

Problems with the Advocates (Amendment) Bill, 2017

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Abstract: *Although attempting to restore the lost reputation and glory of the profession and plug in the endemic malpractices therein, the Advocates (Amendment) Bill, 2017 seems to have arrived at solutions which are not only a threat to the independence of the bar but also seem to have been arrived at in a hurried fashion without proper application of mind. In the present paper, I shall attempt to appraise various sections of the Amendment, which strikes at the independence of the Bar. I shall end the paper with certain suggestions aimed at establishing various institutions and mechanisms which shall protect the independence of the Bar and help bring in the best practices to the profession.*

Keywords: Advocates (Amendment) Bill, 2017, Independence of the Bar

1. Introduction

Let me begin by quoting Louis Brandeis [1] “it is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people...”

If we were to accept the populist view, it can be said without a doubt that for nearly a generation now, the Bar has not only failed to take part in the coming up or assisting in creating constructive legislation designed to solve our great social, economic and industrial problems in the public interest; but they have failed the public by advocating several causes and cases, as lawyers, which as citizens they could not approve and have endeavored to justify themselves by a false analogy. In my opinion, the lawyer has sadly assumed that the rule of ethics that apply to a lawyer’s advocacy are the same in cases where he acts for private interests against the public as well as in the litigation between the private individuals. In its quest of protecting the interest of the clients and discharging its duty of loyalty towards the client the lawyer today has forgotten his other duty as the “officer of the court”, member of a public profession and a citizen with a responsibility to uphold the rule of law.

2. Background to the Amendment

The Advocates (Amendment) Bill, 2017 was introduced by the Law Commission in March 2017 as a result of the direction given by the Supreme Court in the case of *Mahipal Singh Rana v. State of UP* [2]. The Court directed the Commission to look into all the relevant aspects relating to regulation of legal profession in order to curb the rising instances of professional misconduct by the lawyers. The Supreme Court in the said case observed that:

“There was an urgent need to review the provisions of the Advocates Act, particularly dealing with the regulatory mechanisms for the legal profession and other identical issues in consultation with all concerned”.

As a result of the aforesaid direction, the 21st Law Commission of India issued a notice on 29th August 2016, inviting comments on “the need for reform in regulation of legal profession”. In response to the notice, the Commission received 136 responses from across the sector including the Bar Council(s) and Bar Associations, lawyers, Judges, Government Officials, academicians and various research organizations. [3] It was observed that a bare reading of the Advocates Act, 1961 points out to the lack of *defined regulatory objectives and principles*. The regulatory mechanism for the legal profession in India still is based upon the principles of “self regulation” which is the *prima causa* for the failure of the existing system. The causes for the failure of the system are many and complex but essentially it comes down to the *attitudes* and lack of vision of significant group of lawyers who sadly view the practice of law as simply a commercial enterprise. The quality of services offered by the lawyer in his independent capacity has deteriorated enormously. It is by virtue of the independence enjoyed by lawyers, that while dealing with clients who are less informed or are of lower status than themselves they are able to virtually preempt all of the decision making authority, keep information to themselves, not disclose the full range of choices that are available to the client, not inform the client about the status or progress of their cases, patronize the clients and sometimes view them as overemotional and imbecile laypeople who can’t possibly know what legal options will serve them best or simply presume that they know what’s in their clients best interests. Further, an unprecedented increase in the number of lawyers; the competition for business, economic pressures on lawyers and law firms; increasing clients dissatisfaction against excessive fees and substandard services; narrowing of lawyers education and forced specialization; failure to discipline lawyers for myriad abuses such as strikes, acts of intimidation towards the member of the bar and bench alike, sometimes even the client; influence of heavy-handed administrative bureaucracies upon lawyers employed in government agencies, has ultimately resulted in the general

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decline of the trust and confidence of the Indian society upon the legal profession.

3. Review/ Analysis of the above Advocates (Amendment) Bill, 2016

In my opinion, the Law Commission of India, in consultation with the Bar Council of India; has in its zeal to bring about the much needed change in the regulation of the profession and laying down the standards for professional ethics, has erroneously overstepped into the independence of the Bar giving the executive and the Judiciary an unparalleled and unwarranted power over the functioning of the bar which may in the long run be a death blow to the efficient functioning of the Indian democracy.

The amendment have primarily focused on regulating the discipline and misconduct of the Indian advocates but seems to have overlooked other expanse of legal profession in today's globalised world as no specific provision has been created for regulating the activities of foreign firms and foreign lawyers in the Indian legal system under section 49(1)(ia). This particular suggestion is unsubstantiated without any rationale as to why association of Law firms and foreign lawyers has been exempt from the supervision and control of State Bar Councils. The objectives envisaged by the Arbitration and Conciliation Act so as to make India a popular seat for International Arbitration cannot be supreme to the objective of seeking to restore the faith of the public in the profession by bringing about a higher standards of professional conduct. By creating a special class upon whom the regulatory mechanism as proposed by the amendment bill shall not apply, the Commission has itself diluted the very purpose for which the amendment has been initiated. Such exclusion might have consequences which the Commission may not have warranted.

Further, in my opinion the amendments proposed under sections 3 and 4 of the Act, even though intend to create a framework which would be independent in representing the public and consumer interest and also be comprehensive, accountable, consistent, flexible and transparent; has the capacity of being more restrictive and cumbersome than justified. Proposed amendment to section 10 and introduction of section 10 A clearly amounts to executive overreach in the functioning of the bar which may open the door to politicization of the Bar and consequently the bench; which shall be a death blow to the independence of not only the bar but democracy in the long run. Section 9 B may seem to violate the well established principles of natural justice as the consequence of a misconduct has become too grave entailing criminal consequences but the representation of the members from the bar has been reduced drastically. Such a populist measure may lead to a scenario wherein the scrutiny over the activity of the lawyer is done under the light of passion and not reason.

How the above proposed amendments strike at the Independence of the Bar.

1) The term misconduct ['misconduct' includes-an act of an advocate whose conduct is found to be in breach of or non-observance of the standard of professional conduct or etiquette required to be observed by the advocate; or

forbidden act; or an unlawful behaviour; or disgraceful and dishonourable conduct; or neglect; or not working diligently and criminal breach of trust; or any of his conduct incurring disqualification under section 24A] as defined under section 2(1)(iii) is extremely wide and all inclusive. Use of words like etiquette, dishonourable and disgraceful conduct has given a lot of ambiguity to the term misconduct. Such a wide and inclusive definition of the term has exposed the advocates to a great peril. Now, an advocate can be charged of misconduct for virtually any act and thereby open him to a probable enquiry by the council. Such an enquiry for a professional will have dire consequences as an advocate is bound not only by the provisions of the Advocates Act but also by various code of ethics while discharging his duties as an officer of the court. Misconduct needs to be defined clearly as it entails penal consequences.

- a) For instance, an advocate has applied to be elevated to the bench. Pending his application a charge of misconduct gets filed before the council by any party. The advocate is under an obligation to withdraw his application or his application shall stand rejected. Now because the meaning of misconduct is very expansive, the chances of it being misused or abused by a competitor, by an adversary or by a dissatisfied client (who has despite the best efforts of the lawyer, lost the case upon its merits) out of spite chooses to file a case before the council. Who is to look after the fate of such a lawyer? It can be seen from the above that the proposed amendment if brought into force shall have a pernicious effect upon the independence of a lawyer in discharging his duties.
- b) Further the consequence of misconduct is disqualification of lawyer under section 24A of the amendment. Given the above situation how is the lawyer, who is expected to fight for the rights of the poor, aggrieved and a common man against the agents of the State such as the Policeman, bureaucrats, ministers etc, is to perform his job when his license to practice can be challenged upon extremely wide and sweeping grounds which may amount to misconduct under section 2(1)(iii) of the Act. Clearly under such a circumstance a man cannot be expected to perform his duty free from duress or extraneous conditions.
- 2) Under Section 3 and 4 inclusion of a non-lawyer in the membership of the State Bar council on the reasoning that it is *pari materia* to the common practices followed in other professions such as that of Doctors, Company Secretaries or Chartered accountant is, in my humble opinion, highly misplaced. At this juncture, it must be appreciated that the nature of duty discharged by a lawyer is not, strictly speaking, personal in nature. In most of the situation the lawyer is defending the right of a common man against either the State or an agent of the State. Because of this special nature of the lawyers' duty it would be unfair to subject him to same standard of scrutiny as that of other professionals whose duty is more of a personalized character. A lawyer's code of conduct and standard of professional ethics cannot be determined by an outsider who is neither trained nor are expected to understand and appreciate the special nature of the duty discharged by the lawyer as the protector of the rights of the common man against all.

3) Further under section 9, which talks about the composition of the disciplinary committee, the representation awarded to the lawyers is clearly unfair as 3/5 of the members are not from the bar. Further, to add injury to the insult, the commission has in its wisdom suggested that the committee at the Centre be chaired by a retired High Court Chief Justice or an Ex- high Court judge. Such a provision clearly strikes at the independence of the Bar because now the lawyer, who too is an officer of the court, finds himself at the mercy of the judiciary and hence may not be in a position to discharge his duty fearlessly in cases where the accused is a member from the judiciary itself. In the recent years, it is not only the bar which has lost its reputation in the eyes of the general public but also the judiciary. Hence, amendment proposed under section 9 needs serious reconsideration.

4. Importance of Independence of the Bar

Independence of the Bar means the bar's freedom to regulate its own practices without any outside regulations. Lawyers are given this freedom as a part of social bargain. [Clients entrust their affairs to the professional judgment of the counsel, who are expected to serve them with selfless devotion. In turn, the legal profession would protect clients from ignorance and unreliability by preventing them from hiring anyone not enlightened by a legal education and warranted by bar membership. Furthermore, the bar would prevent abuses by its own members through the establishment and enforcement of rules, such as those protecting clients from the wiles of advertising attorneys] Lawyers are given monopoly over certain kinds of work; they enjoy confidentiality with clients as their communication is guarded under the attorney-client privilege. And the bar regulates the conduct of its members to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.

Independent bar helps to serve the client more effectively and efficiently. Lawyers are the best judges of the clients interests in a given case and are expected to design the best strategy to protect and promote this interest. Any outside supervision or regulation may damage the delicate ecology of trust and confidence of the lawyer-client relation. Independence of the bar assumes even more critical importance in relation to the position of the criminal defense lawyers. Such defense lawyers act as a feudal power center who is neither subordinate to the state law enforcement officers nor the judges. They are expected rather encouraged to exploit every loophole in the rules, take advantage of everyone of their opponents' tactical mistakes or oversight and stretch every legal or factual interpretation to favour their clients.

Independence of bar also includes the lawyers duty to remain independent from the populist interests of the civil society *including his clients*. Lawyers are constantly advised to not get emotionally involved with their client, not to take up projects as personal causes as it may impair their ability to analyze and act dispassionately on a given case. Lawyers are required to distance their personal belief in order to be able to perform his duty towards the client in a just and

ethical manner. That is why it is also important for a lawyer to not become associated or identified with one set of clients or matters because if that happens then they won't be able to take on the unpopular or disgusting cases.

5. Suggestions

If an expert body is to be created, it might be appropriate to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions, along with an appellate body based on the doctrine of separation of powers recognized by the Constitution of India.

In order to give effect to the directions of the Supreme Court what a harmony has to be achieved in ensuring the independence of the legal profession from outside influences (especially the government) and creation of a regulatory framework which is capable of representing the public and citizens interest independently. For this purpose, inspiration can be taken from the framework prevalent in the UK, wherein there is a Law Society which acts as a representative body for solicitors and a Solicitors Regulation Authority (SRA) which looks after the regulatory functions. [4] The SRA acts as an independent regulatory arm of the Law society itself. By the virtue of this structural set up the UK has done away with the traditional model of self-regulation of the Bar without compromising upon the independence of the Bar as the regulatory body is simply an extension of the representative body which is capable of performing its functions independently. One interesting point to be noted about the composition of this SRA is that out of a total member of 15 only 7 are from the Bar and the remaining are laymans. It is interesting to point here that the nomenclature used here is a layman and not a Judge, or other professionals or any other eminent jurist/ personalities. Such a layman is then appointed the chairman of the SRA. Such a set up is inclusive in nature as there is a thorough dilution in the composition of the board and specific problems in regard to disciplinary action against lawyers by lawyers are avoided.

References

- [1] Louis Brandeis, "The Opportunity in the Law", in Business-A profession 329, 337-39(1933)
- [2] AIR 2016 SC 3302
- [3] Law Commission Report, 2016
- [4] Sir David Clementi, "Review of the Regulatory Framework for Legal Services in England and Wales Final Report", (Clementi Report). Available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/oftreptconc.htm> (Last accessed 07.07.17)