



Who's who?

The line between lawmakers and legal advisers is blurred. Is it desirable for legal advisers to draft laws on which they will advise?

Raghavendra Verma reports from New Delhi

The Competition Act, the Data Protection Act and the Information Technology Act are just some of India's laws that were written with the assistance of law firms. Indeed, when government ministries draft new laws, it has become common practice for them to turn to the country's corporate lawyers for assistance.

Pallavi Shroff, a partner at Amarchand Mangaldas, who has had a long involvement with the creation of competition law in India, is supportive of the role played by private lawyers in the drafting process. "We bring to the table not only different legal perspectives but also business perspectives on the basis of our dealings with things on a day-to-day basis," she says.

Diljeet Titus, the managing partner of Titus & Co, agrees: "The government does not have the necessary expertise or manpower to effectively draft complex

legislation in new and emerging areas," he says.

However, this view is refuted by India's minister for corporate affairs, M Veerappa Moily. In an exclusive interview with *India Business Law Journal* (*Reflecting on a mutiny*, page 23), Moily says: "I am proud to say that we have an excellent legislative department, which has all the skills needed to draft a law. Inputs and consultations are necessary, but I don't think that any other agency or a law firm is better."

Whatever the level of involvement may be, it is not unusual for the Indian government to tap into the law drafting skills of private lawyers. Moreover, other governments are also benefiting from the expertise of Indian law firms. Economic Laws Practice, for example, has been hired to work on the drafting of Afghanistan's new competition law, the mandate of which is to control surging

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Partner

Amarchand Mangaldas



prices and falling supplies of essential commodities.

Rahul Rai, an associate at the firm, says the Afghan authorities aspire to become part of the global trading system and make a complete transition to market economy. “The challenge is to find a balance between their aspirations and the capability of their judicial system to enforce this third-generation economic legislation,” he says.

Payment in kind

The role that lawyers are expected to play in the process of drafting and reviewing new legislation varies from case to case. Rai says that a law firm’s role depends upon the specific problems that need to be addressed and the political mandate of the government.

In a democracy like India, political considerations and concerns over public perception also weigh heavily on the drafting process. Rai says that during a discussion before the implementation of India’s Competition Act, the then-minister for corporate affairs, Salman Khurshid, said, “at the end of the day I have to go back to my constituency and explain as to how a common man would benefit from the new law”.

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Diljeet Titus

Managing Partner

Titus & Co



Law firms usually receive either a token fee or no remuneration at all for their law-drafting services. But the lack of compensation does not make the assignments unattractive. Most lawyers are more than happy to get involved, perhaps in anticipation of future rewards.

Titus explains that lawyers who interact with ministers and bureaucrats in the law drafting process often benefit by gaining easier access to them in the future – and perhaps even a more sympathetic ear. Lobbying the government and raising concerns on behalf of clients can be a difficult and time-consuming exercise, but for those lawyers who undertake drafting assignments, “getting an appointment with the government to push a client’s case is much easier,” says Titus.

Lack of transparency

The process by which law firms are selected to undertake sensitive government drafting work is far from transparent. Most observers agree that they are normally chosen on the strength of their political and business contacts, and that once a law firm has its foot in the door, it is likely to be approached repeatedly.

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Minister of Corporate Affairs



“There is always a risk of bias or partiality, because a particular firm is given the work over and over again,” says Titus.

Mohit Saraf, a senior partner at Luthra & Luthra, was hired several years ago by the National Council of Applied Economic Research (NCAER), which had been contracted to draft India’s Electricity Act.

As “there were many contractual and legal issues involved” the NCAER could not handle the job internally, so Saraf, who “did the maximum appeals” in this area and understood the sector well, was brought on board to assist.

Saraf confirms that government officials typically approach lawyers with whom they have had dealings in the past. He also concedes that the involvement of private lawyers in the drafting of legislation could lead to conflicts of interest.

This raises the important question of whether it is desirable – or even ethical – for corporate lawyers to write the rules on which they will advise private clients.

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Prashant Bhushan
Senior Counsel



Opportunities for abuse

Torn between government mandates, client demands and the business realities of running a law firm, it is conceivable that lawyers may approach the drafting process with conflicting agendas. Be it the temptation to insert provisions that favour key clients, or the deliberate creation of complications that will force clients to pay for more hours of lawyering, the opportunities for abuse are clear.

“Clients want something done or not done in a particular way and that may influence [how a regulation is drafted],” says Titus. “Law firms may delay the drafting of the legislation or omit some important issues [to give their clients an advantage]”.

Justice Ajit Prakash Shah, a former chief justice of Delhi and Madras high courts, also sees a risk. He is concerned that lawyers or law firms that represent commercial bodies may insert subtle provisions in laws that unduly play to corporate interests.

Civil liberties lawyer Prashant Bhushan, meanwhile, sees the issue as part of a wider problem afflicting India’s political and legal establishment. He argues that laws and policies are largely constructed to pander to the interests

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CV Madhukar
Director
PRS Legislative Research



of private corporations. “Law firms working for companies with commercial interests are preferred for the drafting because the government itself is under the influence of these corporations,” he says.

Bhushan admits that finding impartial experts is tricky but says “it is essential that they are found”.

Checks and balances

There are, of course, safeguards in place. And many observers believe these are sufficient to prevent laws being manipulated to favour certain interest groups.

In recent discussions with *India Business Law Journal*, both Lalit Bhasin, the president of the Society of Indian Law Firms, and Fali Nariman, a prominent senior counsel, rejected concerns over conflicts of interest. The two senior lawyers maintain that the current safeguards are robust enough to detect any provisions that may have been drafted with ill intent. Indeed, after a commercial lawyer has worked on a piece of legislation, the draft is vetted by the relevant ministry and then debated in parliament. Only after clearing these two hurdles is it signed into law.

If the devil lies in the detail, nobody is nit-picking or raising doubts

Vipul Mudgal
Head of Public and Policies Programme,
Centre for the Study of Developing Societies



Yet according to some experts, many laws find their way onto the statute books without being subjected to sufficient scrutiny. CV Madhukar, a director at PRS Legislative Research in New Delhi, says that on many occasions, draft bills are only made public a few days before being presented in parliament. “There is no demand from our MPs for a deeper consultative pre-legislative process in which draft bills are circulated for wider public comments,” he says.

Even when bills are debated in parliament, they may not receive the scrutiny they deserve. Vipul Mudgal, the head of the public and policies programme at the Centre for the Study of Developing Societies in New Delhi, says that in the budget session of parliament in 2010, when 12 bills were passed by the Lok Sabha (the lower house), five took less than 15 minutes of discussion each, while two got through in less than five minutes.

“If the devil lies in the detail,” says Mudgal, “nobody is nit-picking or raising doubts. Worse still is the way in

which the subsidiary legislation and rule-framing takes place at the state level where deliberations are more rare and tinkering relatively easier.”

The buck stops where?

If the country’s MPs are not providing a robust line of defence against laws that have been poorly drafted or manipulated to favour certain interest groups, who is?

Before being presented to parliament, every law is vetted by the ministry responsible for its drafting. But are the bureaucrats who perform this task adequately equipped for the role?

Saraf believes that government bureaucrats often have insufficient knowledge of the drafting process and that the quality of legislation has suffered as a result. “We have very poor quality of laws with many grey areas,” he says.

Afghan tenders and Chinese walls

Most observers agree that concerns over conflicting interests in the drafting of laws can be overcome without removing commercial lawyers from the process altogether. Moreover, the involvement of lawyers is desirable to the extent that they may compensate for the limitations and weaknesses of some bureaucrats.

Rai suggests that lawyers should be invited to review completed drafts and submit their suggestions. This would allow the government to accept or disregard the comments received and make any subsequent alterations in an objective and transparent manner.

Saraf suggests that “a law should not be drafted by one person”. Instead, he points to the merits of a consultative approach, in which all stakeholders are consulted. Saraf says he used such an approach when working on the Electricity Bill.

This view is shared by the minister of corporate affairs: “The lack of consultation leads to conflicts, while better consultation will lead to a better and a smoother implementation of law,” says Moily. “The days are now gone when laws were drafted while sitting within the four walls.”

Improvements could also be made to the process by which law firms are selected to work on drafting assignments. In Afghanistan, Economic Laws Practice won its role in the country’s new competition law in an open tender conducted by Adam Smith International, a UK-based

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Senior Partner
Luthra & Luthra



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Partner
Nishith Desai Associates



governance and economic consultancy. This contrasts starkly to the process of selecting law firms to advise on the drafting of Indian laws.

Vivek Kathpalia, a Singapore-based partner at Nishith Desai Associates, suggests that a similar tender-based process should be adopted by the Indian government. Lawyers would then be selected in a transparent manner, based on their technical skills and the competitiveness of their bids.

He says that India could also adopt systems used in the US and other countries to help ensure a transparent process of selecting law-drafting committees.

A healthy dose of self-regulation may also be required. In the event of conflicts of interest, Madhukar says lawyers should either recuse themselves or make a full disclosure. This would help the ministry concerned to decide whether to discount certain provisions because they come from someone who may have a predisposition.

On the issue of confidentiality, Titus stresses the importance of erecting “Chinese walls” within law firms to prevent the flow of information between teams devoted to government drafting work and those advising private clients.

Kathpalia adds that “the contract for drafting legislation should clearly direct participants to maintain confidentiality and warn that any breach could invite penalty or punishment”.

A step further

Deeper reforms may also be necessary, but these would require increased awareness and substantive debate over the process through which laws are drafted.

The seeds of such change may have already been sown. Recent events surrounding the Lokpal Bill, which proposed a new ombudsman with the responsibility for investigating and prosecuting corrupt government officials and politicians, have brought issues of corruption, accountability and transparency to the forefront of India’s national consciousness.

Mudgal speculates that the extensive involvement of civil society in the drafting of this bill will have a far reaching impact. “The issue of pre-legislative transparency may not have the zing of an anti-corruption campaign,” he says, “but in the long run, it could be more consequential than the Lokpal Bill itself.” ■