Introduction

Scope and Purposes of the Book

The outsourcing of legal services to India is the central focus of my book. The legal process outsourcing (LPO) industry has seen phenomenal growth in recent years. Some critics attribute the growth of legal outsourcing to the recent economic recession and predict that it will fade away once the economy regains its momentum, while others consider it an ‘irreversible trend’. I believe that the LPO industry is here to stay. For the purposes of this book, I have broadly confined myself to three countries where major outsourcing work is currently taking place: the United States of America, the United Kingdom and India.

Economic globalization is transforming practically every economic sector. The legal industry too has not remained untouched by the effects of globalization. Globally – both in developed as well as in emerging nations – legal scholars and academics are discussing the need for reforms in the legal sector. This includes the common law countries, where legal professionalism has traditionally been strong. Unlike other industries – such as finance and accounting – that have undergone transformation through restructuring their business operations; legal professionals, cutting across national boundaries, have been reluctant to embrace these changes. The legal industry that has long remained insulated now needs reform specifically in relation to some legal ethics rules that are incongruous with the present reality. Legal outsourcing to India raises many ethical challenges including conflict of interests, attorney-client privilege,

1. See Romagnino, Kara, Nearshore Alternative: Latin America’s Potential in the Offshore Legal Process Outsourcing Marketplace, 42 U. Miami Inter-Am. L. Rev. 367, 377-378 (2011) (quoting Professor Henderson of the Indian University School of Law, “this is the beginning of a wave that’s only going to get bigger in the years to come.”)
2. See Castells, Manuel, The Rise of The Network Society: The Information Age: Economy, Society and Culture (1st edn. Blackwell, 1996) 67 (quoting Professor Arthurs, “globalization is, among other things, an integrated system of business arrangements that seeks to move large volumes of goods, services, information and capital across international borders with low friction and at high velocity . . . [but] also a technological system that [makes] such movements possible.”)
supervision, fee sharing. The book aims at exploring these specific issues and ascertaining to what extent these challenges will impede the growth of outsourcing of legal services.

The rhetoric of professionalism provided lawyers with a political tool for gaining control of the market for legal services. They managed to persuade governments to prevent non-lawyers from practicing law even to the extent of making it illegal. Laws and regulations have stipulated who can be a lawyer, who can run and own a legal business, and what services they can provide. In this book, I deal in great detail about these issues (control over the legal profession by lawyers) in the context of the United States. Moreover, I devote a significant part analyzing the issue of the liberalization of the legal services in India. Indian law prohibits foreign lawyers from practicing law in India. The Bar Council of India, the regulator of the Indian legal profession, has consistently opposed the entry of foreign law firms into India. The Indian legal sector is maturing. Some economists believe that liberalization in any economic sector without prior ‘infant industry protection’ could prove to be extremely harmful. In other words, sudden liberalization in an emerging economy before adequate safety nets are placed may destroy the growth prospect of that specific domestic industry. Each country has specific conditions and requires specific policies. I discuss this issue in great detail with respect to India.

A changing market-place complemented by unbundling, standardization and outsourcing is propelling the legal industry to behave more like a business and less like a profession. A running theme of this book also reflects upon whether the practice of law corresponds more to ‘profession’ or to ‘business’ logics. Bearing in mind the reality of our times, I slightly lean towards treating the practice of law just like any other profession where profit considerations are involved. For example, I subscribe to the definition of law firms as ‘a business that engages in the profession of practicing laws.’ Moreover, different perceptions of law as a business or as a trade exist among Western countries as well as in the East. For instance, opponents of liberalization of legal services often voice concerns that permitting foreign law firms to practice in India would compromise

4. See Pierce, Russell & Jenoff, Pam, Nothing new under the Sun: How the Legal Profession’s Twenty-First Century Challenges Resemble those of the Turn of the Twentieth Century, 40 Fordham L. Rev. 481, 492 (2012).
5. The infant industry argument is an economic rationale for trade protectionism. It is one of the oldest arguments used to justify the protection of industries from international trade. First formulated by Alexander Hamilton and Friedrich List at the beginning of the 19th Century, the case for infant industry protection has been generally accepted by economists over the last two centuries. See generally Melitz, Marc, When and how should infant industries be protected? 66 Journal of International Economics 177 (2005).
6. See Chapter III.
the core values of the Indian legal profession. Critics contend that Indians view the legal profession as a 'noble' profession, unlike in the West where it is treated as a business. Another recurring subject matter of this book is the independence of the legal profession. Self-regulation is the hallmark of the legal profession in many countries across the world. Whenever the threat of regulation emanates from government, lawyers typically invoke the rhetoric of autonomous control over their work. This book broadly touches upon the issue of the bar's freedom to regulate its own practices.

I devote a specific Chapter to multidisciplinary practices (MDPs). An MDPs allows a non-lawyer to have an ownership interest in an entity that practices law alongside the practice of the other non-lawyer professional. An explanation might be needed to justify the presence of MDPs in a book dealing with the LPO industry. The issue of multidisciplinary practices is an extremely important one for the legal profession in the United States. A common claim by formal professionals like lawyers – seeking to protect their domain – is that an outsider without the professional training required to become a full member of the profession, will not be able to understand the complexities and delicate issues raised in a legal cases. American legal ethics rules expressly forbid non-lawyers to ‘practice law.’

One of the goals of this book is to explore the possibility of including non-lawyers in the delivery of legal services. Even though the majority of legal outsourcing professionals are lawyers in India, they are considered as non-lawyers from the perspective of the U.S. as they cannot practice law in the United States. One of the legal challenges involving legal outsourcing is that the American Model Rules of Professional Conduct do not allow non-lawyers to share profits with lawyers. The study of MDPs in this regard becomes crucial to demonstrate the importance of non-lawyers in the provision of legal services.

Self-regulation is traditionally a key component of occupational control and a core objective for professional projects as professions collectively seek to achieve and exercise a high level of 'institutional autonomy' in managing their own affairs. By excluding non-lawyers, regulators of the legal profession in the United States have effectively placed legal representation beyond the reach of indigent and low-income people who do not have sufficient resources to access justice. In 1991, the Supreme Court Judge Sandra Day O'Connor eloquently expressed this theme in an address to the American Bar Association:

8. See Chapters III, VI.
9. For details on the issue of the rhetoric on “the purity of the legal profession”, see Crystal, Nathan, Core Values: False and True, 70 Fordham L. Rev. 747 (2001); Green, Bruce, The Disciplinary Restrictions on Multidisciplinary practices: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 Minn. L. Rev. 1115, 1144-49 (2000).
The Outsourcing of Legal Services to India: Trends, Challenges and Potential

“We have built a legal framework to protect the poor and it’s a structure of which we can proud. But it has a gate in the front, and lawyers hold the keys. Unless we are willing to unlock the gate for those who can’t afford a key of their own and let them into the shelter we have built for their protection, we might as well not have built it at all.”

A healthy and effective justice system is a core value in any democratic society. Access to justice enables individuals to resolve disputes effectively and aids in enforcing their legal rights. One commentator observed that ‘millions of American citizens live in a form of domestic exile from the law.’ Current statistics on access to justice show that there is a huge gap between the demand for and the supply of legal aid services. Another study revealed that the legal aid program has never provided services of any sort to more than 3 percent of those eligible. Recent cuts in publicly-funded legal aid services have further exacerbated the problem of access to justice for the poor and the low-income citizen of the United States. Being ‘officers of the court’, are lawyers ethically bound to ensure the availability of representation? Should pro bono services be made compulsory for attorneys to enhance the access to justice in the United States? The professional tension between lawyers as public servants and lawyers as normal business people continues to be a point of discussion today. My book touches upon these issues. I devise an innovative proposal to address the issue of representation. My idea is to utilize Indian LPO professionals for the purpose of expanding the scope of legal service delivery to those who are unable to afford expensive legal services in the United States. This possibility of improving access to justice through legal outsourcing has not yet been explored by legal researchers and academics.

**Structure of the Book**

This book is divided into three parts and contains seven Chapters.

**Part I** of the book details the background of the outsourcing of legal services to India. It aims to explore the effect of outsourcing on the U.S. employment market. Finally, it provides an engaging debate over the liberalization of the Indian legal service sector.

13. For details, see Chapter VII.
15. See Chapter VII
Chapter I provide a historical background of how India – which was once a closed economy – became the global leader in the outsourcing industry soon after she liberalized her economy in the early 1990s. I look at the trends in the legal outsourcing market. This Chapter explains the concept of legal process outsourcing (LPO) and discusses the growth of the LPO industry in India. Briefly, I elucidate the types of legal services that are currently outsourced from the U.S.A. and the U.K. to India and other low-cost destinations. I also outline the benefits as well as the challenges associated with the three models of legal outsourcing – third party LPO service providers, captive centers for law firms, and captive centers for corporations. The roles and duties of in-house counsel in the United States have changed significantly since the early decades of the twentieth century. I discuss the historical background of the changing status and position of the general counsel in the United States. Earlier, legal work was undertaken either by clients themselves or by their outside law firms but corporations have, in recent years, led the change either by setting up captive centers in India or by using an American law firm as an intermediary in managing the legal outsourcing business. Although current data reveals that law firms are outsourcing legal services more than corporations, I believe in the coming years the latter entities will command the larger share.

In Chapter II, the focus is on the effect of outsourcing on the job market in the United States. In 2011, the State of Connecticut had introduced a bill designed to prevent law firms and corporations from outsourcing the drafting, reviewing and analyzing of legal documents to workers overseas. Although the bill did not become law it did demonstrate yet again the anti-outsourcing attitudes among U.S. legislators. I begin by exploring the global developments of the outsourcing phenomenon. Outsourcing is not new to the economy of the United States. Initially, most of the jobs outsourced from that country were in the field of manufacturing. However, with the introduction of the fiber optic cable in the 1990s that led to low communication costs, the outsourcing of service industries began to gain traction. In spite of the advantages associated with offshore outsourcing for corporations, recent job losses in the U.S. have resulted in the proposal of many anti-outsourcing bills. Will this protectionist legislation really safeguard U.S. jobs and industries? Are these bills unconstitutional ab initio? To clarify these issues, I discuss general economic theory related to outsourcing and unemployment. Further, I evoke the U.S. Constitution – where federal law is the supreme law with the highest authority and pre-empts any conflicting state laws – to explain the issue of the (un)constitutionality of anti-outsourcing state bills.

Chapter III analyses the issue of the liberalization of the Indian legal service sector. India has benefitted immensely from liberalizing its economy. It is an anomaly that while the LPO sector – a product of globalization – is thriving in India, the legal industry remains closed to foreign
law firms. This Chapter primarily discusses the ban on the entry of foreign law firms into India. I begin by asking why lawyers and law firms from developed countries such as the U.S., the U.K. and Australia are interested in the liberalization of the Indian legal market. I go on to cite examples of ongoing lobbying efforts by foreign governments and bar associations with their Indian counterparts. Soon after India liberalized its economy in 1991, three law firms – among these two were American and one from the U.K. – began exploring the prospect of expanding their base into India. After obtaining permission from the Reserve Bank of India, these three firms opened liaison offices in India. As a matter of fact, none of them operate within the territory of India today. The last one to leave was the U.K. law firm in 2010, when it closed its liaison office in Delhi after the Bombay High Court ruled against the practice of law by foreign firms in India.

I explain various Indian regulatory measures that prohibit foreign lawyers from practicing in India. The debate on the liberalization of the legal sector remains incomplete without discussion of the benefits and drawbacks of allowing foreign law firms to practice in India. Interestingly, despite the prohibitions on practicing law in India, foreign law firms have found various modes through which to operate in the Indian legal market without having a direct presence. Chapter 3 explains all those modes that are currently employed by foreign law firms. Many contend that India, being a member of the World Trade Organization (WTO), is obliged to liberalize its legal sector. I discuss this issue at length in this Chapter. Finally, I suggest an approach India should follow on the issue of opening up the legal service sector for foreign lawyers.

Part II addresses the legal challenges faced by LPO. The outsourcing of legal services calls for a new set of legal ethics rules, as it raises certain specific ethical obligations of an outsourcing lawyer (U.S.) to his client. This is due to the fact that Indian lawyers working on outsourced legal works are non-lawyers from the viewpoint of the United States as they are not legally qualified to practice law in any U.S. jurisdiction. I have identified two forms of legal issues: the first challenge is to address core U.S. legal ethics rules surrounding LPO, and the second concerns data protection law.

Chapter IV deals with ethical issues related to LPO such as conflict of interests, client confidentiality, fee sharing with a non-lawyer, and attorney-client privilege. There are professional ethics rules unique to the profession of law, considerations that do not arise when other service industries consider offshore outsourcing. To begin with, I explain the historical background of codified legal ethics rules in the United States. Thereafter, I deal with specific American legal ethics rules such as those on the unauthorized practice of law by non-lawyers, conflicts of interests, confidentiality, client disclosure, and fee sharing issues related to legal outsourcing. I examine each of these ethical considerations primarily by

After detailing specific issues related to LPO, I explore the subject of legal malpractice liability. It is a tool to regulate the behavior of lawyers and involves professional negligence in exercising ordinary skills and knowledge while representing clients. The question of whether the violation of legal ethics rules attracts legal malpractice liability or whether it is merely confined to disciplinary proceedings against errant lawyers is explored in this Chapter. I then turn my attention to the requirement of an expert witness in assessing violations of professional standards. This is because it is difficult for a layperson to determine whether there has been any violation of professional standards. The assistance of an expert witness is required in such cases. As of now, there are no Formal Opinions by the American Bar Association specifically dealing with a malpractice liability claim in relation to legal process outsourcing. Formal Opinions have so far focused on the professional duties of outsourcing lawyers rather than the malpractice liability. Finally, I discuss how lawyers have attempted various methods to limit their malpractice liability through establishing professional corporations, Limited Liability Partnerships (LLP) etc.

Chapter V deals with data protection law which is another challenge associated with legal process outsourcing to India. India does not have a comprehensive data protection law. Foreign investors and corporations have shown great concerns over the absence of adequate data protection laws in India. I begin by exploring the roots of privacy laws in the developed world. Subsequently, I explain relevant laws related to data protection in the U.S. and the European Union, which are the major source locations of business outsourcing. I also reflect on the Safe-Harbor mechanism which sets out a framework of data protection standards allowing the free flow of personal data from European Economic Area (EEA) data controllers to U.S. organisations. I then turn to the concept of privacy law in India. I also discuss the relevant Indian data protection laws surrounding outsourcing such as the Information Technology Act, 2000 and the Indian Contract Act, 1872. In the absence of comprehensive data protection laws, Indian outsourcing providers have engaged in voluntary control in order to maintain data security. Briefly, I outline these measures along with a suggestion to include an omnibus data protection law in India.

Part III broadly deals with the role of non-lawyers in the delivery of legal services. It explains the advantages of multidisciplinary practices that aim to cater to corporate clients. This Part focuses on the role of LPO professionals in improving access to justice for indigent Americans.

Chapter VI explores another interesting phenomenon: multidisciplinary practices. The United States prohibits the formation of MDPs. The ABA Model Rules do not allow American lawyers to share fees with
non-lawyers. The rationale behind this is that sharing profits with non-lawyers may compromise the lawyer’s professional independence. The globalized economy fuelled by the growth of information technology and reduced trade barriers has transformed the ways in which professionals serve their global business clients. Unlike in other service industries, American legal professionals have been reluctant to adopt reforms in the legal industry. I begin by briefly discussing the issue of the professional independence of lawyers in the United States. Many claim that the American legal profession uses ethical standards as a tool for stifling competition and operating as a monopoly. I also detail the growth of the ‘Big Five’ accounting firms in the early 1990s in the U.S., which created the fear of the acquisition of law firms in foreign markets by the major accounting firms. I provide a historical sketch of American legal regulators’ stance on MDPs. Challenges and benefits of allowing MDPs is the focal point of discussion. Thereafter, I give an overview of MDPs in the United Kingdom and New South Wales (Australia).

Chapter VII of my book suggests a way of improving access to justice to poor citizens of the United States through Indian legal outsourcing professionals. To the best of my knowledge, it is a novel proposal. Although the United States has the world’s highest concentration of lawyers, it has failed to provide access to justice to its indigent and lower-middle class population. With the use of available statistics on legal aid and access to justice in the United States, I demonstrate the abysmal plight of the American civil justice system. However, it would be unfair to ignore the efforts that have been undertaken by the U.S. government to enhance access to justice for low-income groups. I discuss some of these measures, such as the creation of Legal Services Corporations (LSCs), class action suits, the use of pro bono services, and the increased use of paralegals and legal assistants in the delivery of legal services. Perhaps the most controversial proposals related to the lawyer’s duty to serve the poor sections of society has been mandatory pro bono service. Should lawyers be forced to serve the poor? I analyze the issue of mandatory pro bono service in detail in this Chapter.

The availability of class-action suits in the U.S. is seen by some as a legal mechanism that has made legal representation more affordable to indigent defendants. I refute this argument. I also look at the phenomenon of the unbundling of legal services in response to the growing scarcity of lawyers to represent poor and lower-income litigants. The use of paralegals has been recognized as crucial to the delivery of legal services in legal aid services. I explore this issue in-depth. Finally, I provide a brief proposal as to how Indian LPO professionals might expand the scope of legal service delivery to low-income people who are unable to afford legal services in the United States.