ENTRY OF FOREIGN LAWYERS IN INDIA & BAR COUNCIL

OF INDIA RULES

AN OPINION BY PERGO

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ANALYSIS OF BAR COUNCIL OF INDIA RULES QUA ENTRY OF FOREIGN LAWYERS IN INDIA

By Rajnish Maniktala Senior Advocate

In the following judgment, the Supreme Court has analysed the law pertaining to the issue as to whether and to what extent the foreign lawyer can practice law in India. The relevant paragraphs from Judgment have been reproduced:

Bar Council of India v. A.K. Balaji, (2018) 5 SCC 379 Re: (ii)

43. We have already held that <u>practising of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion.</u>

These are parts of non-litigation practice which is part of practise of <u>law.</u> Scheme in Chapter IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practise law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work also. The prohibition applicable to any person in India, other than advocate

enrolled under the Advocates Act, certainly applies to any foreigner also.

Re: (iii)

44. Visit of any foreign lawyer on *fly in and fly out* basis may amount to practise of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression "practice". Whether a particular visit is casual or frequent so as to amount to practice is a question of fact to be determined from situation to situation. The Bar Council of India or the Union of India are at liberty to make appropriate rules in this regard. We may, however, make it clear that the contention that the Advocates Act applies only if a person is practising Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practise foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to group of individuals or juridical persons.

Re: (iv)

45. It is not possible to hold that there is absolutely no bar to a foreign lawyer for conducting arbitrations in India. If the matter is

governed by particular rules of an institution or <u>if the matter otherwise</u> falls under Section 32 or 33, there is no bar to conduct such proceedings in prescribed manner. If the matter is governed by an <u>international commercial arbitration agreement</u>, conduct of proceedings may fall under Section 32 or 33 read with the provisions of the Arbitration Act. Even in such cases, Code of Conduct, if any, applicable to the legal profession in India has to be followed. It is for the Bar Council of India or the Central Government to make a specific provision in this regard, if considered appropriate.

Re: (v)

- 46. The BPO companies providing range of customised and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pith and substance do not amount to practise of law. The manner in which they are styled may not be conclusive. As already explained, if their services do not directly or indirectly amount to ♣⁴¹⁴practise of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on case-to-case basis having regard to a fact situation.
- 47. In view of the above, we uphold the view of the Bombay High Court and the Madras High Court in para 63(i) of the judgment to the effect that foreign law firms/companies or foreign lawyers cannot practise profession of law in India either in the litigation or in non-litigation side. We, however, modify the direction of the Madras High Court in para 63(ii) that there was no bar for the foreign law firms or

foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues. We hold that the expression "fly in and fly out" will only cover a casual visit not amounting to "practice". In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was doing practice which is prohibited can be determined by the Bar Council of India. However, the Bar Council of India or the Union of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases.

48. We also modify the direction in para 63(iii) that foreign lawyers cannot be debarred from coming to India to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. We hold that there is no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. If the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the

Advocates Act. However, they will be governed by the code of conduct applicable to the legal profession in India. The Bar Council of India or the Union of India are at liberty to frame rules in this regard.

49. We also modify the direction of the Madras High Court in para 63(iv) that the BPO companies providing wide range of customised and integrated services and functions to its customers like word processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. We hold that mere label of such services cannot be treated as conclusive. If in pith and substance the services amount to practise of law, the provisions of the Advocates Act will apply and foreign law firms or foreign lawyers will not be allowed to do so.

POINTS ARISING FROM THE JUDGMENT

1. So practising of law includes not only appearance in courts i.e. litigation side but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. These are parts of non-litigation practice which is part of practise of law. Only a person enrolled under Advocates Act can practice law and none other. This prohibition applies to foreigner also. And practising law will mean litigious and non-litigious practice.

- 2. Visit of any foreign lawyer on fly in and fly out basis may amount to practise of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression "practice". The contention that the Advocates Act applies only if a person is practising Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practise foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. So a foreign lawyer cannot practice Indian Law. A casual visit for advising his client with respect to foreign law is not barred. However regular visits on fly in and fly out basis shall amount to practice of law.
- 3. If the matter otherwise falls under Section 32 or 33 of Arbitration and Conciliation Act with respect to international commercial arbitration, there is no bar for foreign lawyers to conduct such proceedings in prescribed manner.
- 4. If BPO Companies, in pith and substance, provide services which may amount to practice of law, even on non-litigious side, this shall amount to practice of law and is prohibited.
- 5. A foreign lawyer can visit India, on "fly in and fly out" casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

RULES OF BAR COUNCIL OF INDIA ARE ULTRA VIRES THE LAW DECLARED BY SUPREME COURT

1. The notification dated 10.3.2023 quotes Law Society of England and governmental delegates of UK to say that Indian lawyers can establish office and practice Indian Law, international law and provide English law advice. However they cannot practice in six reserved activities. The notification also quotes Solicitor's Qualifying examination for Indian lawyers.

The Bar Council of India also proposes to introduce such exam for purpose of eligibility in similar manner. That would mean permitting foreign lawyers on reciprocal basis to practice English Law, advice on Indian Law and international law in India. The Apex Court has clearly held that foreign lawyers cannot practice Indian Law or Foreign law except advising on foreign law and that too on fly in fly out casual basis.

- 2. As per Rule 8, a foreign lawyer shall be entitled to practice law in India in non-litigious matters. The Supreme Court has laid down that practice in non-litigious side may also amount to law practice.
- 3. Again as per Rule 8(2), the foreign lawyers shall be allowed to practice on transactional work/corporate work such as joint mergers and acquisitions, intellectual property matter,

drafting of contracts and other related matters on reciprocal basis. Again this is in conflict with Apex Court observations, according to which a foreign lawyer cannot practice Indian law – be on litigious side or non-litigious side. He can only advise his clients with respect to issues pertaining to foreign law only, whether on reciprocal or non-reciprocal basis. This amounts to giving them access to legal work which is in violation of law of land.

- 4. Further Rule 8(2)(iii) permits foreign lawyer to appear before bodies other than Courts, Tribunals, Boards in which knowledge of foreign law is essential. Again this rule exceeds what is said by the Supreme Court that a foreign lawyer can only advise his clients with respect to foreign law or diverse international issues. It does not permit him/her to appear before such bodies.
- 5. It is also apparent that most of the countries do not permit Indian lawyers to practice law in those countries be it their own law or issues relating to Indian law. How the Bar Council of India is permitting foreign lawyers to do the kind of legal work as explained above without any statutory framework in those countries is beyond comprehension and contrary to law declared by Supreme Court.
- 6. Clearly, Bar Council of India Rules are not in interest of Indian Lawyers, downgrades the self-respect of legal community and contrary to law of land.

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ENTRY OF FOREIGN LAWYERS/LAW FIRMS IN INDIA

By: Siddhant Maniktala

B.A.LL.B 10th Semester

Amity University Noida

As per the notification of the Bar Council of India which states the "Rules for

Registration and Regulation of Foreign Lawyers and Foreign Firms in India,

foreign lawyers and law firms would be allowed to practice in India if they are

registered with the Bar Council of India and that the process of registration would

not be required if the law practiced by an overseas based advocate is done on a

fly in-fly out basis for a period not exceeding 60 days.

The BCI notification lays the registration process for foreign lawyers or foreign

law firms and eligibility criteria.

The same reads as: "A foreign lawyer or foreign law firm shall not be entitled to

practice law in India unless he/it is registered with the Bar Council of India under

these Rules: Provided that this prohibition will not apply to law practice by a

foreign lawyer or law firm in case such practice is done on a 'fly in and fly out

basis' for the purpose of giving legal advice to the client in India regarding foreign

law and on diverse international legal issues and provided further that such

expertise/advise of such a foreign lawyer or foreign law firm had been procured

by the client in a foreign country and foreign lawyer or foreign law firm does not

maintain an office in India for the purpose of such practice and lastly such practice

in India for one or more periods does not, in aggregate, exceed 60 days in any

period of 12 months.

'Right to practice law' in the concerned 'foreign country of the primary

qualification' shall be the primary qualification for practicing law in India under

these rules".

- According to the notification, Bar Council of India would have the sole power to accept or refuse registration of any foreign law firms or advocates to protect the interests of Indian lawyers and law firms.
- The foreign lawyers or foreign Law Firms would be restricted from appearing before any courts, tribunals or other statutory or regulatory authorities, however they would be allowed to practice on transactional corporate work such as joint ventures, intellectual property matters, mergers and acquisitions, contract drafting, and other related matters on a reciprocal basis.
- They would be entitled to practice law in India in non-litigious matters only and he/it shall be deemed to be an 'advocate' in accordance with the Indian law. Foreign lawyers and law firms shall be restricted from doing any work pertaining to conveyancing of property, title investigation or other similar works.
 - 1. I do not completely agree with the Bar Council of India's decision to allow entry of foreign lawyers and law firms into India as it has been done without giving a complete thought and without realising the social and economic challenges faced by the legal sector prevailing in India at present.
 - 2. According to Clause 5 (4), Chapter 3 of BCI rules for Registration and Regulation of Foreign lawyers and Law firms, which state that "The Bar Council of India may refuse to register any Foreign Lawyer or Foreign Law Firm, if in the opinion of the Council, the number of Foreign Lawyers or Foreign Law Firms of any particular Foreign country registered in India is likely to become disproportionate to the number of Indian Lawyers or Indian Law Firms registered or allowed to practice law in the corresponding foreign country. Bar Council of India

may limit the number of registration of Foreign Lawyers and/or Foreign Law Firm in order to maintain a balance or to ensure complete reciprocity or to protect the interest of Indian Law Firms/Indian Lawyers".

- According to this provision, Bar Council of India is obliged to ensure complete reciprocity with other countries in regard to registration of foreign lawyers and law firms so as to protect the interests of the Indian legal sector and can refuse applications for registration so as to maintain a balance to ensure reciprocity.
- However, there is no framework or mechanism in existence to ensure complete reciprocity with other countries and in absence of any accepted process or rules, how would the BCI be able to keep a check on the discrimination in any form which could be faced by Indian advocates and law firms in regard to their registration and permission to practice abroad?
- Further more it has not been mentioned anywhere that the countries which are also keen on opening up their legal sector for Indian Advocates and Law firms to enter into and practice, have framed any legal rules or laws which would allow Indian Legal entities and Advocates to practice over there. This would leave our legal sector especially those firms and advocates who would want to practice in these other countries in complete uncertainty while foreign firms and advocates would completely enjoy the right to practice in our country and entering the Indian Legal sector.
- These facts can be further verified by viewing the 8th para of Objects and Reasons mentioned in the concerned notification dated 10th March, 2023 which is stated as below-

"Further, it is relevant to note that recently in course of some discussions and deliberations with the Law Society of England & Wales and some Governmental delegates of U.K. with the Secretary of Department of Legal Affairs, Government of India, it has been stated by the side of U.K. that Indian lawyers/law firms can establish in England and Wales and can practice Indian law, international law as well as provide English law advice. They however normally cannot practice in any of the six reserved activities detailed in the high-level summary of the regulation of foreign lawyers in UK (e.g. exercise of a right to audience/appear before a Court, conduct litigation, carry out reserved instrument activities (a contract to grant a short lease, a will or other testamentary instrument, an agreement not intended to be executed as a deed, other than a contract that is included above, a letter or power of attorney, a transfer of stock containing no trust or limitation of the transfer, conveyancing of property and similar work), probate activities, administration of oaths, notarial activities).

As per the delegates of U.K. the Indian lawyers only need to register as Registered Foreign Lawyers (RFL) if they are in partnership with solicitors of England and Wales. They remain in any case under the regulatory remit of their Home Bar (Bar Council of India). As per discussions, there is already a way to requalification for Indian advocates through the Solicitors Qualification Examination (SQE), with a process to apply for eligible exemptions. The Bar Council of India proposes to examine such truth/the veracity of such statements and its ramifications in details, and, shall hold enquiries and further deliberations after involving the Government of India through Ministry of Law and Justice and the Government of U.K. and the Bar Council of India, and thereafter may also think to introduce some Qualifying Exam for the purpose of eligibility and exemptions in similar manner, if it does not adversely effect the interest of Indian Lawyers/Law Firms and the Government of

India. It is also to be noted that the Bar Council of India is keen to progress on the idea of an MoU between the Bar Council of India, the Government of India (through Ministry of Law and Justice) on one part and the Law Society of England and Wales, Government of U.K., Bar Council of England and Wales, on the other. The U.K. Delegates have also assured the Bar Council of India that the Authorities in U.K. are also keen and interested in the means of collaboration, cooperation and joint practice between Indian advocates and UK lawyers".

- As per the above-mentioned provision, Indian advocates and law firms have to register as **Registered Foreign Lawyers (RFL)** in the UK, Scotland and Wales if they are working in partnership with the solicitors of England and Wales. However, they would need to qualify the **Solicitors Qualification Examination (SQE)** to obtain the right to practice over there. It is interesting to further note that the **BCI has set no qualifying examination for foreign advocates** to obtain the right to practice in India and thus there is no bar or limitation on Foreign Lawyers and Law firms to enter the Indian Legal Sector.
- It has also been stated by the BCI in the said notification that the UK delegates are "Keen and Interested" in means of collaboration between Indian Advocates and UK Solicitors and in letting them establish their offices in UK. However no legal framework or rules have been framed by the respective Bar Councils or the Administration of United Kingdom yet to let their Indian peers enter their legal sector which leaves our Advocates and Indian Law Firms in a bit of a pickle and uncertainty for the foreseeable future.

- 3. The BCI's notification also provides for the **disciplinary issues and** penalties against foreign lawyers and law firms securing registration by misrepresentation and other aspects which are mentioned below:
- " DISCIPLINARY ISSUES AND PENALTIES FOR SECURING REGISTRATION BY MISREPRESENTATION ETC.
- 10. Disciplinary issues. :-
- (1) A foreign lawyer or Lawyer associated with foreign Law Firm registered under these rules shall normally be subject to the same ethical and practice standards laid down under the Advocates Act, 1961 and Rules made there under as are the advocates enrolled under the Act.
- (2) Where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any foreign lawyer or foreign law firm registered under these Rules has been guilty of professional or other misconduct in connection with law practice in India or has violated the terms and conditions and / or provisions of these Rules in any manner, the Bar Council of India shall refer the matter to the Disciplinary authority of the concerned foreign country for the needful. However, if the misconduct or violation is grave and prima-facie apparent on face of record, then the Council may suspend the registration and refer the matter to the concerned Disciplinary Authority, with intimation of Government of India through Ministries of Foreign Affairs and Ministry of Law and Justice."
- According to this provision, if any foreign advocate or law firm has been found guilty of professional or other misconduct in relation to practicing in India, the BCI would either suspend the concerned registration or would refer the matter to the Disciplinary Authority of the concerned foreign country which in turn would take action on the concerned

Advocate or Law firm which seems highly unlikely if the violators would have a certain influence over their home bar.

- 4. In fact, the concerned rules framed by the BCI go beyond and against the decision of the Supreme Court in Bar Council of India Vs. A.K. Balaji and Ors. [(2018) 5 SCC 379], where the Supreme Court held that foreign law firms/companies or foreign lawyers cannot practice profession of law in India either in the litigation or on the non-litigation matters. The Supreme Court, however stated that there was no bar on foreign law firms or foreign lawyers visiting India for a temporary period on a "fly in and fly out" basis for the purpose of giving legal advice to their clients in India. By framing the current rules, BCI has overstepped its position to overrule a landmark judgement delivered by the Hon'ble Supreme Court.
- 5. In our current legal system, advocates with less years of experience are not able to earn enough even to sustain themselves. Newcomers and people from socially and economically disadvantaged groups face lack of opportunities and discrimination at initial stages of their career. Various attempts were made to frame welfare schemes for such advocates to help them financially during their initial years of practice but nothing concrete has come out so far. Demands for introduction of Advocates Protection laws to protect the practitioners from instances of physical assault, illegal arrests and threats from the police and other state agencies were made various times to the BCI but it seems like the top body is not serious enough in protection and upliftment of advocates practicing in India.

- 6. In a country where 80% of legal practitioners could not even earn enough to sustain themselves, where the legal sector is dominated by small percentage of senior practitioners and no kind of support is provided by the state for the development and upliftment of the legal community, BCI's move of allowing foreign lawyers and law firms to practice in India would have dire and irreparable consequences.
- 7. I strongly feel that the BCI's move to allow foreign practitioners and law firms to practice in India is a misplaced priority. Instead, Bar council of India being a statutory body established to represent the Indian Bar and all its members should prioritize working seriously and tirelessly for the development of the Indian legal community and the upliftment of the young and economically disadvantaged members of the bar.

ENTRY OF FOREIGN LAWYERS/LAW FIRMS IN INDIA

Vipasha Gupta

B.A.LL.B 10th Semester, Institute of Legal Studies, HP University, Shimla

On March 10, 2023 the BCI notified the "Rules for Registration and Regulation of Foreign Lawyers and Foreign Firms in India". This will enable foreign lawyers and law firms to practise foreign law, international law, international arbitration, joint ventures, mergers and acquisitions, intellectual property matters etc on a reciprocal basis. The Rules mention, "This would also help to address the concerns expressed about the flow of Foreign Direct Investment into the country and would help make India a hub for international commercial arbitration. However, foreign lawyers and firms have to submit an undertaking that they shall not practice Indian law in any form or before any court of law, tribunal, board or any other authority legally entitled to record evidence on oath.

Though it is believed by many in the legal fraternity in India that there are no disadvantages and the legal fraternity in India is not likely to suffer any disadvantage in case law practice in India is opened up to foreign lawyers in a restricted and regulated manner. But there are a few disadvantages to this as there is still a need for some clarity around what 'reciprocity' means before we see foreign law firms registering in India. Will the other countries with whom we have reciprocity agreements treat our Indian Lawyers in the same manner and if not will there be any steps taken regarding the same?

Also, under Chapter v of the rules it is mentioned that "Where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any foreign lawyer or foreign law firm registered under these Rules has been guilty of professional or other misconduct in connection with law practice in India or has violated the terms and conditions and / or provisions of these Rules in any

manner, the Bar Council of India shall refer the matter to the Disciplinary authority of the concerned foreign country for the needful. "I believe that BCI should reconsider this rule because if a foreign lawyer or foreign law firm has violated the terms and conditions of this provision the redressal shall be done in India only rather than referring the matter to their respective country.

These are the few points that need reconsideration and the provisions shall be applied effectively so that they will only have positive

Entry of Foreign Lawyers in India

By: Shreya Verma

B.A.LL.B 10th Semester

Institute of Legal Studies, HP University, Shimla

With the introduction of "Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022" the Indian Arbitration field has been laid open to foreign lawyers. Now the Foreign lawyers on fly-in and fly out basis can practice arbitration in India with regard to foreign international dispute and foreign clients only. This raises many questions in many minds. What would fly-in and fly-out entail? Will this soon lead to foreign lawyers in litigation as well? What all is included in the term "practice of law"? Some of these questions have been answered by the BCI and some left to be pondered by us. Let us look at the benefits and disadvantages of these new rules before reaching to a conclusion.

The benefits would be entering a global legal field. According to the BCI "India has to rise to the occasion to meet the global changes in the Legal Arena caused by migration of people from one country to other on such a large scale that had not been witnessed in earlier days. The world is becoming a global village." With increased trade of goods and services, the need for a global legal profession is also becoming imminent. With better connectivity, the world is becoming smaller and smaller, and as it gets so, movement of people has also increased. Lawyers practicing globally without different restrictions of every other country would increase the ease of doing business and create an open, responsive and receptive legal profession.

Now what are the disadvantages of it? Letting foreign lawyers in India would decrease the work for Indian arbitrators. All the big international firms will choose these international legal corporations instead of Indian arbitrators, and

soon the international arbitration could be filled by just these foreign attorneys. This could be the cinnamon of India all over again, creating a tiny hole in the boat which will soon sink with the inflow of foreign lawyers ultimately crowding litigation as well. How do we know that the BCI would not amend the rules further? The reciprocity from other countries is still a matter on the ledge. It could fall on either side.

Different people would reach to different conclusions on this issue, but the best thing we can do is to weigh in the pros and cons on a deeper level before forming an opinion that we will defend in this ongoing debate.

Opinion by Dinkar Bhaskar

B.A.LL.B 10TH Semester, Institute of Legal Studies, HP University, Shimla

I am in the favour of Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022 for the following reasons:

- 1. The permission to practice foreign law in India to foreign lawyers and law firms is given on a reciprocity basis.
- 2. It will give a boost to arbitration in India and hopefully make it cheaper as well.
- 3. Entry of big law firms will generate mass employment.
- 4. Their entry will bring new technology to India.
- 5. It will become a source of income for the government in form of taxes.
- 6. It will create healthy competition.

BAR COUNCIL RULES ALLOWING FOREIGN LAW FIRMS AND LAWYERS

<u>By PRANAV SANTVAN</u> – B.A.LL.B 10th Semester, University Institute of Legal Studies, HP University, Shimla

Pros	Cons
1. Foreign investment in India	Role of Government not acceptable due to arbitrary nature of conduct of the Governments
2. Opportunity to learn arbitration techniques from throughout the world by observing them and entering into partnership	would have to forego their profession in
3. If reciprocating arrangement becomes clear, better option for law field professionals to establish international clientage.	The area of work allowed for Indian employees not clear in the rules if they work for foreign law firms
	There is no clarity regarding whether there will be compulsory examination system like that of Canada or UK in the reciprocating arrangement

Law firms like in US and Canada are allowed to advertise but not in India so they can easily solicit international clients as there these law firms would be governed by the regulating legislations of their own land which allow advertisement contrary to what Bar Council of India allows
There is confusion regarding grounds of disciplinary proceedings as what can be a prohibition here may not be in other country and vice versa
In India, foreign lawyers and firms may be allowed in litigators matters in near future as would be in rule making domain of the regulating bodies
In contravention to the AK Balaji Judgement as practice of law term not interpreted the way Hon'ble SC did in the judgement
Voting Right in Bar Council Elections is also not clear as members do vote at different levels

Therefore, though there are different expected pros and cons of the decision and the notification by BCI, it is difficult to judge what benefits se intended it would serve. Some rules require vast consultations with the stakeholders which the council failed to do. Moreover, BCI needs to mend it is working even in the present rules and must

bring more focus on legal education supervision, improvement, and development for the betterment of Indian Legal professionals instead of just opening the gates without any robust domestic protections