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The Ban on Advertising as a Canon of Ethics for Lawyers

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ABSTRACT

The paper aims to identify the persistent stigma surrounding advertisements by lawyers and observe the period changes that have made such ban on advertising redundant. This paper consists of an analysis of judicial decisions that have moved back and forth between the rights of lawyers to be able to advertise as opposed to their duties as officers of the court and not businessmen. It questions the judiciary's reluctance at identifying the modern aspects of the legal profession as commercial enterprises and recognises the embodiment of the right to advertisement in the right to freedom of speech and expression, which is a protected fundamental right in the constitution. Lastly, it aims to identify the arguments presented by the opponents of advertisements by lawyers and find justifications for the alternative, if the ban was to be lifted by BCI.

Keywords: *Advertisement Ban, Lawyers, Professional Ethics, Code of Conduct.*

Justice Krishna Iyer, a staunch opposer of advertisement by lawyers quoted that, "*The canon of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for the betterment of the legal business."*[2]

I. ANALYSING THE UNDERPINNINGS OF THE BAN ON ADVERTISEMENT BY LAWYERS IN INDIA

The Bar Council of India's (BCI) power to make rules on the professional conduct and etiquette to be observed by advocates comes from Section 49(1)(c) of the Advocates Act 1961.[3] Under this authority, the BCI has notified the 'Standards of Professional Conduct and Etiquette to be Observed by Advocates', Section IV Clause 36 of which prohibits Advocates from soliciting work or advertising.[4] Such activities when undertaken by advocates have been held to be unprofessional and a taboo in the case of *Bar Council of Maharashtra v. M.C. Dabholkar*,[5]

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[2] *Bar Council of Maharashtra v. M.C. Dabholkar* (1976) 2 SCC 291.
[3] Advocates Act, 1961 § 49(1)(c), No. 25, Acts of Parliament, 1961 (India).
[4] Rule 36, Standards of Professional Conduct and Etiquette to be Observed by Advocates. BAR COUNCIL OF INDIA.
[5] BAR, *supra* note 2.

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which upheld the practice of law to not be a trade. This position was revisited in *V.B. Joshi v. Union of India*[6] wherein certain relaxations were granted under Rule 36 under the grounds of constitutionality. Article 19(2) of the constitution places restrictions on the right to freedom of speech and expression however this imposition must be reasonable and fall within the exceptions laid down in the article.[7] The court recognised that Rule 36 is not entirely covered under a reasonable restriction and granted relaxations to lawyers for the purposes of online advertisements for the purpose of information conveyance. This position is contended under the case *Tata Yellow Pages v. MTNL* where the Right to freedom of Speech and Expression was interpreted to include 'commercial speech' such as 'advertising'.[8] Furthermore, in the apex court has also recognised business proposition as a key element of the legal profession wherefore by deduction, the right to freedom of commercial speech extends to the legal profession. It can also be argued that Rule 36 impinges on the freedom to carry on trade, profession or business envisaged in Article 19(1)(g).[9] The article guarantees citizens with the right to their livelihood of choice through the means and method of their choosing. Rule 36's role herein takes that right of advertisement away from advocates who as a result are unable to benefit from the privilege of the freedom to carry on their trade in a manner of their choosing.

Besides unconstitutionality, this rule has also been subject to criticism on the grounds of being anachronistic. In the pre-independence era, the legal profession was considered to be a 'noble' profession that should remain devoid of the competitive nature of advertising that would soil the nobility of lawyers as justice seekers. This idea has however evolved to be considered as an unreasonable rationalisation with increasing commercialisation of the legal profession and has been observed to be restrictive in means of providing law firms with a competitive edge on the global platform.[10] The courts in *Bangalore Water Supply v. A Rajappa* recognised the legal profession as an industry which demonstrates that the notion of nobility in the traditional belief of the legal profession has transformed into a regular business like function.[11] Furthermore, the upper hand of a lawyer's duty to their client in its conflict with their duty to justice as an officer of the court identifies another aspect that lends a commercial colour to the profession.[12]

As a result, while the constitutionality and chronistic validity of the ban on advertisement by law firms has been the subject of criticism and debate, the law under Rule 36 has not been

[6] *V.B. Joshi v. Union of India* W.P.(C) 532/2008.
[7] INDIA CONST. art. 19, § 2.
[8] *Tata Press Limited v. MTNL* 1995 AIR 2438.
[9] INDIA CONST. art. 19, § 1, cl.(g).
[10] S.V.S. Raghavan, *Report of the High-Level Committee on Competition Policy and Law* (2000).
[11] *Bangalore Water Supply v. A Rajappa* 1978 AIR 548.
[12] *K. Vishnu v. National Consumer Dispute Redressal Commission* 2000 (5) ALD 367.

declared ultra vires of the constitution by a court of law. Moreover, the BCI's rules have been created through proper exercise of authority of law under the Advocates Act.

II. ECONOMIC INDICES OF LIFTING THE BAN

This ban on advertisements by lawyers has been gradually outlawed in many common law countries such as through the decision of *Bates v. State Bar of Arizona* in the United States,[13] and the Solicitor's Practice Rules 1990 in the United Kingdom, which have only banned the use of misleading, defamatory or offensive advertisement by lawyers.[14] This is a result of the legal profession's recognition as an operative business and consequently, an acknowledgement of their fundamental right to commercial free speech. The Indian judiciary has also recognised the right to commercial advertisement on multiple occasions under the fundamental right to freedom of speech and expression outlined in Article 19 of the Constitution.[15] However, this recognition has witnessed a failure for lack of incorporation into the rules for professional conduct of advocates in India which imposes a blanket ban on advertisement for the furtherance of legal business.

While there has been significant constitutional recognition for legal work as commercial activity to have advertising rights, there are greater economic and moral indices to allow advertisement by lawyers. The foremost is that through advertising, a larger number of law firms will receive access to the masses to communicate the nature and specialisation of services they provide. This aids is removing information asymmetry in the market allowing consumers access to additional statistical information that is unattainable through reputational or word of mouth marketing.[16] Opponents of advertisements by lawyers argue that marketing and advertisements would cause law firms to charge more for their services since they will face higher costs courtesy of the overheads of advertising. On the contrary, it is argued that advertisements will create a platform for smaller firms with lower administrational costs to offer their services to a wide ranging, previously undiscovered clientele. Opponents also argue that the ban on advertisement emphasises the use of legal services as a 'necessity'. They contend that advertisements for the provision of low cost services will create a novel market for ill spirited and frivolous litigation.[17] This perspective fails to take into consideration how it will improve the affordability and access for law and middle income persons for who, legal

[13] *Bates v. State Bar of Arizona* 555 P.2d 640 (Ariz. 1976).
[14] Solicitor's Practice Rules, 1990 (United Kingdom)
[15] *Tata Press Limited v. MTNL* 1995 AIR 2438; INDIA CONST. art. 19.
[16] Morley Walker, *Advertising by Lawyers: Some Pros and Cons*, 55 CHI.-KENT L. REV. 407 (1979).
[17] Hazard Jr., Pearce and Stempel, *Why Should Lawyers Be Allowed to Advertise: A Market Analysis of Legal Services*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES, PAPER 2398 (1983).

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services are currently an unaffordable necessity.[18]

Multi service law firms gain bigger reputations and consequently a larger client base for which their charges are levied accordingly as opposed to smaller yet specialising firms which may provide the same or even more personalised services at lower rates. Advertising would improve the quality of services provided by all by bringing a semblance of competition between different categories of firms and also make it more cost effective for consumers.[19] Furthermore, it would create an environment for more informed decision making by consumers specially since it creates a market for price discrimination that would allow consumers who do not employ legal services frequently to have an equitable access to lawyers. It will also enable middle income persons to satisfy their unmet legal needs through information symmetry, greater access and competitive prices. [20]

There is a hesitance amongst the lawmakers, specially the Bar Council of India, to consider advertisement as an alternative source of marketing for lawyers, and information for the public for the fear of portrayal of the legal profession as a business that possibly engages in competitive pricing and other tactics that would taint the noble professional image that lawyers as officers of the court carry. This hesitance overshadows the evident benefits that advertisement would offer to all categories of firms and people of different income groups.

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[18] MORLEY, s*upra* note 16.
[19] Shivam Gomber, *Right to Advertise for Lawyers*, 1 UDGAM VIGYATI VOL. (2016).
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