BCI and its new rules: What does it mean for non-litigation advocates?

The recently issued Certificate and Place of Practise (Verification) Rules, 2015 (`the Rules') by the Bar Council of India (BCI) are likely to exclude many non-litigation advocates from `practising' law in India. The avowed purpose of the Rules is to save the Bar Associations from slipping out of the hands of the advocates who `practise law'. Consumed by their zeal to tighten their political grip over Bar Associations, the drafters have failed to look beyond advocates `practising law in different Courts' and recognise that the legal profession of the twenty first century has moved far beyond litigation and courts. Consequently, not only are the Rules myopic in vision and replete with errors, but they potentially derecognise the vibrant non-litigation law practise in India. If this was indeed a conscious policy choice by the BCI, then it is probably a classic case of regulatory capture, where an interest group (a section of litigation advocates) has captured the regulator (BCI).

The ingenious drafting

The Rules do not explicitly define `practise' of law. But Rule 4(l) clarifies that the words used in the Rules (but not defined therein) will derive their meaning from the Advocates Act, 1961. In the context of section 29 of the Advocates Act, 1961, the Supreme Court in *BCI v. A.K. Balaji* interpreted the words `to practise the profession of law' to include practise of litigation as well as non-litigation matters. Therefore, for the purposes of the Rules, `practise' is likely to include non-ligation practise as well. However, Rule 4(g) defines the term `Bar Association' as `court work based association of advocates'. Consequently, the Rules have been specifically drafted to narrowly define `Bar Association' to mean only associations of litigation advocates, while `practise' of law has been left broad enough to include non-litigation practise. In other words, the Rules attempt to bring non-litigation practise within the control of associations of litigation advocates. Although a dubious policy choice, it seems consistent with the apparent scheme of the rules – to corner power and capture more turf!

Rule 5 states that no advocate is entitled to `practise law' unless he holds a certificate of practise issued under the All India Bar Examination Rules, 2010, or under the Rules. Therefore, even non-litigation advocates need to possess certificate of practise for non-litigation practise.

Rule 8 classifies advocates into two sets:

(a) *Advocates who graduated in or after the academic year 2009-10 and enrolled on or after June 12, 2010*: Rule 8.1 requires such advocates to get a certificate of practise under the AIBE Rules, 2010. Such certificates are valid for 5 years (under Rule 9.1) and the validity can be extended every 5 years by the concerned State Bar Council (SBC) (under Rule 9.1).

(b) *Advocates who graduated before the academic year 2009-10:* Rule 8.2 requires such advocates to apply for verification of certificate of practise and place of practise from the SBC where he is enrolled. This application must be made within July 13, 2015 (for those already enrolled) or 6 months from date of enrollment. Such certificate of practise is valid for 5 years (under Rule 9.1) and the validity can be extended every 5 years by the concerned SBC (under Rule 9.1).

Rule 8.4 requires that every such application for verification of certificate of practise to the SBC must be accompanied with certain documents. One such document is a certificate (Column III of Form A) from the President, Secretary or any office bearer of the concerned `Bar Association', SBC

or BCI, stating that `he has not left law practise'. Interestingly, if it is found that the authority issuing this certificate did so despite knowing that the advocate is `not in practise', the SBC can take actions against the authority who issued the certificate.

Now let's take a hypothetical example of a non-litigation advocate, who for the last 10 years have been engaged in purely transactional legal practise and doesn't appear in Courts/Tribunals/statutory authorities at all. Let us assume that she wishes to extend the validity of her certificate of practise to carry on doing non-litigation legal work. To apply for this certificate, she has to procure a certificate (Column III of Form A) from the President, Secretary or any office bearer of the concerned `Bar Association'. As we have already seen, the `Bar Association' can only be a litigation advocates' association. Naturally, the President, Secretary or any other office bearer of the Bar Association would not have seen her in Courts/Tribunals/statutory authorities and would not *readily* issue her the certificate. Even assuming that the President, Secretary or any other office bearer of the Bar Association somehow knows (personal contact!) that the advocate is engaged in non-litigation legal work, he would probably not be keen to certify that she `has not left law practise'. This is so because, in the absence of any explicit definition of `practise' in the Rules, if the SBC is of the view that non-litigation work is not `practise' for the purpose of the Rules, then the SBC can potentially take actions against such Bar Association for issuing the certificate. Effectively, the Rules would ensure that our hypothetical advocate (especially if she does not have the right connections in the litigation world) cannot legally continue to perform non-litigation practise in India. Worse, it may only allow those with the right connections to obtain the certificate of practise. In effect, meritocracy in non-litigation practise itself is under challenge from the litigation oligarchs.

Sqeezing out the non-litigation advocates

For membership to any SBC or BCI, one must be an advocate on the electoral rolls of the SBC. Section 3(4), Advocates Act, 1961, disqualifies an advocate from voting or being a member of a SBC, unless he possesses such qualifications or satisfies such conditions as may be required by BCI rules. As we have seen above, now the Rules require a certification of practice from a litigation lawyer who is an office-bearer in the Bar Association, SBC or BCI. Such an office-bearer is not likely to certify non-litigation lawyers whom he has not seen appearing in Courts/Tribunals/statutory authorities. Therefore, over time non-litigation lawyers will be completely sqeezed out from membership of any SBC or BCI by virtue of this vicious cycle. Consequently, the Rules are likely to completely exclude non-litigation lawyers from influencing the regulatory powers of BCI, although BCI will continue to exercise regulatory powers over non-litigation practise.

Regulatory capture?

Anomalous? Yes, but not completely. To understand the forces at play behind this phenomenon, we need to turn to the economic theory of regulatory capture. The concept of regulatory capture was initially developed to explain the failure of administrative agencies to regulate properly. William Jordan while studying the economic effects of regulation summarised the capture theory well. He showed that regardless of the diverse aims and hopes of the consumers, industry leaders, and legislators who brought about the extension of regulation over various industries in US, the actual effect of such regulation has been to protect producers (instead of consumers). One of the usual restrictions that these producers tend to impose on the industry are entry rules – they restrict entry into the industry.

Legal bar regulators (like BCI) are somewhat different though. They are not minions of some administative agency. The legal system is dominated by lawyers. In India, many politicians (in Parliament as well as Cabinet) have been lawyers themselves. These lawyers occupying senior positions are mostly products of pre-liberalisation Indian legal education system. They have all experienced litigation practise. In contrast, non-litigation practise boomed only post-liberalisation – post-1990s. Moreover, it is primarily the new generation national law universities that have catered to this niche market since early 2000. Consequently, there is a clear disconnect between the older generation of Indian litigation lawyers in influential positions (like in BCI) as against the new age non-litigation lawyers. This disconnect has resulted in litigation advocates identifying themselves as an interest group, separate and distinct from the non-litigation advocates. From this perspective, capture does not suggest corruption or conspiracy; rather it is a phenomenon of identification. Since the BCI identifies with the interests of the litigation advocates only, it ended up shaping the entry rules to the profession accordingly, deeply prejudicing the non-litigation advocates.

Conclusion

How to solve this problem? Like it or not, BCI is here to stay and so are interest groups which will try to capture it. It will be too naive to expect any such interest group to act in `public interest'. So the best way forward is to try build in some checks and balances to the regulation making powers of BCI.

Public consultation during regulation making process is one such check. It reduces the chances of abuse of regulatory powers due to capture. As suggested by the Financial Sector Legislative Reforms Commission (FSLRC), every regulation must be preceded by online publication and wide advertisement of discussion papers, cost benefit analysis and consideration and publication of all public comments received. Discussion papers clarify the exact market failure that the regulator is trying to address by the proposed intervention; cost benefit analysis requires it to gather enough credible evidence to support the proposed intervention; public comments (especially responding to them) ensure that other interest groups are given an *effective* hearing before regulatory powers are used to their disadvantage. Onerous as it may sound, this is a pittance in exchange of the privilege to make regulations, which is otherwise a monopoly of the state. If these checks were in place, the BCI could not have issued such draconian rules so easily. After all, to quote Justice Brandeis, 'sunlight is said to be the best of disinfectants'.