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BRUNEI DARUSSALAM'S PAPER ON

LEGAL ETHICS IN ASEAN LEGAL EDUCATION SYSTEM

PREAMBLE

A man went to see a lawyer and asked what was his least expensive fee was.

“One hundred dollars for three questions” said the lawyer.

“Isn’t that an awful lot of money for three questions?” asked the man.

“Yes” said the lawyer. “What is your final question?”

The term “Legal Ethics” used in this paper, refers to the rules of ethics, codes of etiquette or conduct, usages and customs which apply to the members of the legal profession in carrying out their professional and moral duties to fellow members of the profession, their clients and to the Courts.

The fact that the issue of Legal Ethics is being discussed in this forum, may be taken by some as evidence of a decline in the professional and moral standards of the legal profession today. The need to discuss this topic should not arise at all. The subject of Legal Ethics should indeed be ingrained into all members of the legal profession early on in their study of the law and should be second nature to them by the time they embark on their legal practice. But is this really the case?

Those who subscribe to the view that professional standards are in decline often regard the degradation of the profession by lawyers into a mere business as a reason for this decline. The practice of law is viewed by society as being treated by lawyers as a business, “where the entire human energy is geared to making as much wealth as possible within as short a period of time as possible”¹. In his forward to *The Law, Practice and Conduct of Solicitors*², Lord Donaldson of Lynton, former Master of the Rolls wrote:

“A profession neither deserves to endure, nor will it endure, if it does not adapt to the changing needs of its clients. But equally, a profession neither deserves to endure nor will it endure, if it abandons or compromises the essential characteristics which make it a profession rather than a business”³.

¹ Extracted from the speech of the Mohamad Saied, the Hon.Chief Justice of Brunei delivered at the Opening of the Legal Year, 2004.

² Bird and Weir, *The Law, Practice and Conduct of Solicitors* (1989)

³ Cited by Mohamed Saied, Chief Justice of Brunei Darussalam in the speech delivered during the Opening of the Legal Year, 2004

So, is this point of view fair and justified? Is this why we are discussing the issue of Legal Ethics?

BRIEF BACKGROUND OF LEGAL EDUCATION SYSTEM IN BRUNEI DARUSSALAM

The University of Brunei Darussalam (“UBD”) currently offers the Diploma in Islamic Law and Syariah Practice (Dip. ILP). This is a two year post graduate diploma course. To be eligible for this course, a student must have a bachelors degree in law or a law related subject. The first year of the course covers the subjects of Brunei Legal System, the Islamic Legal System and Islamic Family Laws, while the second year covers the subjects of Syariah Criminal and Civil Procedures and Property Law. Students are also required to submit a dissertation in the second year of the course on a topic which is selected by the student and approved by their designated tutors. This course which was started in 2000, has produced 2 batches of graduates to date. The Diploma in Islamic Law and Syariah Practice is one of the

qualifications⁴ which entitles the holder to apply for admission to be Syari'ie lawyer with the right to appear as such in the Syariah Courts in Brunei Darussalam⁵.

Legal practitioners in the Civil Courts have to be 'qualified persons' as defined under Section 3 of the Legal Profession Act (Cap. 139 of the Laws of Brunei) ("LPA"). (as amended and which came into force on 30th October, 1999).

Section 3 stipulates the requirements of a "qualified person" for the purposes of the LPA as follows:

3(1) A person shall be a qualified person for the purposes of this Act if, subject to the provisions of subsection (3), he –

- (a) is a barrister-at-law of England or Northern Ireland or a member of the Faculty of Advocates of Scotland;

⁴ Rule 10 of the Syariah Courts (Syar'ie Lawyers) Rules 2002

⁵ Rule 16 of the Syariah Courts (Syar'ie Lawyers) Rules 2002

- (b) is a solicitor in England or Northern Ireland or a Writer to the Signet, law agent or solicitor in Scotland; or
- (c) has been in active practice as an advocate and solicitor in Singapore or in any part of Malaysia.

(2) A person who is –

- (a) a Brunei Darussalam national; or
- (b) a person to whom a Residence Permit has been granted under regulations made under the Immigration Act,

on the date of his petition for admission shall, notwithstanding subsection (1), be a qualified person for the purposes of this Act if he has obtained such alternative qualification as may be prescribed.

(3) A person who is not, on the date of his petition for admission, either a Brunei Darussalam national or a person to whom a

Residence Permit has been granted under regulations made under the Immigration Act, shall only apply for admission if, in addition to satisfying the requirements of subsection (1), he has been in active practice in any part of the United Kingdom, in Singapore, in any part of Malaysia or in any other country or territory or any part of a country or territory in the Commonwealth designated by the Attorney General by notice in the *Gazette* for at least seven years immediately preceding such application.

The alternative qualifications described in section 3(2) of the LPA⁶ are:

1. the Certificate of Legal Practice issued by the Qualifying Board pursuant to section 5 of the Legal Profession Act, 1976 of Malaysia;
and

2. a degree in law conferred by the Universiti Islam Antarabangsa of Malaysia.

⁶ Legal Profession (Alternative Qualification) Rules, 1999, (Gazette Notification 51 dated 25th September, 1999)

The criteria for a 'qualified person' described above mean that legal practitioners in the Civil Courts in Brunei Darussalam have to undergo the system of legal education of other countries in order to qualify to practice as advocates and solicitors of the Courts of Brunei Darussalam. Currently, the qualifications from England, Scotland and Malaysia will allow the holder of such qualifications, subject to the other conditions set out in the LPA, to be admitted as an advocate and solicitor in Brunei Darussalam. Most of the lawyers practicing in Brunei Darussalam today have qualified by passing the Bar Finals in United Kingdom or the Certificate of Legal Practice from Malaysia.

This system of qualification for lawyers was adopted for Brunei Darussalam in view of the size of her population in relation to the number of lawyers who are needed to provide legal services for the general population. This current system is perceived as sufficient to meet the current needs for professional legal services and there are no plans to introduce a locally based legal qualification apart from the Diploma in Islamic Law and Syariah Practice currently offered by the UBD.

CANONS OF LEGAL ETHICS

The Advocates (Practice and Etiquette) Rules (“the Etiquette Rules”) sets out the rule of etiquette by which lawyers must abide. The Etiquette Rules are divided into the following parts:

- I. Preliminary
- II. Acceptance of Brief
- III. Conduct in Court
- IV. Conduct out of Court
- V. Restrictions
- VI. Advertising etc.
- VII. Miscellaneous

There are sixty rules in total, divided into the various headings described above. The Etiquette Rules sets out the standards of practice and rules of ethics which are applicable to any person to whom a practicing certificate is granted⁷. The attention of the Chief Justice may be drawn by any person,

⁷ Rule 59(1) of the Etiquette Rules

whether or not an advocate, to any alleged breach of the Etiquette Rules⁸. The Chief Justice may take such steps as he considers proper in relation to the breach including any sanction authorised under the LPA.

BASIC MATERIALS: CODE/CANONS; CASE MATERIALS

The full text of the Etiquette Rules for Brunei Darussalam is attached to this paper for reference purposes.

A DISCUSSION ON SOME ISSUES OF LEGAL ETHICS IN ADVOCACY

This part of the discussion in this paper focuses on some of the applicable rules of ethics on the advocate in carrying out the role of advocacy in the courts. The argument put forward is that Legal Ethics has not been taken seriously enough in the system of legal education and is the basis for the decline in public perception of the legal profession. The discussion will also

⁸ Rule 59(2) of the Etiquette Rules

deal with the question whether Legal Ethics could be included in elective courses.

Being a member of the profession

Before any meaningful discussion can be had on the applicable legal ethics in advocacy, it is useful to remind ourselves of the reasons behind the imposition of a set of rules to which govern the legal profession as we know it.

The main reason for the imposition of the rules of ethics on the legal profession lie in the fact that lawyers are members of a profession. What is meant by being a member of a profession? What makes a profession different from that of other vocations? A useful description is one that was given by the Royal Commission on Legal Services set up some 25 years ago stated that:

When a profession is fully developed it may be described as a body of men and women

- (a) identifiable by reference with some register or record;

- (b) recognized as having a special skill and learning in some field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself;

- (c) holding themselves out as being willing to serve the public;

- (d) voluntarily submitting themselves to the standards of ethical conduct beyond those required of the ordinary citizen by law;

- (e) undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public competence⁹.

William Reece Smith Jr, the then president of the International Bar Association, addressing the 9th Commonwealth Law Conference said:

“... [F]irst ... since lawyers are highly educated in a complex discipline, they are allowed the privilege of self regulation: Those who are uninitiated in the learning of the law are considered unsuited to regulate the profession. Second, in recognition to the 'common calling' facet of the definition, members of the legal profession nurture a high degree of collegiality, civility, and mutual trust.”¹⁰

⁹ Cited by the Rt Hon Lord Alexander of Weedon QC in “The Role of the Advocate in Our Society” [1992] 1 MLJ xxxvii

¹⁰ Cited by Prof Godfrey Smith in his paper entitled *Professionalism in the Legal Profession: An Overview* presented at the International Seminar on 'Professionalism and Specialisation in Law Practice in Malaysia: Challenges and Prospects in the Coming Decade', organized by the Malaysian Muslim Lawyers Association on 10 June 1993 at Kuala Lumpur.

The description of a profession given by the Royal Commission and the statement of Mr. Reece Jr. acknowledge that high ethical standards are essential to professionalism and a lawyers' exclusive privilege to practice law. This privilege can be said to rest on a bargain between society and the legal profession wherein society permits lawyers to regulate themselves in exchange for the profession's assurance that members of this profession will be ethical, competent, and place the public's interest above their own self-interest. If lawyers do not meet these high ethical standards, the rationale for self-regulation and the laws which give exclusive rights to lawyers to practice law fails.

The legal profession owes a duty to members of the public to ensure that they are protected from incompetence of the members of the profession. As often is the case, complaints against lawyers result from breaches of the rule of ethics by the lawyer in question. This makes a compelling case for constant reminders of the rules of ethics and the need to adhere to them, be given to members of the profession.

An Advocates' Duty

The two fundamental duties of an advocate are his duty to the client and his duty to the Court. This is expressly set out in rule 17 of the Etiquette Rules which state that:

An advocate shall, while acting with due courtesy to the Court, fearlessly uphold the interests of his client, the interests of justice and the dignity of the profession, without regard to any unpleasant consequences, either to himself or to any other person.

The duty of an advocate to his client would sometime cause a victim of rape being vigorously cross-examined by the counsel for the accused or a child witness being inundated by questions which cause considerable distress to the child and thereby reducing the child to tears. This duty to his client means that an advocate often has to put aside his personal feelings for the cause he is advancing for his client's case, even if this clearly causes suffering or torment to the witnesses.

However, even if this is an accepted facet of advocacy, this duty should not be carried out to any greater extent than is necessary to put a point across to the judge hearing the case. As stipulated in rule 14 of the Etiquette Rules, questions put to witness shall not insult and annoy and counsel shall exercise his own judgment as to the substance or form of the question put. Counsel should always bear this duty, which is also enshrined as part of Legal Ethics, in mind whenever putting questions to witnesses.

This duty to put forward a client's case without fear or favour, is always counterbalanced with the counsel's duty to the Court. One would even say this is an over-riding duty which must be observed by counsel. One facet of this duty is described in Rule 16 in that an advocate shall maintain a respectful attitude towards the Court, which may, on some days, be a thing easier said than done. However difficult a case is turning out for the advocate, this rule must be observed to uphold a positive public perception of the profession.

On this point of respect to the Court, it is necessary to remind ourselves that as counsel's, we are not the audience in a court hearing. Counsel should be aware that they have to address the Court and deal with any doubts which the Court may have on a point being argued. Sometimes the point may be buried deep in the woods and the Court is unable to see the trees, but nevertheless, it is counsel's duty to maintain respect to the Court and explain his line of thought carefully without insinuating any incompetence on the Court's part.

Closely linked to the duty to respect the Court is the advocate's duty not to practice any deception on the Court. This duty would include the citing of cases which may go against the point which is being advanced or indeed citing cases which may destroy the foundations of the client's case. I would add that this rule is a much overlooked rule and is rarely practiced by fellow counsel. I would put this down to the natural human nature of being averse to the risk of losing. But it is worth remembering that the adversarial system used by the Court in our jurisdiction relies on this duty of counsel to put up

both sides of any argument before it to ensure that justice is done. It only through sound argument that justice can be done.

SHOULD LEGAL ETHICS BE INCLUDED IN ELECTIVE COURSES?

It would be evident from the discussion above that ethics play an important role in the life and practice of an advocate. The role that ethics plays in the professional life of a lawyer must not be underestimated. Any negative perception which the public has of lawyers can be attributed to the lack of adherence to the Legal Ethics which the profession has prescribed for itself. Part of the blame for this lack of adherence has its roots in the system of legal education which is prevalent today. Legal Ethics has become and remains “an unloved orphan of legal education.”¹¹

Many law courses include Legal Ethics as an elective rather than a compulsory subject and this, in my view, gives the erroneous impression to the aspiring lawyer that Legal Ethics should be viewed only as a choice. This

¹¹ Roger C. Cramton & Susan P. Koniak, Rule, Story, and Commitment in the Teaching of Legal Ethics, 38 Wm. & Mary L. Rev. 145, 145 (1996)

mode of thinking is easily ingrained to a law student's mind and is carried on into his later years in practice.

The short answer to the above question would be that Legal Ethics should be taught as a core subject and not merely as a topic in elective courses. By doing so, we would be preparing future lawyers for the responsibility of upholding the professionalism in a profession which has seen a decline in respect for the profession. The number of tasteless lawyer jokes is testimony to this fact.

INCLUSION OF LEGAL ETHICS IN THE CONTINUING LEGAL EDUCATION OF LAWYERS

It has been suggested that Legal Ethics as a subject has not been accorded the level of 'seriousness' in law schools when compared to other subjects such as criminal law, the law of contract etc. for three reasons: (1) a faith that the ethical guarantees of professionalism and the methods of legal education makes the teaching of legal ethics unnecessary; (2) the belief in the scientific

basis of legal education; and (3) the assumption that adults lack the capacity for ethical development.¹²

The first reason is based on the belief that the elements of professional ideology which include the professional assertion of the lawyer's essential goodness, the legal education's promise of character building and the legal community's self-policing function, will all work together to produce lawyers of high ethical standards.

The second reason is based on the notion that the study of law is akin to the study of science which emphasises the study of facts and has no room for the study of 'moral values' which incidentally what legal ethics is based on.

The third reason is based on the idea that law students are adults by the time they reach law school and would therefore have little or no propensity for change. In short, the belief is that teaching Legal Ethics cannot make law students more ethical.

¹² See Prof. Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School* 29 Loy. U Chi. L.J 719 (Summer, 1998)

In his paper, Pearce argues that his research shows that the three reasons relied upon to deprive the subject of Legal Ethics its rightful place in legal curriculum were misplaced and have been proven by the passage of time to be mistaken¹³.

This view that Legal Ethics has not been accorded the same level as other more 'relevant' subjects which are taught in law school would have produced a generation of lawyers who are less enthusiastically inclined to treat the issue of Legal Ethics with sufficient gravity. If this is indeed the case, the increase in the number of complaints and the decrease in the level of perception of the public of the legal profession may be a result of this view of Legal Ethics.

This would make a compelling case for the inclusion of Legal Ethics in any continuing legal education of lawyers. It would be interesting to discover how much any one remembers of any Legal Ethics course which was

¹³ Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 *Wm. & Mary L. Rev.* 145, 145 (1996)

attended during the studies for a law degree. It would not be surprising if more is remembered about the other more 'glamorous' subjects of criminal law, intellectual property than Legal Ethics.

Conclusion

It is indeed encouraging to note that initiatives such the one in this forum here, are being taken in promoting Legal Ethics in the legal profession. Such initiatives serve to remind lawyers of a core value of the profession in which they serve in. And it is a timely reminder in the light of negative publicity that the legal profession receives. Whether this negative publicity is warranted or not, it should be up to the members of the profession to fulfil their part of the social bargain that the legal profession has made with society.

The inculcation of Legal Ethics to practitioners could be the panacea for the ills which are perceived by society as having infected the profession. This effort in promulgating a Legal Ethics in the legal profession is and should be

seen as an effort by a profession that is sensitive to the needs of its clients. It is the hallmark of a profession intent on maintaining the high standards of ethics and moral that it has placed in itself. This ASEAN Law Association initiative on Legal Ethics puts the subject back to its rightful place in the legal profession and deserves the full support of all members of ASEAN.