'Quality Advocacy and the Code of Professional Responsibility, Minnesota Plan: Mandatort Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing', 44 Fordham L. Rev. 1081 (1976), 1086 <http://fordhamlawreview.org/wp-content/uploads/1976/05/Sheran_May.pdf> accessed 23 August, 2016.

[87] ABA Model Rule for Continuing Education with Comments <http://www.americanbar.org/content/dam/aba/administrative/cle/aba_model_rule_cle.authcheckdam.pdf> accessed 23 August, 2016.

[88] Mandatory CLE, American Bar Association <https://www.americanbar.org/cle/mandatory_cle.html> accessed 23 August, 2016.

[89] Solicitors Regulation Authority Training Regulation, 2011- Part 3 CPD Regulations, <http://www.sra.org.uk/solicitors/handbook/cpd/content.page> accessed 23 August, 2016.

[90] Aditya AK, 'Will Continuing Legal Education strengthen the legal profession in India?', (*Bar and Bench,* 20 January, 2016) <http://barandbench.com/continuing-legal-education-strenghten-legal-profession/> accessed 15 September, 2016.

by lawyers in order for CLE to be useful for all sorts of legal professionals. Even as the profession grapples with more pressing issues, such as the quality of legal education being provided in law colleges, maintaining good quality legal services over lawyers' professional careers is also an aspect worthy of regulatory attention.

3. Scope of BCI's standard setting functions

Section 7(1)(h) lists promotion of legal education and laying down standards of such education, in consultation with Universities and SBCs, as one of BCI's many functions. The Act further provide for a Legal Education Committee, and Part IV of the BCI Rules currently enlist, among other things, the courses that ought to be taught in law colleges.[91] The regulatory *status quo* is, thus, limited to prescribing which courses ought to be taught, and the content of such courses and the manner of teaching has not been prescribed. Be that as it may, limits to BCI's function of laying down standards of legal education have not been prescribed and such absence of delimiting of the scope is a cause for regulatory concern. Given the over-broad nature of this power, arguably, the BCI can also prescribe the content of such courses and the manner in which they must be taught, resulting in a problematic scenario wherein an unrepresentative and limited body such as the BCI could control the climate of thought in law colleges. In fact, the Curriculum Development Committee of the UGC has issued a model curriculum and acknowledged that the BCI Rules leave the details of how courses are to be taught to be evolved by Universities.[92] This aspect of BCI's over-broad powers in determining standards of legal education, therefore, merits regulatory attention.

[91] BCI Rules, Part IV, Rules on Legal Education <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> accessed 5 September, 2016.

[92] Curriculum Development Committee Report on Law, University Grants Commission, 1 <http://www.ugc.ac.in/oldpdf/modelcurriculum/law.pdf> accessed 5 September, 2016.

X. CONCLUSION

The regulatory framework governing the legal profession faces several challenges today. First, the existing framework has proven inadequate in light of the way legal services have evolved in contemporary times. Second, it has failed in meeting its objectives even as far as traditional legal services and lawyers are concerned, with the BCI's role often being questioned. There is, therefore, a pressing need to move away from cosmetic amendments to the existing framework and to examine the issue of regulation of the legal profession afresh.

The inputs provided in this paper are being made in the above context. The questions of regulation of the legal profession do not have easy answers. While each of the eight topics examined in this paper requires more detailed debate and deliberation, this paper seeks to draw the Law Commission's attention to some pressing issues and surrounding regulatory concerns with the hope of initiating a larger conversation. To this end, the following suggestions may be considered by the Law Commission:

a. Changes to the Act, including amending the definition of legal practitioners, the provisions governing disqualification of advocates, the disciplinary powers of the BCI, and the powers of the Supreme Court and High Courts;
b. The question of legality of strikes by litigating lawyers needs closure, and a more rigorous regulatory framework must be effectuated to deter unwarranted strikes;
c. The issue of regulatory vacuum favouring non-enrolled lawyers rendering legal services must be reviewed to determine the best framework to bridge this gap;
d. The checks and balances pertaining to Bar Councils must be recalibrated to generate greater accountability for the regulatory framework;
e. The issue of advertising by lawyers requires an immediate overhaul, to put in place a more effective and contemporary regulatory framework, addressing issues of entry barriers caused by the current framework;
f. A more detailed analysis into the need for a ceiling on legal fees is necessary, and it is useful to explore less intrusive regulatory alternatives to address existing issues;
g. While considering the issue of providing free legal services and *pro bono* initiatives by all lawyers, especially litigators, the statutory framework for access to justice contained under existing legislation must be examined; and
h. Issues highlighted in the Law Commission's 184th Report on legal education merit attention, along with BCI's role in setting standards for legal education and continuing legal education.

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