Let.. Doctors.. Assist.. Judiciary

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The title of this article is abbreviated just to make it short, and to generate interest in the mind of the reader. The aim of the article is to bring attention of all concerned to the fact that in the interest of patients at large, and the medical profession in particular; it is necessary to allow doctors (medical professionals) who have completed education in law from recognized colleges, and obtained a degree from recognized universities, to appear before honorable courts and assist judiciary in deciding matters involving medico-legal issues, as the situation in medico-legal field has changed substantially during the last 20-30 years. All State Bar associations, Bar Council of India and Judges of the Supreme courts are requested to "Let.. doctors.. Assist.. Judiciary" with following "reasonable" restrictions.

1. MBBS degree from medical college recognized by recognized university.
2. 15 year experience of working as a doctor in a hospital.
3. Law degree from law college recognized by Bar Council & recognized university.
4. To appear only in matter involving medico-legal issue
5. Undertaking from hospital for providing services in the absence of the doctor.

Currently doctors who have obtained a law degree are not permitted to practice as lawyers and assist the courts while simultaneously working as a medical professional. This has been validated by Hon'ble Supreme Court in **(Dr.) Haniraj Chulani v Bar Council of Maharashtra and Goa, AIR 1996 SC 1708**. In this case the petitioner had challenged rule made by the Bar Council of Maharashtra and Goa on two grounds, firstly Bar Council did not have any authority to make rules, as the delegation to legislate was excessive; and secondly the restriction imposed itself is unreasonable. The court held that reasonable restrictions can be imposed under authority of law, which the Bar Council has done under its power of delegated legislation. The reasons given by the Court for reasonableness were as under :

> *It is easy to visualize that a practising surgeon like the appellant may be required to attend emergency operation, even beyond court hours either in the morning or in the evening. On the other hand the dictates of his legal profession May require him to study the cases for being argued the next day in the court. Under these circumstances his attention would be divided. We would naturally be. in a dilemma as to whether to attend to his patient on the operation table in the evening or to attend to his legal profession and work for preparing cases fur the next day and to take instructions from his clients for efficient conduct of the cases next day in the court. If he is an original side advocate he may be required to spend his evenings and even late nights for making witnesses ready for examination in the court next day. Under these circumstances as a practising advocate if he gives attention to his clients in his chamber after court hours and if he is also required to attend an emergency operation at that very time, it would be very difficult for him to choose whether to leave his clients and go to attend his patient in the operation theater or to refuse to attend to his patients. If he selects the first alternative his clients would clamour, his preparation as advocate would suffer and naturally it would reflect upon his performance in the court next day. If on the other hand he chooses to cater to the needs of his clients and his legal work, his patients may suffer and may in given contingency even stand to lose their lives without the aid of his expert hand as a surgeon.*

…...If the contention of the learned senior counsel for the appellant is countenanced and any person professing any other profession is permitted to join the legal profession having obtained the Degree of Law and having fulfilled the other requirements of Section 24, then even chartered accountants, engineers and architects would also legitimately say that during court hours they will practise law and they will simultaneously carry on their other profession beyond court hours. If such simultaneous practices of professionals who want to carry on more than one profession at a time are permitted, the unflinching devotion expected by the legal profession from its members is bound to be adversely affected.

While it is agreed that there was no ground to challenge authority under delegated legislation, it needs to be appreciated that the restriction imposed is not reasonable. Each restriction must be reasonable, related to the purposes mentioned in 19(2) to (6) which is subject to judicial review. This restriction is NOT reasonable, as the purpose sought to be achieved is more or less UNRELATED hence Bar Council and Hon'ble Courts are requested to review this decision.

It may be appreciated that each case has to be adjudicated on its own merit. In **State of Madras v V G Rao AIR 1952 SC 196,** it was held that no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. Substantive restrictions should be removed; and procedural provisions should be renewed as Judgment in Dr Haniraj is not applicable in the current situation which has changed substantially since 1996.

For adjudicating reasonableness of restrictions it was held in **Chintamani Rao v State of Madhya Pradesh AIR 1951 SC 118** that duration and extent of restrictions, the circumstances, the nature of the right infringed, underlying purpose, urgency of evil sought to be remedied, disproportion of imposition and prevailing conditions at the time should be looked into. The present restriction on all doctors for all the time should be changed to defined period till they get experience in the medical profession as circumstances have changed since Judgment in Dr Haniraj Chulani case in 1996. Since doctors who want to practice law have to surrender medical degree, right to profession and patients' right to life; both are getting affected. Current stand appears to be from the perspective of only legal professionals including judiciary, however please consider huge backlog of pending cases, which are getting prolonged due to lack of knowledge w.r.t complexity in medicine; in advocates of both sides viz patient and doctor as well as judges. Disproportionate hue and cry about doctors being busy in handling patients at the time of hearing does not justify the fact that 80% of patients get verdict against them. In addition out of 20% verdict against doctors, half are reversed in appeals.

In **Dharam Dutt v Union of India (2004) SC 1959**, it wash held that the main points on which decision on such cases is made are whether the right claimed is fundamental right, answer being affirmative in present case. Whether restriction is contemplated by 19(2) to (6), the answer is in negative and whether restriction is reasonable or unreasonable, on which the answer would be that it is UNREASONABLE in current situation.

In **Pathumma And Others vs State Of Kerala And Others, 1978 AIR 771, 1978 SCR (2) 537** it was held that standard of reasonableness is to be judged with subject matter of the legislation in question, economic and social conditions in India and surrounding circumstances. What is being discussed is whether doctors should be allowed to practice law in an environment which has dismal health literacy among the general population. The court held that judges

should keep in mind societal settings of the country so as to show a complete consciousness and deep awareness regarding growing requirements of society, Increasing needs of the nation and burning problems of the day. While the court felt that legislature through beneficial legislation seeks to solve complex issues facing the people, this law is doing exactly the opposite. Healthcare is extremely complex to be understood by people having no background in healthcare delivery, patients are not getting justice, and doctors are punished unnecessarily in half of the cases due to incompetent assistance provided to judiciary. Judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid, hence this article seeks to communicate the need of the hour to all stakeholders, so that the judiciary is assisted by appropriately qualified people who understand the complexity.

In **Director General of Doordarshan v Anand Patwardhan, AIR (2006)8 SCC** it was held that reasonable restrictions correspond to societal norms of decency. The concept of reasonableness must change with the passage of time and absorb the current socio-economic values. It may be noted that IMA has been opposing view that patients are consumers. There have been various changes in the administration of healthcare in the country which includes more thrust on defensive medicine because of inappropriate decisions in consumer court cases. It is necessary to have appropriate adjudication of cases against doctors, and increasing attacks on doctors and healthcare providers need to be prevented quickly.

In **MRF Limited v Inspector Kerala Government AIR 1999 SC 188** it was held that limitation imposed should not be arbitrary or excessive or beyond what is required in the interest of public. The reasons given in the judgment of Dr. Haniraj are arbitrary as the court has assumed that the doctor who wants to practice law will have a patient to treat when there is a hearing in court. This assumption is without any foundation especially in current situation when there is a hierarchy in institutional hospitals which takes care of patients at any hour of the day. Emergencies are handled by ER doctors under consultation from senior doctors who need not be present in ER. Interest of public is having knowledgeable advocate to represent them when they are affected by medical negligence, malpractice or criminal behavior of the doctor.

In **Om Kumar v UOI AIR 2000 SC 3689** it was held that restriction should strike a proper balance between the freedom guaranteed by any of the clauses and the social control. Reasonable restrictions in various forms are suggested below so that freedom is limited to the extent necessary to protect society of which a citizen is only a part. Permission should be given only to appear for doctor or patient in medicolegal case and not other disputes. This will introduce the principle of proportionality, and both patient and doctor will get adequate representation by those who have knowledge of law and medicine. It is necessary to determine whether restrictions imposed by legislation on the fundamental right are disproportionate to the situation, and not the least restrictive of the choices.It is submitted that it is far fetched idea that

> *Such an insistence on his part itself would create an awkward situation not only for him but for his own clients as well as patients.*

Today this legislation restricts both patients and doctors from availing appropriate medico-legal representation assisting the court. Objects achieved by the legislation should be clear, but in this case there is no object other than restricting knowledgeable people assisting court. Even if the doctor has and emergency to handle at the time of hearing; saving a life is more important than adjournment, and no court can have adverse opinion. Hon’ble Supreme

Court has directed each person to be a good Samaritan, and each medical professional to stabilize the patient and then shift to facility where further treatment can be given.

In **Arunachala Nadar v State of Madras, AIR 1959 SC 300** it was held that for a restriction to be valid, it must have direct and proximate nexus, or a rational relation with the object which the legislature seeks to be achieved. This can be achieved by putting restrictions such as post-graduate qualification in medicine, minimum 15 years of experience in practice before one can practice law, so that the judiciary is assisted by experienced doctors.

In **Express Newspapers v Union of India AIR 1958 SC 578** it was held that it is the substance of the legislation and not merely its appearance or form which is to be taken into consideration. Legislation has to benefit the people at large. In this era of inter-disciplinary expertise required in various fields of life, it would be appropriate to allow professionals from other disciplines to practice law. It is the direct, inevitable and the real, not the remote, effect of the legislation on the fundamental right which is to be considered. Direct effect is violation of right of profession, and if doctor surrenders his medical degree, right to life of patient who can be saved by the doctor is also violated.

In **Re Kerala Education Bill, AIR 1958 SC 956** it was held that the legislature can not indirectly take away or abridge fundamental right when it cannot do so directly. It is a remote possibility that doctor practicing law will not pay attention to the interest of his client. In fact, frivolous litigations are being filed in the court by members of the Bar association against doctors. Many have seen cases where advocates have asked for adjournment giving reason of illness, while they were arguing in the same court on the same day before another bench. Such dishonest individuals can be dealt with by individual judge from time to time without blanket restriction all doctors to practice law.

In **State of Bombay v Balsara AIR 1951 SC 318** it was held that a restriction which promotes a directive principle is generally regarded as reasonable, this restriction does not promote any directive principle. In **Kasturi Lal Lakshmi Reddy v State of Jammu and Kashmir, AIR1980 SC 1992,** it was held that action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable. This restriction is against Equal justice and free legal aid (39), Right to work, to education and to public assistance in certain cases (41) Duty of state to raise the level of nutrition and the standard of living and to improve public health (47). In **Maneka Gandhi v Union of India AIR 1978 SC 597** it was held that the concept of public interest must as far as possible receive its orientation from the Directive Principles. It will be in the interest of public at large to allow doctors to practice law as patients can not understand the complexity of medical sciences, nor can advocates. Judges who decide cases need assistance from qualified people, which can be given only by medico-legal experts.

In **Papnasam Labor Union v Madura Coats Ltd AIR 1995 SC 2200 (1995) 1 SCC 501**; principle and guidelines which should be kept in view while considering the constitutionality of a statutory provision imposing restriction on fundamental right were elaborated.

a. The restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved. This restriction is going beyond felt needs of the society as patients are not getting guidance as well as appropriate representation which would assist judiciary.

b. There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought to be achieved. In **(Dr) Haniraj Chulani v Bar Council of Maharashtra and Goa, AIR 1996 SC 1708** the Court held that

The said classification has a reasonable nexus to the object sought to be achieved, namely, the efficiency of advocates belonging to the legal profession and the better administration of justice for which the legal profession is a partner with the judiciary.

The less said the better regarding efficiency of administration of justice. Some lawyers are prolonging cases for their commercial interests, a fact which need not be overemphasized. Administration of Justice will improve if the judiciary gets qualified people to assist them especially when they are dealing with complex matters.

c. No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case. Blanket restriction on doctors practicing law is bad law. The law may restrict them from taking any other case not involving medico-legal matter.
d. In interpreting constitutional provisions, courts should be alive to the felt need of the society and complex issues facing the people which the Legislature intends to solve through effective legislation. Healthcare is extremely complex to be understood by people having no background in healthcare delivery, courts need qualified assistance.
e. In appreciating such problems and the felt needs of the society the judicial approach must necessarily be dynamic, pragmatic and elastic, So in the era of strained doctor-patient relationship, both doctors and patients need to be represented appropriately.
f. It is imperative that for consideration of reasonableness of restrictions imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restrictions imposed on the Fundamental Rights, The answer is in negative as far as this restriction is concerned.
g. Although Article 19 guarantees all the seven freedoms to the citizens, such guarantee does not confer any absolute or unconditional right but is subject to reasonable restrictions which the Legislature may impose in the public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values. This restriction does not protect social welfare. In fact, doctor-patient relation has gone from bad to worse, because 80% of patients do not get relief in medico-legal cases as they are difficult to prove. In order to improve this ratio, patients need appropriate counsel from medico-legal experts.
h. The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies. Restriction w.r.t. experience of doctor, qualification in law may be appended with necessity of advocate on record to take care of procedural matters.
i. Restrictions imposed on the Fundamental Rights guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. *Ex hypothesi,* therefore, a restriction to be reasonable must also be consistent with Article 14 of the Constitution. Blanket restrictions are certainly

arbitrary, unbridled, uncanalised and excessive and also unreasonably discriminatory.

j. In judging the reasonableness of the restriction imposed by clause (6)of Article 19, the Court has to bear in mind Directive Principles of State Policy (explained above)
k. Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest(explained above)

In **K A Abbas v UOI 1973 SC 123** it was held that a law affecting fundamental right may be held bad for sheer vagueness and uncertainty. The law is clear and certain, but nexus to be achieved is vague. In **Superintendent District Jail v Lohia AIR 1960 SC 633** it was held that for a restriction to be valid, it must have a rational relation with the ground for which the legislature is entitled to impose restrictions. There is absolutely no ground for which the legislature is entitled to impose such blatant restrictions. Too remote connection between a restriction and the constitutionally authorized ground for restriction will render the law invalid. There is absolutely no connection between the restriction and any constitutionally authorized ground for restriction, hence the law is invalid.

In **Laxmi Khandesari v State of UP** it was held that the law will be invalid unless it can be brought under the protective provisions of articles 19(2) to 19(6). None of the provisions of 19(2) to 19(6) are applicable viz. Security of state(2) Interest of public order(3) Motrality(4) Interest of general public or schedule tribe(5) Professional or technical qualifications(6) OR partial or complete exclusion of citizens. Burden to show this is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid. The State Bar Council of Maharashtra and Goa or Bar council of India may show what is appropriate ground for this restriction, which in fact does not exist in the current situation,changed substantially from 1996.

Severability test : The law in its entirety will have to be considered as bad. Rule(1) framed by the Bar Council of Maharashtra under Sections 28(2) and 24(1)(e) of the Act prohibits a person who is otherwise qualified to be admitted as an advocate from being enrolled as an advocate if he is carrying on any other profession like medical profession

Judicial discretion : While deciding a medico-legal case, each judge must have felt want of medico-legal expertise. This can not be fulfilled by expert opinion in a particular case, as medical experts are not aware of legal niti-grities and legal experts are not aware of medical complexities. Knowledge of forensic medicine is different from the law of torts. At times opinion of expert panel has not been taken into consideration by consumer forum. Therefore need of medico-legal experts assisting courts in deciding a case can not be over emphasized.

It is important to note that Securities Adjudication Tribunal established under SEBI act allows Company secretaries to appear on behalf of their clients in addition to advocates as they have knowledge, experience and expertise with respect to SEBI act. Similarly Chartered Accounts appear before Income Tax Tribunal, Sales Tax Consultants appear before Sales Tax tribunals. Many such examples can be given in Alternate Dispute Resolution Mechanism in which non advocate professionals can practice. Even advocates registered in foreign countries who can not practice law in India can ‘fly in and fly out’ for arbitration of matters related to international trade and commerce to assist companies who engage them. Therefore there is no valid reason why doctors who have knowledge regarding medical management can not

represent their clients, be it patient or doctors; and can not assist judiciary especially when advocates from both sides as well as judges themselves do not have any background enabling them to understand complexity in medical sciences.

Most of the legislators or law makers are practicing advocates. They have been cabinet ministers or ministers of state in various government. It is true that they apply their knowledge of law in serving the country, but it is also true that they do practice in the court simultaneously. The legislators donning the black robes draw salaries from the Consolidated Fund of India, they are 'employees' of the State, a position that warrants suspension of practice under the Advocates Act and Bar Council Rules. In addition the MPs can initiate impeachment proceedings against judges, and therefore, appearing before them as lawyers would be a conflict of interest. Both law practice and the role of representatives of the people are full time professions. However Bar Council allows them to do both professions simultaneously. Does it mean that they have some extraordinary powers which entitle them to discriminatory treatment?

It may not be out of place to say that doctors have been trained to switch on and switch off from case to case, which they are treating simultaneously. They have to take correct decision in a very short time, especially when there is an emergency situation. There is no scope for making a mistake. There is neither an appeal to the high court nor to the supreme court. They have to work for 16 to 20 hours a day during training. It is extremely insulting to read judgment in (Dr) Haniraj Chulani v Bar Council of Maharashtra and Goa AIR 1996 SC 1708 saying

> "*Thus he would be torn between two conflicting loyalties, loyalty to his clients on the one hand and loyalty to his patients on the other. In a way he will instead of having the best of both the worlds, have worst of both the worlds. Such a person aspiring to have simultaneous enrollment both as a lawyer and as a medical practitioner will thus be like 'trishanku' of yore who will neither be in heaven nor on earth"*

Such statements only indicate narrow mindedness of judges who have not been able to clear backlog of cases which are piling up year on year. Judiciary has been blaming everyone else except themselves; government for not appointing adequate judges, lawyers for not assisting courts to clear backlog and litigants for filing unnecessary litigations. Even Alternate Dispute Redressal mechanism in this country failed to reduce burden on courts as finally everyone files appeal as some more time can be "purchased". Matter like Dr. Subramanian Swami v Arun Shourie, which was regarding contempt of court took 24 years in Supreme Court. High courts could not remember simple rule that there should be pre-defined punishment for pre-defined offence in cases involving contempt of court such as Pushpaben v Narandas Badian. It is disheartening to see that judges are making ultimate mockery of doctors who desire to assist judiciary by making their expertise in medico-legal field available to patients, doctors, courts and public at large.

Government of India published gazette for NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NOTIFICATION, New Delhi, the 13th February, 2014 having G.S.R. 89(E). The title section of this notification said "These regulations may be called the 'Consumer Protection (Procedure for regulation of allowing appearance of Agents or representatives or Non-Advocates or Voluntary Organisations before the Consumer Forum), Regulations, 2014'." These rules allowed any person of choice of the applicant or respondent to appear before the court. Non advocate persons could get accreditation from appropriate

authorities, and assist the consumer courts. This mechanism was functional till 2016, but appears to have been repealed by subsequent amendments in Consumer Protection Act for reasons best known to the Government of India and Bar Council of India.

Very recently In **Aruna and Anr vs Mukund and Anr, in criminal appeal no 2963 of 2019** Hon'ble Supreme Court bench comprising of Justice Arun Mishra, Vineet Saran and S Ravindra Bhat held that

> As admittedly, no medical expert has been examined in this case, we set aside the impugned orders passed by the courts below and remand the case to the trial court to examine the witnesses and to take the view of the medical expert on behalf of the complainant and only thereafter, to form an opinion whether any charge is made out in the case or not."

As early as 2005 in "**Jacob Mathew vs State of Punjab and Anr (2005) 6 SCC1**" Supreme court laid down guidelines governing the prosecution of doctors for the offence of criminal negligence, punishable under Section 304A of IPC has clarified requirement of "credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor." It had held therein,

1. A private complaint may not be entertained unless the complainant produces prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge negligence.
2. The investigating officer should, before proceeding against the doctor accused of negligence, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice, who can normally be expected to give an impartial and unbiased opinion applying Bolam;s test to the facts collected in the investigation
3. A doctor accused of negligence should not be arrested in a routine manner unless his arrest is necessary for furthering the investigation or unless there is a flight risk.

In spite of such clear directives, the trial court could not appreciate the need of examining expert witness and get credible opinion. This clearly indicates lack of knowledge regarding medico-legal aspects in lawyers of both sides as well as the judiciary. **Earlier this year, a doctor from Ratnagiri, Maharashtra was arrested without taking any opinion from expert committee**. The trial court refused to grant bail, Bombay High Court passed 10 page order justifying arrest and not granting bail, and Supreme Court granted bail in one line order. Need of medico-legal experts who can assist courts in cases involving medical negligence, whether in civil, criminal or consumer courts can not be overemphasized.

No point in dreaming of becoming like the UK, USA and Canada, which are developed countries having advanced healthcare, mature law and sophisticated malpractice suits in which doctors can represent doctors and patients to assist judiciary for better delivery of justice. It is requested that this article will be taken in a proper spirit, after giving due consideration to societal changes in medico-legal field in the last few years, after the entire medical profession has been subjected to unnecessary harassment under the guise of protection of consumers. Whether patients are consumers or not is a matter for another debate. For now, getting the restriction imposed on doctors for appearing in courts removed partially for medico-legal cases in civil or criminal courts, or in consumer forum is the need of the hour.