

COMMENTS

LEGAL AID IN INDIA: RETUNING PHILOSOPHICAL CHORDS

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Legal aid in India has evolved over the last few decades since 42nd Amendment to the Indian Constitution. This paper attempts to provide philosophical underpinnings suggesting how legal aid model has evolved over the years and excogitate a newer trajectory for its future evolution. It delves into weighing Kant's imperfect duty justifying a charity based regime and marks a transition to utilitarian model suggesting requirement of institutional need to address issues of basic liberty of 'access to justice.' It also spells out Rawls' principles of justice and attempts to explore their applicability in the Indian context, to chart out a road map for future. While contrasting different models on legal aids, it makes a finding that, India doesn't accord priority to liberty of access to justice. The Indian Supreme Court has emerged as a bastion of liberty but the finer details of the enactment has been messed up by the Indian lawmakers. The lower compensation to lawyers and lack of alternative incentives in attracting established litigators, testifies this. There is a convergence in Kantian duty of benevolence and Rawls' liberty principle but in the world of moral relativism, a fair compensation must precede before imposing any obligation on lawyers to take up pro bono matters, as doing so, is likely to compromise their 'true needs.'

Keywords: legal aid; Immanuel Kant; John Rawls; Indian Supreme Court; principle of fair equality of opportunity; liberty of access to justice.

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Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in a benefit by its impartiality and fairness.

Justice Brennan

1. Introduction

Until 1945 in United Kingdom, legal aid was seen as part of charity. United States saw its first independent institution dealing with legal aid in 1964. Article 39A of the Indian Constitution provides free legal aid as a directive principle of state policy but not as part of individual's liberty. This was clearly in view of conceiving access to justice as a week liberty and avoiding fiscal burden on the newly formed state. It was only through the untiring efforts of the Indian Supreme Court that free legal aid could be brought within the larger sweep of liberty clause under Art. 21 of the Constitution.¹

The journey of legal aid philosophically could be viewed as a trajectory manifesting a movement from Kant's deontology to Rawlsian welfare principles through the phase of utilitarianism. Kant's imperfect duty of beneficence creates a moral obligation to help others. This may be viewed in a narrow or a broader sense. A narrow view might offer greater latitude to a lawyer in extending help to a client and not getting into queries like 'when' to help or 'how many' to help. However, a broader view necessitates understanding 'true need' of the client and extending help until 'true need' of the client conflicts with that of a lawyer. Given the systemic need of the people to have 'access to justice' characterized with absence of any legal obligation on lawyers to provide the same, led to a dent in fair equality of opportunity in 'access to justice.' This led states to resort to utilitarian model which espoused the view that the state's duty to provide legal assistance exists to the extent that legal aid maximizes the general welfare. This institutional structure led to creation of legal obligation on lawyers as opposed to moral obligation, but failed to account for individual liberty of 'access to justice.' This article takes a view that liberty of 'access to justice' must not be constrained by utilitarian principles and should be guaranteed under principles of equality and difference as propounded by John Rawls.

¹ See *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*, A.I.R. 1979 S.C. 1369; see also *Khatri & Ors. v. State of Bihar & Ors.*, (1981) 1 S.C.C. 627.

The National Legal Services Authorities Act, 1987, creates a concurrent duty on existing judicial machinery to dispose of legal aid matters. This burdens the existing machinery without creating any additional incentive for expeditious disposal. It is manifestly evident that the state doesn't accord priority right to liberty of 'access to justice' which is clearly reflected in the micro- as well as macro-allocation of resources. The statute also flops in attracting talented lawyers to take up briefs of people from vulnerable section, depriving them of fair equality of opportunity. A middle path has to be forged, somewhere reconciling a fair compensation with talented lawyers taking up such briefs with a fair equality of opportunity to such people. What we argue here is, not to hire the best talent for representing such people, but to hire reasonably talented lawyers so that requirement of fair equality of opportunity is fulfilled in spirit.

2. Immanuel Kant: Imperfect Duty of Beneficence and Its Impact on Legal Aid in India

Kant's distinction between perfect and imperfect duty might shed some light on the prospective discourse related to legal aid in India. The ethical code creates moral obligation of the highest order to provide legal aid. We say moral obligation because no sanction is riveted to such an obligation. This could be loosely understood in terms of how largely Immanuel Kant's imperfect duty is understood across. We wish to argue that this general understanding of Kant's imperfect duty is a flawed assessment of moral obligation which a member of a profession owes to another member of the community. We would also argue that the 'latitude' associated with Kant's imperfect duty must be guided by terse norms which must categorically provide for a clear response in a given situation.

Kant's imperfect duty provides:

The duty of beneficence is a wide imperfect duty. Agents are required to adopt the maxim of beneficence, but they have considerable latitude in choosing the individual actions that manifest their commitment to the maxim.

The latitude offered by imperfect duty is enormous. This is quite poignantly brought out by Brad Hooker and David Cummiskey. Hooker writes:

Underneath the surface plausibility of the imperfect duties view, however, lurk serious problems! Suppose I am faced with two strangers who each need help, but one of whom has greater needs and can be helped a lot more than the other. According to the imperfect duties view, I can simply choose which to help. But that answer seems wrong. Other things being equal, I should

help the needier one. The imperfect duties view leaves too much room here for arbitrary choice.

Or suppose I saved someone's life this morning and now I can save someone else's life at no cost to myself. Is it really morally optional whether I go on to save the second person? Surely not!²

It is this latitude which fails to account for truer understanding of Kant's imperfect duty. The account given by Barbara Herman which narrows down the latitude and offers a plausible account on imperfect duty. She writes:

The duty of mutual aid is thus based in the duty of respect for rational agency. Failing to meet someone's true needs in circumstances where I could do so without sacrificing any true needs of my own constitutes a rejection of her standing as a member of the moral community. As such, meeting the true needs of others when I can is strictly required of me.

Having said this she also doesn't want to obliterate the distinction between virtue of kindness and duty of mutual aid. She suggests that both have a different moral structure:

So if someone needs help changing a tire, a helpful person, in the absence of pressing demands of his own, will help. There is no moral requirement that he do so; it is not impermissible not to help. If, however, the person who needs this help is in great distress (someone on the way to the hospital, an elderly person who cannot tolerate exposure to bad weather), it is no longer an act of kindness but a duty to help. When if help is not given, a life will be in jeopardy or gravely diminished, then changing a tire is addressing someone's true need. It is not the action (its strenuousness, and so on) but the nature of the need to be met that determines whether it is an occasion where helping is required of us. I am not saying that kindness and benevolence are without moral structure or content (they are not 'mere inclinations'). The claim is rather that they have a different moral structure, one that parallels the difference between interests and true needs.³

The duty of mutual aid is grounded in the necessity of seeing ourselves as members of a community of dependent beings. Until 1945 in UK, 1964 in US and

² Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* 161 (Oxford University Press 2000); see also David Cummiskey, *Kantian Consequentialism* 105–22 (Oxford University Press 1996).

³ Barbara Herman, *Mutual Aid and Respect for Persons*, 94 *Ethics* 577 (1984).

1976 in India, it was Kant's imperfect duty of beneficence that guided the conduct of lawyers. However, with growing needs of people from vulnerable class to avail easy access to justice, led the policy makers to scratch existing mechanisms on legal aid with a view to adopting a new model which creates valid legal obligations on lawyers and not merely moral obligations. This new movement was marked with the spirit of utilitarianism. A conspicuous illustration of the same is Art. 39A of the Indian Constitution which was adopted as a directive principle and not as an extension of liberty.

2.1. Nature of 'Justice' and an Imperfect Duty of Mutual Aid

Justice as a foundational pillar of any society has never been contested. The opening words to this essay by Justice Brennan solemnly reaffirm this view. In such a situation access to justice assumes significant importance. Rawls admits it to be a primary social good.⁴ Now to what extent Kant's imperfect duty of beneficence be extended to provisions of free legal aid is what we wish to explore next.

The obligation of the State to offer free legal aid is beyond the scope of this section. In this section it is intended to offer some guidance on the attitude of a lawyer towards vulnerable clients in need of legal aid. It is amply clear that the latitude in Kant's imperfect duty might be interpreted to the prejudice of vulnerable class as pointed out by Hooker and Cumiskey. Let's take few situations to sense its limitations.

1. A who is a recent graduate from a premier law school starts practicing law. A is approached by a B – a client who qualifies for a free legal aid but wants to bet on A rather than going with State machinery. A refuses to take up B's case as he was advised by his senior to spend his spare time in reading recent cases decided by the court.

2. Let's assume, in situation illustrated above, A takes up B's matter and gets it decided in B's favor. Many others from vulnerable section approach A for fighting their cases *pro bono* and A refuses them saying that he has already decided a case *pro bono* and he is done for the month.

3. In our third situation, let's assume A has become a big lawyer and on record he hasn't lost a single *pro bono* matter. Should he devote his time for *pro bono* matters only?

The above three situations get to the heart of whole debate. As seen above, a narrow understanding of Kant's imperfect duty would suggest that A must do *pro bono* matters but 'which one,' 'how many' and 'when' are absolutely at the discretion of A. Such a reading might justify A not having any obligation under any of the above three situations. Now, if we offer the 'true need' test as proposed by Barbara Herman, we might get altered responses. In situation 1 the reason for not taking up B's matter was reading new case laws by A. In such a situation B's 'true needs' clearly trump A's

⁴ John Rawls, A Theory of Justice 62 (Harvard University Press 1971).

desire to read up cases. In situation 2 the reason for not taking up matters of other people from vulnerable section was A's belief that 'he did his bit.' Now clearly a belief can't survive the test of 'true needs.' In such a situation, A's decision must be based on his true needs and not his beliefs. There should be a perpetual quest on the part of a lawyer to satisfy her moral duty towards the community.

It is situation 3 which is slightly tricky. Now, A's taking up *pro bono* matters would mean compromising on his personal matters. Whether personal matters constitute true needs? How to reconcile personal matters with *pro bono* matters without compromising the welfare of A? Should A take up any *pro bono* matter at all if there seem to be a conflict of interest? These are few question which might be responded either ways. As part of this paper, it is argued that a more holistic interpretation of Kant's imperfect duty must create a moral obligation on the lawyers to take up matters *pro bono* unless it clearly assails her own 'true needs.'

In situations 1 and 2 provision for reasonable compensation may be created for the services rendered by the lawyers. However, from practical perspective, it would be difficult to impose obligation on any lawyer simply because she is new or doesn't have conflict of interest. Thus a proper scheme may be envisaged wherein expression of interest may be solicited from lawyers who may be able to spare time for fighting cases of people from vulnerable section. Herein we move from imperfect duty to a perfect one wherein obligation is specified and legally enforceable. This institutional scheme may be traced through under the utilitarian model. This is premised on the view that the state's duty to provide legal assistance exists to the extent that legal aid maximizes the general welfare.⁵ Marshall further writes⁶:

Consideration of social utility govern the amount and kind of services provided and the choice of persons to receive it. Under this theory, the provision of legal assistance is an instrumental good, and its significance stems from the results achieved through the services provided.

In situation 3 since there exists an ever increasing chances of conflict in true interest of a lawyer and the client. Such a situation must admit a rational choice on behalf of such a lawyer and she may be allowed to charge her regular fee from the State for compromising her true interest in taking up briefs of client from vulnerable section. However, this may be easily countered, as this approach is likely to put excessive burden on few exceptionally good lawyers and burden on the exchequer. In the hindsight, this model is likely to compromise the public value of fair equality

⁵ Marshall J. Berger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 281, 287 (1982), available at <<http://scholarship.law.edu/cgi/viewcontent.cgi?article=1588&context=scholar>> (accessed Feb. 6, 2016).

⁶ *Id.*

of opportunity. But an alternative model must admit of a situation envisaging a handsome compensation to all the lawyers who take up legal aid matters and must be constrained from appearing in private matters, due to conflict of interest.

The models of legal aid in United States, United Kingdom and India reflect the arrangements seen in situations 1, 2 and 3.

Given that 'access to justice' is primary social good, a differential system of its enforcement sounds morally wrong. A utilitarian model fails as notions of liberty ought to be protected beyond welfare notions.

3. John Rawls: Envisaging His Response on Legal Aid⁷

Kantian deontology has often been found hard pressed in being subsumed cogently within institutional framework, given its moral rigor. The plausible drawback while creating an institutional framework for imperfect duty of benevolence would be determining if reasonable pay would enable lawyers in defending clients from vulnerable section or a higher fee would be required, creating a plum incentive for them. This is often constrained by theory of utilitarianism, asserting minimal emphasis on notions of individual liberty of 'access to justice.' In this section we wish to argue that 'access to justice' satisfies both Rawlsian principles: equality as well as difference. Rawls' equality principle provides:

Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

'Access to justice' is a primary social good⁸ and any institutional framework must not only reflect this but also safeguard this in strongest possible terms. This must justify an aggressive effort on the part of the state in safeguarding liberty of 'access to justice' and further justifying a higher fee to the lawyers in taking up briefs of people from vulnerable section. Though this paper wouldn't touch upon issues related to micro- and macro-allocation of resources but it must be emphasized that 'true needs' of people must be kept in mind and 'access to justice' must be seen as an inalienable part of an individual's liberty.

⁷ Rawls, *supra* n. 4, at 239. However, Rawls hasn't written in explicit terms on legal aid but he was strongly in favor of having a counsel in a well ordered legal system.

⁸ *Id.* at 62: '[P]rimary goods [are] things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth . . . These are primary social goods.'

Rawls' difference principle which affirmatively asserts on allocation of social and economic inequalities with a view to benefit the least advantaged person would justify payment of higher fees to those lawyers who take up briefs of those belonging to vulnerable section.

The aforesaid principles could be reaffirmed when looked through from the original position behind the veil of ignorance. Without knowing where one might land up once veil is lifted, one would certainly want a fairer institutional mechanism which could effectively safeguard an individual's liberty and benefit the least advantaged person offering fair equality of opportunity to all.

4. Model of Legal Aid in United States, United Kingdom and India: A Comparative Study

Traditionally there are two views on providing legal aid. Traditional view provides that a litigant has the freedom to choose litigator of her choice and if a litigant is unable to pay for her services then the State would subsidize such services by paying the litigator. This approach is popularly called as 'legal aid' or 'judicare' and has been followed in UK since 1949.⁹ The underlying philosophy of this approach rests on the stated belief that it provides the best means of allowing equal access for all to the same service, without restricting in any way the independence of the lawyer.¹⁰ Though this method does satisfy Rawlsian difference principle ensuring fair equality of opportunity but failed to account for micro- and macro-allocation of resources. The chord needed to be touched somewhere in between reconciling the fiscal burden on the state along with ensuring fair equality of opportunity to the people.

This led United States to explore alternative arrangement which involved employing lawyers on salaries and making them work with paralegals in offices situated in the poor community.¹¹ This model, experimented through neighborhood law offices [hereinafter NLO's], formed the heart of legal aid movement in United States since 1965.¹² Following this, in a more limited capacity, neighborhood law centre (equivalent to NLO's) started functioning in UK since 1970.¹³

⁹ The Legal Aid and Advice Act 1949 contained most of the recommendations offered by Rushcliffe Committee. It is interesting to note that the Act also provided for the setting up of offices employing full time salaried legal aid solicitors, which was never activated.

¹⁰ Jeremy Cooper, *The Delivery Systems Study: A Policy Report to the Congress and the President of the United States. The Legal Services Corporation June 1980*, 44 *The Modern Law Review* 308 (1981), available at <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1981.tb01631.x/epdf>> (accessed Feb. 6, 2016). doi:10.1111/j.1468-2230.1981.tb01631.x

¹¹ *Id.*

¹² Economic Opportunities Act of 1964, 42 U.S.C. §§ 2701–2995.

¹³ The first law centre began operating in North Kensington in 1970. Now their numbers have swollen.

Indian model largely seeks its inspiration from the United States. The lawyers are empaneled and paid retainership fees besides an additional fee on a case basis.¹⁴ This system hasn't worked very well for India. Reason is obvious: lower remuneration has failed to generate any interest among the established private practitioners to proactively receive briefs of poor clients. This is largely our situation 3 while failure in not realizing situations 1 and 2 is largely due to lack of recognition by the bar for taking up *pro bono* work, lack of adequate incentives and failure in generating a *pro bono* culture in the country amongst others.¹⁵ This moral relativism reflects a classical drawback of Kantian deontology. Thus, those who get empaneled as lawyers for free legal aid are mostly briefless counsels who take up the position to make adequate connections in the administration and judiciary with a view to improve their practice.¹⁶

5. Indian Model of Legal Aid: Legal Services Authorities Act, 1987, and Its Contours

The genesis of free legal aid in India could be traced back to 42nd Constitutional Amendment Act, 1976, which introduced Art. 39A¹⁷ to the Indian Constitution. This strived for dispensing away 'economic or other disabilities' from availing what is

¹⁴ Regulation 17 of the National Legal Service Authority (Legal Aid Clinics) Regulations, 2011, provides: 'Honorarium for the lawyers and para-legal volunteers rendering services in the legal aid clinics. – (1) Subject to the financial resources available, the State Legal Services Authority in consultation with the National Legal Services Authority may fix the honorarium of lawyers and paralegal volunteers engaged in the legal aid clinics: Provided that such honorarium shall not be less than Rs. 500/- per day for lawyers and Rs. 250/- per day for the para-legal volunteers.'

Regulation 8(9) of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, provides: 'The honorarium payable to Retainer lawyer shall be, –

(a) Rs.10,000 per month in the case of Supreme Court Legal Services Committee;

(b) Rs.7,500 per month in the case of High Court Legal Services Committee;

(c) Rs.5,000 per month in the case of District Legal Services Authority;

(d) Rs.3,000 per month in the case of the Taluk Legal Services Committee:

Provided that the honorarium specified in this sub-regulation is in addition to the honorarium or fee payable by the Legal Services Institution for each case entrusted to the Retainer lawyer.'

¹⁵ Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odisha, Rajasthan and Chhattisgarh (Department of Justice, Government of India and UNDP India 2012), available at <<http://www.in.undp.org/content/dam/india/docs/DG/needs-assessment-study-of-selected-legal-services-authorities.pdf>> (accessed Feb. 6, 2016).

¹⁶ In an interview with the District Judge of Allahabad, U.P. which was later reiterated by the District Judge of Samastipur, Bihar, India.

¹⁷ 'Equal justice and free legal aid. – The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, 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 disabilities.'

justly due to one under the wider sweeps of justice. This provision was effectively put to function in *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*¹⁸ where Supreme Court chastised the State for treating under trials for minor offences as mere *ticket numbers* on account of being poor and ordered the state machinery to bring life to Art. 39A by compulsorily providing lawyers to such people. By stretching the principle in *Maneka Gandhi v. Union of India*¹⁹, Justice Bhagwati observed:

This Article also emphasizes that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.

Almost couple of years later, in *Khatri & Ors. v. State of Bihar & Ors.*,²⁰ Supreme Court in absolute clear terms rejected the utilitarian argument proposed by the State of Bihar, and in spirit, adopted the Rawlsian principle of equality. In this case, while rejecting an argument espousing financial constrain as a reason in failing to provide free legal aid to the accused, Justice Bhagwati observed:

We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for this purpose, has to be done by the State.

The Indian Supreme Court has, in umpteen judgments, unequivocally asserted on free legal aid. The assiduous efforts of the Indian Supreme Court led the Parliament to enact Legal Services Authorities Act in the year 1987.

¹⁸ *Supra* n. 1.

¹⁹ A.I.R. 1978 S.C. 597.

²⁰ *Supra* n. 1.

5.1. Statutory Scheme on Legal Aid in India

Present model of legal aid in India is set out in Legal Services Authorities Act, 1987.²¹ Unlike United States or United Kingdom, legal aid in India is linked with the various judicial offices across the country operating at different levels. There is one National Legal Services Authority²² at the national level, headed by the Chief Justice of India as its Patron-in-Chief²³ and a Judge of the Supreme Court, immediately next in seniority to the Chief Justice of India as its Executive Chairperson.²⁴ This model is replicated in all states and bodies so constituted are referred to as State Legal Services Authority.²⁵

Devising policies,²⁶ framing effective and economic schemes for the deprived section,²⁷ conducting legal aid camps for generating awareness amongst the deprived sections of the society about their rights and various governmental schemes to which they are entitled to,²⁸ encouraging settlement of disputes through Lok Adalats,²⁹ promoting out of the court settlements – through negotiations, conciliations and arbitrations,³⁰ providing grant in aid to various social institutions which are working on specific schemes envisaged under the provisions of this statute,³¹ monitoring and evaluating the functioning of State Legal Service Authorities, District Legal Service Authorities, Taluka Legal Service Authorities and other social institutions working under the mandate of this legislation³² are the functions which National Legal Service Authority is entrusted with.

Offering legal aid to economically deprived section,³³ expediting the disposal of cases,³⁴ devising strategic and preventive legal aid programmes³⁵ are some of the functions State Legal Services Authorities are invested with.

²¹ *Supra* n. 1.

²² Legal Services Authorities Act, 1987, Sec. 3.

²³ *Id.* Sec. 3(2)(a).

²⁴ *Id.* Sec. 3(2)(b).

²⁵ *Id.* Sec. 6.

²⁶ *Id.* Sec. 4(a).

²⁷ *Id.* Sec. 4(b).

²⁸ *Id.* Secs. 4(e), (i).

²⁹ *Id.* Sec. 4(e).

³⁰ *Id.* Sec. 4(f).

³¹ *Id.* Sec. 4(j).

³² *Id.* Secs. 4(i), (n).

³³ *Id.* Sec. 7(2)(a).

³⁴ *Id.* Sec. 7 (2)(b).

³⁵ *Id.* Sec. 7(2)(c).

Similarly, functions of the District Legal Services Authorities and Taluka Legal Services Authorities includes coordinating the activities of legal services within their jurisdiction,³⁶ organizing Lok Adalats³⁷ and perform such other functions as the State Legal Services Authority.³⁸

5.2. Legal Services Authorities Act, 1987: Spelling out Procedures

Every person who is qualified³⁹ under the statute may avail the benefits of free legal aid under the provisions of the statute, provided the concerned legal authority is satisfied that such a person has a *prima facie* case to defend or prosecute.⁴⁰ Procedurally, a person is only required to produce an affidavit stating under what category he falls so that benefit should be conferred upon him.⁴¹ However, the concerned authority may disbelieve such affidavit, if it has reasons to believe so.⁴² Thus, a person who is indigent and qualifies under the regulation framed by the State for legal aid, may avail legal aid by providing an affidavit stating his status and expressing his desire to avail such aid. Once the legal service authority decides to support claim of any such person, he would not incur any expense towards the litigation.

Further, 'legal service' includes the rendering of any service in the conduct of any case or other legal proceedings before any court or other authority or tribunal and

³⁶ Legal Services Authorities Act, 1987, Secs. 10(2)(a), 11B(a).

³⁷ *Id.* Secs. 10(2)(b), 11B(b).

³⁸ *Id.* Secs. 10(2)(c), 11B(c).

³⁹ Section 12 'Criteria for Giving Legal Service:' 'Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

- (a) a member of a Scheduled Caste or Scheduled Tribe;
- (b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- (c) a woman or a child;
- (d) a mentally ill or otherwise disabled person;
- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home within the meaning of clause (g) of § 2 of the Immoral Traffic (Prevention) Act, 1954; or in a juvenile home within the meaning of clause (j) of § 2 of the Juvenile Justice Act, 1986; or in a psychiatric nursing home within the meaning of clause (g) of § 2 of the Mental Health Act, 1987; or
- (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.'

⁴⁰ Legal Services Authorities Act, 1987, Sec. 13(1).

⁴¹ *Id.* Sec. 13(2).

⁴² *Id.*

offering of advice on any legal matter.⁴³ The word 'court' where such a person may avail such services has been given an expansive connotation and for purposes of this Act, 'court' is a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions.⁴⁴

The National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, sets out the varied processes for availing legal aid. All Legal Services Authorities shall have a front office which should be manned by one panel lawyer and at least one paralegal volunteer.⁴⁵ An application by an aggrieved party should be generally made in Form-I.⁴⁶ However, oral applications⁴⁷ or applications through e-mails are also accepted.⁴⁸ Legal Services Authority shall evaluate application of the applicant and forward it to the Committee constituted under the regulation for said purposes.⁴⁹ He may also provide other kinds of legal services from such office.⁵⁰ Such Committee shall screen the application and then take a decision on whether such applicant be offered legal aid or not.⁵¹ The Committee is under a statutory obligation to come out with a decision within eight weeks from the date of receipt of application.⁵² If the Committee decides not to provide free legal aid to the applicant then the Committee may provide the applicant with a list of lawyers or other organizations which provide free legal aid either voluntarily or under some scheme.⁵³ If any person is aggrieved by such order or decision of the Committee then he may prefer an appeal before the Chairman of Legal Services Institution and his decision shall be final.⁵⁴

For the empanelment of lawyers, applications shall be called in from members of the bar.⁵⁵ Only those lawyers who have had an experience of minimum three years of practice are eligible to apply.⁵⁶ While appointing panel lawyers, competence,

⁴³ Legal Services Authorities Act, 1987, Sec. 2(1)(c).

⁴⁴ *Id.* Sec. 2(1)(a).

⁴⁵ Regulation 4.

⁴⁶ Regulation 3(1).

⁴⁷ Regulation 3(5).

⁴⁸ Regulation 3(7).

⁴⁹ Regulation 7.

⁵⁰ Regulations 4(2), (3) ('The panel lawyer in the front office shall render services like drafting notices, sending replies to lawyers' notices and drafting applications, petitions, etc.').

⁵¹ Regulation 7.

⁵² Regulation 7(4).

⁵³ Regulation 7(5).

⁵⁴ Regulation 7(7).

⁵⁵ Regulation 8(1).

⁵⁶ Regulation 8(3).

integrity, suitability and experience of such lawyers shall be taken into account.⁵⁷ After assessing a lawyer on the criterions laid above, selection of the panel lawyers shall be made by the Executive Chairman or Chairman of the Legal Services Institution in consultation with the Attorney General (for the Supreme Court), Advocate General (for the High Court), District Attorney or Government Pleader (for the District and Taluk level) and respective President of the Bar Associations as the case may be.⁵⁸ The Executive Chairman or Chairman of the Legal Services Institution may maintain separate panels for dealing with different types of cases like, Civil, Criminal, Constitutional Law, Environmental Law, Labour Laws, Matrimonial disputes *etc.*⁵⁹ and the lawyers should provide their areas of preference while making an application before the Committee at the initial stage only.⁶⁰

5.3. Critique of the Indian Model

In this part we wish to argue that though Indian Model has transposed from a charity based model to a utilitarian model on legal aid with Rawlsian remnants, still falls short of crease in realizing Rawlsian principles. It is also argued that liberty of 'access to justice' is offered an inferior position under the wide array of liberties entrenched under the Indian Constitution. The empathetic expressions of the Indian Supreme Court haven't found adequate space under the statutory scheme conceived by the Parliament. The Indian story fails to narrate effective discourses on equality principle as well as difference principle. This section delves into shedding light on highlighting such lackadaisical attitude.

Firstly, Indian model fails to fine tune an effective balance between values of efficiency and quality disposal. It appears 'justice' has been forsaken from 'access to justice.' This could be illustrated through the functioning of the Lok Adalats.⁶¹ They have emerged as case disposal mechanism, entirely inconsistent with the purpose for which they were created – which was speedy delivery of justice.⁶² In its pursuit of speedy disposal of cases some serious compromise in quality disposal and unsolicited matters being dealt by Lok Adalats, is not unknown.⁶³

⁵⁷ Regulation 8(4).

⁵⁸ Regulation 8(2).

⁵⁹ Regulation 8(5).

⁶⁰ Regulation 8(1).

⁶¹ Institutions created under the Legal Services Authorities Act, 1987, for speedy disposal of compoundable cases.

⁶² *Report on the Study of National Legal Services Authorities Act in the State of Gujarat (November 2008) 27*, <<ftp://ftp.solutionexchange-un.net.in/public/gen/cr/res13011201.pdf>> (accessed Feb. 6, 2016) [hereinafter *Report*].

⁶³ *Id.*: 'In the Lok Adalats pre litigation cases are taken which as per Gujarat rules are out of purview. In Permanent Lok Adalats, pre litigation cases of public utility are taken up. Data shows cases of criminal, civil and MACP cases being taken up. Either there is confusion in providing the data or there has been mixing up of cases taken up in regular lok adalats and permanent lok adalats.'

Secondly, to realize Rawls' difference principle a more equitable scheme of incentives for lawyers needs to be implemented. Individual liberty of 'access to justice' is likely to be significantly compromised in absence of adequate incentives for lawyers to take up briefs of people from vulnerable section.

Thirdly, paralegals are placed at the heart of legal aid scheme under the Legal Services Authorities Act, 1987. 'Paralegal volunteer' means a paralegal volunteer trained as such by a Legal Services Institution.^{64,65} The irony is, the eligibility criterions, responsibilities, training and remuneration of paralegals are either not provided in the Act / Regulations or provided extremely poorly. Indian Institute of Paralegal Studies attempted to define the functions of paralegals which go on to show their greater significance in the entire functioning of legal aid in the country.⁶⁶

⁶⁴ Regulation 2(f) of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010.

⁶⁵ Report, *supra* n. 62, at 4, defines paralegal as:

'A Paralegal bridges the gap between community, lawyers and judicial system. She / he helps in dissemination of legal information; follow up cases, etc. She / he can help in pre-litigative work, which is very crucial and if not done well, can affect the entire case adversely.

Most of the times, a common person finds it very difficult to understand the technical legal procedure. Not knowing the procedure, not having information of law and tear of judiciary leads to people suffering in justice and not fighting for their rights. A paralegal has the knowledge of law and the procedures and attempts to simplify them.

Unlike many people, who think going to the court will get them justice, a paralegal knows what the court can do and what they can't. Therefore she / he approaches alternate forums like national human rights commission etc. She / he understands the strength and limitation of the legal system. She / he knows how to strategically use the system for maximum benefit.

People find it difficult to articulate their problem from a legal perspective. Law does not deal with injustices, it deals with illegalities. The courts intervene only if there is a violation of a law. Merely that there has been an injustice done to me will not move the legal machinery. A paralegal adds a legal perspective to social issues. She / he has the ability to convert a social problem into a legal case.

Most people find it very frustrating to deal with lawyer. While lawyer is interested only in a legal case the common person expects someone to help them through their problem. A paralegal is the link between common persons and the community and the lawyer. He identifies with the community in just-unjust framework and juxtaposes it to lawyer in the legal-illegal framework.'

⁶⁶ Report, *supra* n. 62, at 4-5. Functions as set out in this report are provided hereinafter:

'1. Delivery of services (pre-litigative work and follow up)

A paralegal is trained into doing the pre-litigative work like support in investigation and fact finding, out of court settlement with a right's perspective, filling of F.I.R. etc. Also, once a court order has been obtained she or he is involved in ensuring proper implementation of the order and takes necessary steps for the same.

2. Education and awareness

A paralegal is involved in bringing about legal awareness in the masses through means like community, education programs. She or he educates people about what their rights are and motivates them to fight for their rights.

3. Updating community dispute resolution system

A paralegal place a role in revamping the existing dispute resolution mechanism and adds a legal and rights perspective to it.

Fourthly, any right is obsolete without knowing what 'it' is. Conducting legal aid camps is a cardinal function entrusted on Legal Institutions under the Legal Services Authority Act, 1987. However, studies highlight parochial ways in which these camps are conducted.⁶⁷ No record keeping, topics being aberrations, having no connect with the purpose of conducting such camps, no list of beneficiaries and slapdash frequency of conducting these camps, characterize their functioning across different places.⁶⁸ If the camps are conducted on effete topics which have no bearing on dispensing legal aid to vulnerable class, the entire purpose of conducting such camps would be impotency at play.

6. Conclusion

The Indian regulations on ethics display Kant's duty of beneficence, however, it in clear terms argues for a narrow interpretation than a broader one. Kantian duty of beneficence premised on 'true needs' converge with Rawls' liberty principle but due to moral relativism it may not be possible to evoke an institutional duty on part of lawyers without addressing their 'true needs.' These notions of 'true needs' are not only fiscal but also cultural. India has a long way to trod in forging this convergence and striking that balance between fair equality of opportunity and true needs of the lawyers.

4. Adding social perspective to court room lawyering

A paralegal adds a social perspective to standard court room lawyering. Usually typical lawyer gets caught in the technicalities of law and does not pay attention to the social angle of the case. Paralegal plays an important role in sensitizing the lawyer to social issues.

5. Research and data collection

Paralegal also does research and data collection on sociolegal issues. He is constantly studying the impact laws have on lives of people, interrelationship between the judicial system and people, where laws need change, water the emerging areas where a fresh laws is needed and what are the pitfalls and drawbacks of implementation of a particular law.

6. Negotiation, counselling and conciliation

A paralegal also is involved in counselling with the rights perspective or issue based perspective and out of court settlements.

⁶⁷ *Report, supra* n. 62, at 15–16.

⁶⁸ *Id.* These awareness camps get people to know about their rights and they register for availing such free legal aid. Pointing to few districts, this reports suggests that either no application or very few were filed to avail such services, which basically suggests that these camps failed to cater to their purposes. *Report, supra* n. 62, at 18, broaching to one of the districts in the state of Gujarat goes on to say: 'Dahod, in fact, presents a highly interesting case in point. After conducting 800 legal literacy camps from 2006–2008, the Dahod DLSA has received only 40 applications and has a panel of 20 lawyers for free legal aid. This leaves an approximate of 2 cases per lawyer. This is also highly suspect as a lawyer on the free legal aid panel then has been able to reach only 2 beneficiaries. This is also inextricably linked to the awareness campaign and the legal literacy camps which have been conducted by the district Legal services Authorities. This case study shows that the whole structure of legal literacy and of cases received is in fact null and void because the DLSA is unable to reach the masses it is meant for.'

To cater to contemporary predicament of extending effective representation to the clients from vulnerable section, Art. 39A of the Constitution and the Supreme Court's judgments have been *sentinel on the qui vive*. However, the kind of shoddy free legal services offered to such clients is not unknown. Until adequate arrangements are made to effectively incentivize the lawyers who take up briefs of such clients and attract bright lawyers to bar, Rawls' first principle of equality which argues for extending lexical priority to liberty rights (here liberty of access to justice) can't be realized. Indian Supreme Court has been the bastion of rights but the Parliament in its attempt to offer a statutory attire, messed with finer details.

It was beyond the scope of this essay to evaluate finer nuances of micro- and macro-allocation of resources but without excogitating the same, a holistic understanding of finer details in implementing the Legal Service Authorities Act, 1987, may not be possible.

There are limitation of a charity based regime, precisely, in its inability to create legal obligations on the stakeholders in performing the desired act. It is indeed glaring how India has recognized the liberty of 'access to justice' as part of liberty clause under Art. 21 of the Constitution but to offer it a position at par with other liberties, should be her aspiration.

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