

# LITIGATION VERSUS NON-LITIGATION: 'PRACTICE OF LAW' UNDER THE ADVOCATES ACT

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*This article seeks to analyse the decision of the Bombay High Court in Lawyers Collective v. Bar Council of India and Others<sup>1</sup> (hereinafter Lawyers' Collective judgement). The petitioners had challenged the permission granted by the RBI to certain foreign firms to set up liaison offices in India. The Court went on to examine whether non-litigious practice comes within the ambit of 'practice of law' under the Advocates Act. In this article, the authors seek to examine the judicial reasoning employed by the Court and then seek to provide alternate reasoning which may possibly have resulted in a different conclusion. It is also suggested that the conclusion of the Court does not in actuality further the objective of regulating non-litigious practice. Expansive reading of the present laws is insufficient for the purpose and specific regulations need to be brought in to do so. Furthermore, the article will read into the potential impact of this judgement on ancillary areas such as 'best-friends' agreements and India's commitments to the WTO under the GATS.*

## I. INTRODUCTION

The expansion of foreign law firms in India coincided with the liberalization of the Indian economy in the early 1990s. With such expansion began controversy.

In the early 1990s, White & Case, Chadburne & Parke and Ashurst, three foreign law firms made an attempt to formally establish themselves in India. The first contentious step they took in this regard was to approach the Reserve Bank of India (*hereinafter* RBI) with an application to open their respective offices in India. Such permission was granted, although for the restricted purposes of learning about the business environment, collecting investment information, serving as official representatives of the foreign firms to the Indian government and to Indian businesses and promoting relationships with others involved in such cooperative initiatives. Subsequently, a writ petition was brought against these three firms by Lawyers' Collective, a non-governmental organization,

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<sup>1</sup> W.P. No. 1526 of 1995, decided on December 16, 2009; MANU/MH/1467/2009.

essentially alleging, *inter alia*, that these firms had overstepped the limits imposed by the terms of the RBI license. Arguments of the petitioner implied that lawyers from these firms were working on transactional deals openly.<sup>2</sup> This judgment however, has had a protracted journey. By way of an interim order, the Bombay High Court held in favour of the petitioners, that the Advocates Act, 1961 restricted the ‘practice of law’ to only Indian citizens. Further, the Court held that even the “rendering [of] legal assistance and/or . . . executing [of] documents, negotiations and settlements of documents would certainly amount to [the] practice of law”.<sup>3</sup> Additionally, the Court ordered an RBI investigation to determine the extent to which these firms were exceeding their statutory restrictions.<sup>4</sup> The law firms appealed this decision in the Supreme Court; however, the Apex Court declined to decide on any substantive issues and sent the matter back to the Bombay High Court to conduct a full hearing and further deliberation. Hence, the Bombay High Court’s decision of December 16, 2009 was a culmination of a process that started well over a decade earlier.

The core issue was that these liaison offices were a backdoor entry for foreign firms and a convenient way to circumvent the strict rules governing the ‘practice of law’ enumerated in the Advocates Act, 1961. Into this definition of ‘practice of law’, the Court included non-litigious work. As this term has very heavy implications for this judgement as well as the Act, we will delve into its origins and assess what it implies, in our humble opinion. We would also like to examine the extent to which this judgement impacts the non-litigious practice of law in India.

At the outset, we would like to limit the scope of the analysis in this article. The issue of practice of law only arose because the Court found that the liaison offices of these foreign firms indulged in the practice of law, even though the scope of the permission granted by the RBI was conditional on not entering into contracts in its own name, not charging commission, fees or generating any other remuneration or revenue, not borrowing or lending money or acquiring or holding land and meeting expenses from funds received from abroad.<sup>5</sup> The Court concluded that from the affidavits filed, it was clear that the liaison activities of these firms constituted nothing but the profession of law in non-litigious matters.<sup>6</sup>

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<sup>2</sup> Vinaya Natarajan, *Looking past the hype: Lawyers Collective v. Chadbourne, Ashurst and White & Case*, available at <http://www.barandbench.com/brief/3/402/looking-past-the-hype-lawyers-collective-v-chadbourne-ashurst-and-white-case> (Last visited on September 3, 2010).

<sup>3</sup> “Lawyers Collective Case” as quoted in Jayanth K. Krishnan, *Globetrotting Law Firms*, Forthcoming: 23 Georgetown Journal Of Legal Ethics 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1371098](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371098), (Last visited September 3, 2010); See also Richard Lloyd, *Indian Court Ponders Opening Legal Market to Foreign Firms*, AM. L. DAILY, May 2, 2008, available at: <http://amlawdaily.typepad.com/amlawdaily/2008/05/a-mumbai-court.html> (Last visited on September 3, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> See *supra* note 1, ¶6.

<sup>6</sup> *Id.*, ¶41.

But the Court did not conclude that the permission granted by the RBI had been violated by the respondents. It found that the liaison activities of coordination and communication between the Indian and foreign offices of these firms were intricately linked to the practice of law.<sup>7</sup> If the respondents have stuck to the permission granted to them, then they have not undertaken any revenue-generating activity. To say that law may be practised even when no revenue has been generated from it seems erroneous.<sup>8</sup> The Court has not explained how the administrative nature of liaison activities can constitute the practice of law.<sup>9</sup> However, we do not seek to analyse this issue at length in our examination of the judgement and shall merely scrutinize the arguments on non-litigious practice of law. It has to be noted that foreign firms were never understood to be able undertake the practice of law in non-litigious matters, even prior to this judgement.

In Part II of this article, we will discuss the judgement of the Bombay High Court in detail, along with legislative history, relevant statutory provisions and judicial precedents. In Part III of the article, we will discuss the implications that may result from the decision of the Court. Part IV will discuss the contemporary development of Best Friends Agreements and the implications that this decision of the Court may have on such agreements. Part V will examine the nature of obligations that the India has with respect to legal services at the World Trade Organisation under the General Agreement on Trade in Services. Part VI will examine briefly a new controversy which has been raised before the Madras High Court against the allegedly illegal practice of law by foreign firms in India. Part VII concludes with our observations regarding the nature of regulation prevalent in the legal sector in India and its adequacy to achieve the purpose sought by its proponents.

## II. JUDGEMENT OF THE COURT

We hypothesise that the ‘practice of law’ in the Advocates Act, 1961 includes only litigious practice.

The reasoning of the court with regard to the Advocates Act is analysed with respect to:

- Statement of objects and reasons
- Analyses of §29 as well as §§30 & 33
- Penalty provisions and current enforcement
- Opinion of the Court in previous decisions.

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<sup>7</sup> *Id.*, ¶43.

<sup>8</sup> See Hemant Batra, *Opinion: Why the Lawyers Collective judgment is wrong*, available at <http://www.legallyindia.com/20100128427/Legal-opinions/opinion-why-the-lawyers-collective-judgment-is-wrong> (Last visited on September 2, 2010).

<sup>9</sup> Sanjay Bhatia, *Legal opinion: Ashurst, Balaji and other writ petitions: Are LPOs safe?*, May 11, 2010 available at <http://www.legallyindia.com/20100511807/Legal-opinions/ashurst-balaji-and-other-writ-petitions-are-lpos-safe> (Last visited on September 2, 2010).

### A. STATEMENT OF OBJECTS AND REASONS

The Statement of Objects and Reasons of the Advocates Act, 1961 declares the creation of a common roll of advocates and granting advocates the right to practise in any part of the country *and* in any court as one of its main objectives.<sup>10</sup> The Court reasons that, in this statement, the right to practise in *any part* of the country is indicative of the right to engage in non-litigious practice, whereas the right to practise in *any court*, is indicative of litigious practice. Drawing this literal inference, it concludes that both litigious and non-litigious forms of practice are covered under the Act.<sup>11</sup>

While this reasoning may be acceptable, it is a well-established principle of statutory interpretation that the Statement of Objects and Reasons cannot be used as an independent aid in interpretation.<sup>12</sup> It cannot be used to construe a section or control the words used therein.<sup>13</sup> Its role is limited *only* to assessment of the background against which the Bill was introduced<sup>14</sup> and the context in which it must therefore be read.<sup>15</sup> No interpretation based merely on the objects can be adopted, since it is not voted upon and does not form part of the Act.<sup>16</sup> In any event, the reasoning based on the objects must be reconsidered when the scheme of the Act provides a contrary opinion.<sup>17</sup>

The single object laid down in that clause cannot be held to be conclusively determinative, without an examination of the rest of the objects laid down therein. Besides, the establishment of an All India Bar Council, the integration of the Bar into a single class of legal practitioners and the prescription of uniform qualification for the admission of persons to be advocates are also important objects of the Bill.<sup>18</sup> In addition, it has been described to be an Act to *amend and consolidate* the law relating to legal practitioners [Emphasis supplied].<sup>19</sup> Clearly, even an inspection of the other objects laid down in the Act, reveals that the single object chosen to be used by the Court is neither comprehensive nor conclusive. *Subsequently, we have analyzed the structure of the Advocates Act and its provisions in Part II.C, based upon which we conclude that exclusive reliance on this object does not lead to an unequivocal conclusion.*

<sup>10</sup> Statement of Objects and Reasons, annexed to the Advocates Bill.

<sup>11</sup> See *Supra* note 1, ¶48.

<sup>12</sup> *Ashwini Kumar Ghose v. Arabinda Ghose*, AIR 1952 SC 369, 378 (*per* Shastri, C.J.).

<sup>13</sup> *Central Bank of India v. Its Workmen*, AIR 1960 SC 12, 21 (*per* Das, J.).

<sup>14</sup> *State of West Bengal v. Union of India*, AIR 1963 SC 1241, 1247 (*per* Sinha, C.J.); *Jairam v. Delhi Administration* AIR 1962 SC 1781, 1787 (*per* Aiyar, J.); see also *S.S. Bola v. B.D. Sardana* AIR 1997 SC 3127, 3208; *Subhash Ramkumar Bind v. State of Maharashtra* AIR 2003 SC 269, 270.

<sup>15</sup> *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 369 (*per* Das, J.).

<sup>16</sup> *Supra* note 12.

<sup>17</sup> *Khandelwal Metal and Engineering Works v. Union of India*, (1985) 3 SCC 620, 628 (*per* Chandrachud, C.J.).

<sup>18</sup> *Supra* note 10.

<sup>19</sup> Preamble to the Advocates Act, 1961.

## B. PREVIOUS LEGISLATIONS

“When the terms of the enactment in the new shape are sufficiently difficult and ambiguous, the consideration of its evolution in the statute book is justified as the proper and logical course.”<sup>20</sup> It has been said that “an amending Act is to be construed in a manner that does result in its inefficacy, but *without straining its language or rewriting it to cover cases other than those to which it clearly applies*”.<sup>21</sup> [Emphasis supplied].

Prior to this Act, there were many classes of legal practitioners practising the legal profession.<sup>22</sup> Previous legislations indicate that such practice was prevalent before different courts in the country. The Advocates Act clearly intends to ensure that only one class of advocates practise law. While the Act is one to consolidate and *amend* the law relating to legal practitioners, there seems to be no discernible shift in the policy of the Act towards *regulation of non-litigious practice*.

At this stage, a brief examination of the then prevailing system governing legal practitioners is in order. The Indian High Courts Act, 1861, was passed enabling the Crown to establish High Courts in India by Letters Patent which authorized the courts to make rules for the enrolment of advocates, legal practitioners and attorneys. Thereafter, in 1865, the High Court was given the authority to make rules regarding qualifications for the admission to the Bar of advocates, vakils and attorneys (or solicitors). The High Court was also empowered to remove or suspend them if found guilty of professional misconduct.<sup>23</sup>

Clause (9) of the Letters Patent of High Court at Fort William (Calcutta) in Bengal, Bombay and Madras, allowed the enrolment of different classes of legal practitioners and authorized them to appear for and to plead and/or act for suitors of the said Courts.<sup>24</sup>

Some of the legislations which regulated legal practice in India then were the Legal Practitioners Act, 1879, the Bombay Pleaders Act, 1920, the Indian Bar Councils Act, 1926. A brief look into these statutes reveals a similar focus only on appearance and pleadings before a court.

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<sup>20</sup> Pacific Motor v. Motor Credits, (1965) 2 All ER 105, 113 (PC); Sitapur v. Muralidhar Bhagwandas, AIR 1965 SC 342, (*per* Subba Rao, J.); ITO, I, Salem v. Short Brothers, AIR 1967 SC 81, 84, (*per* Shah, J); Mohanlal Tripathi v. District Magistrate, Rai Bareilly, AIR 1993 SC 2042, 2049 (*per* R.M. Sahai, J.).

<sup>21</sup> Wijesuriya v. Amit, (1965) 3 All ER 695, 700 (PC).

<sup>22</sup> *Supra* note 1, ¶49.

<sup>23</sup> §10 of the Indian High Courts Act, 1861.

<sup>24</sup> *See* C.S. LAL, SUBRAMANYAM’S COMMENTARIES ON ADVOCATES ACT, 1961 AND BAR COUNCIL OF INDIA RULES, xxxi (2<sup>nd</sup> ed., 2004).

The Legal Practitioners Act, 1879 gave powers to the High Court to enroll advocates and vakils on its rolls to practise in the High Court and in the respective subordinate courts. ‘Legal practitioner’ is defined as an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue-agent.<sup>25</sup> The advocate and vakil<sup>26</sup> and attorney<sup>27</sup> were entitled to practise in any court subordinate to the court where he was enrolled. To appear in a different High Court, permission was required.<sup>28</sup> The vakils and pleaders were not allowed to appear before the High Court and were confined to the subordinate courts.<sup>29</sup> The functions, powers and duties of the attorney were to be defined by the High Court.<sup>30</sup> Other categories like muktars and pleaders were not entitled to appear in the court without due certification.<sup>31</sup> Disciplinary control over advocates, vakils, and pleaders was given to the High Court which could inquire, suspend or remove if any of them was found guilty of misconduct.<sup>32</sup>

Clearly, there was no provision in this Act which dealt with the practice of law *outside a court*. The enrolment of advocates and vakils under this Act was meant only for the purpose of appearing and pleading before a court. In essence, it dealt with *litigious practice*.

The Bombay Pleaders Act, 1920, though applicable only in the Presidency of Bombay, is also relevant to the current discussion; it exhibited the same trend. The vakil was entitled to practise in the High Court, in any court subordinate to the High Court, before any tribunal of appeal specified, in or before any court, tribunal or person before whom vakils<sup>33</sup> and attorneys<sup>34</sup> were thereafter entitled to practise and before certain specified public officers.<sup>35</sup> A district pleader, on the other hand, was entitled to practise before specified district courts.<sup>36</sup> No pleader was allowed to appear, plead or act for any party before any court unless he was a pleader under this Act.<sup>37</sup> The duty to attend court was imposed on the pleader.<sup>38</sup> The Act also provided for punishment of pleaders for

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<sup>25</sup> §3 of the Legal Practitioners Act, 1879.

<sup>26</sup> §4 of the Legal Practitioners Act, 1879.

<sup>27</sup> §5 of the Legal Practitioners Act, 1879.

<sup>28</sup> §4 of the Legal Practitioners Act, 1879.

<sup>29</sup> Proviso to §4 of the Legal Practitioners Act, 1879.

<sup>30</sup> §5 of the Legal Practitioners Act, 1879.

<sup>31</sup> §10 of the Legal Practitioners Act, 1879.

<sup>32</sup> See §§12, 13, 16, 21, 22, 26, 32, 33, 34, 41(2) and 41(3) of the Legal Practitioners Act, 1879. §34 explicitly provides punishment for those legal practitioners who practise in *any Court or revenue office*, when he has been suspended or dismissed.

<sup>33</sup> §7(1) of the Bombay Pleaders Act, 1920.

<sup>34</sup> §7(2) of the Bombay Pleaders Act, 1920.

<sup>35</sup> §7 of the Bombay Pleaders Act, 1920.

<sup>36</sup> §8 of the Bombay Pleaders Act, 1920.

<sup>37</sup> §9 of the Bombay Pleaders Act, 1920.

<sup>38</sup> §14 of the Bombay Pleaders Act, 1920.

improper conduct.<sup>39</sup> Several restrictions regarding fees and conduct were imposed by this Act.

Like the Legal Practitioners Act, this legislation did not contain provisions for any kind of practice of law outside the courtroom. Therefore, the regulation was for those lawyers involved in litigation.

The Indian Bar Councils Act, 1926, preceded the Advocates Act and established the first Bar Councils in the country. The object of the Act was clear: expediency in constitution and incorporation of Bar Councils for *certain courts*, to confer powers and impose duties on such Bar Councils and to consolidate and amend the law relating to *legal practitioners entitled to practise in such Courts* [Emphasis supplied].<sup>40</sup> No person was entitled to a right to practise in any High Court unless his name was entered in the roll of advocates maintained under the Act.<sup>41</sup> It was authorized to make inquiry against advocates for misconduct<sup>42</sup> and provided for punishment of misconduct.<sup>43</sup> It allowed a Bar Council, *inter alia*, to regulate the rights and duties of advocates of the High Court and their discipline and professional conduct, the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court etc. A general provision was made by which an amendment of any other enactment applicable to pleaders, vakils or advocates entitled to practise in such High Court would be applicable to the advocate under this High Court as well.<sup>44</sup>

Some of these provisions are very similar to those present in the Advocates Act, as will be demonstrated below. This Act also makes no reference to regulation of legal practitioners in general and deals only with such aspects of the conduct of legal professionals concerning a court of law. No person was entitled to practise *before any court* without enrolment; the Bar Council was entitled to regulate the rights and duties of advocates of the *High Court* and the conditions subject to which the advocates from other courts were *entitled to practise before the particular High Court*.

Thus, the various provisions point towards practice before a court and not practice of law in general. The specificity of every provision is unmistakable, and the only way to expand it to include practice outside a court is by omitting the specific references themselves.

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<sup>39</sup> §§24-28 of the Bombay Pleaders Act, 1920.

<sup>40</sup> Preamble to the Indian Bar Councils Act, 1926.

<sup>41</sup> §8(1) of the Indian Bar Councils Act, 1926.

<sup>42</sup> §12 of the Indian Bar Councils Act, 1926.

<sup>43</sup> §10 of the Indian Bar Councils Act, 1926.

<sup>44</sup> §19 of the Indian Bar Councils Act, 1926.

### C. *ADVOCATES ACT, 1961*

The Advocates Act, enacted in 1961, sought to implement the recommendations of the All India Bar Committee and the Report of the Law Commission regarding reforms in the administration of justice. This enactment repealed the Indian Bar Councils Act, 1926, the Letter Patent of High Courts, the Legal Practitioners Act, 1879, the Supreme Court Advocates (Practice in High Courts) Act, 1951 and the Bombay Pleaders Act, 1920 and amalgamated all categories of legal practitioners into a classless profession of advocates for the whole of India.

As stated earlier, this Act was meant to consolidate and amend the law relating to legal practitioners. As has been amply elucidated above, the law as it existed then, related only to litigious practice and did not extend to cover non-litigious practice as well. Therefore, it follows that the consolidation of the existing law, would not mean that the law extended to non-litigious practice as well. However, the Act also sought to amend the law. Therefore it is important to ascertain whether the Advocates Act introduced any new provisions which could have expanded the understanding of practice of law to non-litigious matters.

Chapter IV of the Advocates Act deals with the right to practice. The relevant sections are 29 and 30 & 33. Each of these sections deals with a distinct aspect of the right to practice. §29 deals with *who* is entitled to practise law in India: only one class of persons, namely advocates, shall be entitled to practise law. §30, on the other hand, lays down what an advocate is guaranteed as of right: he is entitled to practise throughout the territories to which the Act extends, in all courts, before all tribunals and any other authority or person. §33 states that no person shall be entitled to practise in any court or before any person or authority unless he is enrolled as an advocate under the Act. This clearly shows that it is only to practise before a court or other authority, that enrollment under this Act is required. Therefore, it cannot be said that other aspects of practice are included within the ambit of this provision. Such an interpretation is also consistent with the principle that a prohibition or restriction needs to be clearly and unambiguously laid down and that it cannot be implied, unless such is the only possible interpretation of the provision in question.<sup>45</sup> It is argued that there is no implication that an advocate is not entitled to practise in non-litigious issues. If any, the only logical inference from this scheme is that it is only in order to practise in litigious matters that enrolment is required.

Rules on Standards of Professional Conduct and Ethics in Chapter II, Part VI of the Bar Council of India (*hereinafter* BCI) Rules have described the duties owed by the advocate under different heads: firstly, the duty to the court; secondly, the duty to the client; thirdly, duty to the opponent and finally, duty to colleagues. Without question, the duty to the court would only arise in litigious

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<sup>45</sup> *Infra* note 49.



matters. The others will have to be analysed before a conclusion is drawn.

A reading of those duties owed to the client also reflect litigious aspects such as the duty to accept a brief in any court or tribunal that he practises in, non-appearance in cases where he is to be a witness, duty of a prosecutor in a criminal trial, interest in an actionable claim, duty to not purchase property involved in the execution of a decree, duty not to charge fee contingent on the result of litigation, duty not to plead for the other party after institution of the proceedings and so on.

While certain general duties such as duty to ensure that there is no abuse of trust of the client, duty not to withdraw from engagements, duty to uphold the interests of the clients etc. do exist, the lack of specific duties directed exclusively towards non-litigious matters and lawyers involved in such transactions, is apparent as are its implications. There is no express provision regarding the duty owed by a practitioner when involved in transactional work for a client or the interests to be kept in mind then. How would the BCI regulate advocates in this regard, without any specific regulations framed? What would be the basis of any action undertaken by the BCI against an alleged defaulter? Would a client or the colleague have any recourse to the disciplinary framework of the BCI in case of a violation? The answers to these questions would only support the argument that the Bar Council has not been entrusted with the duty to regulate in earnest those legal practitioners who do not appear before any court, tribunal or legal authority.

The Act provides for the punishment of professional misconduct.<sup>46</sup> Important for our analysis, however, is §35(4), where it is stated that an advocate who is suspended from practice under clause (c) of sub-section (3), shall during the period of suspension be debarred from *practising before any court or before any authority in India*. [Emphasis supplied]

In the important provision on punishment of misconduct, there has been no reference to suspension of the practice of an advocate in non-litigious matters in the event of such misconduct.<sup>47</sup> It is a generally accepted principle that if a reasonable interpretation leads to the avoidance of penalty, such a construction must be adopted.<sup>48</sup> The penalty needs to be stated clearly and explicitly; such a provision must be strictly construed.<sup>49</sup> The conduct of the citizen must fall squarely within the definition, before he is convicted.<sup>50</sup> In light of such an attitude of the courts, the Advocates Act does not seem to be governing or regulating the practice of those advocates who do not practise before a court.

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<sup>46</sup> §35 of the Advocates Act, 1961 (§35(3) (c) and (d) deal suspension of an advocate from practice and removal of an advocate from practice respectively).

<sup>47</sup> This argument was advanced by the Counsel for the Union of India in the judgment in ¶20.

<sup>48</sup> *Tuck & Sons v. Priester*, (1887) 19 QBD 629, 638 (*per* Lord Esher); *Tolaram v. State of Bombay*, AIR 1954 SC 496, 498, 499 (*per* Mahajan, C.J.).

<sup>49</sup> *Iqbal Singh Marwah v. Meenakshi Marwah*, AIR 2005 SC 2119, 2131 (*per* G.P. Mathur, J.).

<sup>50</sup> *Spicer v. Holt*, (1976) 3 All ER 71, 78, 79 (HL).

However, Chapter III of Part VI of the BCI Rules deals with the conditions for the right to practice which creates some ambiguity in the situation. Rule 6(1) states that an advocate whose name has been removed shall not be entitled to practice the profession of law either before the Court and authorities mentioned under §30 of the Act, or in chambers or *otherwise*. While this does largely support the earlier argument made regarding the punishment provisions, the use of the expression ‘otherwise’ creates ambiguity.

#### D. JUDICIAL DECISIONS

The Bombay High Court then went on to analyse past judicial decisions in order to substantiate its interpretation of the Advocates Act.

The decision of the Supreme Court in *Pravin Shah v. K.A. Mohd. Ali*,<sup>51</sup> (*hereinafter* Pravin Shah) was cited by the petitioner in the instant case,<sup>52</sup> stating that “the right of the advocate to practise envelops a lot of acts performed by him in the discharge of his duties. Apart from appearing in courts, he can be consulted by his clients, he can give his legal opinion whenever sought, he can draft instruments, pleadings, affidavits and any other documents, he can participate in any conference involving legal discussions etc”. This observation of the Apex Court no doubt enumerates the rights of an advocate. A person enrolled as an advocate under the Act can, not only practise before a court, but also carry on other professional activities as listed. However, this *does not* substantiate the proposition that in order to carry on the enumerated activities, one *must* be enrolled as an advocate.

This may be explained more clearly with the help of another decision of the Supreme Court relied on by the petitioner,<sup>53</sup> *Harish Uppal v. Union of India*,<sup>54</sup> where the Court in addition to the observations made in *Pravin Shah*, explained that “the right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie”. It stated that such duties performed “would have nothing to do at all with the acts done by an advocate during his practice”.<sup>55</sup>

Therefore, we contend that merely because an advocate has the *right* to be involved in non-litigious practice *does not* mean that those lawyers engaged in non-litigious practice *need* to be enrolled under the Bar Council. Since practice in court in a sub-set of the legal profession and *not the converse*, a license required for the former, *cannot* by implication necessitate a license for the latter.

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<sup>51</sup> (2001) 8 SCC 650, ¶16.

<sup>52</sup> *Id.*, ¶17.

<sup>53</sup> *Id.*, ¶15.

<sup>54</sup> (2003) 2 SCC 45, ¶34.

<sup>55</sup> It may be noted that this case dealt with the power of the court to control or supervise the conduct in court of an advocate.

Further, in the case of *Supreme Court Bar Association v. Union of India*,<sup>56</sup> the Supreme Court laid down that “since the suspension or revocation of licence of an advocate has not only civil consequences but also penal consequences, the punishment being in the nature of penalty, the provisions have to be strictly construed”. In light of this observation, it does not seem that the intention of the Court would be to extend the provisions of the Act to non-litigious practice, if the scheme of the Act or the Rules framed thereunder does not support the same.<sup>57</sup>

The crux of the decision lies in the analysis provided by the High Court on the interpretation of §§29 and 33. §29 states that subject to the provisions of the Act, there shall be only one class of persons shall be entitled to practise the profession of law, namely, advocates. §33 states that except as otherwise provided in this Act or any other law in force, no person shall be entitled to practise before any court or before any authority or person, unless he is enrolled as an advocate under this Act.

The Court’s interpretation is that §33 is prohibitory and is not related to the *entitlement* of a person to be *enrolled*. A person necessarily has to be enrolled under §29 in order to be able to practise law. But every person enrolled under §29 may not want to practise before a court. This makes §29 the genus of the practice of law and §33 the specie. Therefore in order to practise before a court, by virtue of §33, one needs to be enrolled as an advocate. However, every person enrolled under §29 need not avail of the right under §33 and practise before a court. The conclusion of the Court, therefore, is that §33 does not exclude the application of the Act to non-litigious practice and therefore §29 applies to such practice as well.<sup>58</sup>

We are in agreement with the reasoning of the Court that the right to practise is the genus, of which the right to appear in and practise before a court is a specie. However, they disagree that §29 represents this genus and §33, the specie. They would like to argue that §§29 and 33 must be read in consonance, which would necessitate the conclusion that both cover only litigious practice.

We further propose that the argument of the Court may lead to an inherent contradiction. If §29 grants the right, §33, being prohibitory as stated by the Court, bars the practice before a court without enrolment, i.e. bars only the specie of litigious practice. Hence practice without enrolment is prohibited only where the practice is before a court of law. If practice without enrolment is not prohibited where the practice is not before a court, there is certain aspect of the practice of law (i.e. non-litigious practice) which may be carried on without enrolment. If this conclusion is accepted, then the mandatory nature of enrolment under §29 seems to be obliterated.

<sup>56</sup> (1998) 4 SCC 409, ¶58.

<sup>57</sup> In support of this proposition is a further observation of the Court in the same case: Punishment by way of suspending the licence of an advocate can only be imposed by the competent statutory body after the charge is established against the advocate in a manner prescribed by the Act and the Rules framed there under. (*Supreme Court Bar Association v. Union of India*, (1998) 4 SCC 409, ¶58).

<sup>58</sup> *Supra* note 1, ¶47.

The alternate interpretation that we would like to propose is that §29 is declaratory of the *removal* of other classes of legal practitioners and the *institution of a single class* of such practitioners, entitled to practice law. (This must be seen in the context of the previous legislations discussed earlier, by which, there were several classes of practitioners entitled to practise before the various courts and authorities). §33 defines the scope of the entitlement of the advocates enrolled under §29, which is ‘practise in any court or before any authority’. To reiterate, the right to practise is the genus of which the right to practise before a court is a specie. However, we would like to propose that it is only the latter, i.e. the right to practise before a court which is covered by the Advocates Act, existing independent of the right to engage in other forms of practice.

The Court stated that since §35 of the Act does punish professional and other misconduct of an advocate, it is intended to cover litigious and non-litigious practice on the part of the advocate.<sup>59</sup> As explained above, the BCI Rules can be used to show that misconduct dealt with deal with those aspects of practice before a court of law. Also, professional and other misconduct is a general term which does not indicate whether it is meant to apply to both kinds of practice; there can be no reason to conclude that ‘professional’ means litigious practice and ‘other’ means non-litigious practice.

The constitutional argument that the Advocates Act should be considered to have been made only on the basis of Entries 77 and 78 of List I and therefore its application should be restricted to practice before the Supreme Court and the High Court was rejected by the Court on the ground that the Act would lead to the anomalous situation of being inapplicable to practice before lower courts. However, if the interpretation of the Court is accepted, then Entry 26 of List III, dealing legal, medical and other profession would become redundant. However the latter aspect of the argument was not addressed by the Court.

### *E. POLICY ASPECT OF THE COURT’S DECISION*

Historically, courts have been warned against usurpation of legislative function under the guise of interpretation.<sup>60</sup> They must avoid an *apriori* determination of the meaning of a provision based on their own pre-conceived notions of an ideological structure or scheme within which the provision in question must somehow be fitted.<sup>61</sup>

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<sup>59</sup> *Id.*, ¶51.

<sup>60</sup> *See, for e.g.*, *Magor and St. Mellons Rural District Council v. New Port Corporation*, (1951) 2 All ER 839 (HL).

<sup>61</sup> *Venkatachalam v. Deputy Transport Commissioner*, AIR 1977 SC 842, 853, 854; *Union of India v. Elphinstone Spinning and Weaving Co. Ltd*, AIR 2001 SC 724, 740; *Maulvi Hussain v. State of Gujarat*, AIR 2004 SC 3946.

It is not in dispute that non-litigious practice and transactional lawyers need to be under some professional regulation.<sup>62</sup> The Court concluded that since excluding transactional practice from the scope of ‘practice of law’ would be counter-intuitive; leaving such lawyers beyond the scope of regulation, the interpretation itself must be modified. In short, the Court chose the interpretation that the Act covers non-litigious practice, because this sector *should not* go unregulated.<sup>63</sup> We submit, humbly, that such a conclusion traverses past the realm of judicial interpretation into that of policy-making.

The Court has observed that the respondents have *neither* claimed that in India, legal practitioners are involved in non-litigious matters without being enrolled *nor* that in other countries, persons are allowed to practise in non-litigious matters without being subject to the control of any authority.<sup>64</sup> We are in agreement with the Court’s reasoning that neither of these contentions has been raised by the foreign firm respondents in this case. However, the relevance of either of these conclusions of the Court is difficult to understand. How would the decision of the Court have been affected if such a contention had been raised? How can the presence or absence of regulations in the countries where these law firms have their headquarters and branch offices make a difference to the interpretation of the law as it currently exists in our country?

Increasing the scope of the Advocates Act to include transactional lawyers does not mean that they are indeed regulated.<sup>65</sup> In the absence of any enforcement provisions or penalty clauses, even the existence of regulation would be ineffective.<sup>66</sup> The Court has observed that it would be an anomaly if an advocate found guilty of misconduct during litigious practice is debarred and can still continue to carry on practice in non-litigious matters.<sup>67</sup> However, the question is not merely whether this is an anomalous situation, but whether there is an enforcement mechanism to ensure that this situation does not, indeed, exist in reality.

On the other hand, excluding them from the purview of this law may lead to the enactment of a legislation that has the ability to actually govern them. Merely

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<sup>62</sup> *Supra* note 1, ¶18, arguments for the petitioner; (Bar Council is constituted with a view to keep check on the lawyers who render services to their clients in litigious as well as non-litigious matters. No country in the world permits unregulated practise of law).

<sup>63</sup> See N. Vivekananda, *Of Unintended Consequences: the Lawyers Collective judgment and the regulation of alternative legal practice*, available at <http://www.rainmaker.co.in/Feature/Of-unintended-consequences-the-Lawyers-Collective-judgment-and-the-regulation-of-alternative-legal-practice.html> (Last visited on March 23, 2010).

<sup>64</sup> *Supra* note 1, ¶54.

<sup>65</sup> See *Law min, BCI moot rules to regulate law firms*, August 31, 2010, available at <http://www.legallyindia.com/201008311250/Law-firms/law-min-bci-mooting-rules-to-regulate-law-firms> (Last visited on September 2, 2010).

<sup>66</sup> See *No Foreigners Please!*, available at [http://thefirm.moneycontrol.com/news\\_details.php?autono=432690](http://thefirm.moneycontrol.com/news_details.php?autono=432690) (Last visited on September 2, 2010).

<sup>67</sup> *Supra* note 1, ¶57.

because the Court believes that the Advocates Act should cover transactional lawyers does not mean that it is actually possible under its current framework.

Penalty has no doubt been provided for professional and other misconduct. This penalty naturally applies only to those who have been enrolled in a Bar Council. The pertinent issue then is how the Bar Council would regulate those who have not been enrolled.<sup>68</sup> The issues that would follow thereafter are whether the Bar Council has any jurisdiction over them and if it so, how the Bar Council would exercise this jurisdiction in practical terms.<sup>69</sup>

### III. IMPLICATIONS OF THE JUDGMENT

Although the instant case arose because of the petition filed against the foreign law firms who had obtained permission from the RBI to set up liaison offices, the ultimate question framed by the Court was whether the 'practice of law' included litigious and non-litigious work. The question therefore expanded beyond the scope of permissibility of such law firms practising in India.

As a result, the decision of the Court may have far greater consequences than was intended when the petition was filed. It affects the practice of Indian lawyers involved in such transactional work.<sup>70</sup>

On the other hand, there is much debate on whether this changes anything for the working of a *foreign firm* carrying on operations in India. Even in the absence of this judgement, there was never any doubt that a foreign firm *cannot* carry on any revenue-generating activities in India. By stating that liaison offices of such firms carry on non-litigious practice, the Court does seem to have indulged in

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<sup>68</sup> *Supra* note 63.

<sup>69</sup> At this juncture, we would like to draw an analogy between the non-litigious legal practitioners and Chartered Accountants. The latter are regulated by the Institute of Chartered Accountants of India. Every person who has passed the requisite examination and satisfies the criteria laid down, must apply for membership to the Institute. It is only one who is a registered as a member that can use the letters CA as a qualification after his/her name. In addition, regulatory checks have been introduced wherever a qualified chartered accountant is required to act. For instance, when a Chartered Accountant provides a certificate regarding the financial status of an individual, this certificate is required to contain the membership number issued by the Institute. A qualified Chartered Accountant alone is allowed to act as a statutory auditor of a limited company and §226 of the Companies Act imposes the qualification that only one who is considered a Chartered Accountant under the Chartered Accountants Act can be appointed as an auditor. When signing the Balance Sheet of a company, the Chartered Accountant is required to provide his/her membership number.

On the other hand, the Advocates Act contains no such provisions or in-built checks to prevent non-members from practicing. Even the provisions on ethical and professional conduct deal with aspects of practice before a Court of law. In light of this, the applicability of the Advocates Act to non-litigious practice remains doubtful and certainly not practicable.

*See supra* note 65.

<sup>70</sup> *See supra* note 2.

a degree of conjecture.<sup>71</sup> This has in turn led to the conclusion that even a liaison office is involved in the same nature of work as an Indian law firm that carries on non-litigious practice, necessitating a discussion on the meaning of the expression 'practice of law' as a whole.

Thus what we have is a possible situation, where the Court's decision is leaving unaffected the entities the petition was directed against, while affecting deeply, other entities who were outside the purview of the petition itself.

The Court also does not seem to have considered other prevailing realities in the Indian legal sectors today. Best friends' agreements, secondments and other less formal tie-ups are too many in number and any analysis of liberalisation or practice of law by foreign lawyers cannot escape an analysis into these. By not doing so, the Court has been very legalistic and un-dynamic in its approach to the issue at hand.

#### IV. 'BEST FRIENDS' AGREEMENTS

In December 2008, limited liability partnerships (*hereinafter* LLP) were allowed by way of a legislation which made it possible for Indian law firms to grow and made room for fair competition, if and when the legal market was liberalized. Under the LLP Act, foreign law firms would be permitted to register and offer consultation services as long as they did not 'practice law'. Although many news reports interpreted this to mean that foreign law firms could now set up shop in India,<sup>72</sup> it soon became apparent that the domestic regulations under the Advocates Act would prevent such a situation. The Union Law Minister at the time, H.R. Bharadwaj was quoted saying that §59 of the LLP Act would enable foreign firms to register in India, subject to the bar on legal practice due to the Advocates Act.<sup>73</sup> Interestingly, at the time of its enactment, the Law Minister categorically advocated entry of overseas law firms into India in light of global obligations as well as a "benefit from it".<sup>74</sup>

In fact, debate surrounding the liberalization of the Indian legal market

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<sup>71</sup> See also, Hemant Batra, *Opinion: Why the Lawyers Collective judgment is wrong*, available at <http://www.legallyindia.com/20100128427/Legal-opinions/opinion-why-the-lawyers-collective-judgment-is-wrong> (Last visited on September 2, 2010).

<sup>72</sup> Times of India, *Foreign law firms can register in India*, available at <http://timesofindia.indiatimes.com/news/india/Foreign-law-firms-can-register-in-India-says-Law-minister/articleshow/4023571.cms> (Last visited on September 2, 2010).

<sup>73</sup> *Foreign law firms are allowed to register and offer consultation services in India*, available at <http://www.worldlawdirect.com/forum/indian-law/21550-foreign-law-firms-allowed-register-offer-consultation-services-india.html> (Last visited on September 2, 2010).

<sup>74</sup> Swati Deshpande, *Foreign law firms can register in India, says Law minister*, available at <http://www.worldlawdirect.com/forum/indian-law/21550-foreign-law-firms-allowed-register-offer-consultation-services-india.html> (Last visited on September 2, 2010).

predominantly has its advocates arguing that we have a lot to learn from foreign legal firms.<sup>75</sup> This has been best reflected in a visible increase in tie-ups between foreign (primarily UK based) and Indian law firms, with varying degrees of formality. Popularly referred to by the term ‘best friend agreements’, these have come to be understood primarily as exclusive referral relationships.<sup>76</sup> They follow the logic of mutual benefit – foreign law firms clearly want to tap into the Indian economies.<sup>77</sup> In a time when the legal market is facing one of its worst financial crises in the US and the UK, geographical diversification can only mean good things for these firms. These elite Indian firms have flourishing corporate and tax advisory practices, an area important to corporate law firms abroad, and this serves as the starting point for these friendships. Furthermore, globalization has created an ‘increasingly global’ client base, in terms of their demands of legal counsel.<sup>78</sup>

The last decade has seen the birth of many of these agreements among elite law firms in India – Lovells and the Indian firm Phoenix Legal, Clyde & Co. and the Indian firm ALMT Legal. AZB & Partners is allied with Clifford Chance, Trilegal with Allen & Overy, Talwar, Thakore & Associates with Linklaters, P&A Law Offices with Jones Day and Platinum Partners with Freshfields. Poovayya & Co., had an agreement with US firm Brown Rudnik that was later terminated.<sup>79</sup> Most recently, Rodney Ryder, Kochhar & Co’s former technology and media law partner, who started up IP and IT boutique practice Scriboard in April has entered into a strategic alliance with legal process outsourcing (LPO) company Overlegen.<sup>80</sup>

These agreements are usually described as a mutual first contact point of these firms and their clients in their respective countries accompanied by sharing technical know-how. Many see these alliances as the first step towards full fledged mergers if and when permissible under the law in India. Until the time the legal

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<sup>75</sup> See *Entry of foreign law firms: let them in?*, available at [http://www.legallyindia.com/entry-of-foreign-law-firms-let-them-in?index\\_php?view=article&print=1&tmpl=component](http://www.legallyindia.com/entry-of-foreign-law-firms-let-them-in?index_php?view=article&print=1&tmpl=component); *Entry of foreign law firms*, available at <http://www.foxmandallittle.com/foreign.html> (Last visited on September 2, 2010).

<sup>76</sup> Asia Legal blog, Lorraine David, *Growing U.K. Role in the Indian Legal Market*, July 6, 2009, available at <http://asialegalblog.com/?tag=allen-overy&paged=3> (Last visited on September 2, 2010).

<sup>77</sup> George W Russel, *Going the distance*, INDIAN BUSINESS LAW JOURNAL, April 2009, available at [http://www.indilaw.com/pdfs/Foreign\\_law\\_firms\\_face\\_new\\_hurdles\\_in\\_India\\_race.pdf](http://www.indilaw.com/pdfs/Foreign_law_firms_face_new_hurdles_in_India_race.pdf) (Last visited on September 2, 2010).

<sup>78</sup> Malathi Nayak, *Trilegal makes innovative deal with top UK firm*, February 21, 2008, available at <http://www.livemint.com/trilegal.htm> (Last visited on September 2, 2010).

<sup>79</sup> *Vaish Associates align with Chinese-Singaporean Dacheng Central Chambers*, Bar & Bench News Network, September 30, 2009, available at <http://www.barandbench.com/brief/2/153/vaish-associates-align-with-chinese-singaporean-dacheng-central-chambers> (Last visited on September 2, 2010).

<sup>80</sup> *Ryder’s Scriboard enters atypical ‘best friend’ alliance with LPO Overlegen*, June 18, 2010, available at <http://www.legallyindia.com/20100618991/Legal-Process-Outsourcing-LPO/ryders-scriboard-enters-atypical-best-friend-alliance-with-lpo-overlegen> (Last visited on September 2, 2010).



services industry is opened up, it is viewed as an opportunity for foreign law firms to understand the Indian market.<sup>81</sup> This has resulted in several innovative relationships between firms and their Indian counterparts. Often, as in the case of Clifford Chance and AZB, fee sharing is excluded.<sup>82</sup> It is argued that Indian firms have a lot to learn from the professional norms and practices of UK based firms.<sup>83</sup>

However, discourse on these best friend agreements has been accompanied by a skepticism that it is merely back door entry for these foreign law firms given that a formal entry is prohibited.<sup>84</sup> They have often been alleged as being ‘surrogate practice’ of foreign law firms in India.<sup>85</sup> The skepticism is not confined merely to external observers; Rajiv Luthra of Luthra & Luthra Law Offices has declined many offers for these best friend relationships believing that they are inherently ‘foggy’.<sup>86</sup> He believes that even if they are legal, they do not follow the spirit of the law, since the BCI does not allow foreign lawyers to practise in India.<sup>87</sup> Many opine that they are vague enough to leave room for the unauthorized intervention by foreign lawyers.<sup>88</sup> Foreign firms and their Indian counterparts have definitely been feeling the heat – they continuously stress that these agreements, referral in nature, are ‘non-exclusive’ in the sense of agreements with other firms and ‘non-financial’ as there is no profit-sharing.<sup>89</sup>

The recent Bombay High Court judgement came as a result of a challenge against the work of some of these firms in India. The judgement finds the ‘practice of law’ to include litigation and non-litigation; therefore foreign lawyers are not allowed to practise in India. Interestingly, these firms often describe such strategic alliances as necessary given the government’s reluctance to liberalize the legal services sector.<sup>90</sup> However, the pertinent question is whether, and how the judgement will actually affect these best friends agreements. The focus of the judgment was an inclusion of non-litigious work into the definition of ‘practice of

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<sup>81</sup> Jayanth K. Krishnan, *supra* note 3; *Clifford Chance, AZB and Partners to share expertise*, January 14, 2009, available at <http://www.livemint.com/2009/01/14215208/Clifford-Chance-AZB-and-Partn.html> (Last visited on September 2, 2010).

<sup>82</sup> *Id.*

<sup>83</sup> Jayanth K. Krishnan, *supra* note 3; The Economic Times, *Practice of law and its regulation*, March 26, 2009, available at <http://economictimes.indiatimes.com/Opinion/Practice-of-law-and-its-regulation/articleshow/4316436.cms> (Last visited on September 2, 2010).

<sup>84</sup> *Id.*, The Economic Times.

<sup>85</sup> *Supra* note 78.

<sup>86</sup> Asia Legal blog, Aleena Khan, *A best friend agreement may lead to marriage*, February 10, 2009, available at <http://asialegalblog.com/?p=570> (Last visited on September 2, 2010).

<sup>87</sup> *Id.* See also James Dean, *Indian ‘best friends’ criticized*, LAW SOCIETY GAZETTE, January 22, 2009, available at <http://www.lawgazette.co.uk/news/indian-039best-friends039-criticised> (Last visited on September 2, 2010).

<sup>88</sup> *Id.*

<sup>89</sup> *Clifford Chance, AZB and Partners to share expertise*, *supra* note 81.

<sup>90</sup> *Id.*

law' provided in the Advocates Act. Non-litigious work would entail drafting and consultancy among other things. According to Lalit Bhasin,<sup>91</sup> such an agreement will not be affected by the judgement – a sentiment voiced commonly in the legal community.<sup>92</sup> The argument is that it is only a new term given to a practice of referral that has been in practice for several decades, even though it is undeniable that these agreements do provide some foothold in India for these foreign firms, at least to the extent of understanding the market better.

On a deeper look, it is evident that these best friend relationships are not as transparent as they appear to project, and perhaps naturally so. The inner workings of these relationships, and the actual nature of the work that is carried out by foreign lawyers by way of these agreements is impossible for an observer to ascertain. It is this aspect of such an agreement that requires closer analysis, perhaps necessitating regulation thereafter. However, for a best friends agreement, as such, to be affected by the judgement, the activities undertaken by them must fall within the realm of non-litigious practice of law – the interpretation would need to be much expanded for referral relationship to be thus included.

## V. IMPLICATIONS OF THE JUDGEMENT IN RELATION TO THE GATS

Unlike the pre-existing GATT system, the World Trade Organisation through the instrument of the General Agreement on Trade in Services (*hereinafter* GATS), moves beyond trade of goods to include trade in services. This was the natural result of the extent and importance of services in the international economic order. The globalization and liberalization of the Indian economy has created a revolution in the legal services sector, and niche corporate law firms have reaped the most benefits. Firstly, the burgeoning of multinational corporations has directly translated into increased business for these firms which provide them with legal assistance.<sup>93</sup> Apart from the corporates themselves, state and central governments

<sup>91</sup> *Bar councils to discuss global law firms' rush to India*, January 27, 2009, available at [http://www.thaindian.com/newsportal/politics/bar-councils-to-discuss-global-law-firms-rush-to-india\\_100147458.html#ixzz0yUXC2Kin](http://www.thaindian.com/newsportal/politics/bar-councils-to-discuss-global-law-firms-rush-to-india_100147458.html#ixzz0yUXC2Kin) (Last visited on September 2, 2010).

<sup>92</sup> *See*, "The judgement will have no impact on our best friends agreement with Clifford Chance as they are not practising here. Neither do they have any liaison office in the country," said AZB Partner Zia Mody. Almas Meherally, *Foreign law firms barred from non-litigious practice in India*, THE ECONOMIC TIMES, December 17, 2009, available at <http://economictimes.indiatimes.com/news/news-by-industry/services/consultancy/-audit/Foreign-law-firms-barred-from-non-litigious-practice-in-India/articleshow/5345542.cms> (Last visited on April 15, 2010). *See also* "In my view, apart from the fact that 'best friend' relationships were not in issue, the judgement does not in any way affect them," says Shobhan Thakore who is a founding partner of Linklaters' Indian best friend Talwar Thakore & Associates. *Advocates Act unfit for purpose after Lawyers Collective HC judgment*, December 18, 2009, available at <http://www.legallyindia.com/20091218353/Analysis/Advocates-Act-unfit-for-purpose-after-Lawyers-Collective-HC-judgment> (Last visited on September 2, 2010).

<sup>93</sup> Jayanth K. Krishnan, *supra* note 3.

as well as foreign governments making investments in India have utilized legal services for transactional matters on their various infrastructural and other projects.<sup>94</sup> New law firms in India are continuously branching into new areas to meet the demands of globalization, be it project finance, intellectual property, technology transfer contracts and so on. Simultaneously, large scale economic growth in India over the last decade has translated into new client bases for foreign firms and made the Indian market a profitable option for those firms who are looking beyond their borders.<sup>95</sup>

In a background note on legal services, issued by the WTO Secretariat, the link between the boom in trade in legal services and internationalization of the economy is explicitly made.<sup>96</sup> So from the very outset, GATS has been an instrument having the potential to facilitate liberalization of the legal sector. GATS, not only provides a general framework of rules and obligations, but also has distinct individual schedules for WTO members on a sectoral basis as well as conditions under which foreigners may supply services.<sup>97</sup> GATS has classified twelve sectors for which commitments may be made which include, *inter alia*, business services and professional services. Like the GATT, GATS has also sought to create a Most Favoured Nation status for WTO members, as a general obligation which is applicable across the board by all Members to all services sectors which mandates that non-discriminatory treatment be given to all foreign service suppliers.<sup>98</sup> It uses the MFN treatment under Article II and XVII in order to reform markets, while making allowances for differential treatment for developing countries.<sup>99</sup> The GATS also has an in-built mandate (under Article VI:4) for the development of disciplines on domestic regulation.<sup>100</sup>

India, like all other member countries, has signed the GATS, which effectively covers 95% of all trade in services. India's position has also seen many transitions since the Uruguay Round; today it is an aggressive promoter of several GATS agendas.<sup>101</sup> The country's vast resources in software, health and legal

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *LEGAL SERVICES: Background Note by the Secretariat*, World Trade Organisation, S/C/W43, July 6, 1998; see *Liberalizing Legal Services under GATS*, EQUATIONS, July 2006, available at <http://www.equitabletourism.org/stage/readfull.php?AID=390> (Last visited on September 3, 2010).

<sup>97</sup> *A Consultation Paper on Legal Services under GATS*, prepared by Trade Policy Division, Department of Commerce, Govt of India, 2006, available at [commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf](http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf) (Last visited on September 3, 2010).

<sup>98</sup> Aaditya Mattoo, *MFN and the GATS*, Paper presented at the World Trade Forum Conference on "Most-Favoured Nation (MFN): Past and Present", at Neuchâtel, August 28-29, 1998, available at <http://www.iatp.org/tradeobservatory/library.cfm?refID=25142> (Last visited on September 3, 2010).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Jayanth K. Krishnan, *supra* note 3.

transcription services combined with aggressive lobbying by IT companies and the Ministry of Commerce have ensured that India plays a leading role in pushing for various measures within the GATS framework. However, India has not included legal services in its schedule of commitments under the GATS and has restricted its specific commitments to engineering services.<sup>102</sup> This stands in contrast to 44 other countries that have made specific commitments in the legal services sector.<sup>103</sup>

Needless to say, the pressure on India to do so has been tremendous. The corporate sector in India today largely consists of multinational companies, which could potentially provide a fertile market for foreign law firms to open offices here.<sup>104</sup> Were liberalization of legal services to be a part of India's GATS agenda, many feel that a necessary implication would be the commercial presence of foreign firms in India. Interestingly the GATS has classified the complete range of service trade into four modes recognizing the multifarious forms of international transactions today of which Mode 3 is commercial presence.<sup>105</sup> It is worth noting that India's focus, of late, has been an aggressive campaign for the export of services involving 'cross-border' service (Mode 1) as well as those services involving 'movement of natural persons' (Mode 4) and conspicuously not in the field of commercial presence.<sup>106</sup> At least with respect to the legal sector, the reason for this may be the obvious difficulties in the form of competition adverse to the interest of Indian law firms. Many arguments made against India opening up its legal services sector through GATS are the same as those made in support of the Bombay High Court ruling, directed towards protection of domestic interest. Therefore, although GATS may prescribe specific modes through which the exchange of skills, services and outsourcing of work may be enabled, at the end of the day, such a commercial presence of foreign law firms in India is still regarded as illegal. Even prior to the judgment, there has been no doubt regarding the prohibition of foreign lawyers practising in India.

Due to the fact that India has made no specific commitments regarding the liberalisation of its legal sector under GATS, domestic regulations and restrictions (in particular the Advocates Act, 1961, and the Bar Council of India Rules)<sup>107</sup> are seen to stand as absolute barriers to any kind of foreign commercial presence in India.

It is also important to analyse the nature of obligations that the GATS

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<sup>102</sup> Swapnil Joshi, *Changing Face Of The Legal Profession In India In The Era Of Globalization*, available at <http://www.legalserviceindia.com/articles/lprof.htm> (Last visited on September 3, 2010).

<sup>103</sup> *Id.*

<sup>104</sup> *Supra* note 96.

<sup>105</sup> Jayanth K. Krishnan, *supra* note 3.

<sup>106</sup> Kasturi Das, *GATS Negotiations and India: Evolution and State of Play*, Working Paper 7, CENTAD, October 2006, available at [www.centad.org/cwp\\_09.asp](http://www.centad.org/cwp_09.asp) (Last visited on September 3, 2010).

<sup>107</sup> *Id.*, see also, *supra* note 96.

imposes insofar as they conflict with domestic regulations and restrictions. Clearly, the ultimate aim of the GATS is greatest economic integration which would entail, among other things, foreign law firms opening their offices in India, and vice versa with Indian law firms appointing associates and partners from foreign countries. The focus of the judgement is on tightening regulations and restrictions on foreign firms, leading to policy considerations which stand in stark contrast to the goals that the GATS is seeking to achieve.

## VI. MORE CONTROVERSY

On March 18, 2010, a writ petition was filed before the Madras High Court against 31 law firms and one legal process outsource firm (*hereinafter* LPO) along with government respondents, alleging that these foreign law firms are practising law in India out of hotels and business centres, where they undertake arbitration or provide legal advice on various transactions. It has also been alleged that such activities are carried on under the guise of LPOs. Such activities have been alleged to violate *inter alia*, the income tax laws, immigration laws as well as the Advocates Act.<sup>108</sup>

The matter has been subject to repeated delay since it was brought before the Court.<sup>109</sup> Government respondents, including the BCI, Union Law Ministry, Ministry of External Affairs and the RBI as well as the firms have been served and the matter remains pending for hearing. Law Minister Veerappa Moily announced at a press briefing that in lieu of the decision of the Bombay High Court in *Lawyers' Collective*, there have been plans to move this matter to the Supreme Court for a broader perspective and to help the government arrive at a final decision.<sup>110</sup>

There has been hope that this present case will clarify issues which have been raised and remain ambiguous after the decision of the Bombay High Court in *Lawyers' Collective*.<sup>111</sup>

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<sup>108</sup> *Writ Petition filed against 31 foreign law firms and an LPO – Immigration law violations also alleged*, March 22, 2010, available at <http://barandbench.com/index.php?page=brief&id=597> (Last visited on September 2, 2010).

<sup>109</sup> *Madras writ hearing v foreign firms bogged down by court delays*, April 15, 2010, available at <http://www.legallyindia.com/20100415699/The-Bar-and-Bench/madras-writ-hearing-v-foreign-firms-bogged-down-by-court-delays> (Last visited on September 2, 2010).

<sup>110</sup> *Madras writ petition v foreign firms will be moved to Supreme Court for "final decision", says Moily*, July 20, 2010, available at <http://www.legallyindia.com/201007201116/Law-firms/madras-writ-petition-v-foreign-firms-will-be-moved-to-supreme-court-for-qfinal-decision-q-says-moily> (Last visited on September 2, 2010).

<sup>111</sup> *No Foreign Relations? AK Balaji v Ashurst et al*, March 24, 2010, available at [http://www.barandbench.com/index.php?title=No\\_Foreign\\_Relations?AK\\_Balaji\\_v\\_Ashurst\\_et\\_al&page=brief&id=606](http://www.barandbench.com/index.php?title=No_Foreign_Relations?AK_Balaji_v_Ashurst_et_al&page=brief&id=606) (Last visited on September 2, 2010).

## VII. CONCLUSION

The present article aimed to analyse the conclusions of the Bombay High Court in the landmark decision in *Lawyers' Collective*. In doing so, we have sought to look beyond the immediate premises of the Court's arguments and examine the bases on which the conclusions were drawn.

The writ petition was filed against the liaison offices of the foreign firms set up in India. The Bombay High Court entered a debate regarding the 'practice of law' under the Advocates Act. Firstly, the Court did not examine the nature of work carried on by the liaison offices. Since, in reality, the work carried on by such liaison offices falls beyond the scope of practice of law, even in the wider sense understood by the Court, the judgement leaves them unaffected, while having implications on others.

A very pertinent issue resulting from this decision is its applicability to the rest of the country. Until it has been reiterated and upheld by the Supreme Court, it is binding only within the state of Maharashtra.<sup>112</sup> Although, the Bombay High Court has no control over this, it would lead to the anomalous situation where non-litigious practice is covered by the Advocates Act in one state, but not necessarily in another. This would become even more so, if the High Court of any other state decides differently from the Bombay High Court. This possibility needs to be considered by the Supreme Court and perhaps a suo motu examination of the matter is called for.

In this article, we have argued that Advocates Act applies only to litigious practice and that non-litigious practice falls beyond the scope of the Act. We rely on statutory provisions and judicial precedents to support such an interpretation. We also argue that the Court's attempt to include non-litigious practice within the ambit of this statute would be futile because of the lack of an adequate mechanism thereunder to enforce the same against those lawyers who are practising outside a court of law. It is our view, *not that non-litigious practice must be left unregulated, but merely that the Advocates Act and the present framework are insufficient for the purpose*. Therefore, we argue that if the Court interpret the law as such, it would necessitate a new law that would satisfactorily and amply regulate non-litigious practice and address the professional concerns that arise in such practice. On the other hand, the Court's interpretation that the Advocates Act does cover non-litigious practice only leads to the continued lack of regulation of non-litigious lawyers.

A further conclusion of our argument is that the Advocates Act does not apply to foreign lawyers and law firms, if they are involved in non-litigious practice. This would mean that the non-entry of law firms in India is prevented by political factors and not legal factors. *It is not our stand that foreign firms must be*

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<sup>112</sup> *Supra* note 9.

*allowed to set up formal and full-fledged practices in India; we are merely raising questions regarding the adequacy of the legal and regulatory measures being relied on by the Government of India to prevent their entry into the country.* Once again, we put forth that if the Government wishes to continue the prevention of foreign law firms in India, more specific laws and regulations are required. But for the purpose of this article, we have worked on the assumption that the prohibition of foreign lawyers into India is governed by the Advocates Act read with the BCI Rules, as is relied on by the Government of India.

While we have sought to humbly disagree with the reasoning of the Court, several legal experts think otherwise. Whichever opinion one holds, this decision has brought to the fore issues which are of current relevance and debate in the country. Perhaps it is time for the Supreme Court to express its opinion and for the Government to step up and take a stand, to bring to rest these raging uncertainties.

