

THE POWER AND LIMITS OF TEACHING ETHICS IN THE CLASSROOM

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I remember ... how I felt every time a disciplinary case came before the Supreme Court involving a former student for gross and willful violation of the canons governing the conduct of members of the bench or the bar. The question I asked myself and my colleagues in the Supreme Court who were once law teachers was: "Where did we fail?" But then, there are those who believe that ethics like virtue cannot be taught. They are attributes each individual develops from childhood and through life as a consequence of interrelationships in the home, at school, and the community.

-- Irene R. Cortes, *Towards Effective Teaching of Legal Ethics*, in ESSAYS ON LEGAL EDUCATION (1994)

In the past decade, international institutions and foreign aid programs have focused on the need to insulate institutions from corruption, and an important part of that effort has focused on cleansing the legal profession and the courts. As the Philippines takes part in that global effort, I invite you to re-examine the tried-and-tested strategies for promoting ethics in the legal profession, and to ask whether much of this work is wasted in what Filipinos call "sermonizing", i.e., the tendency to preach from the pulpit oblivious to whether the faith is lived out in the streets and outside the temples.

***Historical Framework of Legal Education in the Philippines***

Following the defeat of the Spanish colonial government in Manila, the Revolutionary Government of 1898, during its brief existence, established a national

university (the “Literary University of the Philippines”). A Faculty of Law was created, patterned after Continental European law schools. It had a six-year curriculum, which combined, on one hand, philosophy and political economy, and on the other, traditional law courses that we will recognize today: the civil code, the penal code, political and administrative law, commercial law, procedural law and public international law.

The Spanish-American War no sooner broke out and, with America’s invasion of the Philippine islands, followed the Filipino war of resistance. The Philippines became America’s colony, and after a decade-long pacification effort, in 1911, the Americans established the first American-style law school in the Philippines, the University of the Philippines (hereinafter, the U.P.) College of Law.

Thus began the transplantation, virtually wholesale, of an entirely new system of law and legal education. The U.P. used the case-method devised at the Harvard Law School, and adopted the common law reliance on decided cases. It discarded the traditional lecture method, and pioneered in the country the Socratic method, based on a question-and-answer format. The law course also became a post-baccalaureate degree, following American practice, instead of a first university degree as practiced in many European jurisdictions. However, huge chunks of laws inherited from the former Spanish colonizer remained, governing mainly penal law and civil law, together with the civil law reliance on annotators. The principal body of law inherited from the Americans was constitutional law, which established, for the nation, the “rule of law” tradition, which has persisted through the changing seasons in the political life of our country.

Today, there are more than 80 law schools all over the country. It is difficult to say how far the case method has taken root, or conversely, how far the Spanish legacy of the civil law has been uprooted. On one hand, Supreme Court decisions are systematically reported, and case-law expressly declared to be a source of law. Legal reasoning, in judicial decisions, law practice and published articles, are rich in case citations. On the other hand, the most persistent civil law influence lies in the lawyer's mind-set, which seeks a pervasive, internal rationality within a statute code, which favors the tight textual reading of statutes and deters the creative, sometimes flamboyant, interpretations of laws seen in American judicial decisions. Statute codes remain, e.g., the Civil Code, the Revised Penal Code, and more focused codification projects (e.g., the Family Code), and every major reformer purports to think up new encompassing codes. A generation of famous annotators continues to hold sway as authoritative publicists, though again they are slowly dying out.

### *The Stage of Normativization*

We have begun with the premise that, in order to promote legal ethics, it is important to codify ethical standards. The formalization of ethical standards in the Philippine legal profession began when the Philippine Bar Association, a private, voluntary society of lawyers, in 1917 adopted Canons 1-32 of the American Bar Association (ABA) Canons of Professional Ethics, and in 1946, adopted further Canons

33-47. When the Philippine bar was formally integrated, the Integrated Bar of the Philippines adopted in 1980 a proposed Code of Professional Responsibility, which they submitted to the Supreme Court and which the Court promulgated in 1987. The Code consists of four parts: The Lawyer and Society; The Lawyer and the Legal Profession; The Lawyer and the Courts; The Lawyer and the Client.

Indeed its enforcement has constitutional foundations. The charter vests the Supreme Court with the exclusive power over “admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged” (Const. art. VIII §5.5). The Court has actually promulgated the Rules of Court, which sets forth rules on Admission to the Bar (Rule 138) and Disbarment and Discipline of Attorneys (Rule 139.B).

Parallel to this, the Department of Justice issued Administrative Order No. 162 in 1946 (when the supervision of the lower courts was still lodged with the Department) containing canons of judicial ethics. In 1989, the Supreme Court promulgated a Code of Judicial Conduct.

The inherited wisdom among lawyers is that ethics must be transformed from open-ended moral duties into formal codes of law. At the outset, therefore, there is a clear preference for clarity and fixity in the rules, versus the open contestation of the philosophers on what is right and what is wrong. If we judge the advance of legal ethics

in the Philippines by the test of codification, the existing codes and the enforcement mechanisms certainly meet global standards.

This overweening trust in words and rules ignores entire schools of thought – e.g., Legal Realism (Karl Llewellyn, *Bramblebush*) or Critical Legal Studies (Roberto Mangabeira Unger, *The Critical Legal Studies Movement*) – that have demonstrated the malleability of meaning and the elasticity of language, captured in Holmes’ admonition: “Certainty is an illusion and repose is not the destiny of man.” The Filipino legal imagination is, in the language of jurisprudence (or “Legal Theory”), excessively Formalist, and has remained oblivious to more sophisticated intellectual developments abroad. In fact, the U.S. Supreme Court, reversing a Philippine Supreme Court decision (when the Philippines was still a U.S. colony), had occasion to comment on the Philippine court’s mechanistic reasoning, saying that the separation of powers cannot be seen as setting “fields of black and white”, dividing it into “watertight compartments” with “mathematical precision.”

### ***The Teaching of Norms***

Both the Report of the Study Group on the Bar Examinations (chaired by Justice Amerufina Melencio-Herrera, created in 2003) and the Reform Proposals submitted by Justice Vicente V. Mendoza acknowledge the place of the bar examinations in shaping legal education in the Philippines. The subject of Legal Ethics is included as one of the

eight subjects in the Philippine bar examinations. This is doubly significant. One, as a practical matter, it means that law schools will teach, and students will study, the codes of professional conduct (Irene R. Cortes, *Legal Education: The Bar Examination as a Qualifying Process*, 53 *Phil. L.J.* 130 (1978)). Two, as an institutional matter, it shows that the Supreme Court no less, pursuant to its power over admission into the bar, has placed the full weight of its authority behind the strengthening of ethical standards.

At the same time, Justice Irene Cortes says that what this means is the teaching of the “substantive and procedural content” of legal ethics as a subject in the law curriculum and the bar examinations, and concedes that, indeed, that is all that can be taught in the law school classroom (Irene R. Cortes, *Towards Effective Teaching of Legal Ethics*, *ESSAYS ON LEGAL EDUCATION* (1994)). Further in this direction, the campaign to strengthen legal ethics has taken the form of increasing the number of hours of instruction at various levels. For law students, the reforms in the bar examinations have proposed increasing the weight given to Legal Ethics (*infra.*) For lawyers, the Mandatory Continuing Legal Education requires almost a third of the lecture hours in Legal Ethics. For judges, there is likewise an increase in the instruction in Legal Ethics.

### *The “Concentrated Approach” versus the “Pervasive Approach”*

Justice Cortes uses the term “concentrated approach” to describe the teaching of legal ethics in one self-contained course exclusively on this subject. She contrasts it to the “pervasive approach” in which professors in all law school courses incorporate ethical perspectives in their subject: in commercial law, the duty of disclosures before the SEC; in agency and partnership, the relationship of trust amongst the parties; or in evidence, the principles protecting relationships covered by testimonial privilege.

She says that the concentrated approach is of varied effectiveness. The overeager will jumpstart the teaching of Legal Ethics in the early years, before the students know enough about law to agonize over law’s dilemmas. Yet when the pervasive approach has been tried in many other areas of law, the result is that the particular interest – in this case legal ethics – becomes all-present but oft-ignored. In other words, in the mass of laws and cases packed into one semester, the ethical perspective is the first one that goes out the window. Worse, given the pressures from the bar examinations toward blackletter rules, ethical perspectives will be seen as poor “second-class” cousins to hornbook doctrine. I will go back to this very important issue of lawyers’ and law students’ attitude to Legal Ethics.

### *Use of Decided Cases in Legal Ethics*

The next problem is pedagogy. The case-method, as developed by Dean Christopher Columbus Langdell of the Harvard Law School, aimed to make law a scientific discipline by using actual cases as the “laboratory” from which we can generalize the actual rules by which we live, or in Holmes’ felicitous phrase, the “oracles of the law.” For teaching Legal Ethics, this in fact should be a step forward. After all, how can you teach the “do’s and don’ts” of lawyers unless these rules come to life in the context of actual ethical dilemmas brought before the courts?

On the other hand, for law schools, by the time the law professor takes up the case with his students, the ethical dilemma is already resolved – indeed, rather authoritatively – by the Supreme Court. While this may not be a problem elsewhere where teachers and students are not deferential to Supreme Court decisions, in the Philippines, it poses a real challenge. The effect on the law school classroom is that the Supreme Court decision forecloses any real ethical debate. The game is not to understand how the Court resolved the moral dilemma. Rather it is to remember what the Court said, in case the question is asked in the bar examinations.

Contrast this to business schools, and how they use “case-studies.” These are open-ended problem-based cases. Just like in law’s case method, they examine detailed facts and problems, not abstract propositions. However, unlike law school, there is no single, right answer to the problem, and much more – an answer given by a Supreme Court which is “infallible because it is final.” Thus business schools foster ethical debate, law schools deter them.

Finally, the business school approach frankly acknowledges the “gray areas” in ethics, where rules yield no black-and-white solution. Again, contrast that to the tendency of law schools to seek the single, right answer in a Supreme Court decision, completely oblivious to the “penumbra shading from white to gray” that emanates from blackletter rules. I ask you: If your goal is to produce morally-attuned lawyers, which way is better? Who is the more ethical lawyer: the one who memorized all the “do’s and don’ts” and remembered what the Supreme Court said? Or the one who candidly recognizes the bona fide dilemmas, the gray areas, and genuinely agonizes?

(A practical note. The law school’s case method is cheaper. The cases are published “full grown” in the Supreme Court Reports Annotated. The business school’s approach is expensive. The “case studies” are written – much like short stories – and reviewed and edited by panels of experts, all of whom are commissioned for the task.)

In answering, please note that when Holmes said that decided cases are important because “law is nothing but a prediction of what the courts in fact will do, and nothing more” – he also said that law must work by imagining the “bad man” who doesn’t care a whit about good or evil and will decide solely on a rational basis, to avoid pain and seek profit.

***“Do’s and Don’ts” Degenerate into Sermonizing***

I have thus far tried to cast a doubt on the wisdom of current campaign to strengthen Legal Ethics by producing more codes and requiring more classroom hours. We must, I insist, look at what we do inside the classroom and ask whether it actually produces more ethically attuned attorneys.

Justice Irene Cortes lamented that the Legal Ethics course can merely teach the substance of the rules on professional conduct, but cannot guarantee that these ethical standards are absorbed by the students. Indeed, students enter law school in their 20s, when their moral compass is already set by family, community and friends, and two hours a week over sixteen weeks learning Legal Ethics can do little to change them.

This has actually been widely acknowledged but there is what I consider a characteristically Filipino twist. If merely teaching the rules is not enough, then – some teachers say – we should do more: we must moralize. We must preach goodness and rectitude to the students, hector them to join the forces of light, and demonize the forces of darkness. Does this work?

First of all, if we build on the Cortes assumption that their moral formation is just about complete by the time students get to law school, this will not redeem their sinful souls. At best, it will make them feel guilty while they keep on doing what they used to do. Indeed, it seems part of the medieval Roman Catholic mindset that feeling guilty is

actually a good thing, that it somehow assuages the sin if you say that you really didn't have fun doing it.

Second, the "sermonizing" may actually deter moral behavior. In idealizing the forces of light versus blackening the forces of evil, it actually posits an unrealistic model of rectitude that may be impossible to sustain in the real world. In other words, if Holmes' rule-bound lawyer assumes the "bad man", the moralizer builds legal ethics around saints. Contrast that to the "case-study" approach in business schools, which asks not just "what ought to be" but also "what can be done."

### ***The Power of Example***

George Malcolm no less recognized these limits and embarked on a most interesting experiment in pedagogy, one that his successor Irene Cortes would speak of three decades later.

Malcolm began his 1949 book *Legal and Judicial Ethics* by lamenting the "iniquities of the legal profession", and the emergence of the lawyer as the "pettifogger, the shyster, the runner, the touter, the rustler, the *leguleyo*, the *picapleito*, all the ilk who live by sharp practices."

To teach his students “that honorable dealing between lawyers is to be expected”, he said:

The roll will not be called. The student will keep a record of his own attendance. At the last meeting of the class, he will make a written report of the number of his absences. When the examination is held, the lecturer will not be present, but the participants will be placed on their honor neither to give nor to receive assistance.

(He does not say how the experiment worked.) Moreover, to teach that law is “a profession not [] a business” dedicated to the “ideal of ... service and not of monetary or political gain”, he donated his lecturers’ fees to a Prize for the biography of the late Chief Justice Jose Abad Santos ... “to encourage legal scholarship.”

Irene Cortes would speak of this as the law professor’s “gatekeeper” function in the legal sub-culture. She quoted an NYU law professor:

Law teachers should start and finish classes on time. We should respect the time of students, as we expect them to respect ours, by keeping appointments or letting students know in advance if we cannot be available. Grading of papers should take precedence over all but the most urgent of personal or professional considerations.

### ***A Plea for a Sociological Approach***

Thus far, we are trapped between the proverbial rock and a hard place. On one hand, we teach the hard rules of legal ethics, because that is what will be asked in the bar examinations and that is what local lawyers consider the true legal ethics (in contrast to lofty moral debates). On the other, we acknowledge that teaching just the rules is not enough, and what will push the students toward ethical behavior is a moral urge – which no sooner degenerates into guilt-tripping moralizing.

What I propose is to make students understand the “why” of legal ethics, not the “what” (as in “what are the rules?”) or the “how” (as in “how do I go around the rules?”). The why will entail the following.

First, it will entail the sensitization of students to ethical dilemmas. In other words, Legal Ethics remains in the realm of the intellectual – does not cross over into the realm of guilty-inducement – but aims to ensure that the student or lawyer is intellectually aware that his decision or action has a moral dimension. You will recall the sage advice: “The unexamined life is not worth living.” Here, we compel the law student or lawyer to examine his day-to-day choices as ethical choices, whether it is a seemingly innocent postponement, or deferment of cross-examination to the next hearing, or less innocent, like finding *padrinos* with the court.

For this, the case study is the best mechanism, not decided cases, and the seminar or workshop type discussion is more fruitful, rather than the hard Socratic.

Second, any serious campaign for Legal Ethics in the Philippines must look at its sociological milieu. Already, in the United States and Japan, sociological studies abound to examine the decline in values. For instance, Yale Law Dean Anthony Kronman, in *The Lost Lawyer*, examined how the rise of the big firms weakened the attorney-client relationship, the organic bond that is the cornerstone of all legal ethics. He noted that all the rules of Legal Ethics were drawn in the classical age when attorneys came face-to-face with their clients in sustained relationships of trust, and contrasted that to the business-like transactions where the “rainmaker” who wins the trust of the client is different from the “workhorse” who must deliver the job.

In the Philippine context, this means looking at the moral universe of the Filipino. When we speak of conflicts of interest, how do we reconcile the legal definitions with the true allegiances of Filipinos in real life, where all relationships are translated into kin-like obligations? When we speak of cleansing the profession, should we not upgrade the salaries and offices of our judges, and ensure that they maintain their stature vis-à-vis the lawyers who appear before them? When we speak of “justice”, should we not confront the cultural tendency toward *awa* (mercy) and *kapwa tao* (good neighborliness)?