# WORKING PAPER

ON REVIEW OF THE

ADVOCATES ACT, 1961.

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# RESTRUCTURING LEGAL PROFESSION : TASKS AND CHALLENGES IN THE TWENTY-FIRST CENTURY

Legal profession in India, the second largest in the world[1], is today beset with several problems and challenges not entirely of its own making. It is not one of the popular professions which it used to be before Independence despite the growing number of people joining its ranks[2]. The professional set up is compared to a pyramidal structure in which those occupying the top have work, wealth and fame beyond limits, and those in the middle, have reasonable opportunities to make a living and prospects for joining the fortunate few at the top, the vast majority constituting nearly fifty per cent of the profession are left to struggle for work and survival. In many cases they opt out of the profession to be able to survive[3]. The irony of the situation is that there is a growing demand for legal services and a large area of unmet legal needs in society; yet the surging number of young advocates are unable to get employment unless they have godfathers in the profession or abundant political patronage. Leadership in the profession complain of the unemployability of many of them because of the poor quality of legal education they had and the total inability of the licensing and enrolment procedures to ensure basic knowledge. Whatever be the reasons for the present anomalous and potentially dangerous situation, the fact remains that one of the serious challenges before the profession today is its inability to ensure minimum competence in knowledge and skills particularly among the new entrants to the bar.

With the explosion in numbers and dilution in standards, another related challenge arose in respect of maintenance of discipline and etiquette in the profession. Frequent strikes and boycott of courts by lawyers coupled with mounting costs and delays in

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1. America has the distinction of having over a million lawyers and India ranks second with a little over half a million (500,000 Advocates); yet, in terms of the ratio of people to lawyers, India is placed in the bottom ten countries in the world!
2. While engineering, medicine, management, commerce and civil services continue to attract the best talented men and women, Law is, excepting honourable exceptions, one of the last career choices today among university students.
3. See, Menon, Madhava (Ed.) " Legal Profession in India". Bar Council of India Trust, N.D.(1980)

litigation have dampened the image of lawyers in society at a time when the profession is looking up in the rest of the democratic world. The absence of a leadership role for the organized profession in the dispensation of legal aid to the poor tended to identify lawyers with the rich and propertied classes. The contribution of the bar in the law reform process remains negligible. For any profession to be accepted and encouraged, public image is a crucial factor in a democracy. It is perhaps partly the result of the dismal image problem that lawyers are being excluded from several adjudicative forums and the Government is showing reluctance to give monopoly right of representation to advocates by not enforcing Section 30 of the Advocates Act. Organization of delivery of legal services at more accessible levels and enforcement of higher levels of ethical conduct on the part of each and every member of the bar is thus a major challenge before the profession at the turn of the millenium.

A third serious challenge assuming importance relates to the globalisation process under way. Trade in legal services is bound to grow fast in the coming years under the WTO regime. India will have to open up its legal services sector sooner or later within the next five years. It is both a challenge and an opportunity to the second largest profession in the world. To be able to provide a level playing field within the country and to encourage cross-border practice among Indian lawyers, the profession has to revise policies and controls appropriately for which the time has come. India is in the process of negotiation on trade in services and the bar should be prepared to respond to the new demands and challenges.

Another issue around which problems emerged is in respect of the pattern of management of the profession. When the Advocates Act was formulated the profession was not even one-tenth of its present size. The number of law teaching institutions were less than fifty, whereas today it is over five hundred. Apart from the size and spread of the bar, the qualitative changes in the nature of work and in the organization of legal

services warrant a fresh look at the management issue with a view to enhance professional development and to maintain autonomy of the bar.

A review around these four broad issues concerning the bar and the society is what is attempted in this report.

**Brief history of the Profession and its regulation**

The history of the modern legal profession in India begins with the establishment of the first British Court in Bombay in 1672. Early attorneys had no organized legal training and some of those who represented litigants were members of the clerical staff of the so-called courts which, evidence suggest, brought discredit to the profession. During the early period of British rule, the East India Company, in fact, discouraged the growth of the profession and the Company's servants managed administration of justice in the settlements with little or no participation of attorneys/agents. With the establishment of the Supreme Courts in Presidency Towns towards the end of 18th century, the situation slowly started changing and barristers and solicitors from England came in either as judges or lawyers or legal advisors to the Company. Some wealthy Indians also went to England to get trained as barristers and some of them returned to give a fight to the English barristers in the growing Indian legal profession.

The Legal Practitioners' Act of 1846 modified by Act of 1853 attempted to regularise the profession by giving right to plead and practise for people of all nationalities before all courts (Crown Courts and Company's Courts) if they were properly licensed by the courts before whom they practised. When the British Crown assumed direct control over the colony, the Indian High Courts Act, 1861 was enacted enabling the Crown to establish High Courts in India by Letters Patent which, in turn authorised the High Courts to make rules for enrolment of advocates. The system thus established was further modified through the Legal Practitioners Act, 1879 and the Indian

Bar Councils Act, 1926 which continued to govern the profession till the attainment of Freedom in 1947.

After Independence, it was felt that both the legal profession and the system of judicial administration required structural changes and the matter was assigned to the Law Commission. The disparate and divided profession in different jurisdictions in India posed an immediate problem in legal representation and the Government of India appointed an All India Bar Committee to suggest strategies for unification and standardization of legal practice in the country. The Bar Committee had recommended the establishment of an integrated bar for the whole country and constitution of a single class of legal practitioners (advocates) with uniform qualifications for admission. It further canvassed the creation of autonomous Bar Councils, one for the whole of India and one for each State.

The Advocates Act, 1961 (25 of 1961) is thus the product of the recommendations of the All India Bar Committee (1953) and the report of the Law Commission of India (1954).

The Act, divided into seven Chapters and a Schedule, authorized the Central Government to bring into force its provisions by notification in the Official Gazette, if necessary, keeping different dates for different provisions. Thus Chapters I, II, III and VII were notified in 1961, Chapters V and VI during 1963 and Chapter IV in 1969. There is still a provision not brought into force after 38 years of enactment of the law which is an all important provision for the profession, namely, the Right of Advocates to Practice in all Courts and Tribunals (Section 30). The main features of the Act are :

(1) the establishment of an All India Bar Council and a common roll of advocates, and advocate on the common roll having a right to practise in any part of the country and in any Court, including the Supreme Court;

(2) the integration of the bar into a single class of legal practitioners known as advocates;

(3) the prescription of a uniform qualification for the admission of persons to be advocates;

(4) the division of advocates into senior advocates and other advocates based on merit;

(5) the creation of autonomous Bar Councils, one for the whole of India and one for each State.

**Amendments to the Act**

The Act was amended thrice in 1964, 1973, 1977, in 1980, and in 1993.

The Advocates (Amendment) Act, 1976 introduced provisions to enable the Chairman and Vice-Chairman to continue in office till their successors are duly elected, abolished the dual system in the High Courts of Bombay and Calcutta, and extended the term of Members of the Bar Councils to five years. The Amendment Act of 1980 gave the right of pre-audience to the Law Officers (Additional Solicitor General) of the Government of India over all other advocates. The Amendment Act of 1993 was at the instance of the bar Council of India to enable it to function more effectively. It provided for automatic cessation of membership in State Bar Councils in the event of non-holding of elections within the stipulated period, enabled the Bar Councils to meet at places other than their respective headquarters, increased the enrolment fee (excepting for SC/ST persons) from Rs.250 to Rs.750 and empowered the Councils to refuse enrolment to those dismissed from service on charges involving moral turpitude. The Amendment Act also empowered the Supreme Court to make rules for determining as to who shall be entitled to plead before that Court.

The initial objects with which the Act was originally conceived and its subsequent history through the amendments mentioned above, indicate that several substantive issues which confront the legal profession in modern times and which have been part of professional discourse at various levels did not receive legislative attention so far. The

Bar Council of India at its own initiative did introduce certain reforms through its rule-making powers some of which have been negatived by courts on the ground of its being outside its legislative competence (some of these changes relate to improvement in the quality of legal education, prescription of compulsory apprenticeship before enrolment, introduction of an age-bar in fresh enrolment etc.).

The Bar Council of India, after consultation with Universities teaching law and professional bodies, recently recommended a series of changes in the Advocates Act to modernise the system of legal education to fulfil professional needs. These are pending the consideration of the Government of India. There are few other matters also for which the Bar Council wanted the Government to initiate fresh amendments to the Act.

The Committee on Subordinate Legislation of Tenth Parliament recommended certain changes in the legal profession and in legal education which are awaiting legislative attention.

Consequent on the adoption of the Legal Services Authorities Act, 1987, the Arbitration and Conciliation Act, 1996 and changes proposed to the C.P.C. and Cr.P.C., the Advocates Act may need a fresh look if judicial administration were to achieve expected results. The impending globalisation in legal services may also necessitate a variety of changes to equip the profession to face the challenges ahead.

The issues confronting the profession are many, complex and varied. They arise because of changes happening at rapid pace in the economy, in governance and in international relations. The basic strength of Indian democracy lies in its legal system which has to respond to changes imaginatively. The Advocates Act which provides the framework for the operation of the world's second largest legal profession (500,000 Advocates) warrants review in the light of perceived difficulties and anticipated challenges to enable it to meet the needs of judicial administration and the cause of better services to the public.

## Chapter II

# LEGAL EDUCATION AND PROFESSIONAL TRAINING

Much has been written and published in the recent past about the inadequacies and decline in standards of legal education in the country. The problems are fairly well known to the educators, the profession, the policy planners, the administrators and the consumers. Several expert committees and commissions have identified the causes and recommended the solutions during the last three decades. Some of them have been implemented as well. Yet the situation remains far from satisfactory and in some respects have deteriorated still further threatening the very foundations of rule of law and administration of justice. A thorough overhaul of the system, rather than mere tinkering, is warranted under the present circumstances.

As early as 1954, the poor state of legal education had been graphically described by the Fourteenth Report of the Law Commission (Setalvad Commission) in the following words :

"..... legal education is imparted in part-time classes by teachers who are mainly legal practitioners who run many of these so-called law colleges which are housed in buildings belonging to arts colleges and other institutions... Most of the students who crowd these institutions are young men who have not been able to secure employment; they take a course in law while waiting for a job with no intention of practicing law as a profession..... Some of these institutions are so overcrowded that classes are held in shifts and there are several hundred students on the rolls of each class. It is to these crowded classes that the part-time lecturer imparts his instruction, and the attendance he commands is only due to the anxiety of the pupil to have his attendance marked when the

lecturer calls the roll. It is not surprising that in this chaotic state of affairs in a number of these institutions, there is hardly a pretence at teaching and that the holding of tutorials or seminars would be unthinkable. A senior lawyer characterised these law colleges as "profit-making industry".

The Commission quoted approvingly the observations of a law teacher who has been a member of the U.P.S.C. who reportedly said : "There are already a plethora of LL.Bs half-baked lawyers, who do not know even the elements of law and who are let loose upon society as drones and parasites in different parts of the country. Several of them did not even know what subjects were prescribed in the LL.B. programme; did not know the names of the prescribed books and asserted cheerfully that all they had done was to cram the lecturer's notes. This is a shocking thing; this kind of answer from a candidate who has obtained a first class in LL.B. is indeed a sad state of affairs and must be corrected at an early date". The Commission added : "What would one have thought of doctors or engineers or other technical men being trained in such a manner and let loose upon society". (Fourteenth Report, Vol.I pp 522-23).

It has to be admitted that almost 45 years after the above observations were made, the state of legal education, honourable exceptions apart, has deteriorated still further because of uncontrolled expansion of law colleges, unlimited admissions in the LL.B. programme, poor quality of teaching and fraudulent examination practices. The Bar Council of India made repeated efforts to arrest the decline by recommending the Universities to follow some norms and maintain certain standards. With hardly any effective sanction at its command, it could not discipline the erring institutions some of which were even managed by members of the Bar Councils or their friends and associates.

Among the many ills of legal education, some are identified as follows :

**(a) Too many law colleges with large intake of students and poor facilities for professional education :**

There are over 500 law teaching institutions today with a sizeable number located in U.P., Bihar, M.P., Rajasthan, A.P., Maharashtra and Karnataka. There is no clear data available on admissions to the law courses. It is estimated that there are over 300,000 students pursuing LL.B. studies with about 50,000 graduating each year. Nearly two-third of law colleges are part-time institutions operating for just 2 to 3 hours in the evening with unsteady attendance. Teachers in these institutions are poorly paid advocates who are not necessarily qualified to teach. Libraries, wherever available, stack cheap guides and help-books. The object of the teachers and students is to manage the examination which often is nothing more than a memory test of text-book knowledge legal information rather than application of that information to problems in society

There are good law colleges too which try to impart professional training and meaningful education to their students; but they are too few in number to make an impact on an ocean of mediocrity dominating the decision-making and standard-setting processes. Politics and economics also play their role in the establishment and functioning of law colleges pushing academic standards to the "lowest common denominator" desired by the numerous wayside teaching shops. The tragedy is that there is a powerful lobby among academics and professionals justifying the so-called legal education in the name of "equality and social justice"!

The non-availability of competent and committed law teachers in adequate numbers is another serious problem contributing to the malaise. This again is the result of poor quality post-graduate legal education offered by many universities some of which on part-time basis or through correspondence courses. The remuneration offered by most law teaching institutions are not attractive enough to get talented law graduates into law teaching. In fact, through a misguided amendment of the Advocates Act in early 1980s, the Government enabled even full-time teachers to be deemed "part-timers" thereby

letting them practise in courts to the detriment of whatever serious teaching was happening before.

The curriculum for legal education which was introduced in 1961 when the Bar Council contemplated an year long apprenticeship and a bar examination was allowed to continue till late 1990s with one change namely, the abolition of apprenticeship and bar examination. Legal education throughout the world had undergone radical changes during the period with expansive curriculum and clinical programmes of training and innovative methods of teaching. In India the numerous ill-equipped colleges managed to shut out every attempt to reform the curriculum till 1998 when the Bar Council of India insisted on a revised programme with increased number of subjects and compulsory clinical courses. Even today there is resistance to this long over-due change and many institutions including a premier institution like Delhi University are continuing with the old curriculum. The Bar Council can do nothing in respect of teaching and examination which continue in the traditional mould giving nothing more than cognitive learning at the lowest levels.

There were two initiatives of the Bar Council of India worth mentioning in this sordid history of so-called legal education. The first one happened in early 1980s through a determined bid to re-structure professional legal education even when several Bar Councillors were opposing the move. After a detailed State-wise study of the status of legal education[4], saner elements in the Bar Council were convinced that a change had to come sooner than later. A five-year integrated LL.B. programme was developed with a view to give a professional orientation, a multi-disciplinary approach and a clinical thrust to legal education. To be able to do it in a desperate situation, the Rules then framed by the Bar Council of India carried a Preamble which stated[5]:



4. See Menon, Madhava N.R., Legal Education in India (1983), Bar Council of India Trust, N.D
5. Rules on Legal Education adopted in 1982 by the Bar Council of India.

" ..... It is the expectation of the Council that universities and colleges in the country will continue to impart liberal education in law and expand it to larger sections of people by developing correspondence programmes if necessary for the benefit of persons in different occupations and in public life so as to advance their occupational goals on the one hand and assist the rule of law and constitutional government on the other. This would mean that the country may require not only the existing centres of liberal legal education working at convenient hours in the morning or in the evening, but also several more such institutions in the remote corners of our vast country. The rules now formulated are directed towards professional legal education and not towards liberal legal education colleges which may continue within the framework of the University System in the country" (emphasis added).

It was for the first time that the Bar Council distinguished professional legal education from non-professional (liberal or general) legal education and tried to concentrate its efforts only on the former leaving the latter to the discretion of universities and colleges. It was a correct move for which the statute gave authority to it as university statutes gave power to individual universities on general education. It would be impractical and unrealistic for the Bar Council to attempt to reform the entire legal education. Tomorrow universities may teach law as a subject in vocational schools or other graduate programmes which clearly is outside the jurisdiction of the Bar Council.

Given the fact that not more than one-third of the law graduates join the bar and stay in legal practice[6], it is futile for the Bar Council to aim at the education of even the other two-thirds of law graduates who are not seeking enrolment. Obviously they study law for some general knowledge about the subject or to improve their employment prospects. To waste scarce resources on them for imparting training in skills and deeper legal knowledges is unnecessary and avoidable. In the process greater attention and

6. An empirical study in 1960s at Delhi University established the fact that a majority of law graduates do not seek enrolment and if they do, drop out as soon as they get any employment. Kelkar & Ors. Unpublished report

effort would become available for improving the quality of professional training confined to those who are studying law for legal practice. This was the sole objective of the Bar Council when it mandated in 1982 that professional legal education for which the Bar Council had statutory responsibility would be confined to the new five year integrated LL.B. course. The Council did not want universities to discontinue the 3 year and part-time LL.B. programme which was much in demand by employed persons and those who were seeking law education to improve employment opportunities.

This two-fold categorisation of law teaching institutions leaving the option to individual law colleges to make their choices and prepare students accordingly was a wise move which would have prevented the present chaotic situation from developing. However, within two years of introduction of the new legal education rules, the Council diluted its own stand and allowed the 3 year and 5 year LL.B. courses to continue as professional courses thereby discouraging even those universities which took the Bar Council Directives seriously and prepared themselves for the switch over to professional programmes. The trend since then had been succumbing to pressure groups and vested interests in the matter of admission requirements, eligibility standards, practical training, award of intermediate degrees and multiple entries, teaching methods and infra-structure demands. The drift continued till recently when a new set of Bar Councillors adopted an alternative strategy and decided to exercise for the first time the power to de-recognize degrees through inspections and evaluating standards. The process is continuing and it is reported that over a hundred law colleges are threatened with closure notices. Many of them are buying time and are succeeding to survive by all types of tactics all of which do not add glory to legal education or professional development.

Experience suggests that the negative strategy of inspection and de-recognition is unlikely to succeed in India under the present circumstances. If nothing else works, there is always the politically sensitive argument of social justice and minority rights to play with for shooting down reform proposals. It is therefore prudent to revive the 1982 strategy of distinguishing professional education from legal education generally and

concentrate the battle with that smaller section of educators involved in preparing students for the bar. No one can take objection to it as there is no demand for closing down existing colleges and all that is being asked from them is to do something more if they aspire to impart professional training. It is important to remember that legal education has multiple goals in a democratic polity governed by rule of law. As a result of this, one can identify at least five streams of legal education all of which cannot be conceived as part of the exclusive jurisdiction of the bar. These five streams are :

(a) Professional legal education (preparing lawyers, judges, law officers and legal advisors.

(b) Academic/general legal education (giving legal education for research, teaching and other academic purposes).

(c) Continuing legal education which can participate both the above streams to update knowledge and skills to perform their respective tasks better.

(d) Para-legal education (education intended to prepare supporting staff in law offices, legal aid centres, social activists, trade unionists, NGOs etc.).

(e) Public legal education (legal awareness/literacy of the masses for responsible citizenship).

Each of the above streams of legal education has its own place and importance in society. Their goals, methods, delivery systems and management differ. Naturally the nature and scope of education to be imparted differ in significant details. The problem with the present system of legal education is that it mixes up these varied programmes and goals in one large unmanageable stream of legal education handled by institutions some of which are competent to impart no more than public legal education. Let the Advocates Act acknowledge the diversities in legal education and assign powers for professional legal education alone to the bar leaving the rest to the university system in the country.

In the course of the debate on Bar Council's authority in regulating legal education standards, there were statements asserting the autonomy of universities and questioning the scope of interference of the Council in the matter. The legislature intentions are clear and unambiguous in this regard. Listing the functions of the Bar Council of India, Section 7(h) and (i) of the Act declared :

> "(h) to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the State Bar Councils:
>
> (i) to recognise universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect universities".

Section 49(af) and (d) give the Bar Council of India power to make rules. inter alia. (a) to prescribe the minimum qualification required for admission to a course of degree in law in any recognised university, and (b) to prescribe the standards of legal education to be observed by such universities. By Section 24(1) of the Act. the qualifications for enrolment as an advocate are subjected to the rules made by the Bar Council of India in this regard. The power to make rules prescribing the standards to be followed by universities imparting legal education and to enforce those rules through inspection of law colleges and recognition of degrees in law of such universities has never been in doubt and universities by and large followed the Bar Council of India rules in structuring their law education programmes. Thus, in pursuance of the Act and the rules. all universities imparting legal education in the country changed over in 1962 to the three-year law course from the then prevailing two-year programme. discontinued double courses and revised the curriculum to reflect the Council-prescribed compulsory and optional subjects.

Of course, several universities also had started non-professional courses such as a two-year general law degree through correspondence education. Universities do have the authority and the competence to decide what course and degrees they would offer and how they should prepare the students for such degrees. Only in the limited area of preparing students for enrolment as advocates, universities are subjected to Bar Council rules which are actually framed in consultation with the universities themselves.

Apart from the consultation process, the Bar Council of India in the matter of legal education is obliged to give due regard to the advice of an expert committee (Legal Education Committee) which is constituted under Section 10(b) of the Advocates Act. Thus Parliament has taken every care to reflect the academic concerns and professional needs in the legal education scheme formulated by the Bar Council of India for universities to follow. The only option open to the universities once the scheme is finalised by the Council is to faithfully implement them. Alternatively they can decide not to impart professional legal education at all.

Section 7(h) requires the Bar Council of India to lay down standards in consultation with Universities and State Bar Councils. The question naturally arises as to what is the scope of the expression "laying down standards of legal education" under Section 7(h) of the Advocates Act. It is apparent that this function of the Bar Council of India is intended to include not only the prescription of subjects to be taught but also to determine, inter alia, the duration of the course, the eligibility for entry into the course, the content and distribution of subjects in the curriculum, the hours of teaching, the text books to be followed, the nature and extent of physical and intellectual facilities required, the qualifications of the teachers etc. This is neither new nor extraordinary procedure for professional education. The Medical Council, the Dental Council, the Nursing Council, the Pharmacy Council and such other professional organisations do exercise these powers in varying degrees according to the demands of circumstances in order to fulfil their statutory and professional obligations of maintaining standards on the part of their members. This power of professional bodies to lay down norms determining the

qualifications and training of its members exists in other countries as well. In England the academic requirements for barristers and solicitors are determined by the respective professional bodies and not by the universities which happen to teach the bar-prescribed academic courses.

An implementational problem created by the Act relates to the power in dealing with erring colleges. The Act empowers the Council only to recognise or not to recognise the degrees of the universities for the purposes of enrolment. It has no power to disaffiliate individual colleges and all it can do is to ask the university concerned to disaffiliate the college, if necessary, under threat of de-recognition of its degrees. This is a circuitous and often ineffective process. Besides, it tends to penalise good institutions for the wrongs of delinquent colleges. Realising this infirmity in the implementational process, the Bar Council of India had proposed certain amendments to the Advocates Act which are said to be under the active consideration of the Government of India.

The legal education rules require the universities to affiliate only those colleges which have the infra-structure as prescribed by the rules. All existing law colleges which are part of other degree colleges are required to become independent law colleges with qualified full-time principal if they want to be recognised as professional colleges under the rules. All existing law colleges whose affiliation is disapproved by the Bar Council of India on account of their non-compliance with the rules are not entitled to impart legal education for the purpose of enrolment as an advocate. For this, the Council is obliged to publish in the gazette and in prominent newspapers the names of universities whose degrees in law are recognised under the rules and a list of law colleges under those universities which are declared professional institutions. Such notification is to be sent to all the universities and State Bar Councils for information and necessary action.

The rules provide for a system of inspection of law colleges by a committee of the Bar Council of India to ensure compliance of the standards laid down under the rules. Also a committee of the Council will undertake inspection when a fresh application for

affiliation is received from a new college. The rules prohibit the starting of a professional law college after June 1982 without the prior approval of the Bar Council of India.

When an unfavourable report is received from an inspection committee on a college, the same is sent to the university concerned for its comments which together with the report are examined by the Legal Education Committee of the Bar Council of India. The recommendation of the Legal Education Committee is considered by the Bar Council of India which decides on appropriate action including disapproval of affiliation of a college which in turn is implemented through the registrar of the university concerned. Information about the non-recognition or derecognition of the degree in law of any university is to be sent to all universities imparting legal education and to all State Bar Councils.

The control mechanism is, of course, dilatory and often ineffective. No degree is yet derecognised though, based on inspection reports, the Council moved in that direction in many instances. Yet the threat of disaffiliation did have its impact in some cases some of whom were till recently not even aware of the existence of the Bar Council and of its jurisdiction in legal education.

## AN ALTERNATE VIEWPOINT

The All India Law Teachers Congress has approached the Law Commission of India espousing an altogether different point of view. According to them, the legal education should be totally removed from the purview of the Bar Council of India, since according to them, the control of the Bar Council of India over legal education has indeed resulted in deterioration of standards of education in law colleges and indiscipline. They say that legal education should be placed within the exclusive domain of the universities alone. The following paragraphs from their representation brings out their viewpoint:

"The deliberations at the technical sessions of the Congress revealed that for any meaningful legal education in the country, the Bar Council of India and the Bar Councils of State should be refrained from prescribing the curriculum, syllabi and methods of teaching. The consensus was that law teaching and the maintenance of law school and law colleges and the standard of legal education should be the exclusive domain of law teachers. The Bar Council of India established under the Bar Council of India Act is essentially concerned with the grant of license and enrollment of advocates and their professional conduct. Further the Congress felt that the role of the Bar Councils in maintaining the legal educational standards in the country so far has been far from satisfactory and

the curriculum devised by the Bar Council of India from time to time has not been in tune with the existing ground realities of the law schools. The Bar Council of India has neither taken into account the needs of the legal education nor has it provided any support, financial or otherwise to make the legal education socially relevant and academically sound. The Congress was unequivocal in asserting that as law teaching in the law School of the country is primarily a discipline unique in character, law teachers of the country should have the prime place in deciding the curriculum and infrastructure facilities to be provided in the law schools. The Bar and the Bench have important roles to play in making the law schools in the country functional and academically sound and socially relevant, and as such the advice of eminent judges and lawyers is necessary and not the lawyers of every hue and colour who may get elected to the Bar Council of India.

The All India Law Teachers Congress adopted resolutions and also suggested that an All India Legal Education Council should be established to oversee, monitor and regulate law teaching and law schools in the country. The Congress also framed the constitution of All India Legal Education Council.

All India Law Teachers Congress was also unanimous in recommending that the degree of law should not per se allow a candidate to get enrolled as an advocate. There should be an Entrance Test for getting the candidates enrolled in the various State Bar Councils and that test should be conducted by the Bar Council of India or the State Bar Councils. So far as maintaining standards of legal education are concerned, the All India Legal Education Council should be given statutory recognition on the same lines as that of Indian Medical Council and should have the full powers regarding recognition/derecognition of law schools and law degrees throughout the length and breadth of the country and also to devise means and methods of law to develop and strengthen the law teaching in the country. The recommendations of the All India Legal Education Council should be binding on the State governments and the Union government and should be enforced strictly."

**Recommendations**

The above discussion of the legal education scene and the Bar Council's efforts in regulating it for improvement of standards suggest some obvious strategies for restructuring professional legal education which may be considered for suitable amendments of the Act. These propositions and strategies may be summarised as follows:

(1) The need and the existence of different streams and goals of legal education have to be acknowledged and the Bar Council's jurisdiction shall be restricted to professional legal education leaving the rest to the Universities concerned which are better able to plan and execute general legal education in society.

(2) Consultation required for reforming legal education shall be modified to limit the process to the University Grants Commission (instead of Universities teaching law) and the Union Ministry of Law and Justice. The UGC has a Law Panel which is a standing body involving law teachers from around the country. It is the agency empowered to maintain standards in higher education and has the machinery therefor. By consultation with the UGC/Law Panel, the purpose of consultation with universities would be met substantially. Joint decisions among the BCI, UGC and Law Ministry would make the policy planning academically sound, professionally significant and the decisions easily implementable. As the BCI consists of members from the State Bar Councils, there is no need to have State Bar Council representatives in LEC.

(3) The five year integrated LL.B. course evolved by the Bar Council of India after mature deliberation and consultation has to be declared as the only law course qualifying the eligibility requirements for enrolment. The course has demonstrated its superiority in legal education wherever it was honestly implemented. The Committee on Subordinate Legislation of the Tenth Lok

Sabha, the Committee of Judges on Legal Education appointed by the Chief Justice of India (1993) and the All India Law Ministers' Conference (1994) have unanimously recommended the adoption of the BCI's five year LL.B. programme as the professional legal education course entitling a person to practise law.

(4) The Legal Education Committee of BCI should be enlarged with equal participation of the bar, the judiciary and the academics. The Union Law Secretary and the Chairman, UGC be additional ex-officio members of the LEC. Rule 21 be modified to say that the Directives on legal education be issued on approval of the LEC with participation of judicial representatives, UGC and the Law Ministry. A further scrutiny of the decisions by the Bar Council is not only avoidable but reflects poorly of the status and autonomy of the LEC itself.

The Judges Committee also made recommendations on similar lines. The Committee also suggested that Section 12(1) of the UGC Act, 1956 and Rules 3, 17, 18(d), 18(h) and 18(j) of the BCI Rules be amended in such a manner that the procedure of placing the decision of the LEC before the Bar Council and the Bar Council corresponding with the universities is dispensed with and the entire process must be shifted to the LEC so that on issues of professional legal education, the Bar Council speaks through the LEC only.

(5) A re-organized and empowered LEC should have authority to inspect law colleges included as professional colleges even without notice to ensure compliance to the norms and standards. The power to disaffiliate institutions should remain with the LEC of the BCI ~~with an appeal procedure to the BCI~~. The BCI, in turn, can ask the LEC to re-consider decision on stated grounds and abide by its recommendation excepting under exceptional circumstances. The object of this procedure is to re-assure the autonomy and authority of this high-powered body involving judges, senior academics and Government representatives besides, bar councillors themselves. It also helps to reduce external interventions undermining

academic integrity and professional discipline. In short, such a re-organized LEC plays the role of a statutory body in professional education like the All India Council for Technical Education. In such a situation, there is no relevance for an all India Council of Legal Education independent of the Bar Council as demanded by some organizations of law teachers.

(6) A Standing Committee of the LEC shall be designated as the committee for recommending recognition and affiliation. Rules made for the purpose should empower the body to recommend disaffiliation/de-recognition of existing colleges after due notice and inspection. The practice of provisional recognition should be discontinued and recognition should be for a minimum period of five years or on a permanent basis subject to maintaining the required standards.

(7) Some law schools and several State Governments have introduced entrance tests for admission to the law courses. Bar Council should pursuade other State Governments also to adopt the practice as they do in the case of engineering, medical and dental courses.

(8) On curriculum, teaching methods and examination system the LEC should evolve uniform rules which should form the basis for professional legal education. Universities teaching law will have the option to do more than what is prescribed in the rules to elevate the standards to higher levels of excellence and the Council should have a system of acknowledging the superior standards they have achieved.

(9) LEC should evolve norms and procedures for academic evaluation of law teaching institutions in consultation with those developed by the Accreditation Council sponsored by the UGC. These should be periodically reviewed and an accreditation and ranking procedure for law schools should be put in place to enable the consumers to choose intelligently the institutions they want to join for legal studies.

The judgment of the Supreme Court in V. Sudeer v. Bar Council of India [1992 (2) SCALE 32]:-The question that arose before the Supreme Court in the said case was whether the Bar Council of India is competent to prescribe a period of training (apprenticeship) as a pre-condition for enrolment as an advocate. The power of the Bar Council of India to make such a rule (Bar Council of India Training Rules, 1995) was questioned not only by certain intending applicants for enrolment but also by the Bar Council of Maharashtra. On an examination of the relevant provisions of the Advocates Act, 1961, the Supreme Court pointed out that the power to enrol advocates is conferred upon the State Bar Councils by virtue of section 24 of the Act and that in fact, originally a certain period of training and a pass in examination to be held by the State Bar Council were prescribed as pre-conditions to enrolment by clause (d) of sub-section (1) of section 24. By an amendment in 1964, the requirement of examination was deleted while retaining the requirement of training. However, on the recommendation of the Bar Council of India that in view of the introduction of 3-years degree course in law in the place of 2-years degree course, the period of apprenticeship is no longer necessary and may be deleted, the Parliament by the Advocates (Amendment) Act, 1963, which came into force with effect from 31st January, 1974, deleted the said requirement of training as well. Several years later, however, the Bar Council of India chose to make the aforesaid 1995 Rules reintroducing the

requirement of training for prescribed period as a pre-condition to enrolment. The contention of the intending applicants for enrolment and the Bar Council of Maharashtra was that the said 1995 Rule was beyond the competence and authority of the Bar Council of India. The Supreme Court upheld the said contention in the light of the aforementioned legal position - affirming in the process the decision of the Bombay High Court which had taken a similar view. While holding so, the Supreme Court did emphasise the need of training to be imparted before enrolling a law graduate as an advocate and suggested that the law may be amended suitably to provide for such pre-enrolment training. As an interim measure, the Court recommended the Bar Council of India to introduce an "in-house training" for freshly enrolled candidates to prepare them for appearance in courts. The Supreme Court of India further desired that the Law Commission of India should look into this matter and suggest appropriate amendments.

The Law Commission of India fully agrees with the view that before enrolling an advocate, a law graduate must be subjected to intensive training over a period which shall not be less than one year. Such a training must be undergone in the office of a senior advocate or an advocate having reasonably good practice. Not only such a period of training should be made obligatory, but the passing of an examination (which may be called Bar examination or by any other name) to be held by the Bar Council of India, should be made a pre-condition for

enrolment. The performance of advocates, who are neither properly equipped in law nor in the culture and etiquette of the court, is bringing down the image of the profession in the eyes of the public. In this context we may refer to the proposals contained in chapter IV of this Report that before permitting the foreign lawyers to practice in our courts and tribunals (as and when the legal profession is liberalised and is included in the Schedule contemplated by Articles XIX and XX of the General Agreement on Trade in Services, 1994 (GATS)), they must be subjected to a Bar examination involving Indian Constitution and India-specific laws.

We, therefore, recommend that the Bar examination to be held should be a fairly comprehensive one involving the Constitution of India, the India-specific laws (e.g. personal laws and land tenure laws) and the procedure codes (Civil Procedure Code and Criminal Procedure Code). Necessary amendments are accordingly proposed herein.

**Sections of the Act to be amended to incorporate reforms in legal education**

The sections in the Advocates Act dealing with legal education are :

(a) Section 7 dealing with "Functions of Bar Council of India" ;

Sub-section (h) reads :

"..... to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the State Bar Councils".

Sub-section (i) reads :

"..... to recognise universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect universities or cause the State Bar Councils to visit and inspect universities in accordance with such directions as it may give in this behalf".

(b) Section 10. The Bar Council of India shall constitute the following Standing Committees, namely –

Sub-section 2(h) reads :

"..... a legal education committee consisting of ten members, of whom five shall be persons elected by the council from amongst its members and five shall be persons co-opted by the council who are not members thereof".

(c) Section 24 Persons who may be admitted as advocates on a State roll -

Subject to the Act and the rules made thereunder, a person shall be qualified to be admitted, if :-

Sub-section 1(c)(iii) reads –

"..... he has obtained a degree in law ..... after undergoing a three years course of study in law from any university in India which is recognized for the purposes of this Act by the Bar Council of India".

Sub-clause (e) reads :

"..... he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this chapter".

Section 49 General Power of the Bar Council of India to make Rules to include:

Sub-section 1(d) reads :

"the standards of legal education to be observed by university in India and the inspection of universities for that purpose";

Sub-section 1(af) reads :

"the minimum qualifications required for admission to a course of degree in law in any recognised university"

Sub-section 1(ag) reads :

"the class or category of persons entitled to be enrolled as advocates".

All the above and related provisions in the Act which gave powers to the Bar Council to set standards of professional legal education, and recognise degrees for admission as Advocates have been found very inadequate to achieve the purpose. On the basis of the Bar Council's recommendation, the Advocates Amendment Bill, 1997 was readied by the Ministry for Law for introduction in Parliament which, inter alia, included the following amendments on legal education :-

(a) Amendment of Section 10(h) to ensure that the Legal Education Committee has representatives of the judiciary, the UGC and the Union Ministry of Law.

(b) Amendment of Section 24(i) to the effect that after 12 March 1998 only graduates who completed the integrated five year LL.B. course recognised by the Bar Council of India alone become eligible for enrolment subject, of course, for a

grace period of three years from 1998-99 during which the 3 year law graduates also be considered eligible for the purpose.

(c) Amendment of Section 24(ii) to ensure that every law graduate has to undergo a course of practical training in law as may be prescribed by the Bar Council of India before becoming eligible for enrolment.

(d) Amendment to validate the Bar Council of India Training Rules 1995 purported to have been made under clause (d) of sub-section (3) of Section 24 of the Act.

Unfortunately, these amendments could not be passed and are awaiting Parliamentary approval. Meanwhile, taking the urgency of the matter into consideration, the Chairman of the Bar Council of India wrote a letter to the Law Commission of India in 1998 canvassing its support to what the Committee on Subordinate Legislation of the Tenth Lok Sabha recommended in respect of reforming legal education which the Bar Council of India fully endorsed. These recommendations, in essence, are the following :

(1) Professional law course should be of five year's duration after the 10+2 stage. The three year LL.B. course can remain as non-professional academic course only.

(2) Apprenticeship for an year under senior advocates followed by Bar Council organized pre-entrance examination be made compulsory requirement for enrolment.

**Draft Amendments Proposed** :

In view of the Bar Council of India's repeated demands for the five year LL.B. course to be made the only professional course and the apprenticeship and examination as pre-requisites for enrolment, there is apparently no difficulty that The (Advocates) Amendment Bill, 1999 incorporating these two changes getting the approval of

Parliament. However, in view of few related aspects raised in the present review of the subject, the Law Commission would recommend more comprehensive amendments incorporating the BCI demands on the following lines in respect of legal education :-

Amendment of Section 7

Section 1, sub-clause (h) shall be substituted by the following clause, namely :-

"(h) to lay down standards of professional legal education in accordance with the recommendations of the Legal Education Committee of the Bar Council of India which, inter alia, includes curriculum, teaching methods, examination, admission of students, qualifications, number of teachers, location and infra-structure requirements and management".

Amendment of Section 10

In Section 10 of the Advocates Act, 1961, in Sub-section (2) for clause (h), the following clause shall be substituted, namely :-

"(h) a legal education committee consisting of fifteen members, of whom five shall be persons elected by the Council from among its members, three shall be judges, sitting or retired, of the High Courts/Supreme Court/Judicial Training Institutions co-opted by the Council in consultation with the Chief Justice of India, three shall be law professors, in service or retired co-opted by the Council in consultation with the Chairman of the University Grants Commission, the Director of the National Law School of India University at Bangalore (member ex-officio), the Secretary to the Government of India, in the Ministry of Law (member ex-officio) and the Secretary to the Bar Council of India who shall act Member-Secretary (ex-officio).

(hh) The senior most judge in the Committee shall be the Chairman of the Committee and, in his absence, the second senior most judge will chair the meetings of the Committee.

(hhh) The term of the Committee shall be five years (other than ex officio members) from the date of election/nomination, as the case may be.

**Amendment of Section 24**

In Section 24, sub-section (1), clause (c) for sub-clause (iii), the following shall be substituted namely : -

"(iii) after the 12th day of March 2000, save as provided in sub-clauses (iii a) and (iii b), after undergoing a five year course of study in law from any university in India which is recognised for the purpose of this Act by the Bar Council of India; or" ;

After sub-clause (iii a) the following sub-clause shall be inserted, namely : -

"(iii b) after undergoing a course of study in law, the duration of which is not less than three academic years commencing from academic year 1999-2000 or any earlier academic year from any university in India which is recognised for the purposes of this Act by the Bar Council of India" ;

After clause (c), the following clause shall be inserted, namely : -

"(d) he/she has undergone a course of training/apprenticeship and qualified the bar examination as may be prescribed by the Bar Council of India ,"

**Amendment of Section 49**

After Section 1 Clause (ah), the following clauses shall be inserted, namely : -

"(ai) the structure and standards of training/apprenticeship for law graduates aspiring for enrolment as an advocate under clause (d) of sub-section (1) of section 24;"

"(aj) the content and conduct of pre-enrolment examination during or at the end of the training/apprenticeship under clause (d) of sub-section (1) of section 24;"

"(ak) the conditions subject to which foreign nationals holding degrees recognised by the Bar Council of India and seeking to practise law in India may be allowed provisional/permanent enrolment to one or other State roll;"

"(al) the conditions subject to which universities and private professional institutions may be allowed to organize, supervise and present trainees for the pre-enrolment examination under clause (d) of sub-section (1) of section 24;"

"(am) the conditions subject to which universities and private professional institutions may be allowed to conduct and certify continuing legal education credit for advocates in fulfilment of the provisions of Chapter IV of the Advocates Act and the rules made thereunder"

## Chapter III

# BAR : PROFESSIONAL COMPETENCE AND SOCIAL RESPONSIBILITY

The recommendations made in the previous Chapter may enable the Bar Council to ensure minimum knowledges and skills on the part of the young entrants to the Bar. However, it is one thing to ensure minimum competence at the time of entry into the profession and quite another to maintain that ability at all times in different areas of legal practice. Legal knowledge and skills are growing at such a fast pace that no one can expect to be an expert unless special efforts are made to acquire new skills and update relevant knowledges. In many countries around the world, legal practitioners are required under law to get certain number of credits periodically from approved continuing legal education institutions in order to keep the license to practice. This is one strategy for promoting professional competence on a continuing basis.

## Continuing Education

The Bar Council of India Trust and few State Bar Councils have been making occasional attempts to organize short-term refresher courses for young Advocates on purely optional basis. It has not yet picked up in the Bar because of organizational drawbacks and lack of expertise for institutionalised imparting of such training. The Bar also needs to consider whether it is desirable to continue with the prevailing concept of a general practitioner or whether the time has come to recognise specialisation in legal practice providing better options to the litigant public. If specialisation and continuing education are to be recognised, institutional arrangements for training and re-licensing procedures have to be developed lest it should degenerate into easy options, often deceptive and unproductive of desired results.

For a country of India's size and a profession as large as that of the Indian Bar, it is imperative that systematic steps are undertaken to streamline continuing legal

education and to provide opportunities for specialisation under the auspices of the organized Bar, if necessary, with appropriate sanctions. To enable the Bar Council to organize a scheme, it may be necessary for the Advocates Act to delegate such powers explicitly and to compel observance with sanction from the organized Bar. Universities and professional bodies under defined parameters can be authorised to join the Council in this effort.

The introduction of ADRs as part of civil procedure under the Conciliation and Arbitration Act and the thrust on Lok Adalat as well as conciliated settlements under the Legal Services Authority Act and the Family Courts Act respectively, necessitate the acquisition of special skills by the lawyers involved in special types of litigation. It is therefore necessary for the organized profession to provide appropriate opportunities for Advocates in this regard.

A closely related aspect in which the Bar needs to re-orient itself quickly is in the use of the information technology in accessing legal data simplifying paper work and modernising legal procedures. Computer has become an imperative tool in legal business and lawyers must be helped to change over quickly for increased efficiency and better service. The Bar Councils need to address these problems with the seriousness they deserve if the profession were to offer quality services to the consumers.

**Multi-disciplinary Partnerships**

A related issue for quality improvement is in respect of multi-disciplinary partnerships and licensing for specialised legal services. Given the changes in society and in the profile of legal disputes, it is increasingly difficult for a single practitioner or a group of advocates to be able to deliver comprehensive and quality services to the clients. Several problems which are becoming common nowadays demand inputs from accountancy, management and related professions.

The Bar Council Rules have prohibited multi-disciplinary practices (that is, association between lawyers and non-lawyers) probably on public policy grounds. It is argued that multi-disciplinary partnerships endanger the lawyer-client privilege and the professional independence of the lawyer. In respect of privilege issue, one can say that in multi-disciplinary partnerships confidential information could be passed within the partnership to non-lawyer professionals who are not covered by the rules of professional privileges. The varying standards of ethics of different professions could also, it is argued, tend to compromise the independence of advocates. However, these are matters which can be appropriately regulated by the Bar for better delivery of services. Or else, the system would indulge in such partnerships unauthorisedly which is worse than the situation otherwise. One cannot deny the increased efficiency and quality in services which multi-disciplinary firms can deliver to the clients because of the organizational efficiency, economics of scale and inter-disciplinary inputs in dispute resolution and legal planning.

It is, therefore, incumbent on the part of the Bar Council of India to devise appropriate rules and evolve a scheme under which selective multi-disciplinary partnerships could be allowed without compromising ethical standards. The alternative is unauthorised and invisible ways of associating lawyers with non-lawyer professionals which would undermine the sanctity and image of the profession itself.

**Lawyers' Fees, Legal Aid and Access to Justice**

There has been a lot of public resentment on the rising cost of litigation including the fees collected by Advocates, sometimes quite disproportionate to the services rendered. The Rules of Court in this regard are often violated and the market forces operate in all its naked fury in the legal market, thereby artificially escalating litigation costs. This adversely affects the ordinary litigants whose right of equal access to justice is inhibited significantly. The Committee on Subordinate Legislation of the Lok Sabha did express its concern in this regard.

A related issue is the acceptability of the system of contingent fees which is prohibited in India but permitted in several jurisdictions around the world. For providing better access to poor victims, the contingent fee system is found to be effective if it can be organized under defined parameters. In accident compensation cases, the system is said to be in vogue in different parts of the country. Without any regulation whatsoever, it works havoc to the interests of illiterate victims and for purity in administration lof justice.

Finally, though the Advocates Act talks about constitution of legal aid committees and the Rules exhort lawyers to do legal aid "within their economic means", there has not been active involvement of the organized Bar in the State-sponsored scheme of legal aid to the poor. The Expert Committee Report on Legal Aid (Provisional Justice to the People, 1973) canvassed for a "public sector" in the legal profession and a variety of structural changes in the delivery of legal services in order to fulfil the Constitutional obligation of equal justice under law. The goal is still a distant dream partly because of the inaction of the organized Bar. The expectations generated by the adoption of the Legal Services Authority Act, 1987 will not be realised fully unless the Advocates Act and Rules are revised to put some amount of compulsion on every legal practitioner to do certain number of legal aid cases every year. Towards this end, a statutory standing legal aid committee in the State and Central Bar Councils are necessary so that the Bar may take the task seriously and demand from its members to discharge their social responsibilities with accountability to the public.

**Renewal of Enrolment**

The Committee on Subordinate Legislation of the Tenth Lok Sabha observed as follows :

"Rules framed by the Bar Council of India in exercise of the rule making power under sections 17, 19, 20, 22 and 49 of the Advocates Act do not require renewal of

registration by the advocates with the Bar Council as registration once done will continue indefinitely. As a result, the roll of advocates maintained by the Councils is not up-to-date. Once an advocate is registered he remains on the rolls ..... The Committee therefore, desire that the Central Government/Bar Council of India prescribe for a compulsory renewal of registration by the advocates after every five years. It should be provided that the advocates should inform the Bar Council of India/State Bar Counqils that they want to continue to have their names on the rolls. If the Bar Councils do not receive any application for renewal of registration, it should be presumed that the advocate has either died, gone out of India or out of practise and his registration might be deemed to have lapsed/cancelled. There should be provision in the rules under which he can get his registration with the Bar Council revived as and when he returns from abroad and resumes his practice ..... For renewal of registration a specific fee as prescribed by the Central Government/Bar Council of India from time to time will be required to be paid.

.....Further. such renewal of registration should also be subject to obtaining prescribed credit for attending refresher courses in continuing legal education".

The Bar Council of India welcomed the above recommendations of the Committee of Parliament and desired that necessary amendments be made to the Act for periodic renewal of registration and for compulsory continuing legal education of advocates. They also saw in the measure a welcome opportunity to generate badly needed funds for developmental activities of the Council.

**Proposals for reform**

In the light of the above discussion relating to continued maintenance of professional standards, promotion of professional development according to changing demands for legal services and ensuring involvement of the private bar in legal aid to the poor. the following proposals for reform of the legal framework may be recommended : -

(1) The Bar Council of India and the State Bar Councils should be empowered to seek renewal of registration from every advocate on the rolls on payment of a fee to be fixed by the rules made for the purpose. Such renewal should be done according to procedure prescribed under the rules every five years for which the responsibility should be with the advocates concerned. Failure to renew registration within a month after the expiry of five years after enrolment or last renewal of registration shall entail automatic revocation or termination of the right to practise and the cancellation of the name from the rolls. For purposes of operation of the provision, the Bar Council of India may prescribe a date for the first renewal of all existing members on the rolls after due notification of the scheme evolved for the purpose.

(2) From a date to be notified by the Bar Council of India, renewal of registration shall be subject to the advocate having successfully undergone continuing legal education courses as prescribed by the Bar Council of India under rules made for the purpose. The Bar Council of India shall evolve a scheme under which professional bodies, university centres and training institutions in different States can be authorised to run continuing education courses for advocates. The object, content, method and duration of such courses and the certification procedure for successful participation shall be prescribed by the Bar Council of India under the scheme. The scheme may provide opportunity for specialised legal practice as and when the Council decide to promote such arrangement.

(3) It is important for the organized profession to be actively involved in the State-sponsored legal aid programme. While involvement at the collective level may be through the committees formed under the Legal Services Authority Act, it is important that individual practitioners are obliged by rules made for the purpose to undertake a certain quantity of legal aid work or public interest advocacy. It is part of the social responsibility of every advocate in a country like India where half the population cannot afford to pay for legal services. No State-funded

scheme can afford to find resources to support such a massive exercise. As such, evidence of a certain prescribed minimum quantum of free legal aid services should be a condition precedent for renewal of registration and for contesting Bar Council elections.

The present exhortation in the Code of Ethics that no advocate should refuse brief on account of the inability of the client to pay fees or that an advocate should do free legal aid cases wherever his economic circumstances permit, is too soft and impractical a measure to achieve the desired goal. A more binding obligation with prospects of sanction for its neglect is necessary to enable the poor to have access to justice and to redeem the steadily loosing popular image of the legal profession.

(4) Maximisation of client satisfaction and minimisation of cost, delay and uncertainty in accessing justice are primary goals of legal practice. In today's complex society, legal problems have become too complex to be efficiently handled by advocates only. This is more so in matters of non-litigative professional services including legal planning, documentation and advice. There is a strong case for limited sanction for multi-disciplinary partnerships. The possible risks to independence of the bar and standards of conduct can be avoided by appropriate rules governing such partnerships. The Bar Council of India will be well advised to evolve a scheme and formulate the rules to be monitored by a Committee of the BCI for enabling multi-disciplinary practice to provide single window legal/financial or other services to clients. The scheme is likely to lessen the scope for avoidable litigation and promote the prospects for alternate methods of dispute settlement. In fact, it is contended that all disputes in India reach litigation because of lack of adequate inputs in business planning.

**Draft Amendments Proposed**

1. **Amendment of Section 10**

In Section 1, after clause (b), the following clause shall be inserted, namely : -

"(c) a legal aid committee consisting of three members elected by the Council from amongst its members".

In Section (2), after clause (b), the following clause shall be inserted, namely : -

"(c) a legal aid committee consisting of three members elected by the Council from amongst its members".

Consequent on the insertion of the above clauses in Section 10 of the Act and thereby making legal aid committee one of the statutory standing committees of the State and Central Bar Councils, the existing section 9A shall stand repealed.

2. **Insertion of Section 33-A**

After Section 33 of the Act, the following section shall be inserted, namely : -

"33-A. Power of Bar Council of India to prescribe conditions for continuation of advocates' right to practise : -

Except as otherwise provided in this Act or in any other law for the time being in force, no advocate on the rolls shall, on or after the appointed day, be entitled to practise in any court or other authority unless he has renewed the registration with the Bar Council according to the rules prescribed therefor and paid the renewal fee prescribed under clause (ff) of Section 24 of the Act".

3. **Amendments to Section 49 : Insertion of Clause (agg)**

In Section 49 of the Act, after clause (ag), the following clauses shall be inserted, namely : -

"(agg) the conditions subject to which an advocate on the rolls can continue to be on the rolls by acquiring the continuing legal education qualifications as prescribed under the rules framed therefor".

"(aggg) the time within which registration with the Bar Council has to be renewed in order to be on the rolls and the procedure to be followed therefor".

The following clause shall be inserted after clause (f) of section 49 : -

"(ff) the restrictions in the matter of multi-disciplinary practice to which non-lawyer professionals may be allowed to associate themselves in partnerships with lawyers".

# CHAPTER IV

## Entry of Foreign Legal Consultants and Liberalisation of Legal Practice

As the title of this Chapter indicates, we propose to discuss two issues herein viz., the question of entry of foreign legal consultants (FLCs) and the liberalisation of the legal profession in India pursuant to and as contemplated by General Agreement on Trade in Services (GATS). We shall first discuss the entry of foreign legal consultants into India and then we shall examine how this issue is germane to the provisions of the GATS and what shape the entry of foreign legal consultant will take as and when legal profession is liberalised under and as contemplated by GATS.

With the liberalistion of our economy since 1991 and on account of globalisation policies being imposed upon the entire globe by the several agreements arrived at in the course of final round (Uruguay Round) of multilateral trade negotiations resulting in the establishment of World Trade Organisation (WTO) in place of GATT, multinationals and foreign corporates are increasingly entering India. Foreign financial institutions and business concerns are also entering India in a fairly large number. All of them require legal consultancy services in connection with their operations in India. They require to be advised on Indian laws affecting them. They require the assitance of lawyers in drawing up agreements, contracts and other business ventures and as and when an occasion arises, they would also require them to appear for them in courts and tribunals in this country. In fact, the process of globalisation has led many countries in the world to examine the qustion of regulating the entry of FLCs and to see whether such entry should be made subject to any restrictions designed to protect the domestic legal profession. The American law firms and the U.S. government have been aggressively pushing for the services market in other countries for the benefit of their countrymen. U.S. and some other advanced countries have large law firms operating on international scale which are primarily business organisations designed to promote commercial

interests of their giant client corporations. Mr. Anil Divan, Senior Advocate, Supreme Court of India, who has done a lot of work on this subject says that the very size, power and influence of these large international law firms "would tend to adversely affect the legal and political systems of host countries which are nascent democracies and may pose a new threat to purity in public life".

The International Bar Association (IBA) has gone into the question of FLCs and has evolved certain "basic principles" and "guidelines". The basic principles set out by the IBA are to the following effect:-

A. FAIRNESS AND UNIFORM TREATMENT. Any proposal dealing with developing standards for international legal practice must be based upon principles of uniformity and non-discriminatory treatment. If we are to develop a truly worldwide profession, then all regimes - including those dealing with FLICs - should be fair and should promote effective and non-discriminatory treatment.

B. CLARITY. The permitted scope of, and the limitations on the practice of FLCs should be made clear. This is comparable to the General Agreement on Trade in Services ("GATS") principle of "transparency".

C. PROFESSIONAL RESPONSIBILITY. The professional responsibilities of FLCs should be clearly articulated, and the rules governing their conduct should be designed to promote confidence in the profession and to protect the public interest.

D. REGULATION. The right of the host authority to regulate the FLC should be explicitly confirmed.

E. REALITY AND FLEXIBILITY. The FLC proposals should be based upon principles which recognise what lawyers actually do, and they should not be designed to protect the local bar from foreign competition. The goal should be to promote the adoption of realistic regimes which facilitate the delivery of legal services while

maintaining professional standards. Any regime which departs from this approach will likely fail in the long run because lawyers (and their clients) will simply find other ways to accomplish their objectives.

So far as the guidelines laid down by IBA are concerned, they may briefly be summarised thus: The expression "legal consultant", (which really means FLC), means a person qualified to practice law in a country (home jurisdiction) who desires to be licensed to practice law as a legal consultant, without examination by the body with authority to regulate the legal profession (host authority) in a country other than the home jurisdiction. Such person has to apply to the host authority for a licence. The host authority may specify the procedure for obtaining a licence and may also impose reasonable conditions on the issue of licences. The conditions which may be imposed by the host authority stipulate, inter alia, that the applicant is a member in good standing in the home jurisdiction, that he has at least five years standing in the home jurisdiction, that he is a person of good character and repute, that he submits an undertaking along with his application not to accept, hold, transfer or deal with client found or assigned unless he/she or his/her firm does so in a manner authorised by the host authority, to agree to abide by the code of ethics applicable to host jurisdiction and to abide by all the rules and regulations of both the home and host jurisdictions. The applicant may be further required to carry liability insurance or bond indemnity or other security ("assurances") on a form and an amount satisfactory to host authority. The host authority is entitled to be satisfied on all the above aspects before granting the licence.

The guidelines evolved by the IBA further provide that it is open to the host authority to impose the requirement of reciprocity and can also impose reasonable restrictions upon the practice of the FLC in the host country, namely, (1) unless specifically authorised by the host authority to do so, he/she may not appear as an attorney or plead in any court or other judicial tribunal in the host jurisdiction and (2) he/she may not prepare any documents or instruments whose preparation, or perform other services whose performance, is specifically reserved by the host authority for performance by its local members.

The IBA has also suggested certain alternative formulations and has also set out the rights and obligations of an FLC. They include the right of renewal of licences and the disciplinary powers over the FLCs.

In 1998 the IBA Council reportedly adopted General Principles for the Establishment and Regulation of Foreign Lawyers and encouraged their adoption by its institutional members. The IBA has identified two main approaches for the admission and regulation of foreign lawyers: (a) full licensing approach; and (b) limited licensing approach. Under the former, foreign lawyers are integrated as full members of the local profession, with no restrictions on their scope of practice, provided that they satisfy some basic conditions including: (1) licensing in the home country; (2) minimum periods of practice; (3) good character and repute; (4) submission to the local code of ethics and to all rules and regulations applicable to all lawyers in the host country; and (5) reasonable qualification requirements in the host country. With respect to point (5), the IBA principles specify that "reasonable qualification requirements in the host country by examination or otherwise" should (a) give due recognition to the foreign lawyer's earlier training and experience in the home jurisdiction or elsewhere and (b) be no more burdensome than necessary to satisfy a public policy objective such as consumer protection or public confidence in the profession.

The limited licensing approach sets out principles applicable to foreign legal consultants (FLCs). The principles limit the scope of practice to advice on home country law, and exclude all court work, host country law and the law of any other jurisdiction where the foreign lawyer is not qualified and licensed. All the conditions in the earlier approach excepting (5) apply to FLCs also. In addition to these conditions, a foreign legal consultant must also: (a) carry liability insurance or bond indemnity consistent with local law, and (b) consent to local service of legal process.

The IBA Council also desired the regulators or other bodies to maintain rules in respect of Multidisciplinary Partnerships in order to protect lawyer independence, conflict of interests and client privileges.

The Bar Association of India (BAI) appears to be broadly in agreement with the said guidelines.

The Range of Approaches:

In the admission or exclusion of overseas lawyers, different countries have adopted different approaches which range between total exclusion in respect of representation and advisory services to the complete integration for all types of legal services. The European Union provides a model fast moving towards a total integration model. A Commonwealth-wide study of admission practices discloses the following variations in approaches:

I. Approaches to Qualifications: (i) The Caribbean Council of Legal Education was set up by a number of Commonwealth Caribbean countries with a view to evolve a unified system of legal education and admission for the member States. Practitioners from other countries with law degrees may gain the Council's "Legal Education Certificate" on completion of a six month orientation training course organised by the Council and qualify to practice in member countries.

(ii) Admission of overseas practitioners in the Canadian provinces is based on a Certificate of Qualification issued by the Joint Committee on Foreign Accreditation. It reviews applicant's qualifications and experience and makes recommendations on further education in Canada which applicant should take. Successful completion of such courses prescribed will entail the grant of Certificate of Qualification.

(iii) A number of Commonwealth countries indicate a fixed list of countries whose practitioners they will recognise.

(iv) Some jurisdictions have preferred a more general recognition of Commonwealth or Common Law countries.

(v) The advent in Canada of the Joint Committee on Foreign Accreditation, signalled a move towards a discretionary scheme where each individual case is assessed according to its merits, but overall guidelines as to qualifications are not necessarily laid down in the legislation.

(vi) A few Commonwealth countries decline to admit practitioners from other countries.

II. Legislation:

Usually provisions relating to the admission of overseas lawyers are found in the Act governing the legal profession or in rules made under that Act.

III. Citizenship/Residence Requirements:

Some countries insist on citizenship, others on long period of normal residence to ensure sufficient connection with the country in question. In India, admission is restricted to Indian citizens unless reciprocal recognition is accorded to Indian practitioners in the applicant's home jurisdiction.

IV. Admission Authority:

The assessment of qualifications and the admission of overseas practitioners is perceived as being partly a State function (typically discharged by the court) and partly a function of the profession (represented by the Law Society/Bar Council).

V. Additional Educational/Practical Training Requirements:

The Canadian approach couples a period of nationally prescribed university training with a period of provincial practical courses and articles. Such additional requirements may be designed to ensure that the applicant has the level of education and competency expected of local applicants. That objective may equally be met by simply accepting the standards of other Commonwealth legal education systems, or by requiring period of practice in the applicant's home country. A further objective of such additional requirements, however, may be to orientate the overseas practitioners to local needs and conditions which can be done by a period of study and an examination in local law and/or requiring a period of pupillage or articles with a local practitioner. (Clause 2 of article XIX of GATS may help us in evolving such standards/requirements.)

VI. Special Admission:

Admission for the purpose of conducting a particular case raises a quite distinct set of considerations from general admission. This is justified if (a) no local expertise is available on the subject and (b) political sensitivity of the case, i.e. the interests of justice so demand.

A useful requirement, which is protective of both the local profession and the local law society/Bar is to have the overseas counsel either appear with or be instructed by a local practitioner.

The Commonwealth Study suggested for reform a Generalised Scheme of admission of Commonwealth lawyers based on -

a) the applicant has received a general legal education and a law degree in the Common Law after a period of study; and

b) the applicant has been admitted to the legal profession in his home jurisdiction.

c) This may be supplemented by requirement of a period of practice in the home jurisdiction. The receiving State may then require a period of orientation education or practical training. The Caribbean model of a six-month course specifically designed for overseas lawyers has attractions. Alternatively, a period of combined pupillage/articles and practical courses may be considered.

Citizenship or residence requirements are necessary only if the applicant is to permanently settle to serve the local community's legal needs.

The ideal body for decisions on admission would be a specially constituted board, representing the profession, the government and independent parties (Law Deans, Journalists etc.). "While it would undertake the administration of overseas admissions, the formal act of admission is essentially one for the courts to do", says the Report of the Commonwealth Study.

Mr. Anil Divan, Senior Advocate who has done a good amount of work on this question has, after examining the rules and regulations prevailing in various countries regulating the entry and practice of FLCs, suggested the following regulatory system for India. According to him, the following points will have to be kept in mind while restructuring a proper regulatory regime:-

(1) The distinction between the foreign lawyers, who want full Indian practice in courts in India and Foreign Legal Consultants (FLCs) must be kept in mind. If a foreign lawyer wants to practise in Indian courts, he must enrol himself as an advocate with rights to full practice and subject to immigration and foreign exchange or other requried permissions and approvals.

(2) Most foreign lawyers are not interested in practising in courts. They are interested in legal consultancy practice in non-contentious legal business and that area is of immediate concern.

(3) Any regulatory system permitting foreign law firms must be under Rules of Court with inputs from Indian lawyers and must keep in view:-

a) Reciprocity rights of the Indian lawyer in the foreign country's jurisdiction.

b) Disciplinary control and maintenance of ethical standards as prevailing in India.

c) Undertakings that the FLCs will not practice Indian law or employ Indian lawyers or hold themselves out as advising on or practising Indian law. Most jurisdictions confine FLCs to the practice of laws of their own country. (States in USA. Hong Kong, Australia etc.)

d) They must undertake or make available for inspection and scrutiny their records at any time by a suitable inspector/regulator and give them access to their records, if there is any suspicion or allegation that they are breaching the above conditions and are practising and/or advising on Indian law.

In the event of a foreign legal consultant desiring to practise Indian law, it requires consideration whether he/it should do so under a written agreement with local Indian firm as an associate with an Indian firm's name getting more prominence and foreign legal consultant shown as associate.

(e) In this connection the Hong Kong regulatory regime is a detailed one and would be of considerable help and importance. The foreign legal consultants must disclose the regulations of the country of their origin or their local jurisdictions indicating whether Indian lawyers were permitted

to set up practice in their own country. They must also disclose the hurdles, if any, for immigration and work permit rules in their country. This would only enable the Indian regulatory authority to decide whether or not and on what conditions they should be permitted foreign legal consultancy practice in India.

In view of the fact that Shri Anil Divan recommends the Hong Kong model for our acceptance, it would be relevant to examine what that model is:-

"The Hong Kong legislation has structured its regulations into three parts. Foreign lawyers who wanted full Hong Kong practice have to give examinations and fulfill criteria similar to the Hong Kong practitioners. Foreign lawyers who want to practice as consultants are prohibited from practising Hong Kong Law and cannot employ practising Solicitors and Barristers or enter into a partnership with Hong Kong lawyers. However, there are special provisions for registering associations between Hong Kong firms and foreign law firms.

Under the regime, before the 1994 Amendment Ordinance, the Law Society of Hong Kong had framed guidelines before permitting foreign law firms to operate. It invited applications and after close scrutiny, took extensive undertakings including an undertaking to permit the authorised representative of the Council of the Law Society to examine the records of any particular file so that the Council may be satisfied that the undertakings had been observed. These undertakings, among others, prohibited the foreign lawyer/firm from practising Hong Kong law.

Under the Hong Kong Ordinance, Foreign Lawyers Practice Rules and Foreign Lawyers Registration Rules have also been framed. Section 50B (3) and (4) of the amended Legal Practitoner's Ordinance are as under:-

50B (3) "A foreign lawyer or foreign firm shall not take a solicitor into partnership or employ a solicitor who holds a practising certificate or a barrister who holds a practising certificate."

50B (4) "Where a Hong Kong firm and a foreign firm have an agreement as described in section 39C(1) and they are not registerd as an Association, the partners or the sole practitioners of each firm comunit an offence."

Rule 12 of the Foreign Lawyers Registration Rules is as under:-

"12. Prohibition on the practice of Hong Kong law.

1) Except as provided in sub-section (2), a foreign lawyer shall not provide or offer any legal service, which, having regard to all the circumstances of the case, can properly be regarded as a service customarily provided by a solicitor in his capacity as such.

2) A foreign lawyer may give advice on or handle any matter which.

(a) is expected to be subject to the law of a jurisdiction other than Hong Kong.

or

(b) involves priviate or public international law or conflict of laws."

Rule 8 of the Foreign Lawyers Practice Rules is as under:-

"8. Control of employment of unqualified person.

1) A principal of a foreign firm shall ensure that the firm does not employ persons who are not foreign lawyers ("unqualified persons") in a number

more than 6 plus 8 times the number of resident principals and foreign lawyers employed full-time in that firm."

We shall now examine the provisions of the GATS and their likely impact on the legal profession in India.

GATS: India is a signatory to the General Agreement on Trade in Services (GATS) which is an integral part of the Marrakesh Agreement establishing the World Trade Organisation (WTO). GATS was signed on 15.4.1994 by the participants (including India) in the Uruguay Round of Multilateral Trade Negotiations held under the auspices of GATT. The Agreement came into force on 1st January, 1995 and is ratified by a large number of countries including India.

GATS provides for liberalisation of services throughout the world "as a means of promoting the economic growth of all trading partners and the development of developing countries" (second para of the Preamble). The Preamble to the Agreement further recites the "desire" of the participants in the following words:

"Desiring the early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations while giving out respect to national policy objectives."

Article I deals with the scope of the Agreement and also contains certain definitions. According to the article, the Agreement applies to "measures by Members affecting trade in services". It says that for the purpose of the Agreement "trade in services is defined as the supply of a service (a) from the territory of one Member into the territory of any other member, (b) in the territory of one Member to the consumer of service in any other Member, (c) by a service supplier of one Member, through commercial presence in the territory of any other Member and (d) by a service supplier

of one Member through the presence of natural persons of a Member in the territory of any other Member." The article further defines three expressions. They are to the following effect:

"For the purposes of this Agreement:

(a)"measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplies in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers."

Article II, which carries the heading "Most Favoured Nation Treatment", provides that with respect to any measure "covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers to any other Member, treatment no less favourable than it acords to like services and service suppliers of any other country."

Article III provides for transparency in all measures taken by a Member-country affecting the operation of the Agreement. If any Member-country feels that any measure taken by another Member affects the operation of the Agreement, it can notify the same to the Council for Trade in Services.

Article V saves the trading blocks from the operation of the Agreement provided they satisfy the conditions specified in the said article.

Article VI provides for domestic regulation. Clause 1 of article VI says "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are adminstered in a reasonable, objective and impartial manner." Clause 2 provides for constitution of judicial, arbitral or administrative tribunals and for establishing institutional procedures providing for resolution of disputes arising in connection with or with reference to the said Agreement.

Clause 1 of article VII provides that for the purpose of fair implementation of the Agreement "a Member may recognise the education or experience obtained, requirements met, or licenses or certifications granted in a particular country." Clause 3 however provides that according such recognition shall not be discriminatory between the Member-countries. Clause 4 in fact provides that "each Member shall (a) within 12 months from the date on which the WTO Agreement takes effect for it inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1." The other sub-clauses provide for matters incidental to such recognition.

Article XIII provides that "articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." Clause 2 of this article provides that within two years from the date of entry into force of the WTO

Agreement, there shall be multilateral negotiations on government procurement in services under this Agreement.

Article XIV provides for certain general exceptions which it is not necessary to notice for the purpose of this Report.

Part III, which is an important part, contains three articles. Article XVI, which is the first article in this part, says "with respect to market acces through the modes of supply identified in article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."

Article XVII further provides "1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

Article XVIII enables the Members to negotiate additional commitments.

Part IV is an equally important part. Article XIX deals with "negotiation of specific commitments". Clause 1 of this article provides that "in pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalisation. Such negotiations shall be directed to the reduction of elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations." Clause 2 of this article is significant from the standpoint of developing countries. It says "the process of

liberalisation shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in article IV."

In the light of reference to article IV in article XIX(2), it would be appropriate at this stage to refer to clause 1 of article IV which deals with developing countries. It reads as follows:

> "1. The increasing participation of developing country Members in world trade shall be facilitiated through negotiated specific commitments, by different Members pursuant to parts III and IV of this Agreement, relating to:
>
> a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis;
>
> b) the improvement of their access to distribution channels and information networks; and
>
> c) the liberalisation of market access in sectors and modes of supply of export interest to them."

Article XX provides that each Member shall set out in a schedule the specific commitments it undertakes under part III of this Agreement. The article further provides that where such commitments are undertaken, the particulars specified in the said articles should also be mentioned in the schedule.

Article XXI provides for modification of schedules after a period of three years from the date on which the particular commitment entered into force. The article further provides the procedure according to which the schedules can be modified or withdrawn.

Part V sets out what it calls "institutional provisions". Article XXII provides for resolution of disputes in one of the modes specified therein. Article XXIII provides the procedure according to which a Member can raise a dispute against another Member. Artixle XXIV provides that the Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of the Agreement and to further its objectives. The Council is empowered to establish such subsidiary bodies as it considers appropriate for an effective discharge of its functions.

Article XXV provides for technical cooperation among Members. while Article XXVI provides that the General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialised agencies as well as with other inter-governmental agencies concerned with services.

Part VI contains what it calls "Final Provisions". Article XXVII sets out the circumstances in which a Member may deny the benefits of the Agreement to another Member. Article XVIII contains definitions of several expressions occurring in the Agreement. Article XXIX says that the annexes to the Agreement shall be treated as integral part of the Agreement.

It would be evident from the above provisions of GATS that the legal services do clearly fall within the purview of the expression "services" as defined in article I and that our country would be required under article XIX to enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement (The WTO Agreement came into force on and with effect from 1.1.1995) and to continue to enter into such successive rounds of negotiations periodically, with a view to achieving a progressively higher level of liberalisation.

Liberalisation means a free trade in services without regard to national boundaries obligating each Member-country to accord most-favoured-nation treatment to all other Members of WTO - vide articles II, XVI, XVII and XIX. Indeed, article XIX makes the purpose of such negotiations very clear viz., reduction or elimination of, what it calls, the adverse effects on trade in services and all measures which impede or hinder effective market access. The general exceptions provided in article XIV are of no avail to India since the grounds of exceptions are public morals, maintenance of public order, protection of human, animal or plant life or health and so on. The only saving feature may be said to be contained in clause 2 of article XIX which says that the process of liberalistion shall take place "with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors." The said clause further provides that it shall be open to the developing country Members (like India) to adopt appropriate flexibility in the matter of opening up the service sectors within its boundaries. In other words, it is open to a developing country to choose to liberalise fewer services and fewer types of transactions and also to regulate the market access to its services to the service providers/service suppliers of other Member-countries. It is equally open to developing countries, while making access to its markets available to foreign service suppliers, to attach such conditions for access as are aimed at achieving the objectives referred to in article IV. Article IV which we have noticed hereinabove, speaks inter alia of strengthening domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis.

It would be obvious that in terms of the obligations imposed by GATS, India would have to enter into negotiations shortly in the matter of opening up some or other service sectors to the foreign service suppliers. This may also involve the opening up of the legal services sector to the foreign lawyers and foreign law firms. One is not sure how far the government will seek to take advantage of clause 2 of article XIX to restrict, if not curtail, such entry or to protect the legal profession of this country. If one looks at the record of our government in the matter of patents (governed by the Agreement on Trade Related Aspects of Intellectual Property Rights - TRIPS), it is certainly not very

inspiring. It is hoped that the government will not enter into any commitments which may prejudicially affect the interests of the legal profession of this country without consulting it.

We may draw attention to a resolution passed by the Executive Committee of the Bar Association of India on 5th October, 1994 which was communicated to the Government of India immediately. The resolution reads as follows:-

"In the preamble to the General Agreement on Trade in Services (GATS) - to which India is a signatory - it is recited:

> "Desiring the early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multinational negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives.
>
> Recognising the right of Members to regulate and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives and given asymmetries existing with respect to degree of development of services equally regulations in different countries, the particular need of developing countries to exercise this right....."

Keeping in mind these preambulatory statements in GATS, the Bar Association of India at the meeting of its Executive Committee held on 5th October, 1994 has resolved:

a) that a task force should be set up to clearly define India's "National Policy Objectives" in relation to legal services; and

b) that appropriate guidelines and norms for regulating entry of foreign lawyers/firms for rendering legal services in India be formulated.

The Bar Association of India accordingly requests the Government of India to forthwith appoint a High-Powered Committee in which representatives of this Association and representatives of other lawyer organisations should be associated to help set down India's National Policy Objectives in respect of legal services by foreign nationals and the regulatory framework thereof as also suggest appropriate guidelines and norms for entry of foreign lawyers/firms into India.

The Executive Committee of the Bar Association of India is of the considered view that in principle, our legal system ought to integrate internationally under an appropriate regulatory system - which ensures:

1) A general reciprocity of rights, and non-discrimination;

2) foreign lawyers/firms are subject to the same disciplinary jurisdiction as Indian lawyers; and

3) greater opportunities for the future development of the entire legal profession in India.

It was also resolved that this resolution be conveyed to the Government of India and to all appropriate authorities and bodies."

In reply to the above resolution, the then Finance Minister, Government of India informed the Bar Association of India that since the matter concerns the Law Ministry, they may approach the Law Ministry in that behalf. According to the Bar Council of India, there has practically been no response from the Law Ministry to their resolution.

The Present State of Indian Law:

As the law in India stands today, any person who is a citizen of India, who has attained the age of 21 years and has obtained a law degree from the university recognised by the Bar Council, is entitled to be admitted as an advocate. The proviso to clause (a) of sub-section (1) of section 24 of the Advocates Act, however, says that "subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on the said roll, if citizens of India duly qualified are permitted to practice law in that country". In other words, the said proviso provides for reciprocity between India and other country or countries, as the case may be, which aspect is made clearer by section 47, which reads as follows:

> "Section 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 practising 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.
>
> (2) Subject to the provisions of sub-section (1), the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognised for the purpose of admission as an advocate under this Act."

Sections 29, 30, proviso to section 24(1)(a) and section 47 - indeed several provisions of the Act, speak of "practice" or "practising the profession of law". The question, however, is what does "practice" mean? The Advocates Act does not define the expression but from a perusal of sections 30 and 33, one can gather the impression that the scope of "practice" is limited to appearance before any court, tribunal or authority. It does not purport to take in, what may be called, counselling and legal advice, legal research and documentation, alternate dispute resolution techniques and other similar services which are increasingly coming into vogue in this country and which indeed constitute the bulk of legal practice in developed countries like USA and

UK. It is true that in a recent order made by the Bombay High Court, opinion has been expressed that with the abolition of dual system and creation of a uniform category of advocates, the presumption is that "the act of advocacy does include counselling as well". The Bar Council, however, does not appear to have taken a decision or formed a view on this aspect nor have the State Bar Councils done so. As the position stands today, there does not appear to be any bar for a foreign lawyer acting as a legal consultant and advising his clients in India and doing all the things referred to above except appearance before the Court or Tribunal. As a matter of fact, the foreign companies and corporate bodies, which are increasingly entering this country, tend to rely upon their own lawyers who know their structures, business practices and other relevant matters. They would like to take their own lawyers for advising them or for acting on their behalf in all legal matters and also when disputes arise in other countries involving them. It is true that such foreign lawyers have to become conversant with the laws of this country if they propose to advise their clients in this country, but that does not appear to be a major stumbling block. The only restriction, to repeat, now in force is that they cannot appear or argue in courts or tribunals.



The Pending Litigation against FLCs in India

A Public Interest Litigation has ben instituted in the Bombay High Court by the "Lawyers Collective" which is pending. Several questions have been raised in that petition but one of the important questions raised is the meaning of the phrase "to practice the profession of the law" under section 29 of the Advocates Act, 1961. Some of the Foreign Law Firms who have set up "liaison offices" in India are party defendants like White & Case, Chadbourne & Parke and Ashurst Morris Crisp.

These firms have taken up the defence that they are not practising the profession of law and are, therefore, not governed by the Advocates Act. A second question raised

is whether these firms have committed a breach of the license/permission granted to them under section 29 of the Foreign Exchange Regulations Act, 1973 (FERA) for setting up "liaison offices" and thereby inviting penal liability. The Reserve Bank of India gave them a licence stating:

> "We advise that we are agreeable to your establishing a liaison office at Bombay and New Delhi initially for a period of three years for the purpose of undertaking purely liaison office activities viz. to collect information from parties in India and to act as a communication channel between the head office and parties in India."

Section 29 of FERA deals with licence/permissions for establishing a place of business in India for "carrying on any activity of a trading commercial or industrial nature."

The foreign law firms did not apply under section 30 of FERA which deals with grant of permission to practice a profession or occupation in India.

It was, however, admitted by these foreign firms that they advise and assist non-Indian clients, and Indian clients by drafting documents, conducting negotiations, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practices relating to clients' transactions.

The Bombay High court at the interlocutory stage has expressed a prima facie view that the practice of the profession of law under section 29 would include legal practice outside the court like drafting documents and doing non-contentious legal work like advising clients on international transactions and customary practice relating to clients' transactions and all sorts of non-contentious legal work.

The Bombay High Court has expressed its prima facie view in the following manner:

> "Prima facie it appears that the activities mentioned above carried on by Respondent 12 to 14 (i.e. foreign law firms) would amount to practising the profession of law."

If this view is confirmed, they would require to be enrolled under the Advocates Act and cannot engage in their present activities. The High Court has relied upon a New York decision where a Mexican lawyer advising on Mexican Law was held to practise the profession of law in New York.

Further, the Reserve Bank of India which had given a licence to these firms to establish liaison offices have given show cause notices alleging breach of the conditions of the licence as admittedly these firms have been doing much more than purely liaison office activities viz. to collect information to act as a communication channel between the head office and parties in India."

The Developing Scenario:

The increasing financial investment and trade relations between India and other countries is bound to give rise to what is called the cross-border legal practice. It may be that the foreign lawyers or the foreign law firms may like to enter into alliances with Indian lawyers or law firms to gain entry or to facilitate their working in this country. But even this development necessitates the lawyers in this country to develop professional expertise on the laws of the home country of the company or the corporate body concerned as well.

One can rest assure that there will be pressure from developed countries to open up the legal service sector in our country and to provide for free entry of foreign lawyers and law firms not only for tendering legal advice, drafting or counselling but

also to appear in the courts or tribunals in this country. We do not know to what extent, will this pressure will be resisted by our government.

By enacting the Advocates Act, 1961, the Parliament gave freedom of movement for all members of the legal profession within the country. Breaking the barriers set up by history and tradition, an integrated bar was created in 1961 under which an advocate registered with any State Bar Council is entitled to practice in any court or tribunal anywhere in India. This can be said to have helped in improving the quality of legal service available to the citizens and in developing the professional skills. Probably, the next step may be the integration of our legal services with the legal services of other countries providing for a comparatively freerer exchange of services subject to certain safeguards mentioned below. We presume, the profession has to prepare itself for this.

The issue of practice mobility is no doubt a contentious one: however the points of contention have not yet been clearly brought out as there was no serious attempt so far to internationalise legal practice. There are legitimate local interests such as an assured market, the expectations of society for professional sensitivity to legal and cultural traditions, the tendency of legal education to distinguish itself from outside institutions etc. which militate against freedom to practice internationally. These concerns manufested themselves in nationality, residency and qualification requirements operating as barriers to free movement of professionals. There are also genuine concerns to ensure high standard of professional service to clients which, in turn, demand uniform rules of professional ethics and disciplinary controls. In this context, any scheme for trade in services has to be based on certain fundamental principles which include: (a) the people should have a reasonable guarantee that the persons they employ have the professional competence to deal with the matter; (b) the integrity and independence of the profession and the standards it has maintained in dealing with the clients, the opposing counsel, other members of the profession, the courts and the members of the public are not compromised; and (c) a sense of fair play and a reasonable balance between the local lawyers and outside lawyers in the matter of

distribution of work, fees and market control. If the local profession were to lose substantially in the competition to follow, the arrangement is unlikely to work and internationalisation will bring in more problems than it can solve. Professional control in any case will remain with the local lawyers who are bound to be too numerous and organisationally powerful. If the above principles can be reflected in the regulatory regime, mobility in legal practice may become a blessing to the profession and the litigant public. After all, the client has a constitutional right to be represented by a lawyer of his choice which is to be preserved even in a globalising world.

It is necessary for the legal profession to realise that it must put its house in order by improving its skills and quality before seeking to compete with foreign lawyers and law firms on the home turf. The fact remains that the demand for legal services is fast increasing from the business and commercial sectors and more particularly from foreign institutional investors. They naturally prefer the lawyers/firms with whom they have been doing business in their home countries to do their work in the host country as well. Business law and international investment and commerce are the sectors which will drive the growth of trade in legal services in the immediate future. Naturally the large law firms of developed countries who seek business with India will have the advantage of cornering the emerging legal work in the host country. WTO will act as a broker in facilitating this process once the trade in legal services is settled as part of the Agreement. The question that is crucial for the health of the host country profession therefore is the type of regulatory system appropriate to protect the internal market in legal services from total exploitation by outsiders and, if possible, develop the international market in legal services in a manner that is just and fair to the Indian profession. Whatever the protective system, it has to satisfy the principles of free trade which is part of the WTO commitments and has to be objectively justifiable in terms of the exception and exclusion clauses of the Agreement.

The growth of law firms in this country is confined to certain major cities. Most of the law firms are family controlled. Very few firms provide what is called the 'single

window services' which means providing not only legal but accountancy, financial and other advice to their clients.

Recommendations for Reform:

One view put forward in certain quarters is: existing barriers based on citizenship or nationality are increasingly becoming irrelevant for regulating the legal profession and that competitive quality in legal services and full accountability therefor on the part of those who offer it to the public are basic considerations in organising legal services nationally or internationally. As such, it is argued, the legal framework for regulating the profession in the context of the emerging internationalisation of legal services requires a fresh look with a view to ensure that the benefits arising out of such trade are fully and fairly available to the people and the profession. It is desirable at least for some time to have both the "full" and "limited" licensing approaches recommended by the IBA adopted in India for the regulatory system. Each may be developed as separate scheme governed by appropriate rules by an Authorised Committee of the Bar Council of India.

Be that as it may, it is necessary to define "practice" so that it is made explicit that the term does include advice, documentation, certification, and related information services and is not limited to representation in court/tribunal only. As the Advocates Act recognises only one category of lawyers, there can be only one set of educational qualifications for admision to the Indian legal rofession. It is the "educational qualification" barrier, in adition to the considerations mentioned in clause 2 of article XIX, which provides the maximum leverage for regulating foreign lawyers exploring the Indian legal market. Today that is the weakest link in the Indian regulatory system in respect of admission to the profession inasmuch as our Bar Council (vide section 24(1)(c) of the Advocates Act) has already recognised a host of foreign law degrees (which do not involve instruction in Indian Constitution and Indian laws) as adequate for enrolment as advocates in India. The reform of legal education as proposed elsewhere in this report will provide the basis for the objective criteria for tightening up

admission policies both for Indian lawyers as well as foreign lawyers. The Canadian system of a period of university training with a period of apprenticeship may be suitably adapted for admission of foreigners to the Indian Bar. To decide on the scope of the training and articleship, it is necessary for the Bar Council of India to set up a Special Admission Authority including members of the judiciary, the academia and the profession. The recognition of foreign law degrees should be based on objective principles and must be done after due evaluation by the Special Admission Authority. It cannot be treated as a casual affair particularly when it is not the case with developed countries.

It is necessary to promote larger partnerships of lawyers to enable them to be competitive in efficiency and quality of services rendered. Rules should provide for multi-disciplinary partnerships (between lawyers and non-lawyers) which, while not compromising independence of lawyers and client privileges, would allow delivery of composite services as desired by the clients.

The Bar may perhaps have to adopt a positive approach to the internationalising of and trade in legal services. Freedom of movement for the legal profession is presently being resisted on unfounded apprehensions. Unnecessary barriers may have to go in order to facilitate professional development and improvement in the quality of services. The GATS expects Member States to accomplish this goal by standardising their barriers and building up a fair and transparent regulatory system. The Bar Council of India should immediately proceed with the making of rules necessary to organise this process before it is too late keeping in mind the principles and guidelines evolved by the IBA as well as the several considerations and factors set out by Shri Anil Divan (referred to above). The Bar Council of India has to choose which model suits our country and what should be the regulatory regime to be adopted to regulate the entry and functioning of FLCs. It should also approach the Central Government to introduce appropriate amendments in the Act to arm the Bar Council of India with the necessary powers to meet the oncoming challenges. Parliament should meanwhile amend the Act

and empower the Bar Council to prepare itself for the opportunities and challenges knocking at its door at the end of the millennium.

Draft Amendments Proposed

1. Defining Scope of "Practice"

After sub-clause (h) of clause (1) of section 2 of the Advocates Act, the following clause shall be inserted, namely:-

"(hh) 'practice' means all types of legal services including representation in courts, tribunals or statutory bodies as well as advice, research and documentation, certification and related information services necessary for legal action."

2. Amendment to Section 7

In place of sub-clause (ic) of clause (1) of section 7 of the Act, the following shall be substituted, namely:-

"(ic) to recognise foreign qualifications in law obtained outside India for the purpose of admission as advocate under this Act according to the rules prescribed therefor and as per the decisions of an Authorised Committee constituted by the Bar Council of India for the purpose."

3. Amendment to Section 24

The following shall be added to the proviso to sub-clause (a) of clause (1) of section 24 of the Act after the words "in that other country":-

"and if the overseas national is found duly qualified by the Authorised Committee constituted for the purpose by the Bar Council of India".

4. Amendment to Section 33

The following shall be added to section 33 of the Act after the words "authority or person" and before the words "unless he is enrolled":-

"or otherwise engaged in legal practice as defined under this Act".

5. Amendment to Section 49

After sub-clause (e) of clause (1) of section 49, the following sub-clause shall be inserted, namely:-

"(ee) the additional qualifications and conditions to be fulfilled by overseas nationals seeking admission as an advocate under this Act or seeking to practise in this country".

After sub-clause (gg) of clause (1) of section 49, the following sub-clause shall be inserted, namely:-

"(ggg) regulation of multi-disciplinary practice by lawyers in partnership with non-lawyers".

## Chapter V

# MANAGEMENT AND DEVELOPMENT OF THE PROFESSION

Lawyering is essentially a private sector activity to which monopoly is given by the State in public interest in the matter of organization and delivery of legal services. It is a sector of governance vital to maintain the democratic balance between the government and the governed. Hence it is given privileges and immunities seldom available to other private enterprises or professions. Justice is the ultimate goal of every civilised society and, as brokers of justice, lawyers play a role of social engineering unparalleled in human history. That is why the legal profession is traditionally regarded as "learned and noble". Today, people have started questioning whether it retains even a small percentage of its nobility and wisdom to be able to claim the same status and privileges as before. The public image of the profession has reached its lowest level. This trend is dangerous particularly in a country like India where nearly half the population are yet to enjoy the fruits of democracy and to gain equal access to justice.

The problem can be perceived in many ways and dimensions. While much of the causes for the present malady lie in the society itself, no one can deny that the professional leadership and its style of management has to own up a great deal of responsibility for the current state of affairs. The Parliament delegated management of the profession to the profession itself under the Advocates Act, 1961. The question to be addressed therefore is as to how changes in management styles can bring about the necessary conditions to bring about the desired impact in the role and functioning of the legal profession so that it regains its past glory in society.

## Membership and Formation of Bar Councils

How is the profession in India organized? The dominant and representative organization is that of Bar Councils envisaged under the Advocates Act. Like every

ther elected bodies it suffers from the activism of a few and indifference of the many. The electoral process assumes the style and infirmities of political elections including the corrupt practices associated with it. In fact, in some places Bar Council elections have been contested on political party sponsorships maintaining the party links even in the management of the profession. This has tended to divide the bar in many places causing avoidable ill-feeling and bitterness among members to the detriment of the well-being of the profession. The elections to the bar councils have been challenged on various grounds in the courts and in many cases the entire election in the whole State were struck down. The cost of elections also increased substantially both for the bar councils and the candidates. It is important to have a fresh look at the conduct of bar council elections to retain its representative character while avoiding the ills of political elections based on caste, community, religion, party and such other narrow loyalties.

When the Advocates Act was enacted in 1961 and the Bar Councils were empowered to administer professional affairs, the bar was just one-tenth of its present size. The enormous growth of numbers and its spread to remote areas of the sub-continent has put severe strains on not only financial but human resources available to the State and Central Bar Councils. To manage a profession of over 500,000 advocates, the elected representatives are about 400 in sixteen State Bar Councils and in the Bar Council of India. Obviously this number, conceived under a formula in 1960s, is inadequate in the present context. Each State Council should have double its present strength of whom those elected may remain at the existing level. The other half of the enhanced membership may be brought in through indirect elections-cum-nominations to represent bar associations, law teaching community, the constituency of law officers of government and the judiciary.

Bar associations have grown in strength and influence over the years at all levels of legal practice from the lowest to the highest court of the land. There is hardly a city without one or more bar associations. They are active throughout the year in the locality whereas the Bar Council's presence is felt once in five years when the elections are

organized. Together they can do a great deal for the welfare and development of the profession. Similarly, at the all India level, there are a few organizations which are active on a number of professional causes. The Supreme Court Bar Association, the Bar Association of India, the United Lawyers' Association, the All India Lawyers' Union, the Advocates-on-Record Association are few such professional bodies which can discharge much productive organizational work in collaboration with the Bar Council. Together, they reach out to the entire spectrum of the private bar locally and nationally. The Advocates Act should therefore provide space for the involvement of the bar associations in management of professional affairs along with the Bar Councils. Recognised bar associations (there can be rules made for recognition) must be able to nominate/elect a member either singly or jointly to the Bar Councils at the local/national levels. It is recommended that one-fourth of the expanded strength of Bar Councils be filled up through bar association nominees/representatives.

There are three other segments of the legal profession which should get a place in organizational management for greater efficiency and proper development of the profession. These are the government legal sector, the legal academic sector and the judicial sector. The remaining three-fourths of the expanded strength of the bar councils can be equally divided among these three sectors of the profession. The ideal method of their representation could be through nomination, if election is not practical. For example, the Union Law Minister on the recommendation of the Attorney General could nominate representatives of the Indian Legal Service to the Bar Council of India while their counterparts in the State could do it for the State Bar Council. Similarly, the Chief Justice of India may be requested to nominate representatives of the judiciary for the Bar Council of India while the Chief Justices of the respective High Courts would do it for the State Bar Council. It is only in respect of the legal academic sector, there is some difficulty in the nomination process as it is too large and dispersed. What can possibly be done in this regard is to allow the rotation system to prevail. Out of the list of universities teaching law, depending upon the number of seats available, the vice-chancellors concerned can be asked to nominate a senior teacher of the Law Faculty

for membership in the Council. Thus constituted, the Bar Councils will not only have a larger membership to reflect the enormous growth in membership but also will have representation of all sections of the legal community. It will also help moderate possible intrusion of narrow loyalties in the management of the profession which is inevitable in any predominantly elected body.

**Discipline**

Discipline has two dimensions. At the individual level, it is a question of enforcing the code of ethics and etiquette rigorously with a view to ensure compliance at all levels. This requires both preventive and punitive approaches. Unless the younger generation is educated of what these standards are and why they need to be observed for professional discipline, it is futile to expect them to conform to such behaviour. At the level of university education, these things are hardly taught even if they are included in the curriculum. This is where apprenticeship followed by bar examination assume critical importance in the making of a lawyer.

The punitive approach has been in vogue since 1960s through the bar council disciplinary committees. Earlier, the function was with the High Courts before whom the advocates practised. After the Bar Councils took over that responsibility, disciplinary committees used to have a retired judge and/or a Senior Advocate besides the elected members. Over the years, the composition has changed and many of the committees are manned exclusively by the elected and co-opted members of the profession. The number of cases has increased substantially and the standard of ethics has eroded to an alarming extent. There is dissatisfaction with the enforcement of discipline partly because of the delay involved and partly the inefficient forms of punishment administered. In several cases, the Supreme Court had reprimanded the Council for being too soft and suo moto enhanced the punishments on erring lawyers. There can be arguments based on equality guarantee against the pattern of dispensing punishments by disciplinary committees.

Though peer-group justice is the best strategy for enforcing discipline while maintaining professional independence, it has to be much more transparent, quick and participatory of judicial and non-elected sectors of the profession. Since there are inherent weaknesses in all elected bodies tending to make them soft at implementation, it is necessary for the Act to make it obligatory on the part of the Council to include a judge and a member nominated from bar associations or from another profession (journalism, teaching, medicine) in each disciplinary committee on the lines of the administrative tribunals. Bar Councils should publish the opinions of the Disciplinary Committees to let the litigants know the character of the lawyer they are dealing with. If the proposal to have an enlarged membership for State and Central Bar Councils is accepted, each Council will have adequate number of members from judiciary as well as from bar associations and other sectors of the profession to be co-opted to the disciplinary committees.

There is need to re-write the Code of Ethics as it was drafted in late 1950s. During the last fifteen years, there has been so many changes in laws, delivery of legal services and dispensation of justice which warrant a fresh look at conduct of lawyers in court and in society. The International Bar Association's recommendations in this regard is worthy of being considered. Whether in the matter of contingency fees or legal aid or gender justice or advertising or multi-disciplinary partnerships or fees or specialisation, the norms and standards evolved fifty years ago requires review and adaptation. As such, the Bar Council will be well advised to update the norms of professional etiquette to the needs of contemporary times.

Another issue relating to discipline is at the collective level. The members of the bar have gone on strike, dharna and boycott of courts at local and national levels at the slightest provocation like conflict between a lawyer and a policeman, alleged misconduct of a public official, perceived indiscretion of a judge, creation or non-creation, location or non-location of courts as desired by the bar members etc. Disgusted by the frequency and casualness of these trade union tactics indulged in by bar associations and sometimes

by the Bar Council itself, several public interest litigations have been filed asking the court to declare it as an unethical practice and ban the practice altogether. Court did counsel restraint and directed the Bar Council to avoid boycott of courts and evolve norms for the purpose. Bar Councils can implement such norms only with the support of bar associations concerned. The proposed structure with enhanced membership involving bar associations will hopefully enable the Bar Councils to make its writ prevail and discipline the associations more effectively.

**Finances**

With the growth in numbers and functions, the Bar Councils' meagre resources were found to be inadequate even for managing its statutory functions. The Committee on Subordinate Legislation of the Tenth Lok Sabha desired the Finance Commission to make appropriate recommendations to the Government to enhance the resources available to the Bar Councils. Meanwhile the Bar Council of India approached the Government to substantially increase the enrolment fee and to empower the Bar Councils to compel re-registration of advocates after every five years on payment of an additional fee. It may be noted that the enrolment fee is the only source of income to the Bar Council and the amount fixed in the past is too meagre in view of the inflation and fall in value of the Indian rupee. The Bill introduced in 1997 for amendment of the Advocates Act did contain a provision raising the fee. There is need for a further revision to what was proposed at that time in order to enable the Councils to discharge its functions properly without having to depend on Government for the purpose.

**Disqualification for Enrolment**

The proviso to sub-clause (c) of clause (1) of Section 24-A enables a person convicted of an offence involving moral turpitude and who is dismissed from employment under the State on any charge involving moral turpitude to seek enrolment after a period of two years since his dismissal or removal. This is not a desirable practice

given the privileges, trust and responsibility enjoyed by an advocate and the need to build up public image and confidence. It brings the administration of justice into disrepute and the public is alienated from the system. There is also no guarantee that a rapist or cheat or one who embezzled public money or got dismissed for corruption would not indulge in such activities again under cover of his professional status. The continuance of persons with such history is inimical to the purity of justice and therefore should be kept away from administration of justice.

The proviso deserves to be repealed and persons convicted of offences involving moral turpitude should be permanently disqualified from being members of the legal profession. They can, of course, take up such employments other than 'practice' which require legal qualifications.

**Recommendations for Reform**

(1) Taking into account the size and spread of the Indian bar at the turn of the century, it is recommended that the membership of each Council be increased to twice its existing strength. It is further recommended that the enhanced strength be filled by nomination from the bar associations, the judiciary, the legal academics and the government law officers.

(2) The disciplinary committees should have a member each from the judiciary and from any of other three segments (bar association, legal academic, law officers) who are made members of the enlarged Bar Councils.

(3) The power to fix the enrolment fee may be delegated to the Bar Council of India with the maximum not to exceed five thousand rupees. The fee payable by SC/ST candidates for enrolment may be fixed at half the amount payable by others.

(4) The re-registration of advocates be authorised at an interval of five years

according to the rules prescribed therefor. The fee for re-registration may be fixed by the Bar Council of India with the maximum not to exceed rupees one thousand rupees. The fee payable by SC/ST advocates for re-registration may be fixed at half the amount payable by others.

(5) A person convicted of an offence involving moral turpitude or dismissed from service under the State for an offence involving moral turpitude may be made non-eligible for enrolment.

**Draft Amendments**

1. **Amendment to Section 3**

Section 3(2)(b) shall be replaced by the following, namely : -

"(b) In the case of a State Bar Council with an electorate not exceeding ten thousand, thirty members, in the case of a State Bar Council with an electorate exceeding ten thousand but not exceeding twenty thousand, forty members, and in the case of a State Bar Council with an electorate exceeding twenty thousand, fifty members of whom half the number shall be elected in accordance with the system of proportional representation by means of the single transferable vote from amongst advocates on the electoral roll of the State Bar Council; and the other half of the enhanced membership of the Council shall be filled by nomination according to rules prescribed from among representatives of recognized bar associations in the State, legal academics from universities teaching law within the State, the law officers of the State Government concerned, and the judicial officers, sitting or retired, nominated by the Chief Justice of the State High Court".

2. **Amendment to Section 4**

(a) The following shall be substituted in place of the existing sub-clause (c) of

clause (1) of Section 4, namely : -

"(c) one member from amongst its members elected by each State Bar Council with an electorate not exceeding ten thousand, two members elected by each State Bar Council with an electorate exceeding ten thousand but not exceeding twenty thousand, and three members elected by each State Bar Council with an electorate exceeding twenty thousand".

(b) After sub-clause (c) of clause (1) of Section 4, the following sub-clauses shall be inserted, namely : -

"(d) three judges, sitting or retired, nominated by the Chief Justice of India;

(e) two nominees of the Union Law Minister on the recommendation of the Attorney General from among the officers of the Indian Legal Service;

(f) the President of the Supreme Court Bar Association;

(g) the President of the Bar Association of India;

(h) two Professors of Law in the service of any of the Universities teaching law, nominated by the Chairman, University Grants Commission;

(i) a nominee of the Chairman, Press Council of India ".

3. **Amendment to Section 9**

The following shall be substituted in place of clause (1) of Section 9, namely : -

" (1) A Bar Council shall constitute one or more disciplinary committees, each of which shall consist of three persons of whom one shall be a person elected by the Council from amongst its members, one shall be a retired judge co-opted by the Council and one a senior advocate or a senior law professor co-opted by the Council and the senior-most advocate or judge amongst the members of a disciplinary committee shall be the Chairman thereof".

4. **Amendment to Section 24**

(a) For clause (f), the following clause shall be substituted, namely : -

" (f) he has paid, in respect of the enrolment stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and an enrolment fee of such sum, not exceeding five thousand rupees as may be prescribed by the Bar Council of India" ;

(b) After clause (f), the following clause shall be inserted, namely : -

" (ff) he has paid, in respect of re-registration according to the provisions of Section 33A and the rules made therefor, a re-registration fee of such sum, not exceeding one thousand rupees as may be prescribed by the Bar Council of India".

5. **Amendment to Section 24 A**

The Proviso to sub-clause (c) of clause (1) beginning with the words "provided that" and ending with the words "as the case may be, removal" be omitted.

6. **Amendment to Section 49**

After sub-clause (f) of clause (1) of Section 49, the following additional provision shall be inserted, namely : -

" (ff) the procedure to be followed for recognition of bar associations to be eligible to nominate/elect representatives to the State Bar Council/the Bar Council of India".

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# THE BAR COUNCIL OF INDIA

21, ROUSE AVENUE, INSTITUTIONAL AREA, NEW DELHI-110 002

ARUN MISHRA
CHAIRMAN

Res. : Justice H.G. Misra Colony,
Opp. Telephone Exchange,
Gwalior - 474 009 (M.P.)

3.7.98

**Hon'ble Mr. Justice B.P. Jeevan Reddy,**
**Chairman, Law Commission of India,**
**Shastri Bhawan,**
**NEW DELHI.**

SUB: Amendment to the Advocates' Act 1961 as recommended by the Committee on Subordinate Legislation of 10th Lok Sabha.

Respected Sir,

The Committee on Subordinate Legislation of the 10Th Lok Sabha had submitted a report relating to matters concerning Advocate's Act. Hereunder are the proposals made by the Sub Committee:

1. In para 6.8 of its Report, the Committee made the following recommendations:

   1. The proliferation of Law Colleges without adequate number of teachers with competence has resulted in sharp deterioration in the standards of legal education. This has seriously affected legal profession. The Committee feels that the Bar Council should use the powers given to it under the statute and effectively intervene to stop the proliferation of such sub-standard law colleges.

   2. The Committee note that lack of funds has come in the way of improving legal education in the Country. The 8th Finance Commission has made funds available for improving court's infrastructure. The Committee strongly recommend that adequate funds may be made available for bringing about qualitative improvement in the Legal Education.

   3. The Committee feels that the present law course needs to be restructured. The Committee is of the view that part time law course should be discontinued. They agree with the suggestion of the Bar Council and Supreme Court Bar Association that the Professional Law Course should be of five years duration on the pattern of the National Law School functioning under the University of Bangalore. However, the Universities can offer a three year academic law course for the benefit of people who want to study law from academic point of view.

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4. In order to maintain professional quality and also to ensure that only serious minded persons come into the legal profession, an entrance test of LL.B. Standard should be conducted for enrollment as advocate. It is also necessary to have apprenticeship under senior advocates. The attention of the Committee has been drawn to the fact that Sec.24 (1)(d) of the advocates act had provided for these which was repealed in 1974. The Committee feel that in the interest of quality of legal profession, this provision should be restored in the Act.

5. Syllabus prescribed by the Bar Council should be modernised , so that lawyers get acquainted with modern day commercial practices etc. Bar Council of India should take guidance from the rules prevailing in other countries in this regard.

6. The Committee feel that continuing legal education must be made compulsory. Institutional arrangements should be made so that every practising lawyer can have access to this system. All practising lawyer must attend some courses after every three four years on which they may be given credit which in turn would be essential for their renewal of registration.

II. The Bar Council of India had agreed with the above proposal and the following are the views expressed by the Council:

> "11. Regarding the suggestions made in paragraph No.6.8 of the report, we fully agree with them and feel that those suggestions should be implemented at the earliest to maintain the standards of legal education and thereby that of the profession also."

III. In para 7.1 to 7.6 the Committee on Subordinate Legislation had made the following recommendations:

> 7.1 Rules framed by the Bar Council of India in exercise of the rule making power under Sections 17, 19, 20,22 and 49 of the Advocate's Act 1961 do not require and renewal of registration by the advocates with the Bar Council of India or State Bar Councils as the case may be as registration once done will continue indefinitely. As a result, the roll of advocates maintained by the Bar Council of India or State Bar Councils is not up to date. Once an

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advocate is registered he remains on the rolls. Afterwards it is not known whether he is alive or whether he is living in India or abroad and whether he has abandoned the practice and has joined service. No such information is available with the Bar Council of India or State Bar Councils due to the lack of provision of renewal of registration.

7.1 Shri V.C. Mishra, President , Bar Council of India who appeared before the Committee on 25th Aug.,94 appreciated the suggestion of renewal of registration of advocates. He welcomed the suggestion of incorporating such a provision in the advocates' act and the rules framed thereunder so that the enrollment of individual advocate are renewed periodically and the rolls of advocates are also updated periodically.

7.3 Agreeing to the proposal for renewal of rolls of the advocates, Shri K.K. Venugopal, President , Supreme Court Bar Association stated that t present Bar Councils do not get a feed back for revising the rolls in regard to lawyers who have expired or discontinued practise of who have joined services, and so on. He felt that such a feed back is very essential for updating the rolls. According to him there is no exact figure of practising lawyers in India with the Bar Councils. He was of the opinion that the renewal of registration may be done at least once in every five years by making every lawyer who wants to continue to have his name on the rolls to fill up a form mentioning in which Court he is practising.

7.4 The Committee note that the existing rules under the advocates' Act 1961 do not prescribe or make it compulsory for an advocate to have periodic renewal of registration with the Bar Council of India or State Bar Councils. As a result once an advocate is registered, it is difficult to find out whether he is alive or whether he is abroad or whether he has changed his address and so on. Moreover, the registers maintained by the Bar Councils could not be updated.

7.5 The Committee therefore , desire that the Central Government/ Bar Council of India should prescribe for a compulsory renewal of registration by the advocates after every five years. It should be provided that the advocates should inform the Bar Council of India, State Bar Council that they want to continue to have their names on the rolls. If the Council/State Bar Councils do not receive any application for renewal of registration, it should be presumed that the advocate has either died, gone out of India or out of practise and his registration might be deemed to have lapsed/cancelled. There should be

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provision in the rules under which he can get his registration with the Bar Council revived as and when he returns from abroad and resumes his practice.

7.6 The Committee further desire that most of the funds needed by the Bar Council of India/State Bar Council obtained from registration and renewal of registration. For renewal of registration a specific fee as prescribed by the Central Government/Bar Council of India from time to time will be required to be paid . Further, as recommended in Chapter 7, such renewal of registration should also be subject to obtaining prescribed credit for attending the workshop/refresher courses in continuing Legal Education.

IV. The Bar Council of India had approved the recommendations made by the Lok Sabha Committee and expressed its views as follows:

"12. The views expressed by the Committee in paragraphs Nos. 7.4, 7.5 and 7.6 of its reports are whole heartedly welcomed and the Bar Council of India is of the opinion that necessary provision should be incorporated in the act for the periodical renewal of registration of lawyers . which would not only keep the rolls of theCouncil upto date, but would also generate sufficient funds for the developmental activities and administration of the Central as well as State Bar Councils. This is something which should have been far earlier."

Hence amendment be made in the Advocates' Act providing for the following:

(a) Provision to be made for providing adequate funds of recurring nature for bringing about qualitative improvement in the Legal Education.

(b) Professional Law Course should be of five years duration, however, for the benefit of people who want to study law from academic point of view 3 year course may be continued by the Universities.

(c) In the interest of Legal Education training and examination should be conducted for enrollment as an advocate under Sec.24(1)(d) of the advocates act should be restored to provide for apprenticeship under Senior advocates.

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# THE BAR COUNCIL OF INDIA

21, ROUSE AVENUE, INSTITUTIONAL AREA, NEW DELHI-110 002

ARUN MISHRA
CHAIRMAN

Res. : Justice H.G. Misra Colony,
Opp. Telephone Exchange,
Gwalior - 474 009 (M.P.)



(d) Provision be made for renewal of registration once in every five years on payment of renewal fee with the provision to get the registration revived on resumption of practice once its lapses due to non-renewal subject to obtaining prescribed credit for attending the Workshop/ refresher course.

(e) All practising lawyers must attend a refresher course after three/four years and the same be made essential for renewal of registration.

(e) Provision be made for renewal of registration once in every five years on payment of renewal fee with the provision to get the registration revived on resumption of practice once its lapses due to non-renewal subject to obtaining prescribed credit for attending the Workshop/ refresher course.

I shall be thankful if the Hon'ble Law Minister could kindly look into the matter and give directions for carrying out the recommendations of the Committee on Subordinate Legislation and the views expressed by the Bar Council of India as in the form of amendments to the Advocates' Act.

With kindest regards.

Yours sincerely.

(ARUN MISHRA)
CHAIRMAN

# MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION
## ANNEX 1B: GENERAL AGREEMENT ON TRADE IN SERVICES
## AND
## MINISTERIAL DECISIONS RELATING TO THE GENERAL AGREEMENT ON TRADE IN SERVICES*

The General Agreement on Trade in Services is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (Annex 1B) which was signed on 15 April 1994 by the participants in the Uruguay Round of Multilateral Trade Negotiations held under the auspices of GATT. The Agreement came into force on 1 January 1995 and had been ratified by 105 States as of 5 July 1995. The Ministerial Decisions relating to the General Agreement on Trade in Services were adopted by the Trade Negotiations Committee on 15 December 1993.



*Source: World Trade Organization (1995). "Marrakesh Agreement Establishing the World Trade Organization. Annex 1B: General Agreement on Trade in Services" and "Ministerial Decisions and Declarations adopted by the Trade Negotiations Committee on 15 December 1993". *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: World Trade Organization), pp. 325-364 and 456-463 [Note added by the editor].

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standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

## PART IV
## PROGRESSIVE LIBERALIZATION

### *Article XIX*
### *Negotiation of Specific Commitments*

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

### *Article XX*
### *Schedules of Specific Commitments*

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;



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(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

*Article XXI*
*Modification of Schedules*

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.



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THE ADVOCATES (AMENDMENT) BILL, 1997

A

BILL

further to amend the Advocates Act, 1961.

BE it enacted by Parliament in the Forty-eighth Year of the Republic of India as follows:-

Short title and commencement.

1. (1) This Act may be called the Advocates (Amendment) Act, 1997.

(2) The provisions of clause (*ii*) of section 4 and section 5 shall be deemed to have come into force on the 2nd day of April, 1996 and the remaining provisions of this Act shall come into force at once.

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2. In section 10 of the Advocates Act, 1961 (hereinafter referred to as the principal Act), in sub-section (2), for clause (*b*), the following clauses shall be substituted, namely:— 25 of 1961.

"(*b*) a legal education committee consisting of—

(*i*) a Chairman to be nominated from amongst persons who is or has been a Judge of the Supreme Court, by the Chief Justice of India in consultation with the Chairman of the Bar Council of India;

(*ii*) one member to be nominated from amongst persons who is or has been the Judge of a High Court, by the Chief Justice of India in consultation with the Chairman of the Bar Council of India;

(*iii*) four members to be elected by the Bar Council of India from amongst its members;

(*iv*) one member to be elected by the Bar Council of India from amongst the Chairmen of the State Bar Councils:

Provided that no Chairman shall be so elected under this clause unless he is also the member of the Bar Council of India;

(*v*) one member to be nominated by the Chairman of the Bar Council of India to represent the institutions specialising in legal research or out of the deans of faculties of law of the Central universities by rotation in alphabetical order;

(*vi*) the Secretary to the Government of India, incharge of the Department of Legal Affairs, member *ex officio*;

(*vii*) the Secretary to the Government of India, incharge of the Legislative Department, member *ex officio*;

(*viii*) the Secretary to the University Grants Commission appointed under section 10 of the University Grants Commission Act, 1956, member, *ex officio*. 3 of 1956.

(*bb*) The term of the Chairman, member (other than an *ex-officio* member) of the legal education committee shall be three years from the date of his nomination or election, as the case may be.".

Amendment of section 23.

3. In section 23 of the principal Act,—

(*a*) sub-section (*3A*) shall be omitted;

(*b*) in sub-section (*4*), for the brackets, figures, word and letter "(*3*) and (*3A*)", the word, brackets and figure "and (*3*)" shall be substituted.

Amendment of section 24.

4. In section 24 of the principal Act, in sub-section (*1*),—

(i) in clause (*c*),—

(*a*) for sub-clause (*iii*) the following shall be substituted, namely:—

"(*iii*) after the 12th day of March, 1998, save as provided in sub-clauses (*iiia*) and (*iiib*), after undergoing a five year course of study in law from any university in India which is recognised for the purpose of this Act by the Bar Council of India; or";

(b) after sub-clause (*iiia*), the following sub-clause shall be inserted, namely:—

"(*iiib*) after undergoing a course of study in law, the duration of which is not less than three academic years commencing from academic year 1998-99 or any earlier academic year from any University in India which is recognised for the purposes of this Act by the Bar Council of India;";

(*ii*) after clause (*c*), the following clause shall be inserted, namely:—

"(*d*) he has undergone a course of training in law as may be prescribed by the Bar Council of India;";

(iii) for clause (*f*), the following clause shall be substituted, namely:—

"(*f*) he has paid, in respect of the enrolment stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and an enrolment fee of such sum, not exceeding two thousand and five hundred rupees, as may be prescribed by the Bar Council of India;".

2 of 1899.

Amendment of section 30B.

5. In section 30B of the principal Act, in sub-section (*1*), for the words "one year", the words "two years" shall be substituted.

Amendment of section 49.

6. In section 49 of the principal Act, in sub-section (*1*), after clause (*ah*), the following clause shall be inserted, namely:—

"(ai) the course of training in law for enrolment as an advocate under clause (*d*) of sub-section (*1*) of section 24;".

Validation of Bar Council of India Training Rules, 1995.

7. The Bar Council of India Training Rules, 1995, purported to have been made under clause (d) of sub-section (*3*) of section 24 of the principal Act, shall be deemed and always be deemed to have been made under clause (d) of sub-section (*3*) of section 24 read with clause (*ai*) of sub-section (*1*) of section 49 of the principal Act as amended by this Act, and accordingly no suit or other legal proceeding shall be maintained or continued against any authority whatsoever on the ground that such rules were not made in accordance with the provisions of the principal Act.