

To:

Mr Gopal Subramaniam

Chairman

Bar Council of India

12th May 2010

Re: Request for Deferral of Proposed Bar Exam

Dear Mr Subramaniam:

My heartiest congratulations on your recent election as the Chairman of the Bar Council of India (BCI). It is rather fortuitous that you were elected to this important post soon after you had articulated your vision for an all India bar exam before the Supreme Court in *Bar Council of India vs Bonnie FOI Law College*.

As you are aware, during the consultative process undertaken by you in the context of *Bar Council of India vs Bonnie FOI Law College*, I had submitted a paper to you advocating strongly for a bar exam. I attach this again for your reference.

Needless to state, a number of us applaud your initiative and do hope that it will go a long way towards improving the quality of lawyers in India.

However, we are concerned about the prospect of holding such exam at such short notice i.e. a mere two months from now. May we please request you to defer the proposed bar exam to next year, such that it only applies prospectively to candidates that graduate (with LLB degrees) next year?

First, as you will appreciate, effective notice of the exams came to our students (I speak of the National University of Juridical Sciences (NUJS), Kolkata where I teach) only last week. Although the exam was mandated by the Supreme Court judgment (*Bar Council of India vs Bonnie FOI Law College*) in December 2009, this order was not made public and is, to this day, not available on the Supreme Court website.

I had posted a copy of this order on "Law and Other Things", a blog, on 5th April 2010 (please see < <http://lawandotherthings.blogspot.com/2010/04/raising-indian-bar-legality-and.html>>). Subsequent to this blog posting, some newspapers had interviewed you and reported on the prospects of a bar exam. However, even at this stage, most students did not think that it was logistically possible to hold the exams this year. And many of them did not think that such exams could be held without a legislative amendment (in the light of the Supreme Court ruling in *V Sudeer*, an aspect I will dwell upon later in this letter).

It was only pursuant to my telephonic conversation with you on the 8th of May, that I understood that you were planning on conducting the exams in July-August this year. On the very same day, I announced this to our students at NUJS, who were extremely

concerned at this short notice (a mere 2 months) and have requested me to forward their representation to you, which I attach with this letter.

As you will appreciate, a bar exam has never been held in this country since the 1970's and students had a legitimate expectation that there would be no exam this year. With only a few weeks left for most students to graduate, it will inconvenience them to a very high degree. Many of them have signed contracts with law firms and lawyers and are scheduled to begin working in the months of June-July. Lawyers and law firms may have hired them on the expectation that they are ready to go on day one and not handicapped from appearing in court or practicing law, owing to a bar exam, that has been suddenly instituted after 35 years. Many other students are going abroad for jobs and higher degrees (LLM's) and will be placed at a great disadvantage owing to this sudden announcement.

Secondly, this exam may prove logistically difficult for your team to execute at this late stage. You are of course the best judge of this, but if I may please be permitted to recount our own experience with such exams: it takes the national law schools a good 10 months' time to plan and execute the CLAT entrance exam each year—which as you know has approximately around 15,000 candidates each year and only 11 law schools within its fold. More importantly, it already has a history (although CLAT is 3 years old, individual law schools conducted their own exams for several years prior to CLAT), whereas the bar exam that you envisage will be held for the first time in 35 years. Importantly, this exam will require immense planning and co-ordination as it is likely to have at least 45,000 candidates, if one assumes that the 900 odd law schools in the country might generate at least 50 candidates on an average this year.

Thirdly, and perhaps most importantly, the *V Sudeer* case (*V. Sudeer v. Bar Council of India*, AIR 1999 SC 1167) does not appear to permit a bar exam by the BCI (Bar Council of India) without an amendment to the Advocates Act. In *Sudeer*, the court categorically held that any additional eligibility criteria for the practice of law over and above what was mentioned in Section 24 of the Advocates Act was unconstitutional. Particularly if such additional criteria amounted to either a bar exam or a training of some sort, since the power to mandate such exams/training was expressly taken away via an amendment in 1974 to the Advocates Act.

As you are no doubt aware, in the light of the 1974 amendment, once a student legitimately cleared his or her exams at a recognized University, he/she was entitled to enroll in a state bar council and practice before any court of law, without having to undergo training or take an exam of any sort. Therefore, if such an exam needs to be conducted by the BCI, it can be done only through a legislative amendment.

The court in *Sudeer* stressed that an enrolment comes with an automatic right to practice—subject to conditions of practice framed by BCI, High courts and the Supreme Court. Therefore, the BCI cannot, in my personal view, attempt to pass off a bar exam as a “condition of practice”, since such an exam would effectively emasculate the concept of enrolment i.e. enrolment is meaningless without the right to practice. In short, the court is likely to see this cleverly crafted condition of practice as nothing more than a camouflaged “pre-enrolment” condition, a condition that the BCI has no authority to

impose under the present statutory scheme. As you are aware, the court in *Lawyers Collective vs Ashurst* defined the term “practice” to widely include not just the right to appear before courts, but to also include all kinds of non-litigious practice as well (transactional work and legal advise etc). Therefore divesting enrolled lawyers of the right to practice upon enrolment will have serious consequences for all law graduates this year.

Rather than expending resources into the conduct of a bar exam this year and risking the wastage of resources in the event that the court strikes down the bar exam as outside of the BCI’s current competence and therefore unconstitutional, we strongly urge you to push for an amendment to the Advocates Act and conduct the exam next year.

Given all the above circumstances, I hope you will kindly consider deferring this exam to next year, such that it applies prospectively to only those law graduates that pass out next academic year.

To conclude, let me please reiterate that we are very much in support of your wonderful initiative for an all India bar exam and are ready to help in whatever way you deem fit to make this a success.

We however feel that rushing it through within the next 2-3 months may result in a sub-standard and badly executed exam and prove counterproductive to your vision for regulating the profession in a more optimal manner.

Warm wishes,

Shamnad Basheer

Ministry of HRD Professor of IP Law

NUJS, Kolkata