



BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil)No. of 2021  
(Special Original Jurisdiction)

Adv. Rajesh Vijayan : Petitioner

v.  
Bar Council of India and another : Respondents

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Dated this the 28<sup>th</sup> day of June, 2021

Sd/-  
COUNSEL FOR THE PETITIONER

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Bar Council of India and another : Respondents

**Synopsis**

*"[People] look upon lawyers as trained to use the freedom guaranteed by the country's constitution, as persons who know better than ordinary people how to use this freedom. In times of grave crisis - constitutional or national - they look at lawyers (and associations of lawyers) to see how they react. They have done so in the past - and will continue to do so in the future"*

- Fali S. Nariman, Before Memory Fades (2010)

Dates and Events

25.06.2021	Ext. P1 notification issued by the Bar Council of India as per which Sections V and V-A are added to Chapter II of Part VI of the Bar Council of India Rules.
26.06.2021	Ext. P1 is published in the Gazette of India

The petitioner is aggrieved by the addition of **Section V ('Duties towards Society and Bar')** and **Section V-A ('Code of conduct and disqualification for members of Bar Councils')** to Chapter II of Part VI of the Bar Council of India Rules as per Ext. P1. These Sections have the effect of, inter alia, prohibiting criticism and dissent against the Bar Council of India and other Bar Councils, and demanding unquestioning acceptance of their decisions. Violations of these Sections attracts the consequences of suspension, removal of

membership, and disqualification from contesting elections to Bar Associations and Bar Councils.

The petitioner is filing this Writ Petition in his capacity as an Advocate practising before this Hon'ble Court whose rights are affected by Section V and also in his capacity as an elected member of the Bar Council of Kerala whose rights are affected by Section V-A.

**Sections V and V-A are constitutionally defective as they suffer from pervasive vagueness.** Undefined, subjective, and open-ended terms such as 'healthy criticism', 'undermining the dignity of Bar Councils', 'motivated statement', 'attacking decisions', 'derogatory words' etc. are used to distinguish permissible and impermissible expressions in these Sections. Whether or not a statement is 'healthy', 'attacking', 'undermining', 'derogatory' etc. is a matter of subjective opinion that varies from individual to individual. A 'motivated statement', which is sought to be prohibited, is an unclear term in the absence of specifying what motive is being referred to, since practically all statements would have some motive behind them, whether good or bad. In *Shreya Singhal v. Union of India* reported in (2015) 5 SCC 1, the Hon'ble Supreme Court struck down similar restrictions on free speech and expression since they were subjective and overbroad, and since different people could have different understandings of these restrictions.

Further, it is a settled position of law that **the rights under Article 19 (1) (a) cannot be restricted on any ground other than those specified in Article 19 (2).** Demanding that Bar Council members do not criticize any decisions of Bar Councils in public, that Advocates do not make "motivated" statements against the Bar Councils, that Advocates and Bar Council members do not

undermine the dignity or authority of the Bar Councils etc. cannot be said to be reasonable restrictions falling under any of the grounds in Article 19 (2).

**Advocates have often been at the forefront of public engagement and participation in our country,** and the opinions and expertise shared by Advocates on judicial decisions as well as decisions of the Bar Councils are often of great public relevance and a crucial source of information for the public at large. Prohibiting or disincentivising Advocates and Bar Council members from engaging in public discussion of such decisions would defeat the very purpose of the constitutional freedom of speech and expression.

Sections V and V-A fundamentally fail to recognize that **criticism, disagreement, dissent etc. are all protected under Article 19 (1) (a)**, as clarified by the Hon'ble Supreme Court in decisions such as Kedar Nath Singh v. State of Bihar reported in (1962) Supp. 2 SCR 769. Even with respect to the judicial system, the Hon'ble Supreme Court in P.N. Duda v. P. Shiv Shanker reported in (1988) 3 SCC 167 held that administration of justice and judges are open to public criticism and public scrutiny and that judges also have their accountability to the society. Therefore, the prohibition on criticism sought to be achieved through the vague restrictions of Sections V and V-A are legally impermissible.

**Sections V and V-A demand that Advocates and Bar Council members unquestioningly accept and obey decisions of the Bar Councils.** This is an unreasonable and total restriction of the fundamental right of free speech and expression of Advocates and Bar Council members, and it does not fall within any of the types of reasonable restrictions specified in Article 19 (2) of the Constitution. In some instances, **there may even be a legal duty on**

**Advocates to discuss and evaluate the correctness of decisions taken by the Bar Council of India.** For instance, when Ext. P5 notice was issued by the Bar Council of India calling on Advocates to strike and abstain from court work, an Advocate would be well within his or her rights to comment on and evaluate the correctness and legality of the same in the light of the Hon'ble Supreme Court's declarations that lawyers have no right to go on strike or to abstain from courts.

Further, the procedure prescribed in Section V-A, for declaring an Advocate or a member of the Bar Council as disqualified for contesting the elections of any Bar Association or Bar Council, **violates the basic principles of natural justice.** The final decision is made by the Bar Council of India even if the very allegation against the Advocate or member of the Bar Council is that he criticized the Bar Council of India or its decisions. There is also a possibility of the Bar Council of India having a majority of votes on the enquiry committee.

It is the admitted position of the Bar Council of India that Section V is issued under Section 49 (1) (c) of the Advocates Act, 1961. Ext. P1 itself shows that the Section V which is newly added is "Under Section 49 (1) (c) of the Advocates Act, 1961". **As per the first proviso to Section 49 (1) of the Advocates Act, 1961, Section V can be given effect to only after it has been approved by the Hon'ble Chief Justice of India.** The Bar Council of India has not clarified as to whether or not it has obtained such approval. The Section will continue to have a chilling effect on the free expression of Advocates and Bar Council members, as long as it remains uncertain as to whether or not such approval has been obtained. It is not clear as to whether this statutorily mandated procedure has been followed.

Hence, aggrieved by the illegal incursions sought to be made by Sections V and V-A into the fundamental freedoms and rights of the petitioner who is both an Advocate and a member of a Bar Council, this Writ Petition is being preferred.

**Decisions Referred:**

- 1) Shreya Singhal v. Union of India, (2015) 5 SCC 1
- 2) Richard Grayned v. City of Rockford, [408 US 104]
- 3) State of Madhya Pradesh v. Baldeo Prasad, AIR 1961 SC 293
- 4) K.A. Abbas v. Union of India, (1970) 2 SCC 780
- 5) Romesh Thappar v. State of Madras, AIR 1950 SC 124
- 6) Brij Bhushan v. State of Delhi, in AIR 1950 SC 129
- 7) Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305
- 8) Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788
- 9) S. Khushboo v. Kanniammal, (2010) 5 SCC 600
- 10) S. Rangarajan v. P. Jagjivan Ram, 1989 (2) SCC 574
- 11) Kedar Nath Singh v. State of Bihar, (1962) Supp. 2 SCR 769
- 12) P.N. Duda v. P. Shiv Shanker, (1988) 3 SCC 167
- 13) Ex-Capt. Harish Uppal v. Union of India, (2003) 2 SCC 45

Dated this the 28<sup>th</sup> day of June, 2021.

Sd/-  
COUNSEL FOR THE PETITIONER

**BEFORE THE HON'BLE HIGH COURT OF KERALA AT  
ERNAKULAM**

W.P.(Civil) No. \_\_\_\_\_ of 2021  
(Special Original Jurisdiction)

**Petitioner:-**

Adv. Rajesh Vijayan  
S/o. late K.N. Vijayan, aged 50 years,  
Residing at Narayaneeyam,  
Edapally North P.O.,  
Ernakulam, Kerala - 682024

Vs.

**Respondents:-**

1. Bar Council of India,  
21, Rouse Avenue Institutional Area,  
Near Bal Bhawan, New Delhi – 110002  
Represented by its Secretary
2. Bar Council of Kerala,  
Bar Council Bhavan, High Court Campus,  
Ernakulam, Kochi – 682031  
Represented by its Secretary

**MEMORANDUM OF WRIT PETITION FILED UNDER ARTICLE  
226 OF THE CONSTITUTION OF INDIA**

The Address for service of notice and process to the petitioner is that of their counsel **M/s Santhosh Mathew, Arun Thomas, Jennis Stephen, Vijay V. Paul, Karthika Maria, Veena Raveendran, Anil Sebastian Pulickel, Jaisy Elza Joe, Abi Benny Areeckal, Leah Rachel Ninan, Nanda Sanal, Karthik Rajagopal, Sanita Sabu Varghese, Manasa Benny George, and Mathew Nevin Thomas, M/s. Ninan & Mathew Advocates, S1, 2<sup>nd</sup> Floor, Empire Building, High Court East End, Cochin-18.**

The address for service of notice on the respondents is as stated above.

### **STATEMENT OF FACTS**

1. The petitioner is filing this Writ Petition aggrieved by the addition of Section V and Section V-A to Chapter II of Part VI of the Bar Council of India Rules, which has the effect of, *inter alia*, prohibiting criticism and dissent against the Bar Council of India and other Bar Councils, and demanding unquestioning acceptance of all decisions taken by them.

2. It is submitted that these newly added rules infringe on the constitutionally protected freedom of speech and expression of Advocates and Bar Council members. The petitioner's rights as an Advocate and as a member of the Bar Council of Kerala are curtailed by the addition of Section V and Section V-A to Chapter II of Part VI of the Bar Council of India Rules. Hence he is filing this Writ Petition in his capacity as an Advocate whose rights are affected by Section V and also in his capacity as an elected member of the Bar Council of Kerala whose rights are affected by Section V-A. He is personally aggrieved by both Sections V and V-A.

3. The rules suffer from the vice of vagueness and consequently create an indisputable chilling effect on public engagement and participation by Advocates. They blatantly violate the decisions of the Hon'ble Supreme Court which have laid down the legally permissible restrictions on free speech and expression.

They also prescribe a procedure for proceeding against Advocates and Bar Council members which violates the basic principles of natural justice. By publishing them in the Gazette of India, an attempt is being made to inhibit the exercise of free speech and expression by Advocates and Bar Council members, even though the statutorily mandated procedure for giving effect to such rules has not been fulfilled.

4. The petitioner is an Advocate enrolled with the Bar Council of Kerala (Enrolment No. K/651/1996) and practicing before this Hon'ble Court. He is also a member of the Bar Council of Kerala, having been elected to that position in 2018 by the Advocates enrolled with the Bar Council of Kerala. He attended his first meeting as a member of the Bar Council of Kerala on 03.02.2019. The impugned rules have a direct impact on the petitioner's constitutional and legal rights, both in his capacity as an Advocate and in his capacity as an elected member of the Bar Council of Kerala.

5. The 1<sup>st</sup> respondent is a statutory body constituted under Section 4 of the Advocates Act, 1961. Its powers and functions are prescribed in the Advocates Act, 1961. The 2<sup>nd</sup> respondent is also a statutory body which is constituted under Section 3 of the Advocates Act, 1961.

6. The functions of the Bar Council of India are as per Section 7 of the Advocates Act, 1961 which states as follows:

*(1) The functions of the Bar Council of India shall be:*

*(b) to lay down standards of professional conduct and etiquette for advocates;*

*(c) to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council;*

*(d) to safeguard the rights, privileges and interests of advocates;*

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*(g) to exercise general supervision and control over State Bar Councils;*

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*(l) to perform all other functions conferred on it by or under this Act;*

*(m) to do all other things necessary for discharging the aforesaid functions.*

7. The rule-making powers of the Bar Council of India are as per Section 49 of the Advocates Act, 1961 which states as follows:

*(1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe:*

*(a) the conditions subject to which an Advocate may be entitled to vote at an election to the State Bar Council including the qualifications or disqualifications of voters, and the manner in which an electoral roll of voters may be prepared and revised by a State Bar Council;*

(ab) *qualifications for membership of a Bar Council and the disqualifications for such membership;*

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. .

(c) *the standards of professional conduct and etiquette to be observed by advocates;*

.  
. .

(f) *the procedure to be followed by the disciplinary committee of a State Bar Council and by its own disciplinary committee;*

.  
. .

(j) *any other matter which may be prescribed:*

*Provided that no rules made with reference to clause (c) or clause (gg) shall have effect unless they have been approved by the Chief Justice of India"*

8. In exercise of its rule-making powers, the Bar Council of India has issued the Bar Council of India Rules. Part VI of the Bar Council of India Rules deals with 'Rules Governing Advocates'. Chapter II of the said Part VI deals with 'Standards of Professional Conduct and Etiquette'. Till the insertion of the impugned rules, Chapter II of Part VI of the Bar Council of India Rules had the following sections:

- a. Section I: Duty to the Court
- b. Section II: Duty to the Client
- c. Section III: Duty to Opponent

- d. Section IV: Duty to Colleagues
- e. Section IV-A: (*Untitled*)
- f. Section V: Duty in imparting training
- g. Section VI: Duty to Render Legal Aid
- h. Section VII: Restrictions on Other Employments

9. It is submitted that now, as per notification dated 25.06.2021 (published in the Gazette of India dated 26.06.2021), the Bar Council of India has added **Section V ('Duties towards Society and Bar')** and **Section V-A ('Code of conduct and disqualification for members of Bar Councils')** to Chapter-II of Part VI of the Bar Council of India Rules. True copy of the notification dated 25.06.2021 (published in the Gazette of India dated 26.06.2021) issued by the Bar Council of India is produced herewith and marked as **Exhibit P1**. The newly introduced Sections appear to have been numbered as Section V and Section V-A, even though there already exists a different Section V in Chapter II of Part VI of the Bar Council of India Rules.

10. Section V which has been introduced by Ext. P1 deals with 'Duties towards Society and Bar' and is stated to be issued under Section 49 (1) (c) of the Advocates Act, 1961. It states that "An Advocate shall conduct himself/herself as a **gentleman/gentle lady** in his/her day to day life and he/she shall not do any unlawful act, **he/she shall not make any statement in the Print, Electronic or Social Media**, which is **indecent** or **derogatory**, defamatory or **motivated**, **malicious** or **mischievous** against any Court of Judge or any member of Judiciary, or against State Bar

*Council or Bar Council of India nor shall any Advocate engage in any **willful violation, disregard or defiance of any resolution or order** of the State Bar Council or Bar Council of India and any such act/conduct shall amount to misconduct and such Advocates would be liable to be proceeded with under Section 35 or 36 of the Advocates Act, 1961” (emphasis supplied).*

11. Section V-A which has been introduced by Ext. P1 deals with ‘Code of conduct and disqualification for members of Bar Councils’ and is stated to be issued under Sections 49 (1) (a) and 49 (1) (ab) of the Advocates Act, 1961. Clause (i) states that “*no member of any State Bar Council or of Bar Council of India shall be permitted **to publish anything or to make any Statement or Press-Release in Print, Electronic or Social Media against any Resolution or Order** of concerned State Bar Council or Bar Council of India or **to make/use any derogatory or abusive language/comments/words** against the Bar Council or its office-bearers or members”.* Clause (ii) further states that “**the decision** of any State Bar Council or Bar Council of India **shall not be criticized or attacked** by any members of Bar Council in public domain”. Clause (iii) further states that “**no Advocate or any member of** any State Bar Council or the Bar Council of India shall **undermine the dignity or authority** of the State Bar Council or Bar Council of India”. It is then stated that the violation of clauses (i), (ii), or (iii) can amount to misconduct under Section 35 of the Advocates Act, 1961. It is further stated that “*violation of Section V and/or Section V-A **shall** result in suspension or removal of membership of such member from the Bar Council”.* It is also stated that the Bar Council of India may declare Advocates or members of

Bar Councils who violate the newly introduced Sections as disqualified from contesting the elections of any Bar Association or Bar Council for any period. A 'Note' appended to clause (iv) of Section V-A introduced by Ext. P1 states that "*Provided that a **healthy and bona-fide criticism made in good faith**, shall not be treated as a 'misconduct'*" (emphasis supplied).

12. It is submitted that Section V-A introduced by Ext. P1 also prescribes a procedure for declaring an Advocate or a member of the Bar Council as disqualified for contesting the elections of any Bar Association or Bar Council. The Bar Council of India is to constitute a 3-member committee headed by a former Chief Justice or former Judge of any High Court to hold an inquiry. However, since the committee can also consist of members of the Bar Council of India, if the decisions of the committee are taken by majority voting, the decision of the former Chief Justice or former Judge of the High Court could potentially be overruled by the members of the Bar Council of India. Moreover, in any case, it is clearly stated that "*Bar Council of India shall take its decision after consideration of the report of the Committee*". Hence, it is clear that the final decision is made by the Bar Council of India itself, even though the allegation against the Advocate or member of the Bar Council could very well be that he/she criticized a decision of the very same Bar Council of India.

13. It is submitted that Ext. P1 makes it clear that the newly introduced Section V is issued under Section 49 (1) (c) of the Advocates Act, 1961. At the beginning of Ext. P1, it is stated that the amendment is "*as per the functions contained under Section 7*

(1) (b) (c) (d) (g) and (l) and (m) read with section 49 (1) (a) and (ab) of Advocates Act, 1961". However, Ext. P1 clearly states in the newly added Section V itself that it is "Under Section 49 (1) (c) of the Advocates Act, 1961". Hence, it is the admitted position of the 1<sup>st</sup> respondent that Section V has been introduced under Section 49 (1) (c) of the Advocates Act, 1961. As per the first proviso to Section 49 (1) of the Advocates Act, 1961, no rules made with reference to Section 49 (1) (c) shall have effect unless they have been approved by the Hon'ble Chief Justice of India. Ext. P1 does not disclose if any approval from the Hon'ble Chief Justice of India has been obtained for Section V. To the best of the petitioner's knowledge, the Bar Council of India has not clarified as to whether or not it has obtained approval from the Hon'ble Chief Justice of India with respect to Section V. Without fulfilling the statutory requirement of obtaining the approval of the Hon'ble Chief Justice of India, Section V cannot be given effect to. However, the impression that has been widely reported and conveyed in the legal and general media is that with the publication of Ext. P1 in the Gazette of India, the newly introduced Sections have come into operation. True copy of the article titled 'Bar Council of India amends rules to curb criticism against judges, itself' published in India Today on 27.06.2021 is produced herewith and marked as **Exhibit P2**. True copy of the article titled 'Derogatory words can lead to suspension of lawyers' published in Hindustan Times on 27.06.2021 is produced herewith and marked as **Exhibit P3**. True copy of the article titled 'BCI's new rules prohibit lawyers from making mischievous, defamatory comments against any Judge, Court, Bar Council in public' published in ANI News on 27.06.2021 is produced herewith

and marked as **Exhibit P4**. In the light of how Ext. P1 has been widely reported, it is clear that it already creates a chilling effect on the exercise of free speech and expression by Advocates and Bar Council Members, since the Bar Council of India has not clarified whether or not Section V is currently in effect by virtue of having obtained the approval of the Hon'ble Chief Justice of India. Given the drastic penalties that have been prescribed, in the absence of certainty as to whether or not Section V is currently in effect, it is likely that many persons will exercise self-censorship, thus leading to a classic case of chilling effect on free speech and expression.

14. It is submitted that Sections V and V-A introduced by Ext. P1 are unconstitutional and illegal. The vague and subjective standards adopted in Sections V and V-A to determine what is permissible speech violate the petitioner's rights under Part III of the Constitution and also fly in the face of the decisions of the Hon'ble Supreme Court of India. The demand for unquestioning agreement with the decisions of the Bar Councils is also a violation of the petitioner's constitutional rights. Aggrieved by the introduction of Sections V and V-A in Chapter II of Part VI of the Bar Council of India Rules, the and left with no other efficacious and alternative remedy than to approach this Hon'ble Court, the petitioner begs to prefer this Writ Petition on the following among other:

#### **GROUND**

- A. Sections V and V-A introduced by Ext. P1 in Chapter II of Part VI of the Bar Council of India Rules are illegal, arbitrary,

contrary to the petitioner's legitimate expectations, and unconstitutional in so far as they violate the petitioner's rights under Articles 19 (1) (a), 14, and 21 of the Constitution of India.

- B. Even a cursory glance at Sections V and V-A introduced by Ext. P1 would make it clear that they suffer from pervasive vagueness. Terms such as 'healthy criticism', 'undermining the dignity of Bar Councils', 'motivated statement', 'attacking decisions', 'derogatory words' etc. have no specific or clear definition/meaning in law. None of these terms have been given any definition in Ext. P1 either. Terms such as these are highly subjective and consequently prone to misuse. Whether or not a statement is 'healthy', 'attacking', 'undermining', 'derogatory' etc. is a matter of subjective opinion that varies from individual to individual.
- C. In addition to vagueness, Sections V and V-A also use terms that are unreasonably wide and open-ended. Even the dictionary definitions of these terms do not clarify what exactly is sought to be penalized by Sections V and V-A. For instance, Section V seeks to prohibit 'motivated' statements. According to the Cambridge English dictionary, the meaning of motivated is "*having a particular motive eg. a racially motivated attack*". According to the Collins dictionary, the meaning of motivated is "*occurring for the reason specified eg. politically motivated*". Therefore, in the absence of specifying what motive is being referred to, a 'motivated statement' is a value-neutral term where the motive behind

the statement could be good, bad or even neutral. Almost any statement could thus fall afoul of the prohibition against motivated statements in Section V.

- D. The Hon'ble Supreme Court has categorically held that it is not permissible to restrict the freedom of speech and expression by using vague and subjective terms. In **Shreya Singhal v. Union of India** reported in **(2015) 5 SCC 1**, the Hon'ble Supreme Court struck down Section 66-A of the Information Technology Act. It was held that the expressions used in Section 66-A were unconstitutionally vague and without a clear demarcating line as to what constituted an offence and what did not. This was because of the subjective and overbroad nature of the expressions used in Section 66-A, with different people having different understandings of the meanings of these expressions. The penalization attached to acts which are imprecisely defined and unclearly demarcated was held to be constitutionally impermissible.
- E. It is a cardinal principle of law that a vague law that imposes penalties is constitutionally unsound. As held by the U.S. Supreme Court in **Richard Grayned v. City of Rockford** [408 US 104], "*Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement*

*is to be prevented, laws must provide explicit standards for those who apply them. A Vague Policy matters to policemen, judges, and juries for resolution on an adhoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut upon sensitive areas of basic First Amendment freedoms, it "operates to inhibit the exercise of (those) freedoms". Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked".* A long line of decisions of the Hon'ble Supreme Court have also struck against vague laws, including **State of Madhya Pradesh v. Baldeo Prasad** reported in AIR 1961 SC 293 and **K.A. Abbas v. Union of India** reported in (1970) 2 SCC 780.

- F. There is an exception in Section V-A for *"healthy and bona-fide criticism made in good faith"*. However, the vagueness in the terms used, including *"healthy"*, mean that their interpretations can be subjective and vary from person to person. This results in Advocates and Bar Council members not being able to know with certainty as to whether their expressions could subsequently run afoul of Sections V and V-A, thus attracting the severe penalties specified. This results in a significant chilling effect on the exercise of the fundamental right to free speech and expression, with Advocates and Bar Council members having the tendency to err on the side of self-censorship.

- G. In any case, the exception for “*healthy and bona-fide criticism made in good faith*” is only found in Section V-A and no corresponding exception is seen in Section V. Thus, Section V can be seen as admitting of no exceptions, even to the limited extent that Section V-A does. This renders Section V in particular arbitrary and unreasonable.
- H. It is a settled position of law that the rights under Article 19 (1) (a) cannot be restricted on any ground other than those specified in Article 19 (2). The same has been held in decisions such as **Romesh Thappar v. State of Madras** reported in **AIR 1950 SC 124** and **Brij Bhushan v. State of Delhi** reported in **AIR 1950 SC 129**. The Bar Council of India is a statutory body performing public functions. It is mandated to operate within the constraints of the Constitution of India. Yet, many of the types of speech and expression sought to be prohibited by the Bar Council of India through Sections V and V-A have absolutely no basis in Article 19 (2). Demanding that Bar Council members do not criticize any decisions of Bar Councils in public, that Advocates do not make “*motivated*” statements against the Bar Councils, that Advocates and Bar Council members do not undermine the dignity or authority of the Bar Councils etc. cannot be said to be reasonable restrictions falling under any of the grounds in Article 19 (2) – namely, sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

- I. From the time of India's struggle for freedom, Advocates have often been at the forefront of public engagement and participation. Judicial decisions as well as decisions of the Bar Councils often touch upon issues of great public relevance. The opinions and expertise shared by Advocates on such decisions and issues is a crucial source of information for the public at large. Any direct or indirect prohibition or disincentive for Advocates to engage in public discussion of such decisions would defeat the very purpose of the constitutional freedom of speech and expression. A long line of decisions including **Romesh Thappar v. State of Madras** reported in **AIR 1950 SC 124**, **Sakal Papers (P) Ltd. v. Union of India** reported in **AIR 1962 SC 305**, **Bennett Coleman & Co. v. Union of India** reported in **(1972) 2 SCC 788**, and **S. Khushboo v. Kanniammal** reported in **(2010) 5 SCC 600** have discussed the cardinal importance and necessity of the freedom of speech and expression in a democratic society, and the importance and necessity is only even greater when it comes to Advocates.
  
- J. Prohibiting or disincentivizing discussions on important issues is anathema to a democracy. The Hon'ble Supreme in **S. Rangarajan v. P. Jagjivan Ram** reported in **1989 (2) SCC 574** held that *"The democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process*

*of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value".* The principles recognized by the Hon'ble Supreme Court in this case are applicable to the relationship between the Bar Council of India and Advocates/Bar Council members also. Hence, the attempt of the Bar Council of India to disincentivize open and public discussion of important issues ought to be interdicted.

- K. Sections V and V-A fundamentally fail to recognize that criticism, disagreement, dissent etc. are all protected under Article 19 (1) (a). They would be impermissible only if they reach the stage of incitement. The Hon'ble Supreme Court held in **Shreya Singhal v. Union of India** reported in **(2015) 5 SCC 1** that freedom of speech and expression involves three concepts – discussion, advocacy, and incitement. It was held that mere discussion or even advocacy of even unpopular causes is at the heart of Article 19 (1) (a) and that it is only when such discussion or advocacy reaches the level of incitement that Article 19 (2) can kick in. Similarly, the Hon'ble Supreme Court in **Kedar Nath Singh v. State of Bihar** reported in **(1962) Supp. 2 SCR 769** held that *"A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder"*. Even with respect to the

judicial system, the Hon'ble Supreme Court in **P.N. Duda v. P. Shiv Shanker** reported in **(1988) 3 SCC 167** held that administration of justice and judges are open to public criticism and public scrutiny and that judges also have their accountability to the society. It was held that it is only when the criticism is unfair or unreasonable, hampers the administration of justice, or erodes faith in the judicial system that contempt of court proceedings would be suitable. Therefore, analogously, there cannot be an overbroad prohibition by the Bar Council of India of criticism, disagreement, dissent etc. by Advocates or Bar Council members.

- L. Sections V and V-A demand that Advocates and Bar Council members unquestioningly accept and obey decisions of the Bar Councils. Section V says an Advocate "*shall not engage in any willful violation, disregard or defiance of any resolution or order of the State Bar Council or Bar Council of India*". Similarly, Section V-A says that Bar Council members shall not publish or state anything against any resolution or order of the Bar Councils and shall also not criticize or attack the decisions of Bar Councils in the public domain. This is a grave violation of the fundamental freedom of speech and expression enjoyed by Advocates and Bar Council members. Even constructive criticism or polite disagreement or academic disagreement with decisions of the Bar Councils is not permitted. This is an unreasonable and total restriction of the fundamental right of free speech and expression of Advocates and Bar Council members, and it does not fall within any of

the types of reasonable restrictions specified in Article 19 (2) of the Constitution.

- M. In some instances, there may even be a legal duty on Advocates to discuss and evaluate the correctness of decisions taken by the Bar Council of India. For instance, the Bar Council of India as per resolution dated 29.03.2017 called on Advocates to strike and abstain from court work on 31.03.2017 to protest against a proposal of the Law Commission of India. True Copy of the notice dated 29.03.2017 issued by the Chairman of the Bar Council of India as published on the website of the Bar Council of India is produced herewith and marked as **Exhibit P5**. As early as 2003, the Hon'ble Supreme Court in **Ex-Capt. Harish Uppal v. Union of India** reported in **(2003) 2 SCC 45** had held that lawyers have no right to go on strike or to abstain from courts in pursuance of a call for strike. An Advocate who may be aware of the view taken by the Hon'ble Supreme Court would be well within his or her rights to comment on and evaluate for himself or herself the correctness and legality of the Bar Council of India's call for strike. However, after the introduction of Sections V and V-A, such comments and actions from Advocates or Bar Council members will make them liable for disciplinary action. By insisting on unquestioning obedience, the Bar Council of India thus puts Advocates in legally unreasonable positions.
- N. The procedure prescribed in Section V-A, for declaring an Advocate or a member of the Bar Council as disqualified for

contesting the elections of any Bar Association or Bar Council, violates the basic principles of natural justice. The final decision is made by the Bar Council of India. This is the case even if the very allegation against the Advocate or member of the Bar Council is that he criticized the Bar Council of India or its decisions. The Bar Council of India cannot be considered an impartial and objective arbiter in such cases.

- O. As mentioned hereinbefore, it is the admitted position of the 1<sup>st</sup> respondent that Section V is issued under Section 49 (1) (c) of the Advocates Act, 1961. Ext. P1 itself shows that the Section V which is newly added is "*Under Section 49 (1) (c) of the Advocates Act, 1961*". As per the first proviso to Section 49 (1) of the Advocates Act, 1961, Section V can be given effect to only after it has been approved by the Hon'ble Chief Justice of India. The Bar Council of India has not clarified as to whether or not it has obtained such approval. Even if such approval has not been obtained and Section V therefore cannot be given effect to, it will continue to have a chilling effect on the free expression of Advocates and Bar Council members, as long as it remains uncertain as to whether or not such approval has been obtained.
- P. With respect to defamation, there are exceptions specified in Section 499 of the Indian Penal Code and there are also certain procedural safeguards available under Section 199 of the Code of Criminal Procedure. Similarly, contempt of court proceedings also provide for some defenses such as justification by truth. However, Section V while prohibiting

defamatory statements and while attempting to protect Courts, Judges and members of the judiciary, fails to provide corresponding exceptions and defenses, thus rendering it arbitrary, disproportional and unbalanced.

On these and other grounds to be urged at the time of hearing, it is most humbly prayed that this Hon'ble Court may be pleased to allow this Writ Petition by granting the following:

### **RELIEFS**

- 1) Issue a writ of mandamus or any other appropriate writ, order or direction declaring that Sections V and V-A of Chapter II of Part VI of the Bar Council of India Rules, introduced by Ext. P1, are unconstitutional since they are violative of Articles 14, 19 (1) (a), and 21 of the Constitution of India
- 2) Issue a writ of mandamus or any other appropriate writ, order or direction declaring that Section V of Chapter II of Part VI of the Bar Council of India Rules, introduced by Ext. P1, can be given effect to only after obtaining the approval of the Hon'ble Chief Justice of India under the first proviso to Section 49 (1) of the Advocates Act, 1961
- 3) Any other appropriate writ, order, or direction this Hon'ble Court may deem fit and proper

### **INTERIM RELIEF**

- 1) Stay the operation of Sections V and V-A of Chapter II of Part VI of the Bar Council of India Rules, introduced by Ext. P1;

- 2) Restrain the respondents from taking any coercive action under Sections V and V-A of Chapter II of Part VI of the Bar Council of India Rules, introduced by Ext. P1;
- 3) Restrain the respondents from taking any steps pursuant to Section V of Chapter II of Part VI of the Bar Council of India Rules, introduced by Ext. P1, until the approval of the Hon'ble Chief Justice of India under the first proviso to Section 49 (1) of the Advocates Act, 1961 has been obtained; pending the disposal of this Writ Petition

Dated this the 28<sup>th</sup> day of June, 2021.

Sd/-  
PETITIONER

Sd/-  
COUNSEL FOR THE PETITIONER

**BEFORE THE HON'BLE HIGH COURT OF KERALA AT  
ERNAKULAM**

O.P.(Civil)No. \_\_\_\_\_ of 2021  
(Special Original Jurisdiction)

Adv. Rajesh Vijayan : Petitioner

v.  
Bar Council of India and another : Respondents

**AFFIDAVIT**

I, Adv. Rajesh Vijayan, aged 50 years, S/o. late K.N. Vijayan, residing at Narayaneeyam, Edapally North P.O., Ernakulam, Kerala – 682024, do hereby, solemnly affirm and state as follows:-

1. I am the Petitioner in the above Original Petition and I am aware of this case and is competent to swear this affidavit.

2. The contents of the original petition was read over to me and explained to me. The exhibits produced in the Original Petition are the true copies of the original documents.

3. I have no other alternative and efficacious remedy than to approach this Hon'ble Court through this writ petition.

4. I have not filed any other Petition for the identical relief prayed for in this original petition.

All the facts stated above are true and correct.

Dated this the 28<sup>th</sup> day of June, 2021.

Sd/-  
Deponent

Solemnly affirmed and signed before me by the deponent on this the 28<sup>th</sup> day of June, 2021, in my office at Ernakulam.

Sd/-  
Advocate