DANCING IN THE DARK: THE RIGHT TO EFFECTIVE LEGAL ASSISTANCE IN INDIA

ABHINAV SEKHRI*

Conversations about legal aid and assistance in India have, by and large, been solely focused on the issue of access to counsel alone. As a result, courts, lawyers, and academics, are often unaware of the body of law that has developed over time on the related question of "effective" legal assistance by counsel. This short paper endeavors to fill the information gaps on this score. It focuses on a specific issue - shaping the contours of an accused person's right to effective legal assistance, when raised during an appeal after conviction. The paper demonstrates that while a right to effective legal assistance seems to have been affirmed, its contours are extremely difficult to discern at the moment. There is an urgent need for clarity on core questions in this field to help regulate claims of ineffective assistance by defendants with lesser arbitrariness and more certainty. Further, I also argue that this clarity in the right to effective assistance of counsel must work towards making it easier for defendants to litigate such claims reducing the many structural barriers that not only make it almost impossible for them to present their claim successfully, but also excludes key areas of legal assistance from any judicial scrutiny and potentially renders the right meaningless.

INTRODUCTION

One of the established truths about legal systems across the world, and especially those with a statutory framework as prolix and complicated as India, is that litigants need lawyers to help them navigate the system – especially when the litigants are criminal defendants whose liberty is on the line.

The abundance of lawyers in India means that legal assistance can be secured for quite cheap.[1] On top of which, the Indian legal system also

*Advocate. B.A. LLB (Hons.), 2014 (NLSIU); LL.M., 2018 (Harvard Law School). I am grateful to Justin Murray for introducing me to *Strickland* and the problems with the constitutional right to effective legal assistance as it exists in the United States. I am also grateful to Shri Singh, Ankit Agarwal, Gautam Bhatia, Utkarsh Saxena and Mansi Binjrajka, with whom I've had conversations about these issues. Sregurupriya Ayyapan offered excellent research assistance. All errors are mine.

offers free legal assistance to indigent persons.[2] For most parts, then, the system seems to cater sufficiently to the demand for legal assistance. However, the moment we shift our focus from mere availability to *effectiveness*, we encounter an entirely different scenario.

A short essay is not the space to tackle the regulatory travails of the legal profession in India: advocates are subject to minimal, almost non-existent professional regulations.[3] Instead, I squarely focus on one phenomenon that falls within this scope – judicial intervention to provide a guarantee of effective legal assistance. The anaemic performance of professional regulators exists in stark contrast with the active role played by the Indian Supreme Court [hereinafter "Supreme Court"] in the field of legal assistance since the late 1970s.

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[1] Figures from 2011 pegged the total number of registered advocates at approximately 13,00,000. *See*, *RTI Reveals: 1.3m Advocates*, *in* LEGALLYINDIA, https://www.legallyindia.com/the-bench-and-the-bar/rti-reveals-number-of-lawyers-india-20130218-3448 (February 18, 2013) (last accessed on December 15, 2018). There are no official reports on the variance between legal fees charged across the system. However, the gap between the top and the bottom is acknowledged to be extremely vast. *See*, Prachi Shrivastava, *How Much to Delhi's Top Advocates Charge?*, *in* LIVEMINT (September 16, 2015), https://www.livemint.com/Politics/BvOZE6z7Oyl6LiHZxWVlzL/How-much-do-Delhis-top-advocates-charge.html (last accessed on December 15, 2018).

[2] *See*, Article 39-A, Constitution of India; Legal Services Authority Act, 1987.

[3] The Bar Council of India is the primary regulator and the rules for professional ethics have not been updated since 1975. *See*, Chapter II, Part VI, Bar Council of India Rules, 1975. The calls for an updated code of ethics have been made since the 1980s, however no concrete steps have been taken in this regard. *See*, Law Commission of India, REPORT NO. 131 ON ROLE OF THE LEGAL PROFESSION IN ADMINISTRATION OF JUSTICE (1988); *BCI Floats Conflict Rules, Soft Legal Aid Duty, Ads and CFA Ban in New Ethics Code: Seeks Comments*, *in* LEGALLYINDIA (March 11, 2011), https://www.legallyindia.com/home/bci-floats-conflict-rules-soft-legal-aid-duty-cfas-a-advertising-ban-in-new-ethics-code-invites-comments-within-week-20110311-1904 (last accessed on December 15, 2018); Raghav Ohri, *Government, SC, in Favour of Ethics Body for Legal Profession*, *in* ECONOMIC TIMES (October 23, 2017), https://economictimes.indiatimes.com/news/politics-and-nation/government-sc-in-favour-of-ethics-body-for-legal-profession/articleshow/61177574.cms (last accessed on December 15, 2018); Ashok Bagriya, *Supreme Court Favours Law to Regulate Hefty Fees Charged By Lawyers*, *in* HINDUSTAN TIMES (December 7, 2017), https://www.hindustantimes.com/india-news/sc-favours-law-to-regulate-hefty-fees-charged-by-lawyers/story-n1OdH52JcfVi5IPdwPgxvI.html (last accessed on December 15, 2018).

The journey that led the Supreme Court from not recognising a right to legal aid even in capital cases to recognising a fundamental right to free legal assistance is an area well-traversed in scholarship and popular accounts. What is not equally well-discussed, however, is the Supreme Court's contribution towards buttressing this fundamental right by also recognising a right to *effective* legal assistance in the criminal process, specifically in context of post-conviction appeals by defendants.

This paper aims to contribute to this modest stream of scholarship, and my argument concerns the mechanics of how such claims are litigated and regulated. While there is a clear basis for claiming a right to effective legal assistance, I argue that currently there is no clear test for regulating ineffective assistance claims in India. No consistent answers have been provided for questions such as what is *effective* assistance, when can defendants raise a claim, and what remedies are available.

However, recently this doctrinal gap has been sought to be filled by resorting to American law. I argue that this will be a serious misstep for the development of Indian law in this context. Not only will it be a poor fit with existing in Indian law, but it will exacerbate the systemic issues that mechanics of these litigations have revealed, and quite probably work towards widening the chasm between the kind of justice available to defendants with means and those without.

I. PART ONE

The paucity of scholarship on the right to effective legal assistance in India requires charting an outline of the development of this right before tackling more substantive issues. This section does not attempt to provide a conclusive historical account, rather opts to flag major signposts from 1950 till the present.

a. 1950 – 1978: Effective Assistance through Rule-Enforcement

After much deliberation, the framers of India's Constitution decided against inserting a "Due Process" clause and instead voted in favour of a right protecting life and personal liberty against deprivations not as per

"procedure established by law".[4] This choice meant that claims of this right to personal liberty being violated would not be assessed on the basis of some independent, abstract values but instead on the basis of existing laws.[5] This interpretive approach was key to how the Supreme Court faced claims of effective assistance in the years between 1950 – 1978, i.e. till the time this interpretive approach itself was abandoned.

In 1951, the Court was presented with a petition that sought to overturn capital convictions on, *inter alia*, grounds of no legal assistance having been provided to the defendants.[6] The Court held that since Indian law only prescribed a right to counsel *of choice*, and not a right *to* counsel, there could be no rule vitiating trials conducted without counsel in capital cases.[7] However, it is also noted that superior courts retained discretionary powers to interfere if they found that "the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to a negation of a fair trial."[8]

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[4]INDIA CONST art 21. On the deliberations resulting in the exclusion of the phrase "due process" from the Constitution, *See*, CONSTITUENT ASSEMBLY DEBATES, VOL. VII 797–98 (Dec. 3, 1948), 842–857 (Dec. 6, 1948), 859 (Dec. 7, 1948), 999–1001 (Dec. 13, 1948); CONSTITUENT ASSEMBLY DEBATES, VOL. IX, 1496–1539 (Sept. 15, 1949), 1541–70 (Sept. 16, 1949).

[5]This view was affirmed by the Supreme Court in its first foray into testing Article 21 of the Constitution of India. *See*, A.K. Gopalan v. State of Madras & Ors., 1950 SCR 88 (Supreme Court of India, Six Justices' Bench).

[6]Janardan Reddy & Ors. v. State of Hyderabad & Ors., 1951 SCR 344 (Supreme Court of India, Five Justices' Bench).

[7]*Id. See* also, Tara Singh v. State, 1951 SCR 729 (Supreme Court of India, Four Justices' Bench) (Holding that Section 340 of the Criminal Procedure Code 1898 did not confer any *right* to counsel and only created a duty upon judges to inform the defendant that she could engage counsel). Importantly, the Court in Janardan Reddy expressly refused to apply the United States' Supreme Court decision of Powell v. State of Alabama, 287 U.S. 45 (1932), where convictions in capital cases were overturned for lack of effective legal aid. While the Bench in Janardan Reddy argued that the American decision relied upon the due process logic which was alien to the Indian Constitution, a close look at the facts in *Powell* suggest that the Indian Supreme Court was not entirely correct in its analysis. *See also*, K.K. Nigam, *Due Process of Law: A Comparative Study of Procedural Guarantees against Deprivation of Personal Liberty in the United States and India*, 4(1) J. INDIAN L. INST. 99, 114–17 (1962).

[8]Janardan Reddy, at ¶ 7.

Thus, although the Supreme Court did not speak a language of "rights" in the context of legal assistance for defendants, it did acknowledge the importance of the same towards ensuring a fair trial and so recognised scope for judicial intervention. Moreover, the Court also hinted that the claims might have been more successful had they been able to cite a breach of existing legal rules that *mandated* appointment of counsel – in fact already present in some Indian states at the time.

In the years following *Janardan Reddy*, this combination of factors proved successful in many High Courts which had issued practice directions for providing state-funded counsel in capital cases for indigent defendants. Capital convictions were overturned on grounds of ineffective legal assistance by the High Courts in Kerala, West Bengal, and Orissa, which examined the record to determine not only if counsel had been appointed but also whether any effective defence had been mounted and thus breathed substance into the state's duty to appoint counsel.[9]

In 1968, such a case reached the Supreme Court.[10] Bashira had been convicted and sentenced to death for having murdered his wife. While he had been provided state-funded counsel, the appointment was done just before the trial began. He contended that this amounted to a breach of the practice rules issued by the Allahabad High Court which required appointed-counsel to be provided "sufficient time to prepare the defence".[11]

The Supreme Court agreed, and found that this vitiated his conviction as it took away his right to life and personal liberty not as per the procedure

[9]*See*, Mathai Thommen v. State, AIR 1959 Ker 241 (Kerala High Court, Two Judges' Bench); Kunnummal Mohammed & Anr. v. State of Kerala, AIR 1963 Ker 54 (Kerala High Court, Two Judges' Bench); Panchu Gopal Das v. State, AIR 1968 Cal 38 (Calcutta High Court, Two Judges' Bench); Raj Kishore Rabidas v. State, AIR 1969 Cal 321 (Calcutta High Court, Two Judges' Bench); Kamala Domen v. State, 1971 (1) CWR 636 (Orissa High Court); Mangulu Behera v. State, (1971) 37 CLT 1180 (Orissa High Court, Two Judges' Bench).

[10]Bashira v. State of Uttar Pradesh, AIR 1968 SC 131 (Supreme Court of India, Three Justices' Bench).

[11]*See*, Rule 37, Chapter V, General Rules (Criminal), 1957, promulgated by the High Court of Allahabad and published under Notification No. 241/A/Vlll-a-1, dated September 4, 1956. Cf. Bashira v. State of Uttar Pradesh, AIR 1968 SC 1313 (Supreme Court of India, Three Justices' Bench).

established by law. Having found a rights violation, the Court moved to the question of remedies. It emphatically rejected the government claim that the conviction should not be disturbed without a defendant showing what prejudice was caused by any failure in following the rule,[12] and ordered a retrial.[13]

b. 1978 – 2018: From Duties to Rights

The 1970s saw a tectonic shift in the interpretive approach of the Supreme Court towards the Article 21 - right to life and personal liberty. To put it bluntly, it judicially inserted the same Due Process clause that the framers of the Constitution had deliberately excluded.[14] This opened the doors to test State practices against independent principles or values not specifically rooted in any statute or executive rule.

One of the first developments in this period was judicial testing of the criminal process through this lens, which led the Supreme Court to hold that *all* deprivations of liberty occasioned by the criminal process required legal assistance to satisfy a Due Process requirement.[15] This time, the Court expressly evoked a language of rights, moving beyond the

[12]Bashira, ¶ 11 at 1313. ("Learned counsel also urged that we should not hold the conviction and sentence to be void when it is not shown that there was any prejudice to the appellant by the failure of the court to observe the procedure laid down by the Rule. In our opinion, in such a case, the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law. We may, however, add that, in this case, the facts indicate that there was, in fact, prejudice to the accused caused by the non-compliance with the requirement of r. 37 of the Rules. … In fact, we feel that, in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated.").

[13]The Supreme Court also considered the issue of ineffective assistance in post-conviction appeals in R.M. Wasawa v. State of Gujarat, (1974) 3 SCC 581 (Supreme Court of India, Two Justices' Bench).

[14]*See*, Abhinav Chandrachud, *Due Process*, *in* OXFORD HANDBOOK ON THE INDIAN CONSTITUTION, 778 (2016).

[15]M.H. Hoskot v. State of Maharashtra & Ors., (1978) 3 SCC 744 (Supreme Court of India, Three Justices' Bench). Since the focus was on deprivation of liberty, this judicially recognized right to legal assistance only extended to persons in custody. The centrality of the rights-based language is evident in how the Court renders a newly inserted and non-enforceable Directive Principle to provide legal aid in Article 39-A as an "interpretive tool" for the fundamental right to life and personal liberty recognised under Article 21. *See*, Hoskot, at ¶¶ 10–26.

perspective of considering legal assistance as part of a judicial duty to ensure fair trials to a guaranteed right for persons.[16]

Judicial and legislative engagement with the issue in the 1980s and 1990s was primarily with the first order problem of ensuring that defendants are provided some legal representation,[17] and providing adequate remedies.[18] It is not an exaggeration to suggest that the second order problem of *effective* assistance did not figure prominently on the agenda. While the rhetoric on the right to counsel did mention that *ineffective* assistance was pointless,[19] the focus was still on state obstruction of the right, much like the state's failure to provide counsel. Thus, courts frequently invoked the idea of a judicial duty of securing a fair trial when faced with ineffective

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[16] Here it is important to add a qualifier. Though the rights-rhetoric is central to how the Supreme Court engages with the issue of legal assistance at this time, it is still debatable whether the Court actually embraced the logic. I say this, because in subsequent decisions the Court somehow suggests that while legal assistance is essential to ensure fair trials, there might be certain cases where "social justice" demands no free legal aid be provided. *See,* Khatri & Ors. (II) v. State of Bihar & Ors., (1981) 2 SCC 627, at ¶ 6 (Supreme Court of India, Two Justices' Bench). The problematic nature of these observations has gone unnoticed on the bench. *See*, Rajoo v. State of Madhya Pradesh, (2012) 8 SCC 553, at ¶ 17 (Supreme Court of India, Two Justices' Bench).

[17] The Supreme Court and the many state High Courts were the site of immense litigation for enforcing the newly recognised right to legal assistance. *See, e.g.*, Hussainara Khatoon & Ors. (IV) v. Home Secy., State of Bihar, (1980) 1 SCC 98 (Supreme Court of India, __ Justices' Bench); Khatri & Ors. (II) v. State of Bihar & Ors., (1981) 2 SCC 627 (Supreme Court of India, Two Justices' Bench); Khatri & Ors. (IV) v. State of Bihar & Ors., (1981) 2 SCC 493 (Supreme Court of India, Two Justices' Bench); Ranjan Dwivedi v. Union of India, (1983) 3 SCC 307 (Supreme Court of India, Two Justices' Bench); P.C. Kakati & Anr. v. State of Assam, (1983) 1 Gau LR 80 (Gauhati High Court, Two Judges' Bench); Chandran v. State of Kerala, 1983 KLT 315 (Kerala High Court, Single Judge Bench); Unnikrishnan v. State of Kerala, 1983 KLT 586 (Kerala High Court, Single Judge Bench).

Legislative attention was harnessed with the passing of the Legal Services Authority Act, 1987 (Act No. 39 of 1987), which again was focused on providing free legal assistance and did not specify any tests for ensuring quality assistance. Similarly, no changes were made to the existing norms under the Bar Council of India, the national regulatory agency for legal professionals.

[18] *See, e.g.*, Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401 (Supreme Court of India, Three Justices' Bench); Bani Singh v. State of U.P., (1996) 4 SCC 720 (Supreme Court of India, Three Justices' Bench); Badri v. State of Madhya Pradesh, 1988 Cri LJ 1592 (Madhya Pradesh High Court, Single Judge Bench).

[19] *See, e.g.*, Ram Awadh v. State of Uttar Pradesh, 1999 All LJ 1919 (Allahabad High Court, Two Judges' Bench);

assistance claims rather than suggest this amounted to a violation of Article 21.[20]

Today, the Supreme Court has confirmed that the right to effective legal assistance goes beyond state interference – by denying time for preparing a defence – to considering the adequacy of the legal assistance rendered. This was crystallised in the petition filed by Mohd. Hussain, a foreign national facing the death sentence on charges of extremist acts.[21] Hussain argued that his conviction should be overturned because he received no legal assistance – a claim that the High Court rejected as the trial record showed that Hussain did have a lawyer, albeit one who did not turn up often.[22] The Supreme Court saw things rather differently, and concluded that in a trial where Hussain was without the aid of counsel for major portions – 56 out of 65 witnesses –[23] it could not be said that he had the assistance of counsel "in a substantial and meaningful sense".[24]

While the Court did affirm that there was a fundamental right, and it had been violated, it did not tell us much more. Adopting an "I know it when I see it" approach,[25] both opinions said precious little on what could amount to *effective* assistance and how would defendants show ineffectiveness – could they file new evidence, for instance? Similarly, the

[20]*See*, Modiya v. State of Rajasthan, 1984 RLW 374 (Rajasthan High Court, Two Judges' Bench) (In an appeal against conviction the Court agreed that there was ineffective assistance by the legal aid counsel and ordered a partial retrial, but did not consider this a violation of any fundamental right.).

[21]Mohd. Hussain (I) v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584 (Supreme Court of India, Two Justices' Bench); Mohd. Hussain (II) v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408 (Supreme Court of India, Three Justices' Bench).

[22]Mohd. Hussain (I), at ¶ 4 (Dattu, J.).

[23]Mohd. Hussain (I), at ¶ 13 (Dattu, J.) ("It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant-accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of the learned counsel and her appearance during the last stages of the trial was rather pro forma than active. …").

[24]Mohd. Hussain (I), at ¶ 25 (Dattu, J.).

[25]Mohd. Hussain (I), at ¶¶ 13–26 (Dattu J.). The "I know it when I see it" approach refers to the famous opinion of Potter, J. in Jacobellis v. Ohio, 378 U.S. 184 (1964).

Court said nothing about whether the right extended to situations outside a post-conviction posture.

Hussain's case was referred to a different bench to decide the issue of remedy as while Dattu J. considered a retrial to be the correct remedy, Prasad J. considered an acquittal to be the right answer.[26] This offered another chance to the Supreme Court to fill the doctrinal gap, and erect a clear test to help regulate such claims in the future. It did nothing of the sort, adopting a vague balancing approach to conclude that the gravity of alleged offence merited a retrial.[27]

c. Supplying the Doctrinal Deficit?

Thus, the following can be stated with a measure of certainty: *first*, there is a legally enforceable right to effective legal assistance that can be claimed in a post-conviction context, and *second*, the remedy for breach of this right can be either an outright acquittal or a *de novo* trial. That is where the certainties end, though, as there remains no real test for courts to address the rights or remedies questions.

Or, perhaps not anymore. After *Mohd. Hussain*, the Supreme Court addressed an ineffective assistance claim based on the quality of assistance once again in *Ashok Debbarma*; another capital case involving allegations of extremist violence.[28] There, the Court agreed to apply the doctrinal test followed in the United States as devised in *Strickland* v. *Washington*.[29] This has led to suggestions that the doctrinal gap I identify above has indeed

[26]Justice Dattu awarded a retrial whereas Justice Prasad awarded an acquittal and set Hussain at liberty. *See*, Mohd. Hussain (I), at ¶ 62. The case was heard on this point by a bench of three Justices, which unanimously awarded a retrial. Mohd. Hussain (II), at ¶ 47.

[27]Mohd. Hussain (II), at ¶ 44. There was surprisingly no mention of Bashira, where the Court had addressed the remedial issue at length.

[28]Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747 (Supreme Court of India, Two Justices' Bench). The Supreme Court has recently addressed an ineffective assistance claim akin to Bashira, where counsel was denied any time to prepare having been asked to submit final arguments in a capital case on the day of appointment. *See*, Ambadas Laxman Shinde & Ors. v. State of Maharashtra, Review Petition Nos. 18–19 of 2011 (Decided on October 31, 2018).

[29]Strickland v. Washington, 466 U.S. 668 (1984).

been filled. [30] In the next section, I engage with this recent development, and argue that these claims appear unfounded.

II. PART TWO

In the early years, the Indian Supreme Court had routinely refused to consider American cases on a constitutional right to legal assistance citing the exclusion of the Due Process guarantee in India. Since 1978, though, the Court eagerly seized upon the wisdom of American decisions as it affirmed constitutional status for a right to legal assistance in India.[31] This has meant that the decisions in *Powell* v. *Alabama*[32] and *Gideon* v. *Wainwright*[33] are not only well-known but also much appreciated.

The lack of an equal degree of judicial engagement with the nuanced issues of effective legal assistance in India perhaps explains why so little is known about *Strickland* despite it having been cited by Indian courts for a while. In this section, I first resolve that information gap by explaining *Strickland*. Following which I move on to discuss how elements of that test stand in conflict with pre-existing Indian law. Finally, I demonstrate how the *Strickland* test is being applied rather unfaithfully by Indian courts, rendering claims of incorporation quite dubious.

a. Strickland v. Washington

Strickland was admittedly different from the storied cases of *Powell* and *Gideon*, insofar as it involved no questions about state interference, or denial, of legal assistance. Doctrinally too, whereas the earlier cases had been litigated in the framework of the Fifth Amendment's Due Process clause, *Strickland* was a claim under the Sixth Amendment's legal

[30] *See* Saurav Datta, *Surinder Koli and the Case for Effective Legal Aid*, *in* CARAVAN (October 28, 2014); *Indian Supreme Court's Lesson in Effective Legal Aid*, *in* ASIA TIMES (June 21, 2018), http://www.atimes.com/article/indian-supreme-courts-lesson-in-effective-legal-aid/ (last accessed on December 15, 2018); *SC Recalls Death Sentences Owing to Lack of Effective Legal Representation*, *in* NEWSCLICK (November 10, 2018), https://www.newsclick.in/sc-recalls-death-sentences-owing-lack-effective-legal-representation (last accessed on December 15, 2018).

[31] *See*, Rajeev Dhavan, *Due Process in India: A Preliminary Exploration* (1981); *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. LAW. 505 (1985).

[32] 287 U.S. 45 (1932).

[33] 372 U.S. 335 (1963).

assistance clause,[34] which had been read to include a guarantee for *effective* assistance in 1970.[35]

What difference did this make? It meant courts would be asking very different questions. Legal assistance claims alleging Due Process violations alleged an unfair trial had occurred, requiring a judicial review of the entire trial proceedings. But a Sixth Amendment claim, theoretically, was not linked to the trial and invited courts to consider attorney performance.[36] As ineffective assistance cases began to come before courts, these doctrinal distinctions were often lost, and it resulted in different standards emerging across states to regulate such claims.[37]

Strickland was one such case. The facts were far from straightforward. David Washington pled guilty to multiple murder charges in spite of contrary advice by his state-appointed counsel, and also waived his right to a jury hearing to decide if his case warranted capital punishment. Having been awarded the death sentence, Washington hired new counsel who appealed the sentencing, citing ineffective assistance of counsel. After multiple losses, Washington secured a partial victory when the Court of Appeals for the 11th Circuit remanded the case for a fresh hearing on the ineffective assistance aspect on newly specified guidelines.[38]

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[34]Amendment VI to the United States' Constitution, 1791 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.").

[35]McMann v. Richardson, 397 U.S. 759 (1970).

[36]David Cole, Gideon v. Wainwright and Strickland v. Washington: *Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101, 110–14 (Carol S. Steiker ed., 2006).

[37]For discussions on the development of the effective assistance doctrine before *Strickland*, *see*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End?* 86 COLUM. L. REV. 9 (1986); Sara Mayeux, *Ineffective Assistance of Counsel before* Powell v. Alabama*: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014).

[38]Strickland, at 671–83. For a further discussion on the case history itself, *see*, Brian R. Gallini, *The Historical Case for Abandoning Strickland*, 94 NEB. L. REV. 302 (2016).

The U.S. Supreme Court agreed to hear *Strickland* largely to resolve the confusion emanating from multiple standards and offer a clear standard to guide lower courts.[39] Writing for the majority, Justice O'Connor considered it inappropriate to offer rule-like guidelines and instead opted for a two-part test seeking compliance with broad standards.[40] It required defendants to show (i) that counsel's performance was deficient, i.e. she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment", and (ii) that this caused prejudice, i.e. "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[41]

The Court insisted that a high degree of deference must be accorded to counsel's performance while applying this test to prevent opening the proverbial floodgates, not only undermining the performance of counsel but also the finality of cases.[42] This concern also pervaded *Strickland's* companion case, *United States* v. *Cronic*,[43] where the Court recognised that in some cases the prejudice from ineffective legal assistance could be presumed, but restricted it to only the most egregious of errors.[44] Together, *Strickland* and *Cronic* continue to supply the test for courts to determine ineffective assistance claims in the United States.

b. The Uneasy Fit with Indian Law

While the Indian legal position on the issue of effective assistance is underdeveloped, it has had a chance to engage with the issue of

[39]Strickland, at 683–84. The message was received loud and clear, as besides the federal government, amicus briefs had been filed by almost every state. *See*, *Strickland*, at 670.

[40]Strickland, at 687–88.

[41]Strickland, at 687, 694.

[42]Strickland, at 689–90, 696–98.

[43]466 U.S. 648 (1984).

[44]The Court in Cronic held that the presumption applies where "counsel entirely fails to subject the prosecution case to meaningful adversarial testing", or if the trial was affected by "state interference with counsel's assistance", or in cases of "an actual conflict of interest" that the counsel had which "adversely affected [her] performance." Cronic, at 659.

establishing prejudice in this context, which forms the second prong of the *Strickland* test. The first engagement came back in *Bashira*, a case of state interference with the right to counsel by denying the appointed lawyer sufficient time to prepare for the case.[45] The second instance was the Supreme Court litigation in *Mohd. Hussain*, which involved a more subjective claim without allegations of state interference.

What was the result? In *Bashira* the Court unanimously held that "the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law."[46] Since this was a pre "Due Process" case, the fact of non-compliance with an existing rule was crucial. But, interestingly, the Court also went ahead to make a broad statement: "In fact, we feel that, in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated."[47]

Since the Court had already spoken in terms of non-compliance with the rule at this point, the "in such cases" remark in *Bashira* could not have been a reference to that. Instead, I argue, it was a reference this being a criminal case with state-appointed counsel. This reading of *Bashira* might suggest that the Indian Supreme Court adopted a *Cronic* style test of presumed prejudice in cases of proven state interference with performance of counsel. But that is incorrect, for unlike *Cronic*, here the Court was entirely unconcerned with the result of a trial.

When the prejudice claim resurfaced in *Mohd. Hussain*, with the State arguing that actionable claims for ineffective assistance *must* have defendants showing prejudice, neither of the two opinions supported the claim. The split two Justices' bench did not inquire into the prejudice issue and instead straightaway proceeded to the question of remedies after having established serious error. The three Justices' bench did not conduct an inquiry into result-based prejudice either, instead opting for a wide-ranging balancing test.[48]

c. Indian Courts: Applying Strickland *Lite?*

[45] *Supra* note 10.
[46] Bashira, ¶ 11 at 1313.
[47] Bashira, at ¶ 11 at 1313.
[48] Mohd. Hussain, at ¶ 44.

Despite this, in *Ashok Debbarma* counsel for the appellant invited the Court to apply *Strickland* while arguing that the ineffective legal assistance received was a mitigating factor towards commuting the death sentence to one of life imprisonment.[49] The Court agreed,[50] observing that deciding such claims required a judicial finding arrived at by "independently reweighing the evidence" to determine if there was a "reasonable probability that, absent the errors, the court … would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence."[51]

This clear linkage of the *Strickland* test with sentencing issues should make anyone hesitant before claiming that India has adopted that test. Further, the legal basis of *Ashok Debbarma* is far from secure. The existing Indian position on prejudice that I described above was not cited in the 2014 decision,[52] and according to the doctrine of precedent the two Justices' bench of *Ashok Debbarma* was bound by it. Perhaps, these factors explain why High Courts handling ineffective assistance claims since 2014 have not relied upon it, following the balancing test of *Mohd. Hussain* instead.[53]

Interestingly, while the Delhi High Court has also refrained from applying *Ashok Debbarma*, it has adopted *Strickland* for deciding ineffective assistance claims more generally since at least 2009.[54] But upon reading the cases, one is left distinctly with the impression that only lip-service is paid to the prejudice prong of *Strickland*: The High Court focused mainly

[49]Ashok Debbarma, at ¶ 35.

[50]The Court summarised the test in this fashion: "[N]ot only that counsel was not functioning … so as to provide reasonable effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. … the convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different." Ashok Debbarma, at ¶ 38.

[51]Ashok Debbarma, at ¶ 39.

[52]*Supra* notes 4–27.

[53]*See*, Rakesh v. State of Uttar Pradesh, (2018) 4 All LJ 595 (Allahabad High Court, Two Judges' Bench); M. Kannan v. State, 2018 Cri LJ 116 (Madras High Court, Two Judges' Bench); Rafique v. State (Govt of NCT of Delhi), 2017 SCC OnLine Del 10372 (Delhi High Court, Single Judge Bench); Subhash Bhardwaj v. State, 2016 SCC OnLine Del 5002 (Delhi High Court, Two Judges' Bench);

[54] *See*, State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB) (Delhi High Court, Two Judges' Bench).

on whether any error was established, and if so, moved straight to the remedial question.[55]

Thus, even where we find *Strickland* being referred to by Indian courts, they exclude a major component of what that test requires – proving that serious error by counsel caused prejudice. This is not a bad thing at all. Scholars have demonstrated that the two-pronged test in *Strickland* makes proving ineffective assistance claims nearly impossible for defendants, not only because it operates with a hindsight bias but also because it deems all errors harmless until they prejudicially affect the *outcome* of the trial.[56]

Since this aspect of outcome-determinant prejudice is woven into the fabric of the right itself, it results in significant downstream effects. The scope of the right itself gradually shrinks with each claim that fails to prove prejudice, with the scope for deference towards poor performance increasing with every instance of bad lawyering that goes unpunished. Thus, infamously, *Strickland* has meant that lawyers sleeping through trial, drinking alcohol through trial, not questioning material witnesses, or not knowing any relevant law, were all deemed instances of poor legal assistance, but not *unconstitutionally ineffective* assistance.[57]

d. Summing Up

A close scrutiny of Indian courts' engagement with the *Strickland* test clearly shows that the American position is far from fully incorporated. Most courts continue to ignore the test. Those that have relied upon it are in fact applying only one aspect out of a two-pronged test: that the defendant must establish serious error to claim relief. Since this was the

[55]Sanjay Dass, at 627–30; Salamat Ali, at 562–63.

[56]*See*, Cole, *supra* note 36, at 113–118; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should legal Error be Tolerated?* 70 N.Y.U. L. REV. 1167 (1995); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH. L. REV. 1; NAT'L RIGHT TO COUNSEL COMM., AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 40–41 (2009)*;* Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165 (2016);

[57]Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425 (1996); Cole, *supra* note 36, at 114.

conventional position in India for decades, it explains why the few references to *Strickland* in the past decade have not ruffled many feathers.

III. PART THREE

Indian judicial treatment of *Strickland* might have rendered it synonymous with the existing law, but that does not mean that the existing position was sanguine or that even this limited infusion of American law is not without problems. The reason for this the structural reality in which claims of effective legal assistance are litigated in India.

In this section, I make two claims. *First*, describing structural differences between India and the United States I argue that the systemic barriers against defendants successfully litigating ineffective assistance claims are felt much more severely in the Indian context and truncates the scope of successful claims. *Second*, I argue that imagining ineffective assistance only as a *post-conviction* problem – as *Strickland* does – excludes vast parts of what legal assistance entails from scrutiny. It also prevents judicially-driven structural reform, especially in context of state-funded legal aid. All of which fossilises the right to effective legal assistance.

a. East is East

While ineffective assistance claims in India and the United States (I refer to federal courts here) have a measure of similarity in that they both place the onus on defendants to establish a breach, there are many systemic differences which affect how these claims are litigated.

Trials, whenever they do happen, are by jury in the U.S. federal system.[58] And all that is said in the courtroom forms part of the transcript – the

[58]A vast proportion of criminal cases at both the federal and the state level are decided by guilty pleas. Data released by the United States Sentencing Commission for criminal cases processed in the federal system shows that 97.3% cases were disposed through guilty pleas in 2016. The figure has been hovering around 97% since 2012. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 2016, FIGURE C – GUILTY PLEAS AND TRIALS, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf (last accessed on December 15, 2018). Data compiled in 2009 for felony defendants in state courts pegged convictions through guilty pleas at 53% and through trials at 2%. Brian A. Reeves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, BUREAU OF JUSTICE

arguments, witness examinations, objections, and the reserving of objections to agitate them later. This not only helps relive the spontaneity of trial but also offers a pretty conclusive record of exactly what counsel did or did not do.[59]

What happens when defendants file ineffective assistance claims in the appellate court? The papers – whatever the defendant files in addition to the trial transcript – are sent back to the trial judge to decide whether or not the case has merit. Here, defendants push for an evidentiary hearing seeking permission to examine the allegedly ineffective counsel as a witness, rather than have the judge make up her mind by solely reading the record. The trial judge has to apply *Strickland*, and if the defendant succeeds then a re-trial is normally directed.[60]

In India, trial judges cannot review their orders,[61] and so ineffective assistance claims remain solely with the appellate court. As appellate courts have powers to take further evidence,[62] it is possible to imagine a similar kind of process being forged entirely at the appellate level. But it is a very slim possibility: this power of calling for fresh evidence is invoked extremely rarely, and I have not found a single ineffective assistance case involving it.

This means that defendants are reduced to relying upon the existing record to make their claims, and here lies the problem. The trial court record as it exists in India and the United States is very different. Indian trial courts do not maintain transcripts, perhaps because they do not conduct jury trials. Instead, the record provides a dispassionate and neutral perspective on the proceedings. This includes a judicially dictated

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STATISTICS (December 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (last accessed on December 15, 2018).

[59]*See*, United States Courts, *Covering Criminal Trials – A Journalist's Guide*, http://www.uscourts.gov/statistics-reports/covering-criminal-trials-journalists-guide (last accessed on December 15, 2018).

[60]*See*, Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 (3) CRIM. JUSTICE (2009), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf (last accessed on December 15, 2018).

[61]Section 362, Criminal Procedure Code, 1973.

[62]Section 391, Criminal Procedure Code, 1973.

version of the day-to-day proceedings of the case, judicially dictated evidence recorded by a stenographer, and written pleadings wherever filed. The quality of this record can substantially alter across the country as it heavily depends upon resources – the availability of computers and staff. [63]

All these peculiar features of the Indian setting mean that the scope of ineffective assistance claims is greatly limited to those areas of a trial that are documented. The inference is supported by a review of existing cases on the subject: a vast majority concern alleged failures to cross-examine witnesses.[64] This, and the converse proposition – that undocumented parts make for bad claims – both find support, in what are perhaps the first reported Indian cases relying on *Strickland*: the Delhi High Court's decisions in *Sanjay Dass* and *Salamat Ali*.[65]

The first case to do so was *Sanjay Dass*: a challenge to a murder conviction and death sentence on many grounds, one among them an ineffective assistance claim. The defendant argued that due to counsel's errors he made many improper admissions that worsened his case. Not only this,

[63]Copies of daily orders and, in some cases, the evidence recorded by trial courts, are published online where the technology is available. *See*, www.ecourts.gov.in (last accessed on December 15, 2018). The failure to reform the infrastructure of trial courts across the country continues to be a sore issue, with the Supreme Court re-issuing old directive in August, 2018. *See*, *Supreme Court Issues Directions to Revamp Judicial Infrastructure*, *in* NEW INDIAN EXPRESS (August 3, 2018), http://www.newindianexpress.com/nation/2018/aug/03/supreme-court-issues-directions-to-revamp-judicial-infrastructure-1852585.html (last accessed on December 15, 2018).

[64] *See, e.g.*, Modiya v. State of Rajasthan, 1984 RLW 374; Ram Awadh v. State of Uttar Pradesh, 1999 All LJ 1919; State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB); Mohd. Hussain (I)Vijay Kumar v. State of Punjab, 2012 SCC OnLine P&H 14603 (Punjab & Haryana High Court, Two Judges' Bench); State of Orissa v. Sukru Majhi, 2013 Indlaw ORI 183 (Orissa High Court, Two Judges' Bench); Pherbhungrai Reang v. State of Tripura, 2014 SCC OnLine Tri 571 (Tripura High Court, Single Judge Bench); Subhash Bhardwaj v. State, 2016 SCC OnLine Del 5002; Rafique v. State (Govt of NCT of Delhi*)*, 2017 SCC OnLine Del 10372; Rakesh v. State of Uttar Pradesh, (2018) 4 All LJ 595; M. Kannan v. State, 2018 Cri LJ 116; State of Maharashtra v. Raju, 2018 Indlaw MUM 1540 (Bombay High Court, Two Judges' Bench).

[65]State v. Sanjay Dass, (2009) 164 DLT 596 (DB); Salamat Ali v. State, (2010) 174 DLT 558 (DB). Both decisions were authored by the same judge, Pradeep Nandrajog. J.

while the defendant had pleaded not guilty at the start, he filed multiple applications to change his plea and even sought a transfer of his case because the court was not considering the request.[66]

Importantly, in the middle of trial there was a change in counsel, and it appears that these moves were not supported by the defendant's new counsel who filed applications to recall witnesses and actively resisted the transfer as well.[67] I already mentioned that the High Court resorted to *Strickland* for deciding the claim, and here it found that the first prong of proving error was not met.[68]

How the High Court arrived at this conclusion is remarkable. It found nothing suspicious in a murder accused filing more than five applications for pleading guilty and seeking a transfer, all of which was presumably resisted not only by the trial court but also by his counsel. It did not use its powers to ask for fresh evidence on this point. As the requests were

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[66]Sanjay Dass, at 627–29.

[67]Sanjay Dass, at 627–29.

[68]Sanjay Dass, at 630. ("109. It is most relevant to note that the accused first time pleaded guilty at the stage of the cross-examination when Gurpreet Singh PW-5, who was the first witness who incriminated him in the present case was examined. The fact that the accused did not plead guilty on the occasions when the formal witnesses who were examined prior to the recording of evidence of Gurpreet Singh is of utmost significance. The same is suggestive of the fact that the act of the accused pleading guilty to the charges framed against him had got nothing to do with the incompetence of his Counsel or any other fact. Another fact which stands out is that the accused kept on pleading guilty even after the change of Counsel. The accused pleaded guilty 5 times after the change of Counsel. It is most significant to note that second Counsel for the accused diligently appeared in the Court, effectively cross-examined the witnesses of the prosecution and also cross-examined the material witnesses of the prosecution who could not be examined on previous occasion. If the accused was intelligent enough to come to the conclusion that his first Counsel is incompetent and defending him in a shoddy manner he could very well also see that his second Counsel was most competent, in that he was curing all the defects which had so far occurred in his trial. From the above narrative of the proceedings of the trial Court it is clear that the accused was persistent in pleading guilty throughout the conduct of the trial. The extent of persistence of the accused to plead guilty can be gauged from the fact that he even sought to get his case transferred from one Court to another for the reason the Court dealing with his case was not considering the guilty plea taken by him. In the light of afore-noted facts, we do not agree that with the learned Counsel for the accused that the incompetence of his first Counsel led the accused to make admissions in his statement under Section 313, Cr.P.C.").

made even after a change in counsel, the High Court concluded it had "nothing to do with the incompetence of his Counsel or any other fact."[69] Instead, the High Court approved of counsel's move to recall witnesses and cross-examine them.[70]

Salamat Ali was also an appeal against a murder conviction, without a capital sentence but with an ineffective assistance claim. Here, the claim was more standard – counsel allegedly did not conduct an effective cross-examination of material witnesses. [71] Again, the High Court relied upon *Strickland* to decide the claim, and did not call for fresh evidence or examine the trial court lawyer to ask about strategic decisions. Rather, it concluded "a mere perusal of the cross-examination … brings out the hopelessness of the trial and highlights the ineffectiveness, inefficiency and low standards achieved by the learned defence Counsel."[72]

Thus, since Indian appellate courts demonstrate an aversion to taking fresh evidence in appeals, ineffective assistance claims end up relying upon the trial court record alone. This means that the claim will only be as good as the record upon which it is based. Since the trial court record in India at best offers a partial glimpse of what happened, it naturally decreases the chances of defendants succeeding in their claims.[73]

b. Fossilising a Right and Preventing Reform

All of this means that the conventional position, of making the defendants do the heavy-lifting and prove ineffective assistance through the trial record ultimately fossilises the nature of the right itself. It is prevented from growing beyond the most egregious cases – where 53

[69]*Id.*

[70]Sanjay Dass, at 630.

[71]Salamat Ali, at 562–63.

[72]Salamat Ali, at 563.

[73]Extending the point to its logical conclusion, one finds that it creates a potential for conflict between defendants and their counsel. It is always in the interests of defendants to ensure that a thorough record is maintained, whereas it might be in the interests of bad lawyers to do the exact opposite. And since defendants are often at the mercy of their counsel to help navigate the system, it is not difficult to imagine who will be the loser here. *See*, Abhinav Sekhri, *Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design?* SOCIO L. REV. (Forthcoming, 2019) (Manuscript on file with author).

witnesses go un-examined, for instance – to touch upon important aspects legal assistance that the record can go silent about.

What are these aspects? Decisions on issues such as whether to apply for bail, or filing motions to ensure completeness of the record, or securing independent scientific testing of evidence, or pleading guilty. Also, decisions about whether or not to challenge procedural illegalities in trial proceedings, something that the Indian criminal process adopts a very liberal attitude towards.[74]

Poor legal advice in any of these contexts is critical to the defendant's right to life and personal liberty from which the right to effective assistance is derived. But claims alleging ineffective assistance in this context will have minimal chances of success, because the record is silent on these matters unless specifically informed by counsel.

This criticism has been made by American scholars[75] who extend it to argue that linking effective assistance claims to the outcome of trial in *Strickland* also engenders a different kind of fossilisation. By reducing the scope of what effective advocacy means in this fashion, the law normalises a poorer standard of advocacy for those who cannot afford private counsel and are at the mercy of state-funded legal aid networks, i.e. the bulk of criminal defendants across America.[76]

There are no publicly available statistics to confirm if a bulk of Indian criminal defendants are unable to afford counsel, but a bulk of them certainly qualify for it.[77] Even as not everyone entitled to free legal

[74]*See*, Abhinav Sekhri, *Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design?* SOCIO L. REV. (Forthcoming, 2019) (Manuscript on file with author).

[75]Cole, *supra* note 36, at 115. The position has been ameliorated in the last decade, as the U.S. Supreme Court has upheld ineffective assistance claims at the stage of plea bargaining as well. *See*, *Missouri* v *Frye*, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012); Lee v. United States, 137 S. Ct. 1958 (2017).

[76]Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE 121 (Erik Luna Ed., 2017) (Citing statistics that more than 80% of defendants are indigent).

[77]Commonwealth Human Rights Initiative, 1 HOPE BEHIND BARS xiv-xv (2018), http://www.humanrightsinitiative.org/download/CHRI%20Legal%20Aid%20Report%20Hope%20Behind%20Bars%20Volume%201.pdf (last accessed on December 15, 2018).

assistance is claiming it, the pressures on legal aid networks are immense, much like their American counterparts.[78] There are, naturally, differences in the kind of quality that networks provide in different states across India, but the fact that per capita spending on legal aid is less than a rupee (0.014 USD) sums up the lamentable state of affairs.[79]

Strange as it may sound, having a legal test that normalises lower standards of advocacy for a bulk of defendants can be seen as having benefits. Since better lawyers will be able to poke more holes in prosecution cases – already lacking in quality – it would bring more acquittals and increase perceptions of failure in the criminal justice system for laypersons.[80] Some American scholars argue that this explains why proposals to improve legal aid networks are rarely supported by legislators who espouse a rhetoric of keeping the streets safe.[81]

Even if the perverse incentives explanation behind reforms in American legal aid systems does not apply fully to India, the outcome has been the same. Which means that here as well the impetus for reform is likely to come from the judiciary – the branch most closely witnessing bad lawyering and its consequences. The Indian judiciary can certainly boast an impressive record on this score. It has been very pronounced in its efforts to achieve structural reforms in all aspects of life,[82] and in context

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[78]*See*, Cole, *supra* note 36, at 118–121; RICHARD KLEIN & ROBERT SPANENBERG, AM. BAR ASS'N, THE INDIGENT DEFENSE CRISIS 26 (1993); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2150 (2013); Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE 121 (Erik Luna Ed., 2017). The quality of legal aid at the federal level in the United States is generally accepted as being far better than at the state level. *See*, Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317 (2011).

[79]*Id*, at 1–7.

Volume 2 provides granular data from 24 different states of India. *See*, 2 HOPE BEHIND BARS (2018), http://www.humanrightsinitiative.org/download/CHRI%20Legal%20Aid%20Report%20Hope%20Behind%20Bars%20Volume%202.pdf (last accessed on December 15, 2018).

[80]Cole, *supra* note 36, at 118–25.

[81]*Id.*

[82]Manoj Mate, *The Rise of Judicial Governance in the System Court of India*, 33 B.U. Int'l L.J. 169 (2015).

of the legal system we find that a constitutional right to free legal aid, and the concomitant right to effective legal aid, were both the result of Supreme Court directives.[83]

While I have not found any petitions that have sought structural reform of legal aid networks, in the decades since the Supreme Court first assumed this interventionist mantle, it has often put pressure on the government to take steps for improving the *quality* of the legal system,[84] making it reasonable to suggest that the Court could certainly take steps to improve the quality of legal aid if presented with a claim.

However, importing *Strickland* and its view of the right to effective legal assistance as solely based on the outcome of trials would make it very difficult for the Court to take any such steps even if it were so inclined. I draw this conclusion based on how hopes for systemic reform through class-action lawsuits have been dashed by *Strickland* in the United States. The logic has been simple: since *Strickland* defines the right to effective legal assistance as contingent on *outcomes*, it has been seen as excluding any claims that dysfunctional legal aid systems *pre-emptively* violate the right to effective assistance.[85]

c. Summing up and Suggestions for Reform

[83] *Supra* notes 14–30.

[84] *See, e.g.*, Suk Das v. State of Arunachal Pradesh, (1986) 2 SCC 401 (Supreme Court of India, Three Justices' Bench) (Confirming that states required to set up legal aid networks to fulfil the constitutional mandate); Delhi Domestic Working Women's Forum v. Union of India & Ors., (1995) 1 SCC 14 (Supreme Court of India, Three Justices' Bench) (Requiring that victims of sexual assault be provided free legal assistance from the start of a case); All India Judges Association & Ors. v. Union of India & Ors., Writ Petition (Civil) No. 1022 of 1989, Orders dated 24.01.2011, 04.04.2011, 02.08.2018 (Interlocutory Application No. 279 of 2010) (Supreme Court of India, Three Justices' Bench).

[85] *See*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005); Cara H. Drinan, *Getting Real About* Gideon: *The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309 (2013); Laruen Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013); Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625 (2017); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89 (2018).

Strickland offers one perspective on how to balance claims to effective legal assistance with other interests such as the finality of criminal trials. By most accounts, its two-part test strikes a lopsided balance, shrinking the scope of the right to maximise government interests. The sharp-edge of which is faced by those who need effective legal assistance the most – criminal defendants facing serious, often capital, charges. This section argued that any importation of American law to India will accentuate existing trends of a similar scenario obtaining across the Indian legal system. Not only would the *Strickland* test propagate an unequal justice, it would also make it extremely probable that the gaps between the rich and poor become more concrete as time goes on.

A lot can be done to help rejig the balance and help achieve better regulation of ineffective assistance, and ultimately reduce the gap between the *quality* of justice that the Indian criminal process metes out to the rich and poor. A place to start could be taking steps to provide a set of criteria defining the scope of what is *effective* assistance. Without any clear idea of an objective standard of quality, litigating such claims will continue to be like dancing in the dark. At present, the regulators of the legal profession in India offer vague platitudes on the point of responsibilities. It must be supplemented with clear standards on what can defendants expect of counsel at each stage of the case.[86]

Clarity would help on many fronts. Currently, no data is collected for measuring the quality of free legal aid in India,[87] and such guidelines could form the basis for assessing counsel performance in addition to client interviews. It would naturally help resolve an information gap between clients and lawyers, and broaden the coverage of the trial court record which would have to reflect what counsel did in respect of each stage and why. Political will permitting, they can be taken forward to address doubts on question of timing in such claims as well – outlining when they can be raised in a pre-conviction posture. Note than I use when, rather than if, for in a system like India where lengthy trials are the norm, especially in serious cases, pegging any ineffective assistance claim to conclusion of trials renders it partially redundant. It would mean eliminating the question of legal advice on the crucial issue of seeking release from under-

[86] *See also*, Cole, *supra* note 36, at 126–28.

[87] *Supra* note 77, at 4–5.

trial custody – the kind of custody which a majority of Indian prisoners are subject to.[88]

CONCLUSION

Questions about the quality of the legal assistance rendered have been around for decades in India, but not much concerted attention has been paid to the problems. It has led to a situation where today a decently sized body of law exists on the subject, which confirms that defendants have a fundamental right to effective legal assistance, but offers minimal guidance to courts and litigants who are facing such issues.

In this regard, I addressed present uncertainty about whether or not India has, in fact, adopted the *Strickland* test followed in the United States to regulate these claims. At present, it can be safely stated that nothing of this sort has happened: *Strickland's* requirement that defendants prove ineffective assistance prejudicially affected the outcome of trial remains alien to Indian law.

Although *Strickland* has not been transplanted, there are already many similarities in litigation of ineffective assistance claims in the United States and India. Much like the case across America, the serious consequences of ineffective legal assistance are most likely to be visited upon indigent defendants. Further, it is extremely difficult for defendants in both jurisdictions to successfully establish ineffective assistance. The structural barriers against raising claims for any conduct except the most visibly glaring instances of deficient performance by counsel threaten to gradually normalise much lower expectations of legal assistance for the indigent who are at the mercy of state-funded legal aid systems.

Ensuring equal justice for the rich and poor alike is what informed judicial moves to recognise fundamental rights to legal assistance as well as effective legal assistance in India. But today it is clear that the gap between rhetoric and reality remains as wide as ever. What can be done to address this in context of the right to effective legal assistance? Should India

[88] 62 percent of prisoners are undertrial prisoners in India, as opposed to a global average of reportedly 18 – 20 percent. *See*, *In Re* Inhuman Conditions in 1382 Prisons, Order dated 22.11.2018 in W.P. No. 406 of 2013 (Supreme Court of India, Two Justices' Bench).

import what is left of *Strickland* – its prejudice prong, as well as linking effectiveness to the outcome of trials? The short is answer is an emphatic no. Doing so would, quite certainly, sound the death-knell for the right to effective legal assistance as opposed to resuscitating it.