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LIBERALIZATION IN LEGAL SECTOR: AN IMPREGNABLE FORTRESS*

INTRODUCTION

The world economy has experienced a progressive international economic integration[1] due to a marked acceleration in the process of globalization and liberalization during the last three decades.[2] In legal thinking, globalization is often either purely absent or appears as a simple idea of internationalization that somehow influences the law.[3] With the globalization and liberalization policies implemented in almost all the world industries, it is only reasonable to expect the legal profession to fuse into a seamless transnational fraternity.

The irony is that India being the largest capital for LPOs, its legal fraternity, prefers its complacent stance with its closed functioning restricting all the possible interactions from international lawyers. From an industry design perspective it only leaves people in bewilderment as to how an unmistakably important field such as law can be left completely untouched. While even the judges are moving forward by resolving to adopt an approach of transnational judicial dialogue in the Bangalore Conference back in the year 1988, and the young generation of lawyers preferring to start a career in law in countries such as England, US, etc. the scene in India seems grim with the Advocates Act, 1961. Even the international legal practice, as put forth in the principles of International Bar Association, include fairness, uniform and non-discriminatory treatment, professional responsibility, reality and flexibility.

All this suffers a huge set back resulting in a talent crunch with the cases of Lawyers Collective v. Bar Council of India and ors.[4] (hereinafter referred to as *Lawyers Collective case*) and A.K. Balaji v. The Government of India & ors.[5] (hereinafter referred to as *AK Balaji case*).

LAWYERS COLLECTIVE CASE:

The judgment of the Bombay High court in the *Lawyers Collective case* which was subjected to a 14 year long wait saw the light in 2009. The Court in this case denied the right of entry to foreign law firms in view of the existing provisions of law.
In this case the Court held that the RBI was not justified in granting permission to foreign law firms under the FERA to set up liaison offices in India and also held that the phrase '*to practice*

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[1] Singh, V.K. *"Competition Law And Policy In India: The Journey In A Decade"*, 4 NUJS L.Rev. 523 (2011).
[2] Report of the High Level Committee on Comeptition Policy and Law (Chairman S.V.S.Raghavan) 2000, ¶3.1.1.
[3] Michaels, Ralf, *"Globalization and Law: Law Beyond the State"* (March 15, 2013). Law and Social Theory, Banakar & Travers eds., Oxford, Hart Publishing, 2013, Accessed on 31.8.14, Available at SSRN: http://ssrn.com/abstract=2240898
[4] W.P. No. 1526 of 1995.
[5] W.P. No. 5614 of 2010.

the profession of law' under Section 29 of the Advocates Act, 1961[6], covers both litigious as well as non litigious matters in India.
The history of this case stems from the applications of foreign law firms from US and UK, namely, White & Case, Chadbourne & Parke and Ashurt Morris Crisp, to set up liaison offices in India. Their first application was to the Foreign Investment Promotion Board was denied and subsequent application to the RBI during the period 1993 - 95 was granted under Section 29(1)(a)[7] of the Foreign Exchange Regulation Act, 1973.

In view of Section 24[8] read with Section 29 of the Advocates Act, 1961, the petitioners contented that the enrollment under the Advocates Act, 1961 was mandatory to carry on the profession in law even in non-litigious matters. The petitioners relied on a host of Supreme Court cases from Australia, India and the U.S. to support this contention. Their main submission was that RBI did not have the right to grant permission under Section 29 of FERA since 'practice of law' cannot be classified under '*activity of a trading, commercial or industrial nature'* to fall within the ambit of the provision. They also contended that the grant of such a permission results in an unfair advantage over the Indian advocates for the foreign law firms as they would not be subjected to the Advocates Act, 1961 or the rules framed by the Bar Council of India.

The RBI stated that it was not concerned with the Advocates Act and had the power to grant such permission under Section 26 of FERA. In fact, they also argued that as per the permission granted it was only for establishing liaison office to act as a communication between overseas principal and parties in India[9] and that it was specifically stated that they will not practice. On the other hand, the foreign law firms tried to bring in a novel argument and put forth that there is no violation of the Advocates Act by granting such a permission as the Advocates Act 1961 was enacted by the Parliament under Entries 77 and 78 of List I of the Seventh Schedule to the Constitution and clearly state that they apply only to persons practicing litigious matters before the Supreme Court and the High Courts and the said Act would not apply to the persons practicing in non-litigious matters[10], unless a legislation is enacted to regulate persons practicing in non-litigious matters by invoking Entry 26 in List III to the Seventh Schedule to the Constitution which deals with legal, medical and other profession submits 1961 Act does not govern them.

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[6] Section 29 Advocates to be the only recognized class of persons entitled practice law-
Subject to the provision of this Act an any rules made thereafter, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates.

[7] Section 29(1) Without prejudice to the provisions of Section 28 and Section 47 and notwithstanding anything contained in any other provisions of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, -
(a) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under Section 28; or

[8]Section 24 Persons who may be admitted as advocates on a State roll.-
(1) Subject to the provisions of this Act. And rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:-
a. he is a citizen of India: Provided that subject to the other provisions contained in the Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country.
b. he has completed the age of twenty-one years.
c. he has obtained a degree in law

[9] Ibid 5. *Lawyers Collective case*, Page 15, para 23.

[10]Ibid 5. *Lawyers Collective case*, page 17, para 24.

The Bombay High Court after duly noting the mutually contradictory stand taken by RBI and Foreign Investment Promotion Board (FIPB), went on to decide the two issues in the case. One, whether the permission granted by RBI was valid in law, second, assuming the grant of permission was valid whether the 1961 Act would apply to non litigious matters also. After looking into the objects and reasons of the 1961 Act the court ruled that such a narrow construction is unwarranted and rejected the contention of the foreign law firms by drawing attention to a classic analogy. The court rejected a construction of such a nature as it would then indicate that an advocate found guilty of misconduct in performing his duties while practicing in non-litigious matters cannot be punished under the 1961 Act and that such an argument would defeat the object of the Act. The Court concluded by holding that the Advocates Act, 1961 is a complete code by itself since Section 29 covers both litigious as well as non litigious practice and invalidated the permission granted by the RBI.

AK BALAJI CASE: Though the issue decided by the Bombay High Court is no longer res integra, the Madras High Court, without differing from the view of its counterpart, went one step ahead in its 2009 judgment by allowing the foreign law firms to render advice to clients in India on foreign law on 'fly in and fly out' basis, to which there is an Indian component.

Unlike this writ petition *(AK Balaji case)*, the petitioners in the *Lawyers Collective case* were not averse to foreign law firms practicing in India. The petitioner in the instant case approached the Court seeking mandamus to take action against 31 foreign law firms/lawyers illegally practicing in India and to forbear them from having any litigation/ non litigation practice and commercial transaction in India. The main grounds raised by the petitioner were with respect to enrolment, disciplinary authority, noble profession, reciprocity and loss to the exchequer. Thus, the question in the instant case was, whether offering legal assistance to clients in India on foreign law, with or without establishing liaison offices, is violative of any provisions of the 1961 Act.

India being a signatory to WTO is obliged to conform to the fundamental principles of National Treatment[11] , Market Access[12], Domestic Regulation[13] and Transparency under The General Agreement on Trade in Services (GATS).

Looking into the relevant provisions of The Advocates Act, 1961, it defines an 'Advocate' under Section 2(1)(a)[14] of the Act and Section 33 further clarifies that advocates alone are entitled to practice in any court or before any authority. Further, Section 24(1)(a) provides that a person has to be a citizen for getting enrolled as an Advocate. Through a plain and conjoint reading of the two Sections suggest that only an Indian can be enrolled under the Act. The proviso to Section 24(1)(a) along with Section 47(1)[15] lays down the rule for reciprocity by providing that a national of any country may be admitted if Indian citizens are duly qualified to practice law in that country and are not unfairly discriminated. Also, the Bar Council of India Rules of, 1975 clearly states that no foreigner is allowed to practice law in India unless there is a reciprocal right of the same kind in the country of his origin (Rule 5 of Res. No. 6/1997) and

[11] GATS, Art VII.
[12] GATS, Art XVI.
[13] GATS, Art VI (4).
[14] "advocate" means an advocate entered in any roll under the provisions of this Act.
[15] 47. Reciprocity: (1) Where any country, specified by the Central Government in this behalf by notification in the official Gazette, prevents citizens of India from practicing the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practice the profession of law in India.

he has obtained a degree from a University recognized by the Bar Council of India (Rule 3 of Res. No. 6/1997).

Thus, reading the statute en block without isolating anything, suggests a different story that foreigners can practice law in India provided that the prescribed conditions are satisfied. Though countries such as US and UK are very much receptive of Indian lawyers, India is refusing to grant the same reciprocity.

The Court in the instant case gave due regard to the view that the enactment of the Arbitration Act was to fulfill its obligations under International Treaties and Conventions and also the policy of the government to make India a hub of International Arbitration. India being a signatory to the WTO and the Agreements, the Court opined that liberalization policy which opened up the economy for foreign investment has led to a growth in the number of disputes involving a foreign entity, which naturally leads to the need for advice on foreign law in the course of International Commercial transaction. Also, keeping in mind the economic implications and national interest involved the Court held that it would be a dangerous proposition to hold that foreign law firms cannot come into India to advice clients on foreign law which would catapult the Indian effort backwards in becoming a preferred seat for arbitration.

The Court ultimately held that there is no bar for the foreign law firms/ lawyers to visit India for a temporary period on a 'fly in and fly out' basis to give legal advise to their clients in India on foreign law or any international legal issues or any matter relating to International Commercial Arbitration. Also, it did not differ from the view of the Bombay High Court in the *Lawyers Collective case* that they cannot practice on litigation or non litigation side unless the requisites under the Advocates Act and BCI rules are fulfilled. In view of one of the respondent being an LPO the Court held that these companies providing wide range of customized and integrated services will not fall under the ambit of the Advocates Act or the BCI rules, but BCI can take appropriate action if such companies attract the violation of any provisions under the Act.

After a virtual blow to the foreign law firms by denying them the right of entry into India the Supreme Court throws confetti in 2012 by issuing an interim order restricting foreign law firms. It has been 28 months since the Supreme Court had given time to complete serving notice on the foreign law firms in the appeal preferred by the BCI in the case of *AK Balaji* and has only recently come to the stage of hearing.

CONCLUSION: It could only be reasonable to hope that the decision of the Supreme Court in the appeal would come sooner than the decision in the *Lawyers Collective case*. The Court ought to take notice of the welcome given to Indian lawyers in other countries and reciprocate the courtesy by giving due regard to competition and globalization policies. Though India is a long way from becoming a preferred seat of arbitration, before adopting international standards and practices, the courts must consider the practice adopted by other countries. In view of the BCI Consultative Conference held at Kochi in 2007, it is up to the BCI and the Central Government to make appropriate provisions considering the views of all the necessary stakeholders. It is but a matter of time before Indian legal fraternity is opened to the international competition. But of course, as Jeremy Bentham said, the power of the lawyer is in the uncertainty of the law.