

**Legal Ethics in the
Malaysian Legal Education System**

Quo Vadis...?

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*Legal Ethics, like politeness on subways, kindness to children, or fidelity in marriage, cannot to a great extent be taught in schools or enforced by third parties.*¹

A. CANONS OF LEGAL ETHICS

There are numerous statutes² that deal with legal ethics in Malaysia. Emphasis however will be given to the three main ones, namely the Legal Profession Act 1976 (LPA); Legal Profession (Practice & Etiquette) Rules 1978 (LEPPER) and the Legal Profession (Publicity) Rules 2001(LEPUB). Before I delve into the teaching of ethics and the methods employed to teach, I would like to mention some of the rules of ethics that exist in Malaysia. In order to provide clarity and to illustrate the application of the canon of ethics, several situations are envisaged.

¹ Schnapper E : *'The Myth of Legal Ethics'* – 64 ABA Journal 202

² Advocates and Solicitors (Issue of Sijil Annual) Rules 1978; Advocates and Solicitors' Compensation Fund Rules 1978; Solicitors' Account Rules 1990; Accountant's Report Rules 1990; Solicitors' Accounts (Deposit Interest) Rules 1990; Solicitors' Remuneration Order 1991; Legal Profession (Professional Liability) (Insurance) Rules 1992; Solicitors' Remuneration (Amendment) Order 1994 – P.U. (A) 80/1994; Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994; Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994; Legal Profession (Disciplinary Board) (Procedure) Rules 1994; Legal Profession (Discipline Fund) Rules 1994; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1995 – P.U. (A) 239/95; Legal Profession (Professional Liability) (Insurance) (Amendment) Rules 1999; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1999; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 2000; Solicitors' Accounts (Deposit Interest) (Amendment) Rules 2000; Legal Profession (Publicity) Rules 2001.

1. General Duties

There are some general duties and obligations of an advocate and solicitor³ that must be mentioned at the outset. As a general rule he is to uphold the interest of his client, the interest of justice and the dignity of the profession⁴. He shall, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

An advocate and solicitor is also prohibited from advertising his services⁵. Although the rules against advertising have been relaxed to a certain extent by the Legal Profession (Publicity) Rules 2001, they are still regarded by some quarters as archaic and outdated.

It must also be noted that an advocate and solicitor is not to divide costs or profits with an unqualified person⁶, nor is he allowed to do or cause touting⁷.

2. Duty towards one another

It is quite ironic, if not amusing that lawyers who are supposed to be well-educated and in many situations actually learned and respected, need rules to guide their conduct towards one another. These rules apply to lawyers, whether in court or non-litigious situations from one as non-eventful as a telephone call to a trial at the highest appellate court.

³ A practising lawyer in Malaysia is referred to as an Advocate & Solicitor.

⁴ LEPPER, rules 16 and 31

⁵ LEPPER, rules 37 and 38

⁶ LEPPER, rule 52

⁷ LEPPER, rule 51. See also *Balakrishnan Devaraj v Patwant Singh v Niranjana Singh* [2005] 4 CLJ 210

The rule of thumb is for an advocate and solicitor to conduct himself with integrity and professionalism⁸. In particular he:

- a) SHALL NOT conduct a case in a way merely to facilitate delay⁹
- b) SHALL NOT influence conduct of counsel¹⁰
- c) SHALL NOT communicate with NOR appear for a person represented by another lawyer¹¹
- d) SHALL NOT make unnecessary objections¹²
- e) SHALL be ready for the day for trial¹³

In addition to LEPPER, there are various rulings¹⁴ issued by the Malaysian Bar Council and these rules deal with issues pertaining to courtesy¹⁵; soliciting and poaching of staff¹⁶ and even exchanging of legal authorities¹⁷.

3. Duty towards Clients

Lawyers wear the hat of a confidante when dealing with clients. Whether an individual, firm, company or society, clients take lawyers into their confidence and entrust them not only with their money and confidential information, but also with the task of doing their best to protect, preserve and defend their rights and interests.

⁸ He is to be characterized by candour, courtesy and fairness – rule 18 of LEPPER.

⁹ LEPPER, rule 12

¹⁰ LEPPER, rule 32

¹¹ LEPPER, rule 42

¹² Bar Council Rulings 1997, Ruling 19

¹³ LEPPER, rule 24

¹⁴ Bar Council Rulings 1997 ('BCR')

¹⁵ BCR, Ruling 10

¹⁶ BCR, Ruling 12

¹⁷ BCR, Ruling 20

An advocate and solicitor therefore:

- a) SHALL NOT accept the brief in specific situations where he knows he would be embarrassed¹⁸; or that his professional conduct is likely to be impugned¹⁹; or where it would be difficult to maintain professional independence²⁰; or where he is unable to appear²¹;
- b) SHALL NOT abuse confidence reposed in him²²;
- c) SHALL NOT stand surety²³;
- d) SHALL undertake defence fairly and honourably²⁴;
- e) SHALL disclose all circumstances to the client²⁵.

4. Duty towards the Courts

As officers of the court, it is the duty of every advocate to assist the court in coming to a correct decision. He shall therefore maintain a respectful attitude towards the court²⁶. The conduct of an advocate during proceedings is also regulated by the LEPPER. For instance he:

- a) SHALL supply the court with all relevant information²⁷;
- b) SHALL be ready for trial on the day fixed²⁸;

¹⁸ LEPPER, rule 3

¹⁹ LEPPER, rule 4

²⁰ LEPPER, rule 5

²¹ LEPPER, rule 6

²² LEPPER, rule 35

²³ LEPPER, rule 40

²⁴ LEPPER, rule 9

²⁵ LEPPER, rule 25

²⁶ LEPPER, rule 15

²⁷ LEPPER, rule 23

²⁸ LEPPER, rule 24

- c) SHALL put before the court any relevant binding decision²⁹;
- d) SHALL guard against insulting or annoying questions³⁰;
- e) SHALL NOT practise any deception on the court³¹;
- f) SHALL NOT refer to facts not proved³²;
- g) SHALL NOT misquote³³.

B. WHY DO WE NEED LEGAL ETHICS?

“... all law teachers have a responsibility to give attention to the ethical underpinning of legal practice. We have a responsibility to sensitise students to the ethical problems they will face as practitioners to provide them with some assistance in the task of resolving these problems, and to expose them to wider issues such as the unmet need for legal services.”³⁴

1. An Influential Profession

Almost all decisions made by lawyers affect others and therefore have legal implications which makes ethics part of the everyday life of lawyers. From issues affecting clients, the

²⁹ LEPPER, rule 20

³⁰ LEPPER, rule 13

³¹ LEPPER, rule 17

³² LEPPER, rule 19

³³ LEPPER, rule 21

³⁴ Professor Cranston R, ‘Legal Ethics and Professional Responsibility’

court and society in general, the actions of a lawyer whether condoned or condemned could have far-reaching consequences. As very aptly studied by Lord Bolinbroke³⁵

“... the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.”

2. Public perception of lawyers

From the Bible³⁶ to Shakespeare³⁷, from novels³⁸ to movies, lawyers never seem to escape negative perception.

The qualities generally associated with lawyers include ‘a pre-occupation with money, egocentricity; attitudes variously described as pompous, patronising, condescending and arrogant; and tendencies to turn everything into a debate to be won, to complicate problems, to make more work and generate higher fees, and to distort or conceal the truth by resorting to technicalities (or worse) in the interest of winning’³⁹.

Is this perception due to plain ignorance of the public or is there some truth (whether a modicum or much more) to the generalisation? One must admit that to a large extent such perception is in fact due to public ambivalence which may be seen in the following:

³⁵ Quoted in Sharswood G: *Legal Ethics: An Essay On Professional Ethics*, 5th Ed (Philadelphia: T& JW Johnson & Co, 1984) p. 171

³⁶ “Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne...”

³⁷ Henry VI, Pt II, Act IV, Scene 2 – “The first thing we do, let’s kill all the lawyers”

³⁸ *The Firm*

³⁹ Reimir GA ‘*Ethics: The DRs and Beyond*’ (1992) p.3

a) Expectations

While decorum, decency and professionalism are qualities that are expected of a lawyer, many clients prefer lawyers ‘with a touch of a scoundrel in them’⁴⁰. Hence lawyers may have to juggle a Jeekyll and Hyde personality and in the course of doing so may contribute to the misconception by society in general.

b) Media Portrayal

The media has always had a love-hate relationship with lawyers. Portrayals of lawyers in the media typically depict them as either larger-than-life heroes who advise and protect helpless clients against overpowering enemies or as sinister accomplices of criminals. Neither portrayal bears much resemblance to the actual realities of life where vast majority of lawyers actually provide legal services in a market economy and where law is just as much a business as it is a profession, where competition is stiff, bills have to be paid and overheads covered.

Such perception of lawyers therefore may cause the public to be disillusioned.

3. Non-commercial value

In recent years, lawyers’ practices have become progressively more specialised resulting in several branches of law with which many practitioners have little need to be familiar.

Legal ethics is one of them thus rendering a dire need for inculcation of such.

⁴⁰ Willis J “*What I like and What I don’t Like About Lawyers*” – Law Society of Upper Canada Gazette – March 1970 – p.52

4. Descriptive method in reading law

The influence and popularity of the positivism expounded by John Austin and HLA Hart has created a dichotomy between law and morality. The descriptive (as opposed to the prescriptive) method of studying law has left no place for moral values and ethics. This has created a need for the teaching of legal ethics.

C. LEGAL ETHICS IN MALAYSIA – ‘LEGAL ETHICS WITHOUT THE ETHICS?’

In Malaysia, Legal Ethics is taught at the Bar Finals stage. At the outset it must be mentioned that there is no Common Bar Examination. The law students from the local universities sit for the Bar Finals Examination conducted by their respective law schools⁴¹. External students⁴² and students who read law in foreign universities⁴³ have to sit for the Bar Finals examination conducted by the Legal Profession Qualifying Board and these exams are referred to as the Certificate in Legal Practice (‘CLP’). There have been suggestions to synchronise all bar finals examinations into a Common Bar Examination but to date that has yet to materialise.

⁴¹ There are 5 local public universities conferring law degrees, namely, (a) Universiti Malaya (UM); (b) Universiti Kebangsaan Malaysia (UKM); (c) Universiti Teknologi Mara (UiTM); (d) Universiti Utara Malaysia (UUM); and (e) International Islamic University of Malaysia (IIUM).

⁴² In Malaysia, external law degrees are conferred by Universiti Malaya. It is known as the Bachelor of Jurisprudence (B. Jur).

⁴³ In this context, foreign universities are almost synonymous to universities in the UK, although there are reasonable numbers reading law in Australia and New Zealand.

In Malaysia, legal ethics is compulsory and it is taught either as a subject itself or as a component of a subject spread over one academic year⁴⁴. In addition to that, at the pupillage stage⁴⁵, students are required to attend an Ethics course run by the Bar Council. This is a two day program that ends with a compulsory dinner for students.

Regardless of the law school, Legal Ethics is a compulsory paper and that, to a certain extent, endorses its importance.

However, in Malaysia, in teaching ethics, teachers adopt the passive approach, teaching the black letter rules rather than focusing on the application of such.

Lectures and tutorials are conducted based on the ‘Socratic’ method⁴⁶ where the rules of ethics are dictated to the students in lectures and followed by discussions in tutorials. In certain law schools, students are required to complete assignments that would be reflected in their final examinations grades.

⁴⁴ For example in Universiti Malaya, *Legal Ethics and Professional Conduct* is a compulsory subject whilst at the International Islamic Universiti of Malaysia, it is a component of *Professional Practice*.

⁴⁵ After having completed the Bar Finals examination, a 9 month pupillage awaits the students. Commonly referred to as the ‘chambering period’ students are absorbed by legal firms before they are admitted to the Bar.

⁴⁶ Sometimes referred to as the ‘Passive Approach’ where students are required to memorise the rules and regurgitate them at examinations.

D. OTHER METHODS

Besides the Passive approach, there are other methods employed in other jurisdictions.

1) Problem Based Learning (PBL)

This method of teaching involves the posing of ethical dilemmas to students as a set of problems. Students are required to resolve these dilemmas without too much emphasis on the substantive law issues.

The PBL method has been adopted in some of the local universities in Malaysia in other subjects and has proved successful.

2) Pervasive Method

The pervasive method refers to the process of incorporating or inculcating ethics instructions into all aspects of the legal curriculum. The pervasive method has been championed by many, most notably by Deborah L. Rhode⁴⁷ where she explains why it is preferred to one required course:

“No matter how well conceived, a simple required course has other limitations. Timing is an inherent problem. If the course occurs in the first

⁴⁷ Professor of Law, Stanford University

year of training, many students will not yet know enough to grasp the full dimension of professional dilemmas. If it occurs later, many students will be too cynical or preoccupied to give it full attention, and they will also have lacked the background to raise relevant issues in the other classes.”⁴⁸

3) Clinical Stimulation Approach

This approach involves the teaching of ethics in an actual situation. Students are attached to legal aid or law offices (with a supervisor) and cases involving real people in actual situations are posed to them. The clinical approach involves combining the learning of the substantive law with the teaching of professional legal ethics, in an environment that at least in part, represents the realities of the professional legal practitioners.

E. THE PREFERRED CHOICE?

“There are three basic steps that must be taken; teaching ethics in such a way that it encourages students to treat its study as an active and continuing challenge rather than a passive and finite undertaking, teaching ethics in such a way that the method of instruction obliges students to deal with ethical problems in an engaged and participatory session and teaching ethics in such a way that ensures

⁴⁸ *Ethics by the Pervasive Method* – (1992) 42 *Journal of Legal Education* 31. See also Starrs J.E – *Crossing a Pedagogical Hellespoint via the Pervasive System* – 17 *Journal of Legal Education* 365.

that the process of the product of ethical reasoning is connected to the messy socio-political context in which ethical controversies and their proposed solutions arise.”⁴⁹

The main challenge in teaching ethics in Malaysia is how does one go beyond the teaching of a series of rules to be applied in standard situations? It must also be noted that Legal Ethics is sui generis – different from other courses in that it requires, to a certain extent, personal introspection. It requires students to address their core personal values and this may sometimes involve internal conflict.

We need to produce critical and creative law graduates who are self-reliant, self-determining and self-motivating individuals who are able to communicate well and work co-operatively as well as independently.

In doing so, law teachers need to equip students to enable them to:

- a) Appreciate the relevant principles, issues and complexities of ethics;
- b) Face and resolve ethical dilemmas in practice;
- c) Contemplate ethical conduct in the context of justice

It must be admitted though, that legal ethics is, if not the most, a very difficult subject to teach and even more difficult to instil the interest of students in it. It has been described⁵⁰

⁴⁹ Professor Hutchinson of Osgoode Hall.

⁵⁰ Moss D ‘*Out of Balance Why Can’t Law Schools Teach Ethics?*’ Student Law, Oct 1991

as ‘the dog of the law school (curriculum) – hard to teach, disappointing to take, and often presented to vacant seats or vacant minds’.

Is the method adopted in Malaysia an ideal one? Several criticisms have been made of the passive method of teaching as it is passive learning by preaching, intellectualisation and memorisation and where legal ethics is taught in one single course.

First it preserves the unsatisfactory mindset that the ethics may be learnt in vacuum, confined to a single subject in the curriculum. Students will be unable to appreciate the relevance of ethical decision-making in other parts of the curriculum.

“Such an approach also tends to portray “ethics” merely as knowledge of professional responsibility rules that can be learned and applied like other ‘black-letter’ principles, as if they provide complete or sufficient guidance for the would-be ethical practitioner - which they do not.”⁵¹

Although it is important for a student to familiarise himself with the rules as stipulated, there is more to teaching ethics than merely regurgitating its rules. The teaching of ethics requires much more before the students realise that scoring an ‘A’ in Ethics & Professional Practice is just as laudable as an ‘A’ in Intellectual Property Law.

⁵¹ Robertson M – ‘Renewing a Focus on Ethics In Legal Education’

An assessment of their method could not have been described better than prominent scholar, Deborah L Rhode⁵²

“The current state of professional ethics leaves much to be desired. In most law schools it is relegated to a single required course that ranks low on the academic pecking order. Many of these courses...constitute the functional equivalent of ‘Legal ethics without the ethics’, and leave future practitioners without the foundations for reflective judgment.”

The pervasive method has proved to be popular and successful, especially in the United States. This method has been viewed as the solution to the challenges posed by the passive method⁵².

There is some scepticism of the pervasive method and it stems from the perception that implementing such method may not be an easy task, since it requires the proper incorporation of material on ethics into substantive law subjects. However, just like a thousand mile journey begins with a single step, implementing a pervasive method in the Malaysian legal education system is not impossible. In fact some ethical components are already fused into core curriculum subjects, save for the fact that it has not been highlighted as issues of ethics. For example, in the Law of Evidence and Procedure,

⁵² *‘If Integrity Is The Answer, What Is The Question’* (2003) 72 Fordham Law Review 333 at 340

⁵² See Weckstien DT Boulder II: *Why and How*, 41 University of Colorado Law Review 304 where at p. 308 he states: ‘... we cannot expect too much from ethics classes held, like church services, a couple of hours a week. We need to pervade the entire atmosphere of legal education’

examination of witnesses is already dealt with; in the Law of Evidence the issue of privilege of the client vis-à-vis non-disclosure by the advocate is also addressed. Rules against touting, advertising and the general duties of an advocate are drilled into First Year students through subjects such as Law & Society and Malaysian Legal System; advocacy and the role of the prosecutor in Criminal Procedure; and the role of the advocate as stakeholder in Property Law. What may be required therefore in the Malaysian context is a more comprehensive coverage of ethics in the individual subjects⁵³ and the emphasis that it is part of Legal Ethics.

The pervasive method however is not fool-proof. It has been stated⁵⁴ that in order to be accepted, a legal ethics course ought to become as much like a traditional law course as possible, increasing the number of units, stressing law over theoretical, empirical or clinical approaches, and preferring Socratic interrogation or lecture to open discussion – a single required course.

In fact by teaching ethics in a manner different from contracts, crime or competition law, are we running the risk of delivering the message that ethics education is not nearly as important as courses in other subjects?

⁵³ See Burnham S.J, *Teaching Legal Ethics in Contracts* – (1991) 41 *Journal of Legal Education* 105

⁵⁴ Pipkin RM – *Law School Instruction In Professional Responsibility: A Curricular Paradox* – 1979 *AM B, Found Res J* 247

F. SUGGESTIONS FOR REFORMS

There are advantages and disadvantages in each and every method employed. I am suggesting therefore that we incorporate all methods in the teaching of legal ethics.

The first thing that we should do is to ensure that Legal Ethics is taught in all four years, from the First Year to the Bar Finals stage, focussing not only on different aspects but different methods as well.

In the First Year, it is suggested that Legal Ethics be taught adopting the Socrates approach. This is because one must appreciate the fact that being the product of the Malaysian Education system⁵⁵, first year law students may not adapt well to other methods of teaching. The ‘cold-turkey’ approach of converting to a more innovative method of teaching may be counter-productive.

There is some scepticism in teaching Legal Ethics to First Year law students, as they have a tough time seeing the rules as anything but a set of abstractions to be mastered intellectually, or least memorised. Furthermore, their substantive knowledge of the law is limited and this may restrict their ability to engage hypotheticals on a realistic level. On

⁵⁵ In the Malaysian education system, the teaching method employed is primarily ‘passive’ focusing more on the absorbing and memorising in classrooms and regurgitating at examinations.

the other hand, it has been argued that if Legal Ethics is so important, why should it be taught on the way out, at the Bar Finals stage?

It is suggested therefore that the emphasis in the first year should be general rules of ethics⁵⁶ and the role, function, duties and powers of the Bar Council. This perhaps should be fused into a compulsory first year subject, such as the Malaysian Legal System (MLS).

In the subsequent years (Second, Third and the Bar Finals), what could be adopted is the pervasive approach based on the PBL. For instance, rules pertaining to conflict of interest and fiduciary duties towards clients may be fused into subjects such as Contracts and Property Law; the lawyers duty towards courts may form a component in Civil Procedure and Criminal Procedure and law relating to privilege may be highlighted in the Law of Evidence.

The PBL method may be implemented in various stages but what is most important is for the lecturer to relinquish control. He should merely be their guide, prompting the discussion by asking questions or even playing devil's advocate. Role-playing may be something to consider in the PBL as it adds enormous value.

At the pupillage level, a clinical stimulation method should be adopted. This is suitable as it would provide students with opportunities to confront and engage in ethical dilemmas.

⁵⁶ Students should familiarise themselves with general canons of ethics such as the rules against advertising and touting.

“Clinical legal education offers students the chance to integrate theoretical knowledge of law, based largely on appellate decisions learnt in the classroom, with the everyday experience of legal practice and the legal system. Students discover that there may be no appropriate legal solution or that a legal solution may be not available to a client for a variety of reasons including cost, unavailability of legal aid, delay, lack of evidence or enforceability.”⁵⁷

Since the students have analysed the trees with a fine-tooth comb, we do not want them to miss the forest.

The suggestion is to have the students directly involved in legal practice in a legal aid environment. They should perform their duties under supervision, perhaps one day a week throughout the 9 month pupillage or whatever period as the Bar Council deems fit to prescribe.

G. CONCLUSION

I must admit that it may be difficult to implement the teaching methods suggested because of the difference in the content of the syllabi of the foreign and local law programmes. What has been suggested therefore may be workable only in the law

⁵⁷ Jerome F, ‘*Why Not a Clinical-Lawyer School*’ (1933) 81, University of Pennsylvania Law Review 907

programmes taught at the local public universities as there is no control over the content of courses taught in the external or foreign programmes.

There is also the need for cooperation amongst the Bar Council, Legal Profession Qualifying Board and the respective law faculties of the public universities to ensure that the content of the course is standardised.

Until and unless there is some consistency in the law degrees recognised in Malaysia, it may be difficult to adopt the suggestions made and those who are foreign-trained may only have the benefit of familiarising themselves with legal ethics in Malaysia at the pupillage stage.

Last but not least is the importance of implementing Continuing Legal Education (CLE) programmes. What has to be ensured is for Legal Ethics to be one of its components and this should form the forum to discuss current and future issues in Legal Ethics.

It appears therefore that the co-operation of every sector in the Legal Profession may be required – not just law lecturers and the respective faculties. We are looking at the involvement of the Bar Council and maybe even the judiciary, if the need arises.



THANK YOU – SALAMAT – XIE XIE - KHWAP KHUN – TERIMA KASIH – CAM ON – AR KUN – KHWAP JAI – CHEZU BA – GRACIAS

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