

THE ETHICS OF LEGAL PROCESS OUTSOURCING IN INDIA: GLOBALIZATION AND COMMODIFICATION

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ABSTRACT

The responsibility of lawyers grows as their practices grow with time. The responsibility from becoming a part time assistant to a full-time employee along with the power of supervising, regulating increases their liability. The economy of a country changes with time and in this era of economic condition the demand for cost effective and time effective method of completion of legal process is in demand by the public and the process of Legal Process Outsourcing (LPO) has turned out to be the perfect mechanism to achieve it and attract the clients. The process of outsourcing has no longer remained a novelty but has become a reality in this 21st century for a developing nation like India. With the emergence of time, India has become one of the most favorable destinations amongst legal outsourcers due to its convenient time zones and a majority of English-speaking population. However, amidst the evolving nature of the outsourcing industry in India, serious ethical, legal and professional issues are concerned with it. Ethical implications like client confidentiality, conflict of interest, unauthorized practice of law, disclosure to clients and billing practices have always hinders the growth of the process in India.

Thus, this paper attempts to point out the possible ethical concerns that may arise out of the outsourcing process and proceeds to assess the existing regulations that deals with the ethical issues of outsourcing by examining the rules and guidelines that govern outsourcing in India and United States. Moreover, the paper tends to assess the lacunae in the regulatory framework that controls the outsourcing process in India and tries to seek some recommendations to

improve the condition of the same and the future prospects of the LPO firms so as to be at par with other developed nations like United States.

Keywords: legal services, economy, ethical issues, outsourcing.

INTRODUCTION

“I do have concern about confidence, confidentiality, privacy, conflict of interest, ethical values, and those are the issues that are of real concern”.

-Jerome Shestack, former President of American Bar Associationⁱ.

Legal Profession being a noble profession intended to serve the society at large and is not treated as a business venture. The same was re-considered and re-affirmed by the Apex Court in the case of *A.K Balaji v Government of India*ⁱⁱ. But, the meaning of “law” has changed gradually with the evolution of time and technology and has become more of a “good” than of a “service” provided by legal professionals and law firms over the time. The past few years have witnessed a knowledge economy constituting a central place in development discussions. The reason for law merely becoming a good is mainly due to the transformation in its nature as it is entering into the field of economics and the lawyers who will best adapt them in this newly shaped world will become more successful. In this era of economic condition, the outlook on the legal profession and legal services has changed to a great extent. The existing practice of assessing the clients individually and offering them “universal” legal expertise has been ousted by providing knowledge belonging to narrow, specialized legal fieldsⁱⁱⁱ. The progress of legal services has been greatly affected with the introduction of ease of access to Internet facilities, digitization and other technological advancements, which in turn becomes contradictory to the concept of acquiring high level expert legal knowledge by ensuring 24/7 availability of lawyers to their clients. However, the combination of introduction in the technology and all of these circumstances, especially the economic slowdown results in reduction of costs of legal services and led to the introduction of Legal Service Outsourcing (*hereinafter referred to as LSO*). The need to provide “everyday” legal services to those who lack legal knowledge in exchange for affordable costs through the so-called virtual law offices has increased in the technologically advanced globe^{iv}, and the advancement of LSO and Legal

Process Outsourcing (*hereinafter referred to as LPO*) have turned out to be a perfect vehicle to achieve this.

LPO is essentially a process through which in-house legal departments, law firms, and other businesses outsource legal work from regions where it is expensive to conduct it, like United States or Europe, to countries where it can be completed at a substantially lower cost, mostly India^v. India, being a developing economy, with a large population of English-speaking professionals, convenient time zone makes a favorable condition to create unmatched cost incentives. The evolution of LPO as a process gives an idea about increasing corporatization of the legal profession. Outsourcing has always been a mechanism in the business strategy to increase the efficiency by maximizing profits and gaining competitive advantages^{vi}. This process of outsourcing refers to delegation of work to a more efficient and costeffective service provider situated overseas^{vii}. The process of outsourcing has developed to a great extent in the recent years. LPO is seen as an alternative career option for lawyers in India, since the legal profession in India is mostly based on personal relational networks and lawyers without such advantage faces years of struggle to get established. But LPO tends to reduce the problem by offering an alternative career option by offering higher salaries, better working condition, and work-life balance. It was initially solely restricted to ordinary business and IT outsourcing^{viii}, but it has since evolved into value-added outsourcing, which eventually manifested as knowledge process outsourcing^{ix} that also incorporates legal expertise. Legal outsourcing mainly refers to a specialized form of knowledge outsourcing that the legal practitioners and law firms are resorting to a great extent in order to provide cost-efficient services in the competitive market. This activity of cutting costs and increasing productivity bends legal services to a corporate character, hence, signaling commercialization of the legal profession^x. Due to the increase in economic pressure, the firms are compelled to take the outsourcing route^{xi} in order to bring down the costs and thus creating a nexus between the legal sector and the international economic climate. However, this has raised some important questions that need to be addressed on the role of ethics and professional responsibility in the field of practicing law. The five main categories of conflict of interest, secrecy, unlicensed practice of law, disclosure to clients, and billing methods can be used to classify the ethical issues of LPO. The overarching ethical issue of LPO is the problem of unauthorized practice of law. Such point arises because although on one side the lawyers benefit economically but on the other it led to the decomposition of legal services and has limited the scope of work available to Indian

lawyers. Hence, this paper tends to point out the ethical and professional values of the legal profession amidst the increasing commercial considerations, without commenting upon the appropriateness of the changing nature of profession. It will also discuss numerous ethical and legal difficulties that may arise from legal outsourcing before evaluating current laws and regulations that address these issues by looking at the laws and regulations governing outsourcing in India and United States.

Part II of the paper sets to examine the factors behind the growth of LPO in India along with the shift in nature of services that is provided by the LPO firms, emphasizing on ethical issues such as client confidentiality and data protection. Part III of the paper specifically deals with all the professional and ethical considerations that may arise out of legal outsourcing such as conflict of interest, requirement of disclosure, etc. Part IV of the paper assesses the existing regulatory framework and the drawbacks due to which the solutions to solve the ethical considerations has been failed to a great extent taking into consideration the rules framed by American Bar Association with regards to the process and Part V provides recommendations to deal with legal outsourcing in future taking into consideration the ethical aspects and suggests some plausible solution for international harmonization and concludes the paper.

THE GROWTH AND CHANGE IN NATURE OF WORK OF LEGAL PROCESS OUTSOURCING IN INDIA

According to Webster's dictionary, outsourcing means "Paying another company to provide services which a company might otherwise have employed its own staff to perform, for example software development.^{xiii}" In simple terms it refers to a process of one entity that involves another entity to do a part of its usual work load. As of now, India is one of the biggest and most common countries to receive legal outsourced work as far as LPO is concerned^{xiii}. There has been a considerable shift in the paradigm with the introduction of LPO in India and has resulted in both positive and negative outcomes. Richard Susskind in the book "The Future of Law"^{xiv} had noted way back in 1998 that legal practice will be changed by change in technology, and it will affect fundamentally the administration of justice and the way in which the non-lawyers handle the legal and quasi-legal affairs^{xv}. Globalization has brought a revolution in the field of international trade with a considerable contribution of countries and

access to domestic economies. In such a changing scenario, LPO is the most recent and prominent forms of business opportunity that have emerged in the country^{xvi}. The legal profession has undergone a considerable change over the last decade, which resulted in existing business expanding and corporate lawyers on a growth fight that led to increase in the law firms in India.

Since 1995, when the Dallas-based firm Bickel and Brewer launched a branch in Hyderabad, there has been legal outsourcing in India^{xvii}. But then, the process did not catch up much momentum because many clients and lawyers were much concerned about the legal and ethical implications of doing the legal work in India. However, with time the situation changed and LPO gained much importance due to its cost-effective mechanism, and has facilitated distribution of work that can be performed easily irrespective of the location. The other factors that helped India to emerge in an advantageous position in case of LPO are due to considerably prevailing lower wage rate and the time zone that enables the Indian lawyers to work for US firms to work overnight. Since, the legal system of India is based on British common law; it has attracted attention from countries like US, UK for outsourced works. In such scenario, the ethical considerations that arises encircles the nature of work which was earlier only limited to legal support services and has expanded now to more sophisticated work in the sense, it includes such work which is higher up in the value chain such as drafting, litigation documents, trademark and patent applications etc. But with such technology and skill-based work, it must be noted that they have access to client's information which in turn raises the question of client confidentiality of information and the security of data while transferring those to the overseas. While the outsourcing process has geared higher up in the value chain, the question regarding the competence and quality of work of LPO firms remains in shade, especially those that requires higher legal knowledge and skill and the ethical implications borne out of it.

LEGAL AND ETHICAL IMPLICATIONS ARISING OUT OF LPO

It goes with the common saying that lawyers tend to trust their guts, but when it comes to ethics, be it legal or professional it becomes easy to confuse the unfamiliar with the genuinely problematic. Same is the case with legal process outsourcing. The moot question that arises in this context is “What is being outsourced?” The answer could vary from a wide range of legal

coding to patent applications. Although legal work can be outsourced, comparison cannot be drawn with other kinds of outsourcing due to distinguishing nature of lawyer client relationship. Since the lawyer and client shares fiduciary relationship in the course of action, it raises some ethical problems related to outsourcing. The ethical issues that may be faced while working in LPO are discussed as follows:

➤ Client Confidentiality- Legal work is very confidential by its very nature. The two most basic features that bridge the gap between a lawyer and client are privileged communication and confidentiality of information. This profession requires the client to communicate frankly with the lawyer for legal assistance despite the incriminating subject matter and trust works as a major driving factor in maintaining this relationship. But, with the introduction of LPO such information cannot be only confided to one lawyer or a set of lawyers but many parties have access to such information at the same time and depends on the control and supervision of the outsourcing lawyer to the lawyer to whom the work is outsourced. LPO firms have also relationships with the adverse parties, which may lead to the menaces of exposure of the information that the client shared and jeopardize the best interest of the clients.

Another aspect that needs to be considered is the problem of data security and the risk of electronic data theft, since many countries do not have any laws on data protection and data security, especially regarding trans-border flows, where the information is outsourced^{xviii}. The outsourcing process poses challenges to confidentiality in matters related to connection security and questions the legality in transferring information. For instance, in some works like ‘document-review’ some foreign lawyers are working on it and is impossible to upload with utmost security on some Internet website and then return back the same to the client. In such cases only limited information is required and the context of the case is not so important. But in cases of complex patent drafting and its’ related legal research, more information is necessary to be provided to the foreign lawyers for which some confidential information that needs to be shared abroad, may be without license. These matters raise the security concerns over the Internet and will continue to hinder the work and unnecessarily increase its complexity. Thus, these issues need to be addressed as protection of sensitive information and data is of prime importance in this profession.

➤ Lack of Supervision- A lawyer without a license is not allowed to practice law in a given jurisdiction since it is against the law to do so. It is on the other hand, duty of every lawyer to provide competent representation to their clients. Section 5.5 (b) of American Bar

Association Model Rule of Professional Conduct states “A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”^{xix} The fundamental motivation behind this is to safeguard the general public from receiving legal services from unqualified individuals by restricting the practice of law to bar members. But delegation of some legal work to “non-lawyers” has been in practice from a long time and such practice is accepted by most jurisdictions as well. Hence, there must be proper supervision on the persons to whom the work is delegated for adequate representation of the client. Adequate supervision is also necessary as it raises the doubts on LPO firms’ competency and quality of the work. It also further raises the concern with regards to outsourcing, to the extent as to how supervision of foreign lawyers can be carried out. There are many barriers that may hinder the process such as the geographical distance, language barrier and inadequate communication channels^{xx}. Thus, this process of legal outsourcing lacks effective and appropriate way of supervising the whole mechanism so as to ensure adequate representation to the clients.

➤ Conflict Of Interest- Legal profession is based on lawyers’ loyalty towards the client and he needs to take care that interest of one party may not get jeopardized in the hands of the other party who is directly adverse to one another or there exists any significant risk related by the responsibility of the lawyer towards another client. In case of LPO firms, they serve a number of clients at the same time and there remains a possibility of aiding the two parties of the same matter which leads to conflict of interest. This problem is further enhanced due to the fact that that a number of firms may use the same LPO firms or the third party vendor for any legal assistance or other research in case of legal outsourcing. In lieu of conflict of interest, another major issue that persists is that the difficulty in detecting the level of conflict of interest, where it become practically impossible to determine at which level the conflict of interest gets matched, due to the multiple levels of sharing client confidential information. Since there are a limited number of LPO firms, the chances of conflict of interest increases due to large number of assignments being received from abroad and has aggravated the situation to a greater extent.

➤ Requirement of Disclosure and Appropriate Billing- There have been several inquiries about disclosure, including whether a firm must declare that it normally hire outside lawyers or whether it must provide information for each individual project and client. Is it necessary to take client’s consent prior to the use of outsourced lawyers? These questions become important pertaining to lawyer-client relationship and the answer depends from situation to situation.

Another concern that can arise is whether the disclosure must contain information about the remuneration agreement between the employing firm and the LPO firm.^{xxi} A client may restrict the use of LPO firms since sharing of confidential information is involved and, in such case, if the lawyer does not conceal of use of LPO firms it may lead to breach of confidentiality by the lawyer to the client. There may also be a case that the client may not fully agreed to the use of LPO firms and the lawyer assumes full responsibility and their ambiguity exists which led to the major potential ethical question regarding the use of LPO firms.

The issue of fee sharing is an important ethical issue in LPO firms as it is the heartthrob for the evolution and growth of LPO industry in India, in the near future. It is well settled principle that an attorney cannot charge excessive fees without being upfront with the client about them. It is unethical to charge unreasonable exorbitant fees without disclosing the use of outsourcing to the clients. Moreover, the client is also justified in knowing the nature of legal service for which he is charged, since they are engaging in a commercial transaction^{xxii}. The question arises pertaining to the disclosure of bills as to whether it must be revealed to the client that a substantial amount is being paid to the LPO firm for its services or simply it is put under the head of miscellaneous expenses? There is no definite answer with regards to the process of disclosure and give rise to some ethical ramifications that requires regulation.

COMPARISON OF REGULATORY FRAMEWORK OF LPO INDUSTRY IN INDIA AND UNITED STATES

Nowadays in India, LPO is perceived as an alternative career option for most of the youth Indian lawyers. With the advent of time LPO becomes an attractive alternative in the hands of most young legal professionals as it offers higher salaries, better work-life balance and working conditions. The LPO entails tasks like legal research, the design of typical contracts and agreements, the filing of patent applications, activities related to legal billing, paralegal services, etc. As far as LPO sector is concerned, India is the largest and most popular country to accept legal outsourcing work^{xxiii}. South Korea, Australia, China, and the Philippines are among the nations that participate in the off-shore LPO market. Nonetheless, there are many advantages of off-shoring in India as well but this comes with many ethical issues that demands discussion. However, despite the growth in outsourcing, there are barely any regulatory attempts been made by any country regarding it. Some countries have attempted to introduce

any regulation regarding the same, for instance, the Solicitors Regulation Authority in UK introduced a new Code of Conduct in 2011 for regulating issues such as client confidentiality and disclosure^{xxiv}. The United States is the only country till now that has specifically dealt with outsourcing which was addressed by the American Bar Association.

Position In India and U.S.- The United States was also lacking behind with respect to the framing of rules or code of conduct relating to legal outsourcing until ethics opinion have been released by American Bar Association and other State Bar Associations. The opinions center on the question of whether it is ethical for lawyers to outsource legal work so long as the outsourcing lawyer retains ultimate responsibility for the work and exercises supervisory duties as required by the law^{xxv}. In US, a non-lawyer or an unlicensed lawyer needs to be adequately supervising according to the American Bar Association and State ethics Rules. According to American Bar Association opinion, the principle that must be followed that the lawyers must exert “direct supervisory power” over other attorneys, regardless of whether those attorneys are directly connected to the supervising attorney’s company^{xxvi}. This principle has been further asserted by the New York Bar Committee that issued its opinion on legal outsourcing as there must be ‘rigorous supervision’ over the outsourced lawyer^{xxvii} and also stated the means by which these supervisory duties can be discharged so as to maintain the clarity behind working of a LPO firm. The other bar associations like Los Angeles County bar Association, San Diego County Bar Association also emphasized on the duty of the lawyer that they must act competently which includes the duty to supervise as well. As a result, the bar associations concur that the outsourcing lawyer bears the primary obligation and must exert supervision over the LPO business handling the task.

Regarding the concern of client confidentiality, the ABA ruling states that the outsourcing lawyer must be aware of and take steps to reduce any risk from any outside service provider who might disclose the confidential information to parties who are not authorized to see it^{xxviii}. It further indicates that the outsourcing attorney must adhere to the norm that they must wait to disclose any information related to the client’s representation until the client has given informed consent and authorization regarding it^{xxix}. However, in such case client’s consent is required only where outsourcing requires a noteworthy development pertaining to the case and this may vary from case to case.

The American Bar Associations and other State Bar Associations have also framed rules for the responsibility of outsourcing lawyer to avoid any sort of conflict of interest. The consensus is that the outsourcing attorney must ensure that the LPO company is not representing clients who are opponents of their clients in the same or substantially connected disputes^{xxx}. According to the American Bar Association's position on billing transparency, it is important to charge for outsources services and allocate acceptable amounts of money for their supervision^{xxxi}.

Thus, it can be seen that out of many countries United States have tried to form some regulatory framework regarding the regulation of the outsourcing phenomena which also demonstrates the importance of ethics in the legal profession. Even if there is some sort of regulatory framework, it is absolutely silent regarding the rules to which LPO enterprises must adhere. If the LPO firms (or outsourced lawyers) are required to abide by the laws of their respective countries, it will lead to a disparity in standards and possibly result in the imposition of lenient penalties for ethical violations, which will decrease the incentive of outsourced lawyers to uphold their ethical obligations and professional obligations. Thus, this reflects the need for a stronger regulatory mechanism to deal with such ethical issues of legal outsourcing.

On the contrary, there is no specific regulatory framework regarding legal outsourcing in India despite the expanding nature and growth of the industry in the country. The Advocates Act 1961 is the only legislation governing the legal professionals in the practice of law. In India, the position is not clear pertaining to the fact that whether the applicability of Bar Council of India Rules and the Advocates Act 1961 is extended to the LPO firms as well as foreign clients are also involved in such matters. The Bombay High Court to an extent tried to settle the position in the case of *Lawyers Collective v Bar Council of India*^{xxvii} by pointing out that the practice of law includes litigious and non-litigious matters. The legitimacy of the LPO firms in India has been discussed in the case of *A.K Balaji v Government of India*^{xxviii}. In this case the petitioner had contested the admission of foreign law firms to India and had brought legal action against 31 US and UK law firms, among them an LOP business. The Court made it clear that LPO firms operating as BPO firms are only permitted to do so if they are not also engaged in the practice of law. The LPO firms may constitute to function on that premise since it is allowed foreign firms to give their customers temporary, fly-in, fly-out legal advice that focused on foreign law and not domestic law. However, it is clear from the judgment that although it recognized the practice of foreign law, it is not explicitly covered under the umbrella

of Advocates Act 1961 and in case of any violation by the LPO firms; the Bar Council of India is authorized to take appropriate actions against them. Thus, it is evident that The Advocates Act 1961 is silent on the issue of LPO firms, however some relevancy regarding the same can be found in Bar Council of India Rules. The BCI Rules, specifically Rule 24 states that an advocate is prohibited from abusing or taking advantage of the confidence reposed on him by the clients^{xxxiv}. In simple terms it means that any lawyer or legal professionals that includes outsourcing lawyer to whom the confidence is being reposed upon by the clients is not entitled to take any sort of advantage or use any unfair means that breaches the trust imposed upon him. Rule 14 states, with regards to the conflict of interest the advocate must make full and frank disclosures to his client with respect to all matters that is in connection with the parties and any interest or controversy that is likely to affect his client's judgment in either engaging him or continuing this engagement^{xxxv}. There are a few regulations about correct billing as well, but they are all only loosely applicable when it comes to legal outsourcing because in this situation the client is directly linked to the outsourcing lawyer rather than the LPO company. As a result, India lacks both particular regulations addressing legal outsourcing and adequate regulations to handle the ethical issues raised by the practice.

CONCLUSION AND RECOMMENDATIONS

There is an increasing need for the low-cost legal solutions in such an economic condition and this will help the outsourcing industry in India to grow further to a great extent. But the ethical implication that arises due to the lacunae in the regulatory framework poses a serious threat to the growth of LPO industry in India, with respect to other nations like United States or United Kingdom. Apart from the growth of the industry, these ethical problems will cater in the quantum of work and shift in the nature towards value added work outsourced. In absence of any regulatory framework, serious malpractice may happen, leading to a world-wide attention in lieu of such malpractice. Even though market-based solutions are on the horizon they might not be completely prepared to address and resolve such issues. LPO will be primarily driven by information arbitrage rather than just economic cost arbitrage, hence "Regulatory Mechanism" is a must^{xxxvi}. Besides any regulatory framework in the LPO sector that may govern world-wide, some steps have been taken by the industry themselves, for instance the

formation of Global Legal Professional Certification Test^{xxxvii}. This test was undertaken by the recruitment and training firm Rainmaker along with other LPO firms that aims at testing the candidates on the basis of English fluency, technological and professional skills, personal effectiveness and legal knowledge. Although this step may take the LPO industry to a higher pedestal but it remained as a private initiative and did not get recognition from all over the LPO firms across the country. Nonetheless, it would have been more effective if it were be undertaken with the Bar Associations of different countries that outsource their legal work to the countries like India. The LPO industry is under rapid growth which can be very well demonstrated from the recent acquisitions of Pangea and CPA Global by Thomas Reuters and Cinven respectively^{xxxviii}. However, to include the LPO industry into the mainstream legal profession ethical considerations must be given a place in legal outsourcing. Although ethical opinions have been published by U.S.A., they barely have a binding authority as to the extent of only providing guidance to resolve the ethical issues when they pop up. Law firms are opening satellite compliance offices or LPO providers themselves are attempting to offer onshore/offshore solutions by expanding their operations to “near shore” locations. Although LPO firms are introducing and imposing stringent mechanisms, to improve supervision, it becomes limited due to geographical distance^{xxxix}. These self-regulatory mechanisms may prove effective to some extent but it solely depends on the firms whether to accept and adopt such mechanisms or to completely ignore it and carry on the work of outsourcing.

In such a situation, international harmonization can be an effective mechanism to address the problem. Due to their enforceability and binding nature, international treaties have been considered to play a fundamental role in addressing the issues posed by greater economic integration and globalization. So, in case of legal outsourcing, development of an international treaty may solve the problem as the above legal and ethical legal implications can be addressed globally on a large scale. In such a process of treaty formation, even if all the countries does not want to get involved the most involved countries in the process of legal outsourcing like India, UK, US may adopt the same and this can further be applied in the domestic level as well. Such a process would ensure a standard level of consistency across the most involved countries and it would also get uncomplicated for both the parties, *i.e.*, outsourcing lawyers and LPO firm in fulfilling legal and professional obligations. Thus, considering the fact that LPO industry in India being one of the fast-growing industries in India it needs immediate attention for the efficiency and effectiveness in the regulation and in such case, regulatory harmonization

may work as a solution. And such harmonization can be achieved with the involvement of government bodies and various stakeholders so as to develop a most effective regulatory framework that eliminates the above ethical and professional implications in the increasing commercial practice of legal outsourcing.

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