

LIBERALISING LEGAL SERVICES IN INDIA: AN IDEA WHOSE TIME HAS COME

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Since 19th century the World has witnessed the emergence of many economic practices specifically, the integration of national economy with global economy, which in turn has made a remarkable impact in all most all the economies of the World. India too is a significant partner to it. This overwhelming process of economic integration has resulted not only in fading of the obsolete practices of having business and profession only within the geographical boundary of a State but seeks to expand its horizon across the globe with a specific objective of establishing global market.

It will not be out of the box to mention here that India is not oblivious to the developments taking place in global economy and has already put its strong footprints in the battle for achievement of optimum and sustainable development. Since the opening up of Indian economy in the early 90's there has been an overwhelming growth in the number of national and foreign players doing business in all sectors of economy. Whether it is banking, insurance, agriculture, hospitality or educational sector, India has become a prime destination for multinational corporations for business ventures. Moreover, many Indian companies are entering into cross border mergers and acquisition with foreign companies. As a result Indian economy is presently one of the fastest growing economies of the world. It is surprising to note that one of the vital sectors of Indian milieu, namely the legal sector is still isolated from these developments and more or less monitored by some monopolised groups. Irrespective of the fact of the growing demand, the uncompromisable attitude of the regulating authorities on opening up of legal profession to foreign investment is particularly inscrutable and ironic. Globalisation is the second notable event which has created challenges and opportunities for legal professionals. New concepts such as globalization of law², transnational law³, world

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² Parikshit Dasgupta, "Globalization of Law and Practices," Available at www.legalserviceindia.com/articles/glp.htm. Discussing global implications of commercial law, public law and protective law. (Last accessed on 27/07/2016)

³ Harold J. Berman, 1995. *The Role of International Law in the Twenty First Century: World Law*. Generally signifies law which regulates actions or events that transcend national frontiers.

law⁴, transsystemia⁵ and global law have evolved. Liberalisation in the context of legal services refers to opening up of legal market in India to foreign nationals for setting up law firms for rendering consultancy services and to practice in the court of law.

STATUTORY OBLIGATIONS

Legal practise and practitioners in India are governed by the Advocates Act 1961. Under the existing system, a foreigner can be enrolled as an Advocate only after obtaining degree from a University recognised by the Bar Council of India and must belong to a country where Indian citizens have reciprocal rights to practice. The term ‘practice’ is not defined in the Act. However, the combined reading of sections 29, 30 and 33 of the Act restricts the term practice to only appearance before any court, tribunal or authority but legal advisory, documentation or alternative dispute resolution mechanism are beyond its scope. Foreign direct investment is not permitted in legal sector and international law firms are not authorised to open offices in India. Foreign Service providers may be engaged as employees or consultants in domestic law firms but they cannot sign legal documents, represent clients, or be appointed as partners. The Bombay High Court in the case of *Lawyers Collective Vs. Chadbourne and Park*⁶ held that practices engaged by foreign firms in non-litigious matters tantamount to “practising the profession of law” hence not to be permitted as they are not enrolled as Advocates under the Act. Not only the Advocates Act 1961 restricts legal profession to Indian Advocates only, other legislations such as Bar Council of India Rules, Partnership Act 1932 and the Companies Act 2013 also imposes regulatory restrictions on legal profession. These enactments restrict legal professionals from advertisement, partnership and fee-sharing, employment in foreign law firms and capital raising power.

INDIA’S COMMITMENT

There is another side as well in regard to India’s commitment towards international community. India is a signatory of GATS (General Agreement on Trade in Services) in 1995

⁴ The term “World Law” is used to combine inter-state law with the common law of humanity and customary law of various world communities.

⁵ Jane E. Schukoske, Harry W. Arthurs, 2009. “Law and Learning in the era of globalization”. *10 German Law Review* 629. It implies teaching of multiple legal systems at once.

⁶ 2010 (112) Bom L R 32

when it first came into operation after the Uruguay round of negotiations. The rules laid down in GATS govern the conduct of world trade in services. GATS have not defined the term 'practice'.⁷ The objective of GATS is to ensure free flow of services across the world. GATS require nations to accord 'most favoured nation' status.⁸ Under this agreement a member State must provide market access and national treatment⁹ to other member States and domestic regulation must be reasonable.¹⁰ Under GATS 'services' includes any service in any sector except services in exercise of governmental authorities.¹¹ It has divided 161 services into 12 categories including legal services. Although India is an active member of WTO and has entered into commitments in respect to a number of service sectors like financial (banking and insurance), engineering, telecommunications and information technology but it has not undertaken any commitment in regard to legal services. In the strict sense, India cannot restrict the entry of foreign lawyers or firms into its market otherwise it will amount to an infringement of GATS and WTO agreement. Therefore, the question should not be whether to allow foreign legal professionals or not but it may be up to what extent the opening up of the market will be considered.¹² In comparison, China another fastest growing economy of the world and a direct competitor of India in global economy has liberalised its legal services. Many other countries have offered to improve their commitments in the recent Doha Round of negotiations.

STAND OF REGULATORY AUTHORITIES

The question arises why India's regulatory authorities oppose liberalisation of legal profession. Their arguments are based mainly on the following issues:

1. Indian lawyers will not be able to sustain in the midst of economically and intellectually sound foreign law firms. As a result they will lose work. In simple words they are not ready to face the competition.

⁷ Report on Trade in Legal Services titled as "Trade in Services: Opportunities and Constraints" by Ministry of Commerce, Govt. of India, <http://www.icrier.org/pdf/NLMitra.Pdf>.

⁸ Article II of GATS Agreement

⁹ Article XVII of GATS Agreement

¹⁰ Domestic Regulation under Article VI (4).

¹¹ Article I of GATS Agreement

¹² Faisal Fasih in article titled: 'Liberalisation of legal profession and its implication on legal education: Indian perspective'.

2. Indian lawyers will not be able to coup up with foreign law firms because they face certain regulatory restrictions imposed by domestic laws which put them into disadvantageous position. They are not in a level playing field.
3. Other countries have not given the same status to Indian lawyers and law firms in their respective countries. Reciprocity of right to practise is not being considered.

Liberalising legal service in India will facilitate the direct access of cross border transactional legal services by international law firms to their existing global and corporate clients who wish to have trade in India. They will no more require instructing intermediary Indian law firms under the guise of best friend relationships. Foreign law firms will not be required to fix meetings outside India to advise Indian Lawyers just to avoid criminal sanctions in Indian soil. At present there is little choice for corporate clients who wish to seek legal services to conduct trade in India without duplication of professional fees in both jurisdictions which results additional costs coupled with unnecessary delay to advice on any law directly. Moreover, it is a fact that multinational corporations have a general reluctance to instruct Indian law firms through foreign law firms due to lack of confidence on Indian law firms, which may have a detrimental effect to Indian economy from the angle of prospective investors.

In the long run, Indian lawyers will be more professional, experienced and can develop their expertise in emerging areas of law by working closely with established international legal professionals. Knowledge sharing will enhance employment opportunities, more sophisticated and quality services can be provided to domestic as well as foreign clients at competitive rates¹³. It could be argued that because of the fact that India follows common law principles and being in linguistically advantageous position, much of the work that is taken by foreign law firms based in other jurisdictions such as Singapore, Hong Kong, Malaysia and China will come to India, resulting in significant economic benefit.

¹³ Sadanand Naik, *Globalization of Legal Industry*, Available at www.r-e-s-i.com/article/globalization-of-legal-industry. (Last accessed on 27/07/2016)

ROLE OF JUDICIARY

The opening up of the economy in the early 90's led to the entry of foreign law firms in India. First case that came into limelight was **Lawyers Collective Vs. Bar Council of India**¹⁴ et al whereby the Bombay High Court considered the legality of licences granted by the Reserve Bank of India to three law firms – Ashurst of UK, White & Case and Chadbourne & Parke of US. License was granted under section 29 of the Foreign Exchange Regulation Act 1973 which permitted the establishment of liaison offices in India. The division bench of Bombay High Court held that RBI licences were unjustified. Since then no licenses were issued.

On February 2012, the Madras High court in the case of A.K. Balaji Vs. Government of India¹⁵ held that there is no bar under the Advocates Act 1961 or the BCI Rules for foreign lawyers or law firms to visit India for temporary periods on a 'fly in and fly out' basis to advise their clients on foreign law and diverse international issues. However, they are not permitted to practice Indian law, either in relation to litigation or advisory matters, unless they qualify and enrol as Advocates and fulfilled the requirements of the Act and Rules. The judgement also clarifies that activities performed by BPOs and LPOs do not constitute 'practice' of law and hence do not violate the statutes. Interestingly, the Court further held that the Bar Council of India may take necessary steps in relation to practice of law by chartered accountants and management consultants. Thus, the Balaji judgement marked Indian judiciary's first coveted effort to carve back the blanket prohibition by permitting foreign lawyers to enter India on a temporary basis to conduct arbitration or to advice clients on matters of foreign and international law. It also opened the log gate for inter-disciplinary legal practices with chartered accountants and management consultants.

CONCLUSION

In the light of ongoing wave of globalisation, the incontrovertible fact remains that the need of liberalising Indian legal sector is unarguable and beyond doubts. The entry of law firms will not just favourably add up to our foreign reserves and in due course the GDP but will also create pool for employment of law graduates. At the same time it is also important to

¹⁴ 2010 (112) Bom L R 32

¹⁵ AIR 2012 Madras 124

note that before giving green signal to foreign law professionals, Government should revamp the state of affairs in the legal sector, ensuring eradication of unreasonable restrictions. Without eradicating unreasonable restrictions that are prevailing in our anachronistic laws, domestic law firms will not be able to coup up with the challenges which are to be posed by their foreign counterparts. Today or tomorrow the opening of domestic legal market to international professionals is inevitable. Therefore, instead of offering resistance a sincere attempt should be made by all stakeholders to work on the situation so as to derive utmost benefit from it. French poet Victor Hugo once said that “There is nothing more powerful than an idea whose time has come”. Liberalising legal services in India is one such idea whose time has come.

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