

# M'Lord, Protect Us from Lawyers



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Growing instances of professional misconduct by advocates seem to have finally tipped the scales. On July 5, the Supreme Court in Mahipal Rana Singh v Union of India requested the Law Commission of India to review the regulatory mechanism of the legal profession.

Last year, the Madras High Court had made similar suggestions. The commerce ministry has, for some time, been mulling over the idea of a new independent regulator for professional services including law. With both the judiciary and executive seemingly on the same page, this is an opportune moment to take a step back and rethink the regulatory architecture for the modern Indian legal services sector.

In the Mahipal Rana Singh case, both the Allahabad High Court and the Supreme Court had urged the Bar Council of India (BCI) as well as Bar Council of Uttar Pradesh to take action against the erring advocate, Rana. Still no action was taken.

This blatant regulatory inaction prompted the apex court to consider reviewing the regulatory mechanism under the Advocates Act, 1961. Such a review must begin by identifying the primary market failure in the legal services market: the lack of consumer protection.

Like any market, the legal services market has producers (advocates) and consumers (clients). Left to itself, the market may fail to address information asymmetry, monopoly powers etc. Such market failures will seriously prejudice the consumers of legal services.

Legal services need to be regula-

ted to protect consumers from unscrupulous professionals. Consumer protection should be the primary objective of a modern regulator of the legal services market. For instance, the Legal Services Board (LSB) set up under the UK Legal Services Act, 2007 has a statutory objective of "protecting and promoting the interests of consumers" encoded into the law. This is not the case with the BCI.

Section 7(1)(d) of the Advocates Act, 1961 clearly states that the objective of the BCI is "to safeguard the rights, privileges and interests of advocates" – not the consumers of legal services. This explains the BCI's inaction when it comes to taking action against unscrupulous advocates to protect consumers' interests.

Unlike the BCI, Indian financial sectoral regulators cannot be blamed for inaction against regulated market participants accused of illegal conduct. This disparity in institutional attitude can be attributed to the difference in the legal structure of these regulators.

For instance, the law does not mandate that board members of the Securities and Exchange Board of India (Sebi) must be stockbrokers. Neither does the law mandate that board members of the RBI must be

private bankers. But the Advocates Act prohibits anyone other than an advocate from BCI board membership. Effectively, the law legitimises regulatory capture of the legal services regulator by the producers (advocates) themselves. Consumers have no representation whatsoever in the BCI.

The Advocates Act was enacted three decades before the emergence of modern regulators. Since then, regulatory governance literature and regulatory structures have evolved globally. India is not far behind. The Justice B.N. Srikrishna-led Financial Sector Legislative Reforms Commission (FSLRC) and TK Viswanathan-led Bankruptcy Law Reforms Committee (BLRC) have made crucial contributions to contemporary policy-thinking about modern regulatory structures based on sound administrative law principles.

FSLRC envisaged regulators as 'mini-states'. Accordingly, it extended the doctrine of separation of powers to regulators. The commission emphasised the need to maintain separation of powers in the internal functioning of a regulator, particularly by separating adjudication from other activities. Additionally, Part 4 of the draft Indian Financial Code (IFC) lays down a

standardised legal process for transparent regulation-making through public consultation, cost benefit analysis etc. that any modern regulator ought to adopt.

The recently enacted Insolvency and Bankruptcy Code (IBC) as proposed by the BLRC seeks to regulate the new Insolvency Professionals (IPs) using a three-tiered structure. The IPs will be regulated by Insolvency Professional Agencies (IPAs), while the IPAs will be regulated by the bankruptcy regulator.

This is similar to brokers being regulated by stock exchanges, while stock exchanges are regulated by Sebi. A regulator enjoying monopoly status hardly has any incentive to encourage innovation in the profession. The regulatory structure in the Advocates Act has far outlived its utility and needs to be redesigned from scratch.

The Law Commission should consider setting up a new regulator with the primary objective of consumer protection in legal services market. In the interest of consumers, the regulator must have a majority of non-lawyers on board including the chairperson. Regulations must be made transparently after effective public consultation and a cost-benefit analysis.

Adjudication functions must be kept separate. The overall regulatory architecture should be three-tiered. The supervising regulator should be empowered to approve multiple regulators. Each of these approved regulators must be empowered to regulate different aspects of the legal services industry: litigation, transactional practice, legal education etc.

This supple regulatory architecture will help foster innovation in the legal sector by encouraging competition without sacrificing on consumer protection.



**Another client to bleed!**

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