Battle of the Bar and the Bench: Critical Analysis of the Powers of the High Court and State Bar Councils under the Advocates Act, 1961

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Abstract:

The enactment of the Advocates Act, 1961 was the result of key changes to the legal profession after Independence. There was need for a unified bar, rules governing the State Bar Councils and most importantly, the formulation of an All India Bar, all of which was encompassed in the newly enacted law. A rather peculiar Section 34(1) of the Advocates Act, prevailing since time immemorial had been interpreted sparingly by the Apex Court in a catena of judgments. These interpretations have caused unfortunate contrariness between the points of view of the Bar and that of the Bench. Additionally, the Law Commission of India in its recent report has turned a blind eye towards the issues caused by the perfunctory Section. The authors through this paper have tried to nuance a midway for the Bar and the Bench, whilst providing interim measures of curbing the differences, to amicably removing the ambiguities under the perfunctory section. The study takes into account all the stakeholders and analyses the roles played by each of them. The deductive premises will guide the reader through various interpretations of the section, through judicial pronouncements and the principle behind the formulation of the same. The authors through this paper aim at showcasing the glaring loopholes in the Section and aim to provide a permanent solution for the same. Additionally, as an interim measure, the authors have analysed Part X of the Code of Civil Procedure read with Article 227(2)(b) of the Constitution, which can be used by the High Courts for the purposes of framing of rules and adjudicating.

Keywords: Advocates Act, Section 34(1), Code of Civil Procedure, Law Commission Report and Constitution of India.

1. Introduction

India's post-independence period urgently required a law which created a distinction between *inter alia* advocates, pleaders, vakils, mukhtars and revenue agents. In questioning, the feasibility of the Bar Councils Act, Sir Syed Mohammed Ahmed Kazmi (Sir Kazmi), a Member of the Parliament, laid on the floor of the House a comprehensive bill. The core of this bill being the creation of a unified Bar for the whole of India. Sir Kazmi understood the changing structure of the legal profession after Independence, having the foresight that the change in the original side of the High Courts' was imminent. This original side of the High Courts' was initially a close preserve for the barristers, the only persons who could be enrolled as advocates to practice. Announcement was made by the then Minister of Law that the Government of India had considered the points of Sir Kazmi and was willing to set up a Committee to inquire into the changing structure of the

Indian legal scenario and its impact on the legal practitioners, the desirability and feasibility of a completely unified bar for the whole of India, the continuance or abolition of different classes of legal practitioners and most importantly, the establishment of a separate Bar Council for the Supreme Court. Hon'ble Shri Justice S. R. Das, Former Judge of the Supreme Court of India along with legal stalwarts, M.C. Setalvad, the then Attorney General of India, Dr. Bakshi Tek Chand, V. K. T. Chari, Former Advocate General of Madras among others were the members of this Committee, and were termed as the architects of the newly formed Advocates Act. The architects had grand ambitions for designing a detailed report consisting of all the recommendations which would form the foundation of the Act. Simultaneously, the Law Commission had been provided the thankless task on preparing a report on the reforms of Judicial Administration. Both the Law Commission and the Committee conjointly provided their recommendations and therein a comprehensive Advocate's Bill was presented in the Parliament which resulted in the formulation of the Advocate's Act, 1961 (hereinafter referred to as the 'Act').[136] The Makers of the act knew that the approach to the Act, as much as the content and structure would define the experience and stability of the legal profession in the years to come. A humongous problem did face the makers though, which unfortunately is still prevalent in reality, the Original and Appellate Sides of the High Courts of Bombay and Calcutta, wherein the cleavage continues to exist between the advocates, due to various historical reasons.[137] The erstwhile Indian Bar Councils Act, was relatively silent on the point of recognition of the class of practitioners, the new Act laid it all to rest. By the virtue of Sec. 29 of the Act, '*advocates*' became the only recognized class of persons, entitled to practice the profession of law. Concurrently, by virtue of Sec. 50 of the Act, titled 'Repeal of certain enactments', the provisions of the Legal Practitioners Act, 1879 relating to the enrollment and recognition of class of practitioners stood repealed, thereby resulting in the abolition of the other classes of Legal Practitioners, such as the Mukhtars and revenue agents.[138] '*An Act to amend and consolidate the law relating to the legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar*', a perusal of the preamble of the Act and its relevant sections, clearly emulate the fact that the Act has accomplished in unifying the bar and laying down the body to govern the acts of legal practitioners. Having shown, the history and necessity for the formulation of the act and the inch perfect accomplishment, the authors now nuance into the highly contested battles between the Bar and the Bench through the provisions of the Act, laying particular emphasis on Sec. 34(1) of the Act.[139] It is absolute that the objects emulated in the

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[136] For a detailed history *See, Bar Council of India- History*, The Bar Council of India, available at http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/history/, last seen on 20/03/2018; *See also*, Gupta, J. has provided a brief overview of the establishment of the High Courts in India. Chunilal Basu v. The Hon'ble Chief Justice, AIR Cal 470.

[137] M. Chaudhuri, *Glimpses of the Justice System of Presidency Towns (1687-1973)*, (1st edn., 2006).

[138] Ss. 50 (2)(a) & 56, The Advocates Act, 1961.

[139] The differences between the Bar and the Bench have arisen considerably in the last few years, the reason being the rules formulated under the perfunctory Section 34(1). *See, eg.*, M Imranhullah, *High Court amends rules to debar unruly advocates from practice*, The Hindu, (28/05/2016), available at http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/high-court-amends-rules-to-debar-unruly-advocates-from-practice/article8657820.ece, last seen on 20/03/2018 (Formulation of Rules); N.G. Prasad, D. Nagasaila and V. Suresh, *Do not browbeat Lawyers*, The Hindu, (03/06/2016), available at http://www.thehindu.com/opinion/op-ed/Do-not-browbeat-lawyers/article14380512.ece, last seen on 20/03/2018 (Lawyers agitation to the rules and misinterpretation of the Section 34(1)); S. Prabakaran, *Browbeating, Prerogative of*

preamble have been fulfilled but the perfunctory provision, providing the power to the High Courts to make rules has raised contentions as to what exactly is this power, when can the same be exercised, how is this power different from the power provided to the respective Bar Councils. If the answers to the above questions indicate, that the Section is ambiguous, then to what extent does the same require to be amended?[140]

Trying to define the essence of a provision through the intention is a wretched task. Many judicial pronouncements seek to identify the intention of the legislature, inquisition as to the power of the High Courts and its ambit. Sometimes these pronouncements seek to provide with rigour and clarity, the soul of the perfunctory provision, none clearly identifying it, remaining still an illusion.[141] Thus, in the mix of judging Sec. 34(1) the courts have inadvertently laid down that the words '*laying down the conditions subject to which an advocate shall be permitted to practice*' under Sec. 34 must be given a restricted meaning of permitting physical appearance of the advocate and not his general right to practice.[142] The likelihood is that the opinions and ideas that swirled around these judgments could be laid down as good and valuable-worth preserving, whilst others need to be discarded. First and foremost is the distinction of appearance and practice. Secondly, a further distinction between the activities constituted as being governed by the High Court under the rules to govern appearance vis-à-vis the State Bar Councils governing the general practice of the advocates, related question of, whether the law ought to be in the hands of judiciary-thereby it becoming the author, administrator and the executioner. The Authors have used their intuition, or hunches, as a starting point for decision making to find trenches for the beneficial use of all the stakeholders. A famous example of reasoning of this sort is found in Gladwell's book, *Blink*. Gladwell tells the story of art experts who 'knows' the statue is fake, even if they cannot- immediately-explain why.[143] The High Courts, All India Bar Council, Respective State Bar Councils and the Advocates are identified as the necessary stakeholders by the authors of this paper, the reader must look through the kaleidoscope to analyse the viewpoints of all the stakeholders and the authors want an earthwork for all the stakeholders to amicably be able to understand the rather maligned provision guised tactfully under a masterpiece of an Act. The contentions which the authors would put forward in this paper will provide a picture of Sec. 34(1) being a rather perfunctory provision, the picture of all the ex facie stakeholders and the solutions to remove the ambiguity. Having regard to the

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Lawyers?, The Hindu, (07/06/2016), available at http://www.thehindu.com/todays-paper/tp-opinion/Browbeating-prerogative-of-lawyers/article14389654.ece, last seen 20/03/2018 (Reply from the Co-Chairman of the Bar Council of India, protecting the Bench from the allegations of the Lawyers).

[140] [W]ith respect it is submitted that the situation is still not reconciled with the observation in the case of R.K. Anand v. Registrar, Delhi High Court. There is no clear verdict as to whether the other cases stand overruled, expressly or even impliedly.
A. Sapre, *Sanjiva Row's The Advocates Act, 1961*, 122-124 (9th Edn., 2016).

[141] In re: Vinay Chandra Mishra, (1995) 2 SCC 584; *Compare*, Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409 (A judgment by a five judge Bench) *with* Pravin C. Shah v. K.A. Mohd. Ali, (2001) 8 SCC 650 (A judgment by a two judge Bench), Ex. Capt Harish Uppal v. Union of India, (2003) 2 SCC 45 (A judgment by a three judge bench), Bar Council of India v. High Court of Kerala, (2004) 6 SCC 311 (A judgment by a three judge Bench), R.K. Anand v. Registrar Delhi High Court, (2009) 8 SCC 106 (A judgment by a three judge bench) and Mahipal Singh Rana, Advocate v. State of U.P., ILC 2016 SC CIVIL (A judgment by a three judge bench).

[142]Prayag Das v. Civil Judge, Bulandshahr, AIR 1974 All 133

[143] M. Gladwell, *Blink: The Power of Thinking without Thinking*, 3-8 (2005).

judicial pronouncements, the authors will not determine and lay its major arguments on the outcome of the judicial decisions but through an eye of a legal realist trying to identify the rules, reasoning and backdrop of the decisions. For the beneficial use of the reader, the authors have used a normative approach more on the basis of Virtue Jurisprudence, mainly if the aim of the law is to make citizens virtuous, what are the implications for the content of laws.[144] The Authors have tried to restrain themselves from the rules, which may be made, under the Section but a working study of the issues which have arisen after the formulation of the rules have been studied and the works will be identified by the reader throughout the paper. Deduction of the paper hence is essentially into three parts viz. the interpretation of the perfunctory section with essential impetus on the supposed intention of the legislature, the provisions of the Code of Civil Procedure, which the authors submit are analogous to Sec. 34(1) of the Advocates Act and lastly the suggestive trench which the authors want to build for all the stakeholders. Throughout the paper the authors will guide the readers through the current judicial pronouncements and the makeshift of the judiciary in making the rules under this Section. Research is also culminated by the Authors to make wedge the difference between the quasi executive role of the Bar Councils and the powers of the judiciary-through the doctrine of Separation of Powers. The aim of the paper is not to demean any of the stakeholders, nor the legislature but to lay down an approach providing checks and balances to the High Court whilst their usage of this enormous power.

2. Interpretation: Formulating The Intention Of The Legislature

Interpretation is a fashionable concept and covers a wide range of phenomena and types. For our purposes, Sec. 34(1) of the Act will be viewed through basic principles of interpretation. Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text from the elements known from and given in the text; conclusions which are in the spirit though not within the letter of law.[145]

At the end of a thoughtful judgment S.N. Variava, J and his brothers concluded that '*the right to practice is the genus, of which the right to appear in the Court may be a specie. But the right to appear and conduct cases in the Court is a matter on which only the court must and does have a supervisory and controlling power, which does involve the right of an advocate.*'[146] The authors would like the readers to focus their attention not on the subject of the rules formulated therein and the subject matter but the conclusion reached by the Court, namely that all matters relating to the appearance will fall under the purview of the Court. It is the authors' professional judgment that the perfunctory section cannot and must not be interpreted in the way it has been for years by the Apex Court. In our day (though not in earlier times), technical rather imperative solutions are always welcome,

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[144] For a more detailed study of Virtue Jurisprudence *Accord*, C. Farelly and L. Solum, *Virtue Jurisprudence*, (1st Edn, 2008).

[145]In Re Sea Customs Act, AIR 1963 SC 1760. *See Further*, D. R. Venkatachalan v. Dy. Transport Commissioner, AIR 1977 SC 842; The Commissioner of Wealth Tax v. Hashmatunissa Begum, AIR 1989 SC 1024.

[146]*Supra* note 6

because of the previous failures the prophecy of the apex court has to be ruled out. How should there be a change in the prophecy needs some comment. Browsing intent, as Pound said, "*Naturally the legislatures do have an intent and has sought to express it there is seldom a question of interpretation*".[147] The difficulties arise in myriad cases in respect to which the law-maker had no intention because he had never thought of them. Indeed, perhaps he could have never thought of them. In all real controversies of construction if it were open to consult the Legislature as to its intention, the answer of most of the legislators in all probability will be: '*such a problem never occurred to us, solve it as best as you can, consistent with the words used, and the purpose indicated by us in the statute*.' The start of judging a provision is only legitimate, that the provision be read in its context- the whole statute. The generic law is not too cumbersome, a look at the provisions contained holistically provides a view to the applicability of Sec. 34 of the Act, the authors nuances the arguments about viability of Sec. 34(1) of the Act on the premises of individual sections starting with Section 6 r/w Section 35 of the Act headed 'Functions of State Bar Councils, and Punishment of Advocates' for misconduct respectively. The aforesaid Sections have given the powers to the state bar councils, the only encumbrance being that a complaint have to be provided. On the contrary, the perfunctory provision lays down that under the rules made by the High Court including but not limited to contempt rules which thereby gives the judiciary a power to debar the condemned advocates. In truth, it is not possible to conceive that the legislatures had provided a Bar Council, laid down the powers, provided enormous debarring powers to the Bar Councils and another provision which the legislatures had intended for the purposes of governing the appearance of advocates. The Authors conceive peculiarly proper that when construing the section, the reasoning behind providing the power to the High Courts must be evident enough, if not ex facie then through sufficient cause and effect of historical purpose. Needless to say that prior to the enforcement of the Advocates Act, 1961; the Legal Practitioners Act, 1879 and The Bar Councils Act, 1926 regulated the legal profession and were later struck down on the recommendation of the All India Bar Committee for a peculiar reason which as recorded in the 14th Law Commission Report states that, "*In framing its recommendations, the Committee accepted the principle that the Bar should be autonomous in matters relating to the profession.*[148] *We wish to emphasize the principle of autonomy thus sought to be given effect to by the Committee.*"[149] Bearing these in mind it must be appreciated that the object of passing the legislation leans towards minimal interference – let alone of the kind it is now – of courts in matters relating to regulating the legal profession. The trend of legislation in India has been gradually towards greater autonomy in the field of disciplinary proceedings against members of the legal profession. *Prima facie*, it would be a retrograde step if this trend is reversed and disciplinary jurisdiction it sought to be restored to High Courts.[150]

A fair argument can be raised for the beneficial use of the provision, the harmonious construction of the perfunctory section, to the section which provides the Bar Council to punish the contemptuous advocates. It is for the legislature in forming its policy to consider elements; Moulton rightly said that Great caution is

[147] Roscoe Pound, *The Spirit of Common Law*, (1921)
[148] 14th Law Commission of India Report, *Reform of Judicial Administration* (1958).
[149] *Id.* at 48
[150] 75th Law Commission of India Report, *Disciplinary Jurisdiction under Advocates Act, 1961*(1978).

indeed necessary. The Authors realize the need for the same, treading the path, creating harmony between the Bar and the Bench, the authors need to make it clear that the concerns are abundant and vary in priority. Understanding this, the Authors, in addition to providing coordinated suggestions has presented a concise suggestion only on the basis of workability of the Section. In the succeeding chapters the readers will be provided with a holistic picture of the consequences and the apex court judgments which in due respect, authors deem to be fallacious. Whilst running down, the statute, the readers must remember the essence of the Act and the reasoning through its preamble. The essence here is the formulation of the state bar councils, providing powers to them for the smooth functioning of the judicial profession *in toto*. Reconciling the issue and safeguarding the provisions of the act until necessary amends are carried out can be by ensuring the harmonious construction of the provisions. It'd be absurd to argue that the High Courts and the Apex Court not be given the power to punish for its own contempt and the limit of the same would depend upon the gravity and nature of the offence committed varying on a factual scenario. Sapre provides for a rather peculiar solution to this problem for the interim basis, under the rules, if at all formulated for the High Court does and should not have the power to debar or forfeit the license of an advocate with a rather atypical construction of Section 35 of the Act, the High Court must provide a complaint to the State Bar Councils thereby the formal process of adjudication and execution automatically gets forwarded under the ambit of the respective State Bar Councils.[151] Sapre has provided an insight into the smooth analytical working of the provisions as an interim measure. Any methods of subjugation of the provision would be to go against the legislature's intent however the authors have tried to construe the provisions in the forthcoming chapters to remove the anomalies as much as possible, the authors have perused the arguments and the judgments in detail to lay down a comprehensive suggestive pattern, as a way forward.

3. Critique Of The Perfunctory Section

Witnessing the never-ending era of amends in and around the legal arena, it was then considered well in time for a merger of two long-standing legislations viz., The Bar Councils Act, 1926 and The Legal Practitioners' Act, 1879. Conclusively a marriage of these two culminated into a common legislation as aforementioned. The Honeymoon was brief. As shortly after the merger was consummated there came to light a series of inconsistencies galvanizing itself into yet another era of amends. Thus, the draft as we see today has been comprehensively revised and studied upon with a view to further a better legislation devoid of all anomalies.

Bearing in mind the efficacy and patronage this act provides for, the authors on a few perpendicular lines have tried to sway the attention to a few un-amended yet ought to be amended portions. The authors qua this article have tried to opine on the gaffe that prevails under Sec. 34(1) of the Act, thereby laying down precise remedies so that an effective solution may arise. Under this Chapter the authors critique the perfunctory section primarily on three grounds: (i) Vague and Excessive Delegation of Legislative function (ii) Violation of the principles of Natural Justice and (iii) Provision being *ultra vires* the Constitution. In stretch with the same certain suggestions have been articulated, whereby an inference has been drawn between the powers of the High Court under the impugned section vis-à-

[151] *Supra* note 5

vis the powers of the High Court under Part X the Code of Civil Procedure, 1908, the same will be dealt in the last chapter by the Authors.

3.1 Vague and Excessive Delegation of a Legislative Function

The authors feel that revisiting the language of Sec. 34(1) in this case is of utmost importance. A bare perusal of the same gives us a thorny picture shrouded in the midst of a rosy garden. It thus reads as "*the high court **may** make rules laying down the **conditions** subject to which an advocate **shall** be permitted to practice in the High Court and the Courts subordinate thereto*".[152]

The mannerism followed in the drafting of this section ex facie has a few fallacies; (i) the unconditional powers bestowed upon the High Courts and (ii) the wide discretion to the extent of its exercise. The common error that fortifies these irregularities, is the vague drafting of the legislation coupled with the tenor of delegating excessive and unconditional powers. The discontent that arose on account of this has given rise to an ongoing warfare amidst *the bar versus the bench* with a pen.[153] The pending cases as well as the one's being argued even now as you read is evidence enough for the same.[154] Howsoever, there remains amity in the decisions of the courts as far as Sec. 34(1) of the Act is in question. The powers given to the High Court under the perfunctory Section act suffers from the vice of excessive delegation of powers on two counts, (A) that, it does not set out any criteria nor does it lay down a standard procedure to be followed and (B) that, the rule making function thereunder assumes itself within the ambit of an *essential legislative function*.[155]

3.1.1 No Set Guidelines Provided By The Draftsmen Nor The Apex Court For The Rule Formulation Under The Perfunctory Section

The authors have tried to decipher this complex situation by quoting a few ratios of the Apex Court clearly enumerating the ignorance of the legislature whilst making this Section, the readers ought to keep in mind that the provision has been a reproduction of the sections which provided power to the High Courts in previous acts as well. The question of delegated legislation came up for interpretation before a Seven Judge Bench of the Supreme Court, the observation laid down is truly remarkable and deserves to be quoted quod est., "*The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Since, it cannot abdicate its functions in favour of another, it must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms…this self-effacement of legislative power in favour of another agency either in whole or in part is beyond the*

[152] Ss. 34(1), 27, 28, *The Advocates Act, 1961* (1961).
[153] The Authors had reviewed the same briefly in the First Chapter, *Cf.*, Sriram Panchu, *Restoring the Law in Courts*, The Hindu, (25/09/2015) (Through this the seeds were sown for a long standing duel between the bar and the bench)
[154] *See generally*, Jamshed Ansari v. High Court of Judicature at Allahabad C.A. No. 6120 of 2016, Civil Appellate Jurisdiction
[155] Hamdard Dawakhana v. Union of India [1960] 2 S.C.R. 671

permissible limits of delegation. It is thus the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."[156] In view of the said principle vis-à-vis Sec. 34(1) of the act it is highly preposterous to note that, the words used by the legislature there under not only demonstrate the *danger inherent* as mentioned above but also, (i) fails to lay down any set standard or criteria by virtue of which the High Courts would be guided in making rules, (ii) confers discretionary power to the extent of its application as it uses the word *'may'* and lastly (iii) the perfunctory section is purposefully vague as it ignores the standards to be vouched for thereby creating room for invalid, vague and tenuous interpretation.

Further, Mahajan, C.J. observed that "*the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases, and must provide a **standard to guide** the officials or the body in power to execute the law*"[157] In line with the observation made herein it is to be considered that the perfunctory section bears no semblance to either one of them, i.e., the presence of (i) a standard guide and/or (ii) legal principles to be governed, while making rules. Rather the perfunctory section confirms the discretionary and unbridled power that has been subsumed for making arbitrary rules thereby purporting to violate the Fundamental Rights of Advocates and everyone being governed thereunder.

3.1.2 The Power Delegated Subsumes Within Its Ambit Of An Essential Legislative Function

In dealing with the challenge to the *vires* of any statute on the ground of excessive delegation it is necessary to enquire, whether the impugned delegation involves the delegation of an essential legislative function or power and whether the Legislature has enunciated its policy and principle and given guidance to the delegate or not.[158] Now what purports to be '*essential legislative function'* is a question that is to be decided after considering the object of the act r/w the preamble fundamentally.[159] In applying the said principle the preamble to the Act has to be taken into account and if the said statements therein afford a satisfactory basis for holding that the legislative policy and principle that has been enunciated is done with sufficient accuracy and clarity the preamble itself has been held to satisfy the requirements of the relevant tests. In every case it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation is *intra vires* or not will have to be decided by the application of the relevant tests. In application of this principle it is must be noted that, firstly the words used therein are vague, secondly, the legislature has established no criteria, no standards and has not prescribed any principle by which the High Court is guided in making rules, thirdly, it does not state what facts or circumstances are to be taken into consideration before making any rules and lastly the rule making power under Sec. 34(1) of the Act interferes with the power of the Bar Council to deal with and make rules with regard to the conduct of Advocates.

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[156] *Eg.*, Vasantlal Maganbhai Sanjanwala v. State of Bombay &Ors., 4 1961 SCR (1) 341
[157] Harishankar Bagla v. State of Madhya Pradesh, 1954 AIR 465
[158] *Supra* note 20
[159] *Id.*

If one critically evaluates the preamble as has been in the previous chapters, it would not be out of place to say that the main objects of the Act have been fulfilled. In the very same chronology, a mere perusal of the perfunctory section, makes it complacent to state that the power given to the High Court bears no semblance to the object enunciated thereunder and thus purporting to create disharmony between the powers given to the Bar Council and the High Courts –friction between *the bar and the bench*. This power not only vitiates the autonomy of the Bar Council but the vague language and poor drafting of the legislature is now being misused to interpret and implement the section without bearing any reverence to its history and/or the object of the act.

3.1.3 Principles Of Natural Justice: Checking The Vires Of The Perfunctory Section

The doctrine of natural justice is not merely a matter of procedure, but of substance and any action taken in contravention of natural justice is violative of fundamental rights guaranteed by the Constitution.[160] The law prescribed must be just, fair and not arbitrary, fanciful or oppressive. If the procedure of the law does not satisfy these requirements, it would be no procedure at all within the meaning of Article 14.[161] While the perfunctory section here fails to lay down the essential procedure that would play a pivotal role in guiding the Courts to make rules, the Courts would then be left with no option but to exercise this power as per their own respective interpretation. Thus, in-order to combat the evils contravening the provisions of law there ought to have been a peculiar guideline and/or procedure thereby specifying the subject-matter to which it the Courts may exercise this power.

Nemo debet esse judex in propria causa means no man shall be a judge in his own cause, or no man can act as both at the one and the same time - a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias. The authors in their deferential opinion beseech to state that, the section empowers the court with enough discretion to make regulatory and punitive rules – including but not limited to punishing the advocates for misconduct, thus making the court a party as well as the adjudicator in such proceedings. On the contrary, it is settled law, that if an adjudicator to a dispute is a party to the dispute and/or has financial/proprietary interest in its outcome then he is indeed a Judge in his own cause. Once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias.[162] The real question is not whether an authority was biased, for it is difficult to prove the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration.[163] An inference can thus be drawn between the impugned section and the principle laid down above as in practice the impugned section *ipso facto* tends to contravene the basic rule laid down under this maxim.

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[160]Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184

[161]Distt. Registrar and Collector v. Canara Bank, AIR 2005 SC 186

[162]P. K. Dinakar v. Hon'ble Inquiry Committee, AIR 2011 SC 3711, *See also.*, Dr. S.B.M. Marume, R.R. Jubenkanda and C.W. Namusi, *The principles of Natural Justice in Public Administration and administrative law*, 5 International Journal of Business and Management Invention 22-24 (2016).

[163]*Id.*

3.1.4 Judging The Vires Of Section 34 Of The Act On The Pedestal Of The Violation Of The Provisions Of The Constitution

The authors through this ambit of the article have taken the extreme approach of nuancing that the Section at hand could in actuality be violating the fundamental rights of the Constitution. It isn't hyperbolic to mention the same, a careful perusal of judgments all around have laid down counter submissions of the provision violating basic fundamental rights. The draftsmen need to tread carefully as the path leading to the Section's constitutionality could in the near future be in itself considered as a double edged sword. Article 19 lays down the principle of reasonable restriction whereby the limitation imposed on a person in the enjoyment of a right should not be arbitrary or of an excessive nature and must be in conformity with the test of reasonability.[164] Sec. 34(1) of the Act provides for wide discretionary powers with no specification of ambit, thereby being a legitimate threat to the fundamental rights of the petitioners. To find out what is *'reasonable restriction'* the entire statute has to be read in order to find out the purpose for which or the standard according to which discretionary power has to be exercised. In pursuance of the same, the Advocates Act, 1961 vests the following powers with the Bar Council of India by virtue of Sec. 7 of the Act: *"7(1) The functions of the Bar Council of India shall be- (b) to lay down standards of professional misconduct and etiquette for the advocates (c) to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council"* r/w Sec. 35 of the Act which prescribes the power of the Bar Council to punish errant Advocates.[165] On a simple reading of the above it is implicit that the wide discretionary powers given to the High Court under Sec. 34(1) create disharmony with Sec. 35 on account of its vague and tenuous drafting. The difference between the two sections is that there are no specific guidelines laid down by the legislature to demarcate the High Court's power under the impugned section whereas the said guidelines are evident in case of the powers given to the Bar Council. Thus, in order to avoid the overlapping of powers between the bar and the bench, an amendment in the impugned section to the extent of fencing the powers would not be out of place. In the first chapter the authors had discussed the intricacies of Sec. 6 r/w Sec. 35 of the act, to follow through the process, the authors have tried to touch upon the point again, the reasonability and foresight of the legislature has helped the bar councils of the respective states to move forward in achieving their respective goals but this nonetheless is a thorn which, in the near future, will tend to hurt all the stakeholders. Hopefully the wiser counsel does prevail in our draftsmen and interpreters.

4. The Way Forward

Having gone through varied enactments, judgments and cases that have been and are being battled in this regard, the authors now lean towards a conspicuous neighbour provision that provides for similar powers albeit with much caution and regard for procedure and rule of law. The Code of Civil Procedure, 1908 under

[164] P. P. Enterprises v. Union of India, AIR 1982 SC 1016

[165] Ss. 7 & 9 r/w Ss. 35 & 29, The Advocates Act, 1961 (1961) (Reference can be made to the provision of Ss.7 & 49 of The Advocates Act, 1961)

Part X of its draft provides for a specific chapter giving power to the High Courts for making certain Rules, extending to all but limiting no peculiar subject as the discretion hereunder has been left to the Courts to make rules, as they deem fit and necessary.[166] But, the only difference it remains conscious about is that the rules made by the High Court hereunder will be subject to approval and thus be scrutinized by the executive body. Thus, following a classic methodology of *Checks and Balance* system of work it maintains amity between the one ought to be governed by it and also upholds the tenets of democracy on which it rests.

A careful examination of Part X of the Code of Civil Procedure, 1908[167] read with the powers granted under Article 227(2)(b)[168] of the Constitution of India to the High Court's it can be seen that similar power already vests within the exclusive domain of the High Court's with respect to the framing of rules and adjudicating thereupon. Consequently, on a comparative study of the act – Sec. 34(1) and the Code of Civil Procedure, 1908, the forgoing conclusions can be gauged:

The Code of Civil Procedure, 1908	**The Advocates Act, 1961**
Part X of the Code deals with the Rule making power of the High Courts.	Chapter IV of the Act deals with the Right to Practice.
122. Power of certain High Courts to make rules. 125. Power of other High Courts to make rules. 126. Rules subject to approval (State/Central govt.) 128. Matters for which Rules may be made. 130. Power of other High Courts to make rules as to matters other than procedure.	Section 34 – Power of High Courts to make Rules.

In continuation to the above, it can be seen that the legislature has provided enough powers to the High Court's by virtue of Ss. 122, 125, 126, 128 and 130 of the Code of Civil Procedure for making rules not limiting to any specific subject. Having due regard to the autonomy and authority of the High Courts to deal with and make rules with respect to matters that are within the Court premises they have been bestowed with adequate discretion to adjudicate and decide on areas that warrant the making of any rules. On the other hand a catena of Supreme Court Judgments have stated that the power under Sec. 34 of the act deals with and restricts itself only to the appearance of the advocates within the courts and lays no fetter on their rights to practice.[169]

Thus on a mere reading of the above two statutes it can be seen that; on one side, the rules being made under Sec. 34(1) not only suffer from tenuous, vague and arbitrary drafting but also fail to adhere to the checks and balance system while on the other, the rules to be made under the aforementioned sections of the Code of Civil Procedure, set detailed guidelines and provide adequate scope for additions

[166] Part X, Ss. 121-131 & Ss. 34-37, The Code of Civil Procedure, 1908 (1908).
[167] *Id.*
[168] Art. 227, 114, 115, The Constitution of India, 1950.

[169] *Supra* note 7

along with the same being scrutinized by the Executive. Thus, particularly following the principles laid down by the apex court in the *Harishankar Bagla*[170]case and in the case of *Vasantlal Maganbhai Sanjanwala*[171] the rules of delegated powers are well within the contours of legal framework.

5. Conclusion:

The assessment and review of Sec. 34(1) of the Act, lays down a rather telling story in the history of legal profession in India. The power provided to the High Court to make its own rules, the Apex court interpreting the same as rules in relation to appearance and not general practice. It is rather ironic that the judiciary has the power of judicial review of any law which violates the basic structure of the constitution including but not limited to Fundamental Rights enshrined under the Constitution, it is though telling that the judiciary has diluted the case of Supreme Court Bar Assoc. through its judgments interpreting the Supreme Court Bar Assoc. Judgment in the worst way possible. Well it is unfortunate that, a battle of Shakespearian proportions has erupted between the Bar and the Bench. The authors reiterate that all of the Stakeholders would be affected by this Section and hence have tried to find a middle path, by providing an urgent interim measure and a long term measure of amending, if not, severing the perfunctory section. The words of J. Bronowski rightly ring the bells "We are all afraid- for our confidence, for the future, for the world. That is the nature of the human imagination. Yet every man, every civilization has gone forward because of its engagement with what it has set out to do. The personal commitment of a man to his skill, the intellectual commitment and the emotional commitment working together as one" The authors believe that the synthesis of the criticisms laid on the perfunctory Section and the ideas presented for the betterment of the bar and bench shall go a long way in moulding both the thought process of the legislature, executive and the advocates at large.

References:

1. 14th Law Commission Report. 1958. Reform of Judicial Administration. Available from http://lawcommissionofindia.nic.in/1-50/index1-50.htm
2. 75th Law Commission of India Report. 1978. Disciplinary Jurisdiction under Advocates Act, 1961. Available from http://lawcommissionofindia.nic.in/51-100/index51-100.htm
3. Akshay, Sapre. 9 th ed. 2016. Sanjiva Row's The Advocates Act, 1961. Lexis Nexis
4. Bar Council of India- History. The Bar Council of India. Accessed March 20, 2018. Available from http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/history/
5. Bar Council of India v. High Court of Kerala (2004) 6 SCC 311
6. Chunilal Basu v. The Hon'ble Chief Justice AIR Cal 470

[170]*Supra* note 22
[171]*Supra* note 21

7. Collin, Farelly and Lawrence, Solum. 1 st ed. Virtue Jurisprudence. Palgrave Macmillan UK, 2008
8. D. R. Venkatachalan v. Dy. Transport Commissioner AIR 1977 SC 842
9. Dist. Registrar and Collector v. Canara Bank AIR 2005 SC 186
10. Ex. Capt Harish Uppal v. Union of India (2003) 2 SCC 45
11. Hamdard Dawakhana v. Union of India [1960] 2 S.C.R. 671
12. Harishankar Bagla v. State of Madhya Pradesh 1954 AIR 465
13. In Re Sea Customs Act AIR 1963 SC 1760
14. In re: Vinay Chandra Mishra (1995) 2 SCC 584
15. Jamshed Ansari v. High Court of Judicature at Allahabad C.A. No. 6120 of 2016, Civil Appellate Jurisdiction (Unreported)
16. M Imranhullah. 2016. "High Court amends rules to debar unruly advocates from practice". The Hindu, May 20. Accessed March 20, 2018. Available at http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/high-court-amends-rules-to-debar-unruly-advocates-from-practice/article8657820.ece
17. Mahipal Singh Rana, Advocate v. State of U.P. ILC 2016 SC CIVIL
18. Malcolm, Gladwell. 1st Ed. 2007. Blink: The Power of Thinking without Thinking. Back Bay

Books:

1. Mrinmaya, Chaudhari and Mina, Chaudhari. 1st ed. Glimpses of the Justice System of Presidency
2. Towns (1687-1973). Regency Publications, 2006
3. N.G. Prasad, D. Nagasaila and V. Suresh. 2016. "Do not browbeat Lawyers". The Hindu, June 03. Accessed March 20, 2018. Available at http://www.thehindu.com/opinion/op-ed/Do-not-browbeat-lawyers/article14380512.ece
4. P. K. Dinakar v. Hon'ble Inquiry Committee AIR 2011 SC 3711
5. P. P. Enterprises v. Union of India AIR 1982 SC 1016
6. Pravin C. Shah v. K.A. Mohd. Ali (2001) 8 SCC 650
7. Prayag Das v. Civil Judge, Bulandshahr AIR 1974 All 133
8. R.K.Anand v. Registrar Delhi High Court (2009) 8 SCC 106
9. Raja Ram Pal v. Hon'ble Speaker, Lok Sabha (2007) 3 SCC 184
10. Roscoe, Pound. 2009. The Spirit of Common Law, [1921]. Cornell University Library
11. S. Prabakaran. 2016. "Browbeating, Prerogative of Lawyers?". The Hindu, June 07. Accessed March 20, 2018. Available at http://www.thehindu.com/todays-paper/tp-opinion/Browbeating-prerogative-of-lawyers/article14389654.ece
12. Samson, Marume; Roy, Jubenkanda and Cornelius Namusi. 2016. The principles of Natural
13. Justice in Public Administration and Administrative Law. International Journal of Business and Management Invention 5.

14. Sriram, Panchu, 2015. "Restoring the Law in Courts". The Hindu, September 25. Accessed March 21, 2018. Available at https://www.thehindu.com/opinion/op-ed/restoring-the-law-in-courts/article7686059.ece
15. Supreme Court Bar Association v. Union of India (1998) 4 SCC 409
16. The Advocates Act, 1961
17. The Code of Civil Procedure, 1908
18. The Commissioner of Wealth Tax v. Hashmatunissa Begum AIR 1989 SC 1024.
19. The Constitution of India, 1950
20. Vasantlal Maganbhai Sanjanwala v. State of Bombay & Ors. 1961 SCR (1) 341