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Review Article

Bridging the Gap: A Comprehensive Exploration of Legal Ethics and the Profession

Aparna Singh

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Abstract

The legal profession is guided by a set of ethical principles and standards that serve as the foundation for maintaining the integrity of the judicial system and upholding the rule of law. However, the ever-evolving landscape of legal practice, coupled with the complexities of modern society, has given rise to numerous ethical challenges that require a comprehensive understanding and practical application of legal ethics.

This comprehensive exploration delves into the intricate relationship between legal ethics and the legal profession, examining the historical underpinnings, theoretical frameworks, and practical implications of ethical decision-making in the legal realm. Through a multidisciplinary approach, the article investigates the philosophical foundations of legal ethics, drawing insights from moral philosophy, jurisprudence, and professional ethics.

The Article endeavors to provides an in-depth analysis of the various ethical codes and regulations that govern the conduct of legal professionals, including attorneys, judges, and legal support staff. It examines the ethical obligations and responsibilities that arise in different areas of legal practice, such as litigation, transactional work, and alternative dispute resolution. Additionally, it explores the unique ethical challenges faced by legal professionals in specialized fields, including criminal law, family law, and intellectual property law.

Furthermore, the article addresses the impact of emerging technologies, such as artificial intelligence and digital evidence, on legal ethics and the implications for the profession's adaptation to these technological advancements. It also explores the role of legal education in instilling ethical values and fostering a culture of integrity within the legal community.

By bridging the gap between theory and practice, this book equips legal professionals with the necessary tools and insights to navigate the ethical complexities of their profession. It serves as an invaluable resource for law students, practicing attorneys, judges, legal scholars, and anyone interested in understanding the intricate interplay between legal ethics and the legal profession.

Keywords: Legal Ethics, Culture of Integrity, Transactional work, Alternative Dispute Resolution, Emerging Technologies, Ethical Codes.

Author's Affiliation: Assistant Professor of Law, Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh, India.

Corresponding Author: Aparna Singh, Assistant Professor of Law, Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh, India.

E-mail: greeneyeaparna@gmail.com

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INTRODUCTION

The negative public perception of lawyers is reflected in the pervasive belief that they are self-serving money-seekers rather than compassionate individuals attempting to assist. Principles such as mutuality, decency, and honesty are rapidly being superseded in the legal profession by values such as power, money, and the insatiable need to "win."

Susan Daicoff describes the current state of the legal profession as a "tripartite crisis," characterized by a decrease in professionalism, a poor public image of attorneys and the legal profession, and a rise in dysfunction and dissatisfaction among lawyers. Such a decline in morality begins long before an attorney begins to practice law professionally; it begins in.

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'.[1]

Lawyers often reflect historically acknowledged male principles of rationality, impartiality, and neutrality in a fair and predictable legal system, even though the public also values feminine ideas of sympathy and caring. Research indicates that law schools give a lot of weight to traits that are generally associated with men, like rights, logic, justice, fairness, reasoning, and regulations. Social interactions, emotional responsiveness, kindness, generosity, and other characteristics associated with femininity are undermined. Effective and prosperous attorneys are sometimes described as forceful, competitive, and dominant people who aren't always driven by the values of reverence, kindness, warmth, and compassion. This miscommunication between the public and attorneys has caused the public to become less trusting of the legal profession because lawyers are now perceived as being distant.

Intense competition among lawyers in a tight market for legal services has encouraged aggressive, hostile and dishonest professional behaviour. The rapid commercialisation of legal practice is gradually de-professionalising law and turning it into a business, causing an ethical deficit among lawyers.[2]

Upendra Baxi has long acknowledged the need for a socially relevant legal education. To achieve this, legal pedagogy must transcend the lecture format and become integrated into the socio-legal context and legal curriculum. Only then can it effectively recognize and tackle the pressing issues facing society today, as well as the legal and legal profession's related responsibilities. Due to severe backlogs and courtroom overcrowding, people are turning more and more to alternative dispute resolution (ADR) and mediation, which call for innovative and cooperative methods to legal representation. However, law schools still emphasize doctrinal learning strategies that center on legal analysis of legislation and case law, as well as teaching students to "think like lawyers" while practicing in an adversarial environment.

Filling the Gap Between Legal Ethics and The Legal Profession

The study of law is approached from the perspective of an idealized society in which justice is equated with the law and lawyers are only required to apply the law in all circumstances in conventional legal school. However, in practice, legal services are not always available or reasonably priced, there is a dearth of legal aid, states break the law, laws are ambiguous and incomplete, judges render inconsistent rulings, the police and courts are ineffectual, and lawyers are immoral. As a result, lawyers are seldom taught how to deal with unforeseen situations that often make it difficult to predict the outcome of court cases. There is a common misperception that attorneys with experience can handle complex emotional and intellectual issues.

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'.[3] Law schools must realise that such conversations about value judgements are equally important.

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.[4] While familiarity with the Code of Ethics is crucial, professional responsibility cannot be fully understood until positive behaviors that are essential to the efficient and moral practice of law are reinforced in legal education. Currently,

neither the professors nor the students in law schools take professional ethics classes seriously.

The Legal Theory and Practice (LTP) course in the University of Mary Land School of Law in the United States, 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.[5] The LTP course encouraged law students who were experiencing negative self-perceptions and feelings about law school to integrate the intellectual and emotional aspects of practicing law into a sense of community. Responding to clients' goals and comprehending their viewpoints was emphasized in legal skills, interviewing, and fact-finding classes. In order to build compassionate and cooperative approaches to legal practice, law students were urged to support one another and share their discoveries throughout a portion of the course that concentrated on individual client representation and legal work.

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.[6] 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.[7]

Such models explicitly recognise 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.[8]

Law schools in India can restructure their legal curricula to link moral legal practice to psychological well-being and professional fulfilment by using these creative pedagogical techniques as a foundation. Attorneys can practice law with honesty, compassion, thoroughness, and happiness if they integrate their personal and professional principles and incorporate analytical and emotional intelligence.

'Ethic of Care' as a Model for Advocacy

The current framework for legal education separates a student's emotional and intellectual selves. Instilling in pupils a feeling of ethical duty is severely undermined by law schools' strong emphasis on analytical thinking. The adversarial legal system irresponsibly emphasizes binary thinking by teaching law students to argue against others in order to prove that they are right and others are wrong from the very first year of law school. Various actions that are directed toward the "self" and to the harm of others are justified by traditional legal teaching.

John J. Flynn observed,[9] "Law schools may actually be creating amoral lawyers, by honing skills of rationalization, attempting division of intellectual and emotional sides of their personalities, and insensitivity to ethical issues." In order to demonstrate the importance of caring in both the public and private domains, Carol Gilligan introduced the "feminist ethic of care" in 1982. She promoted the application of care ethics to states, institutions, and communities in order to promote an all-encompassing approach to moral and legal issues. According to her, men and women use different moral thinking processes. Men attempt to decide what is just or unfair (representing the ethics of right), whereas women concentrate on "how to respond" (representing the ethics of caring). While the latter contextualizes issues through relationships and personal beliefs, the former bases justice on a set of legalistic rules applied to a set of facts.

She emphasised on the inter-dependence between justice and care by stating that care wasn't just an emotional response but a coherent moral perspective that values human relationships and mutual connections over individual autonomy.[10] It takes into account both thinking and feeling. The ethic of care regards detachment as a moral problem. It rests on the premise of non-violence- that no one should be hurt[11]. Yet, this is the key challenge in our existing legal structures and institutions which promotes detachment. Lawyers are trained to ignore their personal feelings about their clients and their causes and devote their attention towards achieving success for the client.

The ethic of care will encourage 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 in order to provide better services to the client and care better.

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.[12] With care thinking, the lawyer-client connection is reconstructed as a horizontal one as opposed to a vertical one in which the lawyer evaluates his client's issue independently and objectively before offering advice.

A lawyer should be entitled to suggest that a client find another attorney if his or her personal ethics and principles clash with the client's interests. The ethic of care emphasizes that when deciding whether or not to represent a client, a lawyer should weigh their own needs, interests, and duties against those of others. A compassionate attorney considers a number of aspects while deciding whether to represent a client, including the client's needs, the attorney's personal emotions, and the client's and his cause's level of care or lack thereof. In actuality, a lawyer runs the risk of hurting their clients.

However, Ellman[13] warns 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. 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. Nevertheless, one must try to maintain a professional distance. It is a delicate balance between a level of self-disclosure that will assist the clients rather than flood them with self-revelation.[14]

Care cannot be legislated and must emerge from voluntary, internal sources. However, what can and should be confronted and changed in order to inculcate a care culture- is a legal model that fosters selfish, profit maximising behaviour that minimises sensitivity towards others, 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.[15]

While some have applauded it, others have criticized it for perpetuating archaic ideas of femininity that would force women to stay in caregiver duties. Women are not a homogenous group, as feminists have repeatedly noted. Some contend that Gilligan ignores the diversity of female voices in favor of homogenizing them in her writing. It is undeniable, however, that the idea of a "ethics of care" thrust a new paradigm to the fore, giving compassion and care a greater voice in domains such as the law and health.

The Ethic of Care Vis-À-Vis the Indian Legal Scenario

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'. 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.[16]

The Bar Council of India (BCI), which establishes norms of professional conduct and oversees oversight activities, regulates the legal profession in India. Every state has a Bar Council that controls the addition and deletion of advocates from its lists. Section 49 of the Advocates Act 1961 binds members of the Indian legal profession to the Code of Professional Ethics included in Part VI, Chapter II of the BCI Rules. The State Bar Councils has the authority to impose disciplinary measures thanks to a peer-group adjudication procedure.

The rules de-emphasise care thinking as follows[17]– "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."

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. Care thinking is reflected more clearly in the principle[18] - "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. 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', in court and in public.[19]

The cornerstone of a good justice system is the right of all persons, irrespective or their socio-economic status to full and effective legal representation. 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 poor.'[20]

Article 39-A, which requires 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," was added by the 42nd Amendment to the Indian Constitution.

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. However, 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.[21]

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? 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.[22] These advocates take up public interest or pro bono cases sometimes to elevate their public profile before the bar and the bench. Interestingly, the Advocates Act does not prescribe ay ethical parameters for designation as senior advocate. Section 16 (2) states that '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.'

Lower-tier judges in India's lower judiciary ought to be given more authority to carry out duties beyond issuing rulings based on strict, formal procedural procedures, which is what they are trained to do. More gifted, driven, and sensitive members of the bar may be drawn to the judiciary with increased judicial training and sensitization as well as higher judge compensation.

In spite of 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, a study done, shows that the poor are not entitled to either zealous or adequate legal representation. 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. In that length, the notification by the Central Government of National Legal Services Authority (Free and Competent Legal Services) Amendment Regulations, 2019 is a welcome step though it fails to do much.[23]

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. 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.

Lawyers who represent the poor are not always respected by the bar and the bench and are made to feel less professional. They may be perceived as 'low-status' or incompetent lawyers who cannot get better jobs[24]. High caseloads 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.

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[25]. 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[26] found that very few of these were *suo motu* proceedings by the BCI. 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 punishment for professional misconduct. The BCI disciplinary committees were found to protect deviant advocates from adverse publicity 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. While the lawyer is able to afford legal representation in such proceedings, the complainant remains unrepresented in a majority of cases. 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.

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[27]. Despite the Law Commission of India's recommendation in its 184th Report, 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[28].

CONCLUSION AND RECOMMENDATIONS

The existing code of ethics regulating the legal profession in India are, on one hand, aspiration in the sense that they set high standards which are often not reinforced through appropriate disciplinary sanctions 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.[29] Whether aspiration or disciplinary or both, the important question is whether the code has deterred unethical and unprofessional behaviour and encouraged behaviour that is ethical. Unfortunately, the BCI, as the sole custodian of the legal profession in India, has proved incapable of enforcing ethical standards in a proactive manner.

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.[30] 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, exposing law students to the ethical dilemmas and constraints that arise in various practice areas and help them in making ethically informed career choices.

In the changing world of legal practice, care thinking may positively impact the nature of legal representation and significantly reform the lawyer-client relationship 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 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.[31]

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 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 merits serious consideration from the legal profession in India.

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