

# NURTURING CARING LAWYERS: RETHINKING PROFESSIONAL ETHICS AND RESPONSIBILITY IN INDIA

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*In light of the declining standards and public trust and confidence in the legal profession, there is a need to emphasise a deeper understanding of professional ethics among lawyers and perhaps articulate a different notion of professional responsibility that extends beyond the standards of professional conduct and etiquette for lawyers devised by the Bar Council of India and the limited practical learning imparted in law schools through legal clinics. The exaggerated focus on rules, and legalistic thinking and analysis has distanced lawyers from their ethical sensibilities and goals of truth and justice. In order to reconnect lawyers to the moral dimensions of their profession, it is critical to root their professional relationships and practices in social context and not isolate their private morality as distinct from their profession, rather integrate their individual emotions, feelings and instincts into professional decision-making. In this regard, Carol Gilligan's ethic of care may help lawyers to reimagine and reconstruct the legal profession in India in ethical and responsible ways.*

## I. INTRODUCTION

India has the second largest legal profession in the world with approximately one million lawyers<sup>1</sup> with more than 80,000 lawyers graduating each year from around 900 government and private law schools.<sup>2</sup> Despite an increasing demand for admission into law schools, the legal profession continues to be the subject of public misunderstanding and mistrust.

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<sup>1</sup> *The Indian Legal Profession*, HARVARD PROGRAM ON THE LEGAL PROFESSION (2011), available at [http://www.law.harvard.edu/programs/plp/pdf/Indian\\_Legal\\_Profession.pdf](http://www.law.harvard.edu/programs/plp/pdf/Indian_Legal_Profession.pdf).

<sup>2</sup> *Id.*

As concerns about the falling ethical standards of the legal profession are growing, both the Bar and the legal academy have undermined the importance of instilling normative values in lawyers. The exaggerated importance placed on rules, claims and defences and analytical reasoning in traditional legal education has insulated students from learning about the relevance of social context and processes, moral reasoning, and care and connection between lawyers and clients.<sup>3</sup> The preoccupation with legal procedure in teaching and legal practice has lost sight of the fact that procedural guarantees are a means to the end of truth of justice and not an end in itself.<sup>4</sup>

The dominant understanding of legal ethics is constructed in terms of rights where lawyers act by prioritising their individual freedom and autonomy and undermining the ideals of care and community.<sup>5</sup> This essay explores the possibility of rethinking lawyer's ethics in terms of an *ethic of care*.

## II. TAKING PROFESSIONAL ETHICS SERIOUSLY

The negative public perception of legal practitioners is reflected in the image of the lawyer in popular consciousness as selfish fortune-seekers rather than those seeking to serve.<sup>6</sup> Values like money, power and the uncompromising drive to 'win' are fast replacing values like integrity, decency and mutuality in the legal profession.<sup>7</sup> Susan Daicoff has identified a 'tripartite crisis' in the modern legal profession- decline of professionalism, negative public opinion of lawyers and the legal profession, and increase in lawyer dissatisfaction and dysfunction.<sup>8</sup>

Such erosion of values begins much before a lawyer enters professional practice; from the very first year at the law school, continues and deepens during the law school years and manifests itself during legal practice. While clients are often alienated by their relationship with their lawyer,

<sup>3</sup> Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1160 (1991-92), available at [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1651&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1651&context=fac_pubs).

<sup>4</sup> Dallin H. Oaks, *Ethics, Morality and Professional Responsibility*, 3 BYU L. REV. 591, 596 (1975), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1039&context=lawreview>.

<sup>5</sup> Stephen Ellman, *The Ethic of Care as an Ethic for Lawyers*, 81 THE GEO. L.J. 2665, 2667 (1992-1993).

<sup>6</sup> Chandra Krishnamurthy, *Legal Education and Legal Profession in India*, 36(2) INT'L. J. LEGAL INFO. 245, 260 (2008), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1136&context=ijli>.

<sup>7</sup> Ann Juergens, *Practicing what we Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 901 (2005), available at <http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1191&context=facsch>.

<sup>8</sup> Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 THE AMER. U. L. REV. 1337, 1338 (1997), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1406&context=aulr>.

lawyers themselves complain about their disillusionment and cynicism with the profession.

If indeed, law is a noble profession, meant to help and heal, then why is it that the legal system is becoming increasingly inaccessible to the poor and more and more lawyers are turning away from ideals of justice and public service, choosing financial gain over professional ethics and obligations?<sup>9</sup>

The moral neutrality of the legal profession in the face of commercialisation, specialisation and bureaucratisation of legal practice,<sup>10</sup> and a technical legal education has systematically undermined ethical considerations, leaving lawyers with ‘inferior judgment capacities, a narrower range of moral sensibilities and a reduced personal commitment to moral behaviour’.<sup>11</sup> Despite public scepticism about the legal profession, there has been limited critical enquiry about the ethical dilemmas raised by legal practice. The ‘what’<sup>12</sup> and ‘how’<sup>13</sup> of lawyers’ ethics have remained largely unaddressed.

It has been observed that lawyers’ moral reasoning and decision-making process is more homogenous as compared to the general public.<sup>14</sup> Typically, lawyers embody traditionally acknowledged *masculine* values of rationality, neutrality and impartiality in a fair and predictable legal system while the public also values *feminine* ideals of care and compassion.<sup>15</sup> This gap in understanding between lawyers and the public has led to an erosion of public confidence in the legal profession and cause lawyers to be perceived as cold, uncaring, aggressive, competitive and overly rule-oriented’.<sup>16</sup>

It is no surprise, therefore, that more than 90 per cent of Supreme Court lawyers appearing for the Advocates on Record (AOR) examination in 2013, failed the paper on ‘professional ethics and advocacy’ which asks critical

<sup>9</sup> Chandra Krishnamurthy, *supra* note 6.

<sup>10</sup> Donald Nicolson, *Making Lawyers moral? Ethical codes and moral character*, 25(4) LEGAL STUD. 601, 625 (2005), available at [https://pure.strath.ac.uk/portal/files/2175052/LS\\_2025\\_4\\_20Nicolson\\_1\\_.pdf](https://pure.strath.ac.uk/portal/files/2175052/LS_2025_4_20Nicolson_1_.pdf).

<sup>11</sup> *Id.*, at 626.

<sup>12</sup> This refers to the content of lawyers’ ethics- how do lawyers resolve or how they ought to resolve ethical issues in legal practice. Donald Nicolson, *Making Lawyers moral? Ethical codes and moral character*, 25(4) LEGAL STUD. 601, 603 (2005), available at [https://pure.strath.ac.uk/portal/files/2175052/LS\\_2025\\_4\\_20Nicolson\\_1\\_.pdf](https://pure.strath.ac.uk/portal/files/2175052/LS_2025_4_20Nicolson_1_.pdf).

<sup>13</sup> This refers to the content of lawyers’ ethics-how do lawyers resolve or how they ought to resolve ethical issues in legal practice. *supra* note 10, at 603.

<sup>14</sup> Susan Daicoff, *supra* note 8, at 1409.

<sup>15</sup> Susan Daicoff, *supra* note 8, at 1411.

<sup>16</sup> *Id.* (Research shows that law schools value attributes such as logic, thinking, rationality, justice, fairness, rights and rules which are considered as traditionally masculine traits. Feminine traits such as interpersonal connections, emotional response, altruism, sociability etc are undermined. The popular imagery of a good, effective lawyer is that of an aggressive, competitive, dominant person who is not necessarily guided by ideals of care, compassion, warmth and deference).

questions such as harmonisation of duties as a lawyer and officer of the court; whether or not to take up cases inconsistent with one's personal value system; the way lawyers should conduct themselves etc.<sup>17</sup> A practicing advocate who failed the paper challenged the results on the grounds that the examination questions were related to the daily functioning of the Supreme Court and general ethics of advocacy<sup>18</sup> as if such knowledge and understanding is immaterial to legal practice.

Increasingly, we find that law students graduating from the elite law schools in India are attracted to careers that disconnect them from their 'intrinsic' values and motivations like integrity, care, help etc. and they drift towards 'extrinsic' orientations like winning, high salaries, social status etc. As a result, they begin to understand and practice 'professionalism' as separate from job/personal satisfaction when, in reality; they are inseparable as one's quality of life and professional reputation 'manifest from one's choice of optimal goals, values and motives'.<sup>19</sup>

Intense competition among lawyers in a tight market for legal services has encouraged aggressive, hostile and dishonest professional behaviour. Too many law students graduate from law school with uncertain professional goals, values and standards, which make them susceptible to adopt 'hostile and over-reaching behaviour' to achieve professional prestige and material success.<sup>20</sup> The rapid commercialisation of legal practice is gradually *de-professionalising* law and turning it into a business, causing an *ethical deficit* among lawyers.<sup>21</sup> The competitive and adversarial environment in law schools pushes young aspiring lawyers to transform themselves and their value systems to fit the lawyer 'norm'.<sup>22</sup>

A recent empirical evaluation of civil litigation in India by Eisenberg, Kalantry and Robinson<sup>23</sup> has shown that although improved economic and non-economic<sup>24</sup> well-being usually increases reliance on formal institutions such as courts leading to higher litigation rates, the civil filings have reduced

<sup>17</sup> Utkarsh Anand, 93% *Lawyers fail paper on Ethics, Advocacy*, INDIAN EXPRESS (April 10, 2013), <http://www.indianexpress.com/news/93-lawyers-fail-paper-on-ethics-advocacy/10999861>.

<sup>18</sup> *Id.*

<sup>19</sup> See Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=549361](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=549361).

<sup>20</sup> Susan Daicoff, *supra* note 8, at 1422.

<sup>21</sup> Susan Daicoff, *supra* note 8, at 1424.

<sup>22</sup> Susan Daicoff, *supra* note 8, at 1423.

<sup>23</sup> Theodore Eisenberg, Sital Kalantry & Nick Robinson, *Litigation as a Measure of Well-being*, CORNELL LAW FACULTY WORKING PAPERS, Paper 99 (2012), available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1102&context=clsops\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1102&context=clsops_papers).

<sup>24</sup> *Id.*, at 34. (The study recorded higher litigation rates in those Indian states with higher human development indices (HDI) which suggest that people are more likely to use the courts when they are economically, socially and physically better off. The HDI has both an economic

in recent years despite an overall improvement of human well-being in India. This may be attributable to judicial delays due to increasing court backlogs. As of 2008, India's lower court backlog was more than 26 million cases<sup>25</sup> which may be attributed to poor court infrastructure, overburdened court dockets, high rate of adjournments, insufficient number of judges and poor legal training.<sup>26</sup> An analysis of civil filings across all Indian states between 2005-2010 shows that on average, it takes more than four years to clear court backlogs.<sup>27</sup>

Robinson's analysis has also shown that it takes the Supreme Court of India, four years, on average, to decide a matter<sup>28</sup> and everyone cannot access it equally as most of the admitted appeals are company, tax, service and land acquisition matters from Delhi and other wealthy states.<sup>29</sup> Contrary to popular belief, only two per cent of the Supreme Court's cases are writ petitions and social action litigation (SAL) comprises only one per cent.<sup>30</sup> A 2009 World Bank analysis of Supreme Court data showed that on average, 260 out of 60,000 cases per year are SALs (0.4 per cent), a large majority of which are brought through formal channels and not through letters and handwritten petitions received from ordinary, public spirited citizens.<sup>31</sup>

On average, it takes more than ten years for a litigant to get a final verdict on their case.<sup>32</sup> The Indian litigation experience demonstrates that too many cases are filed but too few are timely adjudicated<sup>33</sup> and potential litigants are slowly turning away from courts.<sup>34</sup>

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component, reflected in higher income per capita and a non-economic component, such as health, education, etc.).

<sup>25</sup> See Vivek Kanwar et al., *Justice without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts*, 2(i) JINDAL GLOBAL L. REV. 9 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679350](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679350); see also Kannan Kasturi, *Civil Litigation? No, Thanks*, INDIA TOGETHER (July 12, 2009), available at <http://www.indiatogether.org/2009/jul/gov-civil.htm>.

<sup>26</sup> For details, see Jayanth K. Krishnan et al, *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2297152](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297152).

<sup>27</sup> Theodore Eisenberg, *supra* note 23, at 15. (Table 2. India State's Civil Filings & GDP, 2005-2010, HDI, Literacy, Population Density, Backlog).

<sup>28</sup> Nick Robinson, *A Court Adrift*, FRONTLINE (3-5-2013), available at <http://www.frontline.in/cover-story/a-court-adrift/article4613892.ece>.

<sup>29</sup> Robinson's study shows that in the last five years, the Supreme Court has adjudicated mainly criminal matters (21%), service matters concerning government employees (16%), direct and indirect tax matters (13%) and land acquisition matters (9%).

<sup>30</sup> *Id.*

<sup>31</sup> Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?*, WORLD BANK, POLICY RESEARCH WORKING PAPER 5109, 10 (2009), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109>.

<sup>32</sup> Nick Robinson, *supra* note 28.

<sup>33</sup> Theodore Eisenberg, *supra* note 23.

<sup>34</sup> Theodore Eisenberg, *supra* note 23.

In one of the early treatises on the modern Indian legal profession, Marc Galanter asked whether Indian lawyers can adapt outside the adversarial setting of courtrooms to collaborate with others to find solutions for substantive problems of their clients, and whether they can think beyond their rule-mindedness to develop creative and practical problem-solving approaches.<sup>35</sup> He suggested that legal education should develop the capacity to impart these new skills and attitudes.

The increasing court backlogs and judicial delays are giving rise to alternative forms of dispute resolution such as mediation, which demands creative and collaborative approaches to lawyering. Yet, law schools continue to teach students to ‘think like lawyers’ practicing in an adversarial setting and stress on doctrinal learning methods focusing on legal analysis of legislation and case law.

### III. BRIDGING THE GAP BETWEEN LEGAL ETHICS AND THE LEGAL PROFESSION: WHAT CAN LAW SCHOOLS DO?

Traditional legal education approaches the subject of law within the imagined paradigm of a perfect world where law equals justice and all that lawyers need to do is apply legal rules in each case.<sup>36</sup> However, in the real world, legal services are not always available or affordable, legal aid is limited, states do not comply with their legal obligations, laws are not comprehensive and clear, judges do not reason consistently, police and courts are not efficient and lawyers are not ethical.<sup>37</sup> As a result, lawyers are deprived of any training on how to respond to the uncontrollable variables that often challenge the predictability of legal outcomes.<sup>38</sup>

Marc Galanter identified the malaise of Indian legal education as follows<sup>39</sup>—

*“The emphasis on litigation and the barrister’s role reinforces lawyers’ rule-mindedness. Where the lawyer’s task is to win disconnected battles, rather than to pattern relationships, there is little to induce the practicing lawyer to go beyond the kind of conceptualism that is characteristic of much of Indian legal scholarship and that pervades legal*

<sup>35</sup> Marc Galanter, *Introduction: The Study of the Indian Legal Profession*, 3 L. & Soc. Rev. 201, 217 (1969), <http://marcgalanter.net/Documents/papers/scannedpdf/studyoftheindianlegalprof.pdf>.

<sup>36</sup> Colin G. James, *Lawyers’ Wellbeing and Professional Legal Education*, 42(1) THE LAW TEACHER: THE INT’L. J. LEGAL EDU. 85, 92 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322339](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322339).

<sup>37</sup> *Id.*, at 93.

<sup>38</sup> *Id.*

<sup>39</sup> Marc Galanter, *supra note 35*, at 208.

*education. Writing and teaching are, with significant exceptions, confined to close textual analysis on a verbal level with little consideration either of underlying policy on the one hand or problems of implementation on the other”.*

Upendra Baxi has long recognised the need for a *socially relevant* legal education which requires legal pedagogy to move beyond the lecture method of instruction and be embedded in the socio-legal context and legal curriculum to acknowledge and address the contemporary problems of society and the corresponding tasks before law and lawyers.<sup>40</sup>

What has also been ignored by the legal profession is the subject of obligations. Law schools and legal professionals have emerged as ‘gladiators, guarantors and enforcers’ in relation to rights<sup>41</sup> but have remained uncharacteristically silent on the subject of responsibilities.

It has been argued by some legal educators that law students cannot be taught ethics and morality in law school because these notions are developed before they enrol<sup>42</sup> and the blame is often shifted to the Bar which is accused of lowering standards of professional discipline and failing to provide the kind of moral and legal leadership expected from officers of the court.<sup>43</sup> It is commonly believed that lawyers will learn to grapple with complex intellectual and emotional issues with their experience of practice.<sup>44</sup>

The dominant legal pedagogy offers lawyers an ‘excused status’, i.e. lawyers are seen as merely facilitating transactions, solving problems and working within the legal system.<sup>45</sup> Lawyers are generally absolved as long as they use clean means, no matter what the end pursued by their clients.<sup>46</sup> Flynn argues that greater harm is caused when lawyers engage in amoral conduct and have no standard of right and wrong by which to judge their conduct.<sup>47</sup>

Studies in American law schools have found that law schools de-emphasise the role of human relationships and connections in lawyering by teaching

<sup>40</sup> Upendra Baxi, *Notes Towards a Socially Relevant Legal Education: A Working Paper for the UGC Regional Workshops in Law* 43 (1975-77), <http://www.ugc.ac.in/oldpdf/pub/report/1.pdf>.

<sup>41</sup> Dallin H. Oaks, *supra* note 4, at 597 See also Elliot Richardson, *On Behalf of Obligations*, 8 LINCOLN L. REV. 109 (1973).

<sup>42</sup> *Id.*, at 593 See also Murray L. Schwartz, *Legal ethics v. Common Notions of Morality*, LEARNING & THE LAW 40, 47-48 (Spring 1975).

<sup>43</sup> *Id.* at 594 See also Bayless Manning, *If Lawyers were Angels: A Sermon in One Cannon*, 60(7) AMER. BAR ASSO. J. 821 (1975).

<sup>44</sup> Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 MICH. J. LEGAL REF. 248, 252 (1974-1975).

<sup>45</sup> Barbara Bezdek, *supra* note 3, at 1162.

<sup>46</sup> Barbara Bezdek, *supra* note 3, at 1162.

<sup>47</sup> See John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976(3) WASH. U. L. Q. 429 (1976), <http://digitalcommons.law.wustl.edu/lawreview/vol1976/iss3/3>.

law students to 'think like a lawyer' and remain emotionally neutral which may cause psychological discomfort among those students who are forced to deny their care orientation in favour of an analytical, rule-based, rights orientation.<sup>48</sup> When law schools refrain from identifying and clarifying ethical issues associated with legal practice, they fail in their duty to train future legal practitioners to understand that value judgments are a significant part of his/her function as a lawyer.<sup>49</sup>

The present legal curriculum does not engage in such critical conversations as lawyers are socialised as 'pragmatic problem solvers who get things done, not poets who wallow in angst or therapists whose expertise is empathy'.<sup>50</sup> Law schools must realise that such conversations are not merely questions of private morality but constitute an important part of a lawyer's professional training.

Traditionally, the teaching of professional ethics and responsibility in Indian law schools has struggled to establish intellectual legitimacy, and the curriculum has remained limited to instruction about a code of conduct for legal practitioners- essentially, a list of do's and don'ts! Professional ethics courses offered in Indian law schools adopt a legalistic approach focused on enforceable laws and rules rather than addressing issues concerning a lawyer's moral conduct and inquiring their role in perpetuating injustices.<sup>51</sup>

While it is important to learn the Code of Ethics, an understanding of professional responsibility is incomplete unless legal education reinforces certain positive behaviours which are critical to effective and ethical practice of law.<sup>52</sup> As it stands today, courses on professional ethics are not taken seriously by the faculty or the students in law schools.

However, there are a few positive examples, developed by some progressive law teachers that have recognised the need for law students to gain a deeper understanding of ethical issues by experiencing the legal system at a social and personal level, and connecting to their professional role at an emotional level.<sup>53</sup>

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<sup>48</sup> Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 234 (1991).

<sup>49</sup> Murray L. Schwartz, *Legal ethics v. Common Notions of Morality*, LEARNING & THE LAW 40, 47-48, 50 (Spring 1975).

<sup>50</sup> Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1172 (1991-92).

<sup>51</sup> Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L. J. 1176 (1992).

<sup>52</sup> Andrew S. Watson, *supra* note 44, at 250.

<sup>53</sup> Colin G. James, *supra* note 36, at 95.



The Legal Theory and Practice (LTP) course in the University of Maryland School of Law in the United States, attempted to rethink the discourse on professional responsibility in terms of an ethic of care.<sup>54</sup> The course focused on two key ideas- that the work of lawyers is deeply connected to those disadvantaged by the legal system and that legal practice can be based on care and connection.<sup>55</sup> For law students struggling with negative feelings about themselves and law school, the LTP course encouraged them to feel part of a care network and combine intellectual and emotional aspects of lawyering.<sup>56</sup> Classes on lawyering skills, interviewing and fact-finding emphasised on responding to the clients' goals and understanding their perspectives.<sup>57</sup> A part of the course focused on individual client representation and legal work which encouraged law students to support each other and share their findings<sup>58</sup> in order to develop caring and cooperative approaches to legal practice.<sup>59</sup>

In a similar vein, the 'humanising legal education' movement that emerged in the United States some years ago, made a sincere plea to law schools to value the emotional experience of lawyering and put an emphasis on human nature as the guiding force in legal education. Such reorientation will lead law schools to reconsider their adversarial approaches to teaching law and grading students, and adopt a more holistic and humanising outlook to teaching and studying law.<sup>60</sup> To reach a comprehensive resolution to any legal problem, it is important for lawyers to take into account the emotional dimensions of the problem by empowering and actively involving parties in problem solving, thus promoting an *emotionally intelligent justice*.<sup>61</sup>

More than two decades ago, law professors, David Wexler and Bruce Winick studied the therapeutic or anti-therapeutic impact of mental health law on patients, their families and other relevant stakeholders. Subsequently, they developed the idea of 'therapeutic jurisprudence' as a perspective that focuses on the impact of the law on emotional life and psychological well-being.<sup>62</sup> It examines how the law, which consists of legal rules, legal procedures, and the behaviour and roles of legal actors, often produces therapeutic or anti-therapeutic outcomes.

<sup>54</sup> Theresa Glennon, *supra* note 51, at 1179.

<sup>55</sup> *Id.*

<sup>56</sup> Theresa Glennon, *supra* note 51, at 1180.

<sup>57</sup> Theresa Glennon, *supra* note 51, at 1181.

<sup>58</sup> Theresa Glennon, *supra* note 51, at 1184.

<sup>59</sup> Theresa Glennon, *supra* note 51, at 1186.

<sup>60</sup> Michael Hunter Schwartz, *Humanising Legal Education: An Introduction to a Symposium whose time came*, 47 WASHBURN L.J. 235, 241 (2007-2008).

<sup>61</sup> See Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 34 MELB. U. L. REV., (2008) <http://www.austlii.edu.au/au/journals/MULR/2008/34.html>.

<sup>62</sup> David B. Wexler., *Therapeutic Jurisprudence: Issues, Analysis and Applications*, 27 SEATTLE U. L. REV. 217, 217-222 (2000-01).

A convergence of these ‘vectors’, comprising of a number of new disciplines, such as collaborative law, preventive law, creative problem solving, holistic justice, therapeutic jurisprudence, ethic of care, restorative justice etc., has created a comprehensive law movement that explicitly recognises law’s potential as an agent of positive and interpersonal individual change and integrates extra-legal concerns like morals, values, beliefs, personal, psychological and community well-being etc. into legal practice.<sup>63</sup>

These innovative pedagogical models provide a basis for law schools in India to reorient their legal curriculum to link ethical legal practice to psychological well-being and professional fulfilment. An integration of personal and professional values, and an assimilation of analytical thinking and emotional intelligence will allow lawyers to practice law with integrity, compassion, diligence and enjoyment.<sup>64</sup>

#### IV. THE ETHIC OF CARE AS A PROFESSIONAL MODEL FOR LAWYERS

The present structure of legal education divorces the intellectual side of a student from his/her emotional side. The strong emphasis on analytical thinking in law schools deeply undermines the need for instilling a sense of ethical responsibility in the students.

The adversarial legal system teaches law students from the very first year of law school to argue against someone for the purpose of establishing that they are right and others are wrong, thus, dangerously emphasising binary thinking.<sup>65</sup> Traditional legal education justifies a variety of practices focused on the ‘self’ and to the detriment of others.<sup>66</sup>

As John J. Flynn observes,<sup>67</sup>

*“Law schools may actually be creating amoral lawyers, whose skills of rationalization, attempted division of intellectual and emotional sides of their personalities, and insensitivity to ethical issues will become increasingly dangerous in the highly complex, specialized, and competitive world of law practice.”*

<sup>63</sup> Susan Daicoff, *Law as a Healing Profession: The “Comprehensive” Law Movement*, BEPRESS LEGAL SERIES, PAPER 1331 (2005), available at [http://law.cwru.edu/lectures/files/2008-2009/20090410\\_Daicoff\\_excerpt.pdf](http://law.cwru.edu/lectures/files/2008-2009/20090410_Daicoff_excerpt.pdf).

<sup>64</sup> Colin G. James, *supra* note 36, at 96.

<sup>65</sup> Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8(2) GEOR. STATE U. L. REV. 385, 387 (1991), <http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1363&context=gsulr>.

<sup>66</sup> *Id.*, at 386.

<sup>67</sup> See John J. Flynn, *Supra* note 47, at 441.

Rand and Dana Jack's research has shown three common responses to the conflict faced by *caring* lawyers—denial of their care orientation and rejection of their emotional side; using one's emotional side in one's personal and family life and one's logical, analytical side at work; attempting to incorporate a care orientation into lawyering.<sup>68</sup> Although a focus on care orientation is a potentially good response to this conflict, it is rarely invoked by lawyers.

In 1982, Carol Gilligan proposed the feminist *ethic of care* as a normative moral theory to establish the centrality of care in both the private and public sphere. She advocates for the extension of care ethics to communities, institutions and states to foster a holistic approach to moral or legal questions. In her thesis, Gilligan analysed the moral decision making processes of girls and young women confronted with hypothetical and real dilemmas. She questioned the six stage moral development theory proposed by Lawrence Kohlberg<sup>69</sup> on the ground that his theory ignores the 'different voice' of women and girls.

Kohlberg reached his conclusions using male subjects as he observed that women lack moral agency and are generally at an inferior stage of moral development.<sup>70</sup> In response, Gilligan prioritised the different voices of women and concluded that men and women exercise different kinds of moral reasoning—while men try to determine what is right or unjust, women focus on 'how to respond'.<sup>71</sup> In other words, men represent the ethic of rights or justice based on a set of legalistic rules applied to a set of facts while women represent the ethic of care or responsibility who contextualise issues through relationships and individual values.<sup>72</sup> The ideal would be to hear or consider *all* voices, particularly marginalised and silenced voices.<sup>73</sup>

Gilligan beautifully explains the interdependence of justice and care as follows<sup>74</sup>—

<sup>68</sup> See RAND JACK & DANA CROWLEY JACK, *MORAL VISIONS AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 130-155* (1988).

<sup>69</sup> See, LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE, ESSAYS ON MORAL DEVELOPMENT I* (1981) (Kohlberg's six stage theory has three levels— The pre-conventional in which behaviour is based on obedience and punishment, the conventional in which maintenance of good relations is paramount and the post-conventional in which individual conscience is paramount).

<sup>70</sup> *Id.*

<sup>71</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE* 35 (1982).

<sup>72</sup> Narnia Bohler-Muller, *Developing a new jurisprudence of gender equality in South Africa*, DOCTORAL THESIS, FACULTY OF LAW, UNIVERSITY OF PRETORIA, SOUTH AFRICA 47 (Nov. 2005), available at <http://upetd.up.ac.za/thesis/available/etd-06152006-123856/unrestricted/othesis.pdf>.

<sup>73</sup> *Id.*, at 90.

<sup>74</sup> Carol Gilligan, *Moral orientation and moral development; in WOMEN AND MORAL THEORY* 10 (Eva Fedder Kittay & Diana T. Meyers eds., 1987).

*“Theoretically, the distinction between justice and care cuts across the familiar divisions between thinking and feeling, egoism and altruism, theoretical and practical reasoning. It calls attention to the fact that all human relationships, both public and private, can be characterised both in terms of attachment, and that both inequality and detachment constitute grounds for moral concern. Since everyone is vulnerable both to oppression and to abandonment, two moral visions- one of justice, and one of care- recur in human experience. The moral injunctions, not to act unfairly toward others, and not to turn away from someone in need, capture these different concerns”.*

In Gilligan’s view, care is not just an emotional response but a coherent moral perspective that values human relationships and mutual connections over individual autonomy<sup>75</sup> and takes into account both *thinking* and *feeling*.<sup>76</sup> The ethic of care regards detachment as a moral problem.<sup>77</sup> Yet, this is the key challenge in our existing legal structures and institutions which promotes detachment with the client, opposing parties/counsel as an important aspect of lawyering. Lawyers are trained to ignore their personal feelings about their clients and their causes and devote their attention towards achieving success for the client irrespective of how their client’s rights might affect others.<sup>78</sup>

Is it possible for legal actors (lawyers, judges, clients, law students, law professors) to acknowledge the centrality of care and if yes, how and with what consequences will they employ it?<sup>79</sup> Gilligan’s contribution is of significant value in the field of legal and moral theory as she has attempted to deconstruct the modern legal subject- rational, abstract, autonomous Man<sup>80</sup> by articulating a plural, non-hierarchical and *relational subject*.<sup>81</sup>

Care cannot be legislated and must emerge from voluntary, internal sources.<sup>82</sup> However, what can and should be confronted and changed is a legal culture that fosters selfish, profit maximising behaviour that minimises sensitivity towards others<sup>83</sup>, and a legal system that allows legal actors to wage war and act in ways, which although ordinarily reprehensible, have become morally defensible in legal practice.<sup>84</sup> Examining the institution of legal representation

<sup>75</sup> Stephen Ellman, *supra* note 5, at 2668.

<sup>76</sup> See Carol Gilligan, *Reply by Carol Gilligan*, 11 Signs 326 (1984).

<sup>77</sup> Carol Gilligan, *supra* note 74.

<sup>78</sup> Sandra Janoff, *supra* note 48, at 228-29.

<sup>79</sup> Carrie Menkel-Meadow, *supra* note 65.

<sup>80</sup> SUSAN HEKMAN, MORAL SELVES, MORAL VOICES, MORAL SELVES: CAROL GILLIGAN AND FEMINIST MORAL THEORY 2 (1995). See generally GRACE CLEMENT, CARE, AUTONOMY AND JUSTICE: FEMINISM AND THE ETHIC OF CARE (1993).

<sup>81</sup> Narnia Bohler-Muller, *supra* note 72, at 50.

<sup>82</sup> Carrie Menkel-Meadow, *supra* note 65, at 401.

<sup>83</sup> *Id.*

<sup>84</sup> Carrie Menkel-Meadow, *supra* note 65, at 407.

in care terms will show that lawyers who believe in the centrality of care in defining their professional responsibility will care for all parties involved in a legal situation.<sup>85</sup> In Gilligan's words, 'an ethic of care rests on the premise of non-violence- that no one should be hurt'.<sup>86</sup>

Care in lawyering allows legal actors to make ethical choices based on 'macro' considerations such as what cases to take on or which clients to represent rather than on 'micro' considerations such as what to do in a particular case.<sup>87</sup> Care thinking reconstructs the lawyer-client relationship as horizontal rather than vertical wherein the lawyer makes an independent and objective assessment of his client's problem to counsel him. If a lawyer's individual values and ethical judgment conflict with a client's interests, he should be able to advise the client to find other representation.<sup>88</sup>

This also means that the lawyer-client relationship is based on empathetic considerations placing greater emphasis on the client's needs.<sup>89</sup> Care for the other will encourage lawyers to rethink some of the harmful, adversarial techniques used in litigation and/or strive to find the best solution for all involved parties.<sup>90</sup>

Menkel-Meadow has proposed ways in which the ethic of care could inform legal procedures and institutions by focusing on solutions that respond to the needs of all parties involved and cause the least harm.<sup>91</sup> Ellman has observed that the ethic of care does not necessarily imply that a caring lawyer-client relationship is always equal, as typically, the client receives more care and attention from the lawyer than the lawyer from the client and such inequality should be acknowledged while rejecting an inflexible, hierarchical lawyer-client relationship that currently exists.<sup>92</sup> Neither is such a caring relationship free of paternalism in certain circumstances given the lawyer's depth of knowledge of the client and his/her attachment/connection to the client's needs.<sup>93</sup>

<sup>85</sup> Stephen Ellman, *supra* note 5, at 2679.

<sup>86</sup> CAROL GILLIGAN, *supra* note 71, at 174.

<sup>87</sup> Carrie Menkel-Meadow, *supra* note 65.

<sup>88</sup> For a more detailed discussion on this, see E. Wayne Thode, *The Ethical Standard For the Advocate*, 39 TEXAS L. REV. 575 (1961).

<sup>89</sup> Carrie Menkel-Meadow, *supra* note 65, at.

<sup>90</sup> Carrie Menkel-Meadow, *supra* note 65, at 411-12.

<sup>91</sup> See Carrie Menkel-Meadow, *Portia in a different voice: Speculations on women's lawyering process*, 1 BERKLY. WOMEN'S L.J. 39 (1985), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1001&context=bglj>.

<sup>92</sup> Stephen Ellman, *supra* note 5, at 2675.

<sup>93</sup> Stephen Ellman, *supra* note 5, at 2704 (Ellman argues that caring lawyers may make paternalistic interventions if there is a demonstrated need for action based on his/her deep knowledge of the client's situation, such as in the case of a victim of domestic violence who is unable to take action against her partner/spouse and allows him/her to move back into the family home. If a caring lawyer is convinced that his/her client will face harm as a result of her

The ethic of care encourages lawyers to establish a personal relationship and/or emotional connection with his/her client to understand the client's perspective and represent the client as a person and not a cause<sup>94</sup> in order to provide better services to the client and care better.<sup>95</sup> At the same time, even while developing a meaningful connection with clients, a caring lawyer should maintain professional distance from them. It is a delicate balance between a level of self-disclosure that will assist the clients rather than flood them with self-revelation.<sup>96</sup> As O'Leary describes, 'sharing personal experiences can lead to dependence that could be dangerous. The lawyer might be so eager to share her own experiences that she imposes on the client'.<sup>97</sup>

With regard to legal representation and choice of clients, the universalist idea that a lawyer must represent any person who approaches him/her is deeply problematic in care terms.<sup>98</sup> In other words, while the ethic of care extends care to everyone, it is implausible to render equal care for all.<sup>99</sup> Our personal beliefs and values guide many of our professional decisions in our lives, yet, oddly, the ethics of lawyers is defined and understood as incompatible with personal morality.

Ellman illustrates this aspect as follows-<sup>100</sup>

*"As an empirical matter, there simply is room- people in professional contexts do respond to the calls of affection, loyalty, and sympathy. As a normative matter, moreover, there should be room- at least as long as we believe that justice should be tempered with mercy, and the rigors of the law eased with equity".*

Many might question the notion that lawyers should have such freedom of choice of clients as this will allow lawyers to reject cases by always prioritising their own interests over others. Charles Fried advocates that a lawyer's personal autonomy justifies his/her selection of any client that he/she wishes for any reason, as long as he/she can faithfully represent the client within the

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choices if he does not intervene, he would rather make a paternalistic intervention rather than remain silent and be indifferent).

<sup>94</sup> Stephen Ellman, *supra* note 5, at 2674.

<sup>95</sup> Stephen Ellman, *supra* note 5, at 2699.

<sup>96</sup> Kimberley E. O'Leary, *Creating Partnerships: Using Feminist Techniques to Enhance the Attorney-Client Relationships*, 16 LEGAL STUDY F. 217, 217 (1992).

<sup>97</sup> Kimberley E. O'Leary, *Creating Partnerships: Using Feminist Techniques to Enhance the Attorney-Client Relationships*, 16 LEGAL STUDY F. 217, 217 (1992).

<sup>98</sup> NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 47, 86, 112 (1982) (Unlike Gilligan, Noddings rejects the possibility of caring for everyone and argues that the caring person will 'dread' the arrival of the stranger needing her care, because true care is very demanding for the person caring and the notion of equal care for all is implausible).

<sup>99</sup> Stephen Ellman, *supra* note 5, at 2681.

<sup>100</sup> Stephen Ellman, *supra* note 5, at 2674.

limits of the law.<sup>101</sup> William Simon, on the other hand, asks lawyers to exercise their ethical discretion by taking up those cases that 'seem most likely to promote justice'.<sup>102</sup>

In contrast, the ethic of care emphasises that a lawyer should balance his/her own interests, needs and responsibilities with that of others to decide whether to represent a client or not. Multiple factors guide a caring lawyer's decision with regard to legal representation, such as client's needs, lawyer's own feelings, and the caring and uncaring nature of the client and his cause. In fact, in care terms, a lawyer is likely to harm the clients if he/she does not care for the client and still chooses to represent them when they may have benefited from effective alternative counsel.

## V. HOW CARING IS THE LEGAL PROFESSION IN INDIA?

The legal profession, as a learned profession, is distinguished from 'occupations' or 'businesses', through its orientation towards the pursuit of social goals such as creation and sustenance of conditions of justice.<sup>103</sup> No formal controls were imposed on legal professionals as it was commonly believed that lawyers, being gentlemen and men of honour, 'instinctively knew how to behave'.<sup>104</sup> It is assumed that as learned professionals, lawyers are in a position to articulate a self-regulatory code of ethics and enforce integrity and discipline into the Indian legal profession.<sup>105</sup>

The legal profession in India is regulated by the Bar Council of India (BCI) which performs oversight functions and lays down standards of professional conduct. Each state has its own Bar Council which regulates admission and removal of advocates from its rolls. The members of the legal profession in India are bound by the Code of Professional Ethics in Part VI, Chapter II of the BCI Rules under Section 49 of the Advocates Act 1961. The powers of disciplinary action are vested in the state Bar Councils through a system of peer group adjudication.<sup>106</sup>

While some critics argue that such a self-regulatory code of ethics attempt to portray lawyers as honourable and ethical who are somehow worthy of an exalted professional status and rich financial rewards and also as a way to minimise state scrutiny and public hostility, others view the code as a social

<sup>101</sup> See, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations*, 85 YALE L.J. 1060 (1976).

<sup>102</sup> See, William H. Simon, *Ethical Discretion in Lawyering*, 101(6) HARV. L. REV. 1083 (1988).

<sup>103</sup> Upendra Baxi, *The Pathology of the Indian Legal Professions*, 13(3, 4) IND. BAR REV. 455 (1986).

<sup>104</sup> Donald Nicolson, *supra* note 10, at 604.

<sup>105</sup> Upendra Baxi, *supra* note 103, at 480.

<sup>106</sup> *Id.*

contract wherein lawyers agree to uphold certain ethical standards in return for their high social and professional standing.<sup>107</sup>

The BCI Rules framed under the Advocates Act 1961 prohibits advocates from refusing client representation<sup>108</sup> and encourages them to represent their clients irrespective of moral considerations. Yet, in practice, we find that advocates exercise absolute discretion in refusing clients as the existing code does not provide any guidance on how to exercise this discretion.

Furthermore, the rules de-emphasise care thinking as follows<sup>109</sup>–

*“It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence”.*

The rules also allow lawyers to maintain a close nexus with the economy. Although they cannot engage in business, the rules permit them to serve as ‘sleeping partners’, directors of companies, inheritors of family businesses, investors and lobbyists<sup>110</sup> to supplement their earnings. In addition, there is no regulation of legal fees charged by lawyers.

As Upendra Baxi describes,<sup>111</sup>

*“In simple words, adequate care has been taken by the Code to authorise the recovery of fees, however negotiated, either from the expense account or from the judgment award....Although the tariff for legal fees is set by the rules of the Court, the Code nowhere places an obligation on lawyers not to charge higher fees”.*

The practice of engaging lawyers on a retainer by large companies is as much for their legal services as it is for preventing their availability to the opposite parties.<sup>112</sup> Specialised legal skills are frozen through an artificial

<sup>107</sup> Donald Nicolson, *supra* note 10, at 604.

<sup>108</sup> Part VI, Chapter II, Standards of Professional Conduct and Etiquette, BAR COUNCIL OF INDIA RULES (under The Advocates Act 1961), <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf>.

<sup>109</sup> Part VI, Chapter II, Standards of Professional Conduct and Etiquette, BAR COUNCIL OF INDIA RULES (under The Advocates Act 1961), <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf>. (S. II, Duty to the Client).

<sup>110</sup> Upendra Baxi, *supra* note 103, at 458.

<sup>111</sup> Upendra Baxi, *supra* note 103, at 459.

<sup>112</sup> Upendra Baxi, *supra* note 103.



restriction on the market for legal services. The existing dichotomy between prohibition of solicitation or advertising by lawyers, on one hand and the wholesale buying of legal services, at unregulated legal fees<sup>113</sup> on the other, invariably benefits the prominent lawyers and the resourceful clients,<sup>114</sup> thus, promoting unfair competition and creating an unequal Bar.

Yet, to a limited extent, the current rules that regulate the legal profession in India seem to be informed by care considerations. The conflict of interest rules prevents a lawyer from appearing in a case in which he is a witness and obligates a lawyer to fully disclose to his client, at the time of engagement, all information relating to his connection with the parties and/or any interests which is likely to affect the client's decision in engaging him.<sup>115</sup>

Care thinking is reflected more clearly in the principle -<sup>116</sup>

*“An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishment the innocence of the accused shall be scrupulously avoided”.*

However, the rules do not recognise the heterogeneity of the legal profession. For example, a lawyer owes a duty to the court to restrain himself and his client from engaging in unfair practices, including use of inappropriate language and aggressive tactics and arguments, in relation to the court and opposing parties and counsels and should refuse to represent a client who engages in such improper conduct.<sup>117</sup> The rules also stipulate that a lawyer should not be a mere mouthpiece for the client. However, in reality, some lawyers, particularly law officers in government service, are rarely in a position to question the means adopted by their client-the government, and in fact, have to justify the actions of the government, no matter how 'unfair',<sup>118</sup> in court and in public.

The cornerstone of a good justice system is the right of all persons, irrespective of their socio-economic status to full and effective legal representation. Yet, two standards of justice for the haves and the have-nots, continues and those most in need of legal assistance must overcome great barriers to obtain it. Quality legal representation is an expensive commodity in the legal market and the poor 'are not able to choose the lawyer, nor the lawyer to choose the

<sup>113</sup> Upendra Baxi, *supra* note 103.

<sup>114</sup> Upendra Baxi, *supra* note 103 (The Code does not differentiate between different types of clients. The capacity and resources available to government, corporations, banks, financial institutions, registered societies, etc. vary greatly from that of an individual client).

<sup>115</sup> *Supra* note 108. (S. II, Duty to the client, BCI Rules).

<sup>116</sup> *Supra* note 108.

<sup>117</sup> *Supra* note 108.

<sup>118</sup> Upendra Baxi, *supra* note 103, at 461.

poor'.<sup>119</sup> The quality of legal representation available for the poor reflects their value within our legal system and whether they are seen as worthy of receiving the same quality of legal counsel as the wealthy.<sup>120</sup>

The 42<sup>nd</sup> Constitutional Amendment in India added Article 39-A which obligates the State to 'provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability'. In 1987, the Legal Services Authorities Act was enacted which led to the establishment of national, state and district level Legal Services Authorities along with Legal Services Committees at the Supreme Court, High Court and Talukas. Since then, legal aid schemes have been rolled out through Lok Adalats, paralegal volunteers, legal aid clinics etc.

The development of social action litigation (SAL) during the 1980s which used judicial power to protect marginalised and powerless individuals and groups was yet another step towards securing access to justice for the poor. Galanter and Krishnan have argued that while SAL was successful in raising awareness, strengthening citizen action, improving government accountability and enhancing the legitimacy of the judiciary, it has failed to ensure the systematic implementation of human rights norms that it has so proudly upheld.<sup>121</sup>

A World Bank study has also shown that SAL has not benefited the poor and other marginalised individuals and groups. The failure of SAL to realise its original objectives has manifested itself in two ways- *beneficiary inequality*, i.e. the middle class with greater organisational and financial resources than the poor have gained better access to the courts and reaped benefits of SAL and *policy area inequality*, i.e., the judiciary comprising of judges representing a certain social class and ideological disposition, have been more sympathetic to the cause of the middle class and the wealthy, as witnessed in rulings involving WTO accession, Union Carbide's liability in the Bhopal gas leak case and the construction of the Narmada Dam.<sup>122</sup> The analysis of SALs in this study brings forth real concerns about 'equality' of access to justice.

<sup>119</sup> Kaleeswaram Raj, Fair Advocacy as a Right, THE HINDU, (March 27, 2014), <http://www.the-hindu.com/opinion/lead/fair-advocacy-as-a-right/article5836221.ece>.

<sup>120</sup> Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOWARD L.J. 257, 258 (2001), available at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1147&context=facultypub>.

<sup>121</sup> Marc Galanter & Jayanth K. Krishnan, "Bread for the Poor": Access to Justice and Rights of the Needy in India, 55 HASTINGS L.J. 789, 796-97 (2003-2004).

<sup>122</sup> Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?*, WORLD BANK, POLICY RESEARCH WORKING PAPER 5109, 8 (Nov. 2009), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109>.

If indeed lawyers have a duty to render legal aid, then why do the most successful and affluent lawyers routinely refuse to take up cases of poor persons in need of legal assistance?<sup>123</sup> Senior advocates routinely charge exorbitant fees under different heads like retainer fee, settlement of brief charges, conference charges, appearance charges, reading fees, opinion/consultation fees etc.<sup>124</sup> Galanter and Robinson, in a recent study, observed that elite litigators or 'Grand Advocates' of India charged 500,000-600,000 INR per appearance (\$10,000-12,000) at the Supreme Court.<sup>125</sup>

These advocates take up public interest or *pro bono* cases sometimes to elevate their public profile before the bar and the bench. The *pro bono* work can assist in enhancing their reputation and visibility as lawyers who support causes they care about. However, lawyers may be overlooked for the designation of 'senior advocate' by the Supreme Court or High Court or if they are perceived as being 'too far outside the mainstream' by frequent engagement with *pro bono* work.<sup>126</sup> Interestingly, the Advocates Act does not prescribe any ethical parameters for designation as senior advocate.<sup>127</sup> In fact, in some States, the income tax details of lawyers are requested which is based on the misplaced notion that a lawyer's ability is somehow linked to his/her income.<sup>128</sup> To uphold the best interest of the litigants and ensure uniformity of the Bar, restrictions should be imposed on levying of such high and unfair fees by advocates.

A needs assessment study conducted of legal services authorities in seven Indian states by MARG,<sup>129</sup> a leading legal empowerment NGO found that all states have a panel of legal aid lawyers who are selected on the basis of their experience. However, they do not receive regular and adequate training. The cases are left entirely to the empanelled lawyers and there is no system to monitor case progress. There is no performance appraisal of the lawyer and no institutional follow up with the client. Lawyers are underpaid and receive a fee as low as Rs 500 per case. Similar patterns were noted with paralegals who receive little or no training, do not have a clear understanding about their

<sup>123</sup> Upendra Baxi, *supra* note 103, at 457.

<sup>124</sup> Kaleeswaram Raj, *supra* note 119.

<sup>125</sup> Marc Galanter & Nick Robinson, *India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalisation*, 5 HARVARD LAW SCHOOL PROGRAM ON THE LEGAL PROFESSION RESEARCH PAPER SERIES 2013 11, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2348699](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348699).

<sup>126</sup> *Id.*

<sup>127</sup> S. 16(1) of the Advocates Act. (It provides, 'An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability [standing at the Bar or special knowledge or experience in law] he is deserving of such distinction.').

<sup>128</sup> Kaleeswaram Raj, *supra* note 119.

<sup>129</sup> For details, *See*, Marg, Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odisha, Rajasthan and Chhatisgarh, Department of Justice. Government of India and UNDP (2012), <http://www.in.undp.org/content/dam/india/docs/DG/needs-assessment-study-of-selected-legal-services-authorities.pdf>.

roles and do not receive adequate remuneration. The National Legal Services Authority (Free and Competent Legal Services) Regulations 2010 which lays out the procedures and criteria for selection of panel lawyers, establishment of monitoring committees are not yet fully functional in the assessed states.<sup>130</sup> This shows that the poor are not entitled to either *zealous*<sup>131</sup> or *adequate*<sup>132</sup> legal representation.<sup>133</sup> The MARG study made certain recommendations to address the gaps in the existing legal aid system such as development of a transparent and systematic empanelment process for lawyers, monitoring and evaluation through case tracking and client feedback, training of empanelled lawyers and regular payment of lawyers' fees.<sup>134</sup>

In another recent study of access to justice in the lower judiciary in India, it was observed that lower-tier judges should be empowered to play a much wider role than simply delivering judicial opinions based on narrow, formal procedural rules as they are trained to do.<sup>135</sup> For example, a lower court judge released a rape accused on bail on the ground that he shall marry the girl. In this case, the judge missed a real opportunity to protect the girl's rights by not arresting the accused and not conducting a fair trial. Instead, he endorsed a marital union between a rape accused and his victim and perpetuated a culture of discrimination and sexual abuse.<sup>136</sup> With more judicial training and sensitisation and increase in judges' salaries, more talented, motivated and sensitive people from the bar could be attracted to join the judiciary.<sup>137</sup>

This apathy towards the poor seeking justice is closely linked to the kind of training that is imparted in law schools. Most students do not learn how to appreciate or value their clients during their legal training.<sup>138</sup> At the same time, lawyers who represent the poor are not always respected by the bar and

<sup>130</sup> *Id.*, at 125

<sup>131</sup> Lawyers have a strict ethical responsibility to advocate zealously on behalf of their client. Zealous representation does not mean a lawyer should strive to "win" a case at all costs, if that means harming third parties and adversaries unnecessarily in the process. It means doing everything reasonable to help a client achieve the goals set forth at the outset of the representation.

<sup>132</sup> Indigent defendants who are represented by appointed lawyers are entitled to adequate representation. But "adequate representation" does not mean perfect representation. Adequate representation not only covers the right to have a lawyer present at a trial in a court of law but also that the lawyer is competent in arguing cases in a court of law.

<sup>133</sup> Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice*, 75 Miss. L. Rev. 710 (2010), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3883&context=mlr&sei-redir=1&referer=http%3A%2F%2Fscholar.google.co.in%2Fscholar%3Fhl%3Den%26q%3Dright%2Bpoor%2Blegal%2Brepresentation%26btnG%3D#search=%22right%20poor%20legal%20representation%22>.

<sup>134</sup> See *supra* note 129, at 137-140.

<sup>135</sup> Jayanth K. Krishnan *supra* note 26, at 534.

<sup>136</sup> Jayanth K. Krishnan *supra* note 26.

<sup>137</sup> Jayanth K. Krishnan *supra* note 26.

<sup>138</sup> Michelle S. Jacobs, *supra* note 120, at 274.

the bench and are made to feel less professional. They may be perceived as 'low-status' or incompetent lawyers who cannot get better jobs.<sup>139</sup> High case-loads and poor salaries further alienate lawyers representing the poor which adversely impacts the quality of legal representation. In addition, courts are often seen as prioritising procedural and administrative concerns over delivering justice. Moving dockets trump competent legal representation in many cases.<sup>140</sup> Given this reality, it is reassuring to learn that the National Law School of India University (NLSIU) is submitting a draft policy to the BCI and the Law Ministry that makes it mandatory for all law schools to establish free legal aid clinics to be run by law students.<sup>141</sup>

Many notorious practices of the Bar are overlooked by the rules, such as bench-fixing,<sup>142</sup> suppression of unfavourable legal precedent, asking for repeated adjournments, charging disproportionately high fees without any regard for the capacity of the client to pay and the nature of the case, encouragement of administrative corruption among court staff.<sup>143</sup>

The Code is couched in mandatory terms although it does not seem to create any binding obligations and is meant to serve as a 'general guide' for legal practitioners.<sup>144</sup> Despite the notional accommodation of care thinking in the existing rules and standards of professional conduct of lawyers in India, we witness blatant disregard for the rules by legal practitioners, mainly due to the lack of a strong accountability framework to initiate disciplinary action in cases of professional misconduct.

Upendra Baxi identified four kinds of professional deviance by lawyers-client-centred deviance, which is the most common, abuse of judicial process, disrespect to the court and/or other judicial authorities, and conviction for criminal offences.<sup>145</sup> He examined some disciplinary rulings of the BCI committee between 1972 and 1978 and offered some interesting observations that, in his opinion, constitute the 'pathology of the legal profession'.

He found that very few of these were *suo motu* proceedings by the BCI.<sup>146</sup> The BCI sparingly uses its powers under Section 35(3) of the Advocates Act 1961 to reprimand, suspend or remove an advocate from its rolls as

<sup>139</sup> Michelle S. Jacobs, *supra* note 120, at 274.

<sup>140</sup> Stephen B. Bright, *supra* note 133, at 709.

<sup>141</sup> Venkata Sushmita Biswas, *When your lawyer is a collegian*, THE HINDU, September 17, 2013, <http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/when-your-lawyer-is-a-collegian/articles136405.ece>.

<sup>142</sup> Some lawyers may use unfair means to ensure that particular judges sit in particular trials to influence the ruling in their favour.

<sup>143</sup> Upendra Baxi, *supra* note 103, at 461-62.

<sup>144</sup> Upendra Baxi, *supra* note 103, at 457.

<sup>145</sup> Upendra Baxi, *supra* note 103, at 478.

<sup>146</sup> *Suo motu* proceedings by State Bar Councils are discretionary. (S. 35 of the Advocates Act)

punishment for professional misconduct. The BCI disciplinary committees were found to protect deviant advocates from adverse publicity<sup>147</sup> and strong sanction by reducing punishment in almost all cases, upon appeal. The study also observed that the disciplinary proceedings of the BCI did not follow a tradition of continuity and operated without any normative standards or a body of precedents and there was no urgency in deciding on disciplinary proceedings and on average, the committees took between two to three years to decide a case.<sup>148</sup>

While the lawyer is able to afford legal representation in such proceedings, the complainant remains unrepresented in a majority of cases.<sup>149</sup> In terms of sanctions, Section 42(5) of the Advocates Act allows the Chairperson or Vice-Chairperson of the State Bar Council to decide a matter when the disciplinary committee fails to reach a clear majority opinion thus promoting majoritarianism and interventions by non-members of the disciplinary committee.<sup>150</sup>

Those few State lawyers who are dismissed or removed from office on charges of moral turpitude are allowed to be re-admitted into the Bar after the expiry of two years since such dismissal or removal.<sup>151</sup> Despite the Law Commission of India's recommendation that this legal proviso be removed so that such lawyers remain disqualified for life and that such disqualification be extended to private legal practitioners, this provision continues to be in effect.<sup>152</sup>

The existing code of ethics regulating the legal profession in India are, on one hand, *aspirational* in the sense that they set high standards which are often not reinforced through appropriate disciplinary sanctions<sup>153</sup> and *disciplinary*, on the other, as they also attempt to lay down a set of categorical, all-or-nothing rules, often without reference to context or consequences.<sup>154</sup> Whether aspirational or disciplinary or both, the important question is whether the code has deterred unethical and unprofessional behaviour and encouraged behaviour that is ethical.<sup>155</sup> Unfortunately, the BCI, as the sole custodian of the legal

<sup>147</sup> The disciplinary proceedings of the Bar Councils are *in camera*.

<sup>148</sup> Upendra Baxi, *supra* note 103, at 478-79.

<sup>149</sup> Although there is a provision for *amicus curiae* lawyers for unrepresented complainants in disciplinary proceedings of Bar Councils, Baxi's study found that this provision was rarely used.

<sup>150</sup> See, Upendra Baxi, *supra* note 103, at 480-82.

<sup>151</sup> S. 24-A(1) of the Advocates Act 1961, <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf> (last visited on October 10, 2013).

<sup>152</sup> Law Commission of India, *The Legal Education & Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956*, 184th REPORT, (Dec. 2002) 122-24, <http://lawcommissionofindia.nic.in/reports/184thereport-PartI.pdf>.

<sup>153</sup> Donald Nicolson, *supra* note 10, at 606.

<sup>154</sup> Donald Nicolson, *supra* note 10.

<sup>155</sup> Donald Nicolson, *supra* note 10, at 605.

profession in India, has proved incapable of enforcing ethical standards in a proactive manner.<sup>156</sup>

Efforts to enforce the standards of professional conduct by the proposed establishment of the Legal Services Board through the enactment of the *Legal Practitioners (Regulations and Maintenance of Standards in Profession, Protecting the Interest of Clients and Promoting the Rule of Law) Bill 2010*, are pending.<sup>157</sup> The proposed law aims to create a Legal Services Board to regulate the legal profession; establish an ombudsman to deal with complaints against legal practitioners and enact the duty to provide pro bono legal services. The Bill is being opposed by large sections of the legal fraternity as they argue that such a 'super-regulator' would undermine the authority of the Bar Councils and interfere with the independence of the Bar. Instead, they have proposed that Bar Councils be strengthened and made more accountable.

## VI. CONCLUSION

The structure and practice milieu of legal practice in India has been radically altered in the last decade or so. In this context, the legal academy and the Bar must attempt to develop new approaches to teaching, learning and practicing professional responsibility which will require a *counter-socialisation* of sorts that prioritises social context, moral reasoning, care and connection, intuition and motivation.<sup>158</sup>

The system of peer group adjudication by the BCI has proved to be ineffective and has failed to enforce the standards of professional conduct for lawyers. Over the years, the BCI has served to protect the interests of advocates and has not upheld the integrity of the legal profession, as was originally intended.

The adherence of existing codes of professional ethics to a set of neutral rules may lead to indifference towards ethical considerations and reduce ethics to risk analysis and management instead of development of moral character and ethical behaviour.<sup>159</sup> Instead, a caring, contextual code will address the ethical issues involved in client selection and provide guidance on how these issues will play out in that particular situation.<sup>160</sup> It will expose law students

<sup>156</sup> Upendra Baxi, *supra* note 103, at 480.

<sup>157</sup> Text of the Bill, *available at* [lawmin.nic.in/la/NALSA.doc](http://lawmin.nic.in/la/NALSA.doc).

<sup>158</sup> Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1160 (1991-92).

<sup>159</sup> Donald Nicolson, *Making Lawyers Moral? Ethical Codes and Moral Character*, 25(4) LEGAL STUD. 601, 619 (2005).

<sup>160</sup> *See generally* DONALD NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS Chapters 6-8 (1999).

to the ethical dilemmas and constraints that arise in various practice areas and help them in making ethically informed career choices.<sup>161</sup>

In the changing world of legal practice, care thinking may positively impact the nature of legal representation and significantly reform the lawyer-client relationship.<sup>162</sup> The ethic of care offers interesting alternatives to current lawyering models by seeking to temper the lawyer's zeal while preserving the core ideal of a lawyer's role as his/her client's advocate<sup>163</sup> but care thinking risks devaluation if it does not run as a thread within the law school curriculum and remains limited to a few isolated courses.<sup>164</sup>

However, we must remain mindful about placing the burden of care disproportionately on certain groups of lawyers, for example, women, or blurring the thin line between care and charity<sup>165</sup> when paternalism trumps empathy. Concerns about legal relativism in the existing legal arena of stable, universal and predictable rules must also be addressed. Despite this, care and relational theories hold the power to transform legal discipline and institutions and merit serious consideration from the legal profession in India.

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<sup>161</sup> Donald Nicolson, *Making Lawyers Moral? Ethical Codes and Moral Character*, 25(4) LEGAL STUD. 601, 623-24 (2005).

<sup>162</sup> Stephen Ellman, *supra* note 5, at 2726.

<sup>163</sup> Stephen Ellman, *supra* note 5, at 2726.

<sup>164</sup> Theresa Glennon, *supra* note 51, at 1186.

<sup>165</sup> Theresa Glennon, *supra* note 51, at 414-15.