

ETHICAL NUMBNESS: SOME GLIMPSES OF LAWYERS ACROSS ASIA AND THE SOUTH PACIFIC

Roderick O'Brien

University of South Australia, Adelaide, SA, Australia

Abstract: Business and professional schools often include ethics instruction, and graduating students are often idealistic about their ethics. But this can change to ethical numbness. The paper examines five causes of ethical numbness among lawyers in the Asia and South Pacific region. How can we counteract this numbness, and maintain a strong sense of ethics among legal professionals? The paper identifies five strategies which are employed across the region to maintain the early ideals. (The paper was presented at the Eighth Annual International Business Ethics Conference; "Rule of Law and International Business Ethics Conference"; 21-22 October 2011: University of International Business and Economics, Beijing.)

Keywords: professional ethics; legal ethics; continuing professional development; lawyers associations

Introduction

Professor Antonette Palma-Angeles is the Director of the Jose B Fernandez Center for Ethics at the Ateneo de Manila University. Recently, Professor Palma-Angeles noted a difficult issue for teaching professional and business ethics: how do we *maintain* moral sensitivity? As a teacher, Professor Palma-Angeles grapples daily with the problem of developing moral or ethical sensitivity in students. But she also confronts the further problem: how do we maintain that sensitivity long after students have left their law schools or business schools?

I would like to respond to that question for lawyers (and here I include prosecutors). I want to draw on experience across Asia and the South Pacific, and examine the issue of loss of moral sensitivity. And I will put forward some of the diverse ways in which the profession of lawyers has attempted to solve the problem by maintaining ethical sensitivity beyond student days and into professional life.

Common Aspirations and Diverse Problems

Because lawyers serve in countries with different economic, social, and political systems, the ethical problems which they face will differ from one society to another. The observer will see different ethical codes, putting forward different priorities and different solutions even for the same issues.

Generally, no matter what the system of law, legal professionals aspire to some sense of ethical obligation beyond the basics of making a living. A report from the Republic of the Philippines put these aspirations at a high level:

"Practice of the law is not a moneymaking venture. Law advocacy is not capital that yields profits. The returns it births are simple rewards for a job done or service rendered. It is a calling that, unlike mercantile pursuits which enjoy a greater deal of freedom from

government interference, is impressed with public interests, for which it is subject to State regulation.” “The primary characteristics which distinguish the legal profession from business are:

1. a duty of public service, of which emolument is a by-product, and in which one may attain the highest eminence without making much money;
2. a relation as officer of the court to the administration of justice involving thorough sincerity, integrity, and reliability;
3. a relation to client in the highest degree fiduciary; and
4. a relation to colleagues at the bar characterized by candor, fairness, and unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their [colleagues'] clients.

These characteristics make the law a noble profession.” (Lapeña, 2009)

Because of the diversity of legal systems and legal professions, these aspirations cannot be directly translated from one country or region to another, but they do provide us with a summary which has many common features across our various jurisdictions.

Ethical Numbness

Veteran Chinese jurist Professor Jiang Ping identified a key issue among lawyers: ethical numbness. Professor Jiang, who trained in the system of soviet law in the former USSR, recognises that his generations of students are often enthusiastic and innocent at the time of graduation. But after some years they become numb. He uses the fable of a toad. If a toad is dropped into boiling water, it will struggle and try to escape. But if the toad is put into water, and the water is slowly heated, the toad will become accustomed to the change in temperature, until finally it dies in comfort. Lawyers become inured to problems such as corruption in the justice system, and their ethical enthusiasm slowly dies. (Jiang, 2010) (The fable of the toad may not be technically correct, but it is widely used.)

While Professor Jiang is writing about the situation in China, the problem of ethical numbness or ethical insensitivity is a common problem. His amusing fable of the toad reminds us that loss of ethical sensitivity is rarely a single event: usually it is a slow process, hardly noticed even by the individual lawyer.

Causes of the Problem

Professor Jiang identifies a number of issues. One of these is the way in which legal work is treated as a business, and not as a profession. Another is that lawyers engage in a kind of self-preservation, in order to reap the material rewards of practice. But there may be a wider variety of issues across the Asia and South Pacific region, and we can identify some of them through the profession's own sources. Each of these may contribute to the incidence of ethical numbness or professional insensitivity.

Burnout and Mental Health Issues

Mental Health issues are important questions for legal professionals. And it seems that some mental problems such as distress and depression may be precisely caused by the ways in which law is practiced. For Western Australian lawyers, a recent report suggests that their rate of depression is worse than that of the general

population. (Kendall, 2011) While the issues covered in the report are wider than ethical issues, the author notes that a feature of the distress of the legal profession is disillusionment “as many lawyers feel compromised by ethical dilemmas in their work”.

The Law Society of South Australia has noted that some lawyers who are suffering from mental health and related issues are then acting unprofessionally, and there has been an increase (“a spike”) in clients claiming on the indemnity funds available through the Law Society. (Martin, 2011) The mental health problem can lead to ethical problems for the individual and for the whole profession.

Institutional Problems Built into the Profession

In some cases, it is the institutional practices of the profession itself which creates the ethical slide for the profession. Many of these issues revolve around questions of fees charged by lawyers. These issues may operate within a law firm, or beyond. Australian researchers have observed that the system of billable hours (whereby a lawyer must be able to bill a client for a fixed number of hours per day, such as 6.5 or 7 hours) creates crushing pressure for young lawyers. Also, Chinese observers have noted that the law profession’s own aspirations may lead clients to believe that lawyers should really work for nothing except their professional dignity. (Yao, 2004) Suing clients to recover legitimate fees creates a dilemma for the aspiring lawyer. The struggle to earn a living and to get paid may weaken the ethical sensitivity of the lawyer, even though this process is slow and imperceptible.

A second issue is the form of business for lawyers. The traditional form has been the partnership law firm, within a single legal jurisdiction. Does this form best serve the needs of the community, and the needs of clients? Certainly some jurisdictions have already moved to alternative business structures. In Australia, most jurisdictions now allow for incorporated practices, (Law Society of New South Wales, 2011), and similar proposals have been made for Hong Kong. (Wong, 2011) We cannot take it for granted that institutional structures which have served us well in the past will automatically be the best structures for future ethical practice. At the same time, we have to maintain ethical sensitivity within any new professional context where lawyers are responsible to non-lawyers such as investors or shareholders.

Thirdly, political or governmental interference in the practice of the profession may provide a source of conflict for lawyers. Faced with carrying out their ethical duties to clients on the one hand, and the restraint by political or governmental regulators on the other, lawyers can lose their ethical sensitivity in situations of professional survival. A Canadian observer has suggested that the Bar in Cambodia is so constrained by the Executive that it is unable to fully function independently and ethically. (Morris, 2009) When the profession is unable to function ethically because of interference, especially from those in authority, the individual lawyer may be led to feel that ethical practice is not a viable option.

A fourth issue is the rate of entry into the legal profession. Usually there is a qualification examination or some other gateway to entry to the profession. Some countries, for example Japan, have traditionally had a very low rate of entry into the profession. One argument is that a small profession ensures ethical and professional quality. But the counter argument is that a small profession is a busy and well-paid profession, and practising lawyers become numb to the needs of the poorer sections of society. (Hood, 1997) In 2004, Japan undertook a major reform of legal education and entry qualifications. Over time, this should result in an increased number of lawyers, but more examination is needed of the impact of these structures on ethics.

Prevalence of Unethical Practice in Society Generally

Where lawyers are working in a society where unethical practices are widely condoned, it can be particularly hard for lawyers to maintain ethical sensitivity. Professor Jiang Ping, in the article already cited, draws attention to the fact that clients may expect lawyers to facilitate the client's own unethical conduct, or may expect lawyers to routinely act in unethical ways to benefit the client, or to benefit the lawyers themselves. This can create a constant pressure whereby the lawyer slowly and imperceptibly loses her or his 'moral compass.'

Some indicator of the diversity of our region can be gained from the annual index of perception of corruption published by Transparency International. (Transparency International, 2010) In our region, we can be glad that two of our nations, Singapore and New Zealand, share the top place. Australia, Hong Kong, and Japan are not far behind. But of the 178 nations on the list, Myanmar has the 176th place, and Papua New Guinea, Laos, and Cambodia share the 154th place. How can lawyers across the region help each other to practice ethically and to maintain ethical sensitivity when the societies within which some lawyers must practice are riddled with unethical practices?

Prevalence of Unethical Practice in the Lawyer's Immediate Professional Environment

One of the key cases of Hong Kong's Independent Commission Against Corruption (ICAC) involved a senior and able government prosecutor, who was heavily indebted in business. The first successful attempt to bribe this lawyer came from other lawyers: a solicitor and barrister whose client was seeking to have charges dismissed. From this first bribe, in his immediate professional environment, the senior government lawyer went on to other cases, until finally he was caught out. It does not excuse his conduct, but it goes some way to explain his unethical receiving of bribes, that he responded to close professional colleagues. (Independent Commission against Corruption, 1996) While that is an individual case, I would generalise that it is more difficult for a lawyer to maintain ethical sensitivity and ethical standards when these standards are not respected widely in the profession.

An important aspect of professional life is the sense of belonging to the professional community. When that community is not acting ethically, then the lawyer will find a tension between ethical values and sense of belonging. It may not be the whole community which is infected with unethical practice, but if the immediate community of the lawyer (such as her law firm, or her peers from law school) are unethical, then ethical numbness may follow. Even if professional colleagues are not personally corrupt, but are cynical about corruption or tolerant of corruption, this creates an environment in which the lawyer's ethical standards and ethical sensitivity may be endangered.

An ethical environment is needed not only for lawyers, but also for the legal system in which they must work. The Transparency International Global Corruption Report for 2007, which focussed on judicial systems, indicated how judicial corruption in Mongolia is linked with bribery by lawyers. (Transparency International, 2007) The wider legal profession, including judges, create an environment which can be supportive of strong ethics, or which can erode a lawyer's ethical sensitivity and standards.

Failure of Moral Courage: Ethical Decisions and Ethical Dilemmas

Professor Jiang, cited earlier for his identification of ethical numbness, suggests that vitality and courage may be lost when life is too comfortable. If the lawyer becomes wealthy, with a good house and car, vitality and

courage are threatened. While he does not suggest an artificially ascetic life, he does suggest that too much ease can be a trap.

In examining ethical courage, we can distinguish between two situations. The first is where the lawyer can see the ethical issue, but lacks the courage to deal with it correctly. The lawyer must have a clear sense of right and wrong, and the courage to act accordingly. But some years ago, the President of the Fiji Law Society complained of the profession that "In simple terms, more and more lawyers have great difficulty recognizing what is wrong from what is right. Worse still they do not care so long as they obtain an outcome in their favour." (Leung, 2004)

The second situation is where the lawyer is faced by a dilemma, and the ethical issue is not clear. In these cases, lawyers sometimes lack the courage to explore and solve the dilemma. The situations are not the same, but the failure of moral courage in these situations can be similar.

Courage is a difficult virtue to define, as it involves a number of elements. Courage includes knowledge of the situation and the dangers. Courage, according to Aristotle, takes the middle path between rashness and cowardice. The lawyer who acts without knowledge is not being courageous, only being rash. The lawyer who acts according to principle even when knowing the dangers is being courageous. Courage also involves the element of persistence or perseverance. The demands of ethical life cannot be satisfied just with one event or with one fine day. Maintaining ethical courage requires a sustained belief and willingness to carry out that belief.

Finding Solutions across the Region

Surely there are many critics both inside and outside the profession who can identify our ethical weaknesses. No doubt many of them are more articulate than I can be. But what can we do to solve the problems? The profession has tried a variety of tools, none of which can be effective on its own. The solutions listed here can be tried in any combination.

Government regulators, the wider public, the media, and especially other members of the profession provide the complex matrix of affirmation and pressures for conformity which will help a lawyer to maintain ethical values and ethical sensitivity. These affirmations and pressures will interact with the individual lawyer's own conscience, to maintain not only initial enthusiasm, but also ethical maturing over decades of practice. In a diverse society, where not everyone shares strong ethical values, we cannot expect that lawyers will only receive support. There will also be pressures from corrupt lawyers, clients, judges, and other members of society, for a lawyer to act against her professional ethics. The solutions listed here are simply possible responses by the profession in Asia and the South Pacific, all aimed at better ethical practice by the region's lawyers.

Continuing Professional Development

Continuing Professional Development (CPD) or Continuing Legal Education (CLE) is a technique commonly used. In many jurisdictions, the renewal of an annual practice certificate is made conditional on the achievement of a certain number of units of mandatory CPD. Of course, this can include a wide variety of professional topics, of which ethics is only one.

The Malaysian Bar has to deal with a geographical situation where the members are separated across wide distances, including a wide sea. In addition to the face-to-face continuing Legal Education, the Bar has recently

introduced electronic education in ethics, to make the resource available more readily to members. (Francis, 2010) As far as I have researched, all organised CPD programmes include some element of ethics and professional conduct. Renewed contract through CPD programmes can serve to bring ethical topics into the foreground, and the compulsory nature of the programmes can underline the profession's concern about ethics.

Professional Exemplars

Across cultures, it is common to look to outstanding examples to serve as models of professional life, including ethical models. China has a wide variety of awards for exemplary lawyers, from local to national level. Some of the lawyers thus affirmed have been praised for their ethical response to difficult situations. Resisting bribes and seeking the enforcement of the law have been among the items for praise. (O'Brien, 2009) The use of professional exemplars has its risks, for example when a lawyer praised as an exemplary professional turns out to have acted, or later acts, unethically.

The President of the Law Institute of Victoria grants Awards each year, and in some years these are for contributions to legal ethics, or advanced the cause of ethics in the profession. In 2009, the award was given to a lawyer in a law firm for his work in ethics, particularly for setting up an ethics and conflicts committee within that firm, as well as contributing to the Law Society's own promotional and advisory work in ethics. In 2010 the award was given to a senior lawyer, who had been in a law firm, then a government official, and then a judge. Through these years he had lectured on ethics to law students, and contributed to the promotion of ethics. (Law Institute of Victoria, 2010) Although these awards are individual, they can contribute to sustaining the overall importance of ethics within a profession. They contribute to the matrix of affirmation.

Of course, it is important that lawyers who breach ethical standards should be disciplined. These disciplinary proceedings provide a kind of negative example for lawyers. If possible, the cases should be publicised through the profession and through the wider community. A valuable example is the practice of the Law Society of Hong Kong, which regularly publicises disciplinary proceedings in its monthly journal. But disciplinary proceedings do not provide lawyers with positive examples of how to live and practice ethically. Positive professional exemplars, endorsed by the profession or by government regulators, can help.

Re-learning the Code of Ethics through Symbolic Actions

Most jurisdictions have written Codes of Ethics for lawyers. The codes may have been prepared by the profession itself, or by government regulators. Sometimes these codes are accompanied by handbooks or other material which set out the experience of the profession through review of individual cases. But how can professional leaders ensure that the code is not just left on the bookshelf to gather dust?

One method for ensuring that lawyers are reminded of their ethical duties is through symbolic actions such as public recital, taking of oaths, or formal signing. These actions are conventionally part of the legal traditions. Such symbolic acts are more common at the commencement of professional life than during its course, but they may come into more frequent use. Recently in China the Supreme People's Procuratorate introduced a formal ceremony for oath-taking. An official commenting on the introduction of the oath suggested that "it should be an important part of ethics construction to organize oath-taking ceremonies for procurators" (Xinhua, 2010).

Mentoring

Most systems for admission to legal practice require the applicant to undertake a formal period of apprenticeship, as well as study and examinations. The name varies across the jurisdictions, but the concept is the same: the candidate must gain exposure to professional experience under the tutelage of a senior lawyer in a law firm. At best, the mentor can provide the applicant with the experience to maintain ethical sensitivity in the practice of law. A good relationship between mentor and applicant can last beyond the required year or two of formal apprenticeship.

Some teaching institutes sponsor mentorship even while students are still studying law. The law schools of the University of Hong Kong and the Chinese University of Hong Kong both promote such programs. The Law Institute of Victoria currently maintains a mentorship program into professional years, and it is specifically geared to include mentoring on ethical issues. It may be that there is a greater need for formal mentorship not only in student years or apprenticeship programs, but in later years when the young or middle-aged lawyer is slipping into ethical numbness.

Exposure to Public Needs

Some lawyers claim that undertaking legal aid work is a core professional responsibility. It should be noted that no other profession takes this claim as seriously as lawyers do. No doubt physicians do help indigent patients, and accountants might forego their fees, but lawyers promote this in an organised way. In some jurisdictions (such as China) the obligation is included in both the *Lawyers Law* and in the lawyers' Code of Conduct. (O'Brien, 2005) The Code of Ethics of Mongolian Advocates requires lawyers to reduce their fees for the needy. (Johnson, 2004) Whether it is undertaken on a voluntary (*pro bono*) basis, or under legislative compulsion, participation in legal aid brings the lawyer into contact with the most needy in society. Other kinds of exposure, such as voluntary work with non-government organisations, can also refresh the lawyer's sense of professional duty towards those most in need. Lawyers in Hong Kong can join in a mentorship programme operated by the Law Society of Hong Kong, through which professional lawyers can act as mentors to at-risk school students. This will bring the lawyer into contact with young people in a particular kind of need.

Conclusion

Professor Antonette Palma-Angeles asked if we could not only teach professional and business ethics, but also if we could maintain the ethical sensitivity of professionals beyond the days when they leave law school or business school. There is no simple answer to her question, but there is an answer in the making.

Surely we can identify many of the problems faced by lawyers in maintaining ethical sensitivity in their professional lives. We can see the professional numbness which can afflict practitioners after only a few years in practice. And we can identify some of the causes, which have been covered in section 3 above.

But we can also identify that the profession is alert to the need. A variety of methods are presently in use across the Asia and South Pacific region. These include Continuing Professional Development (CPD or CLE), symbolic actions such as oaths, mentoring, professional exemplars, and exposure to the needy. None of these methods can by itself be successful. Indeed, without the support and example (beyond mere words) of the leaders of the profession and of professional regulators in government, each of these steps can become mere window dressing. Nevertheless, the profession is alert to the problem of maintaining lawyers' ethical courage,

and across the region we can learn from each other.

The methods which have been used are not restricted to ethical questions. For example, Continuing Professional Development can be used to enhance lawyers' skills in a wide variety of fields. Across the region, we can look at other methods, and see if these tools can be used to enhance ethical sensitivity. Perhaps future options could include retreats, which are now used in business. Another option might be the preparation of in-house Codes of Ethics, especially for those law firms working in more than one jurisdiction. Such in-house codes could draw on the best of ethical experience in each jurisdiction. Whatever steps we can find, they must first be honoured by professional leaders and regulatory leaders. For the cynical lawyer who has already become ethically numb, a retreat can simply be a holiday, and a code can be a useless piece of paper.

As our world and our profession become more globalized, it is important that professionals can share experiences and learn from each other. The Center for International Business Ethics (CIBE) and the co-organisers are to be applauded for arranging this conference on *The Rule of Law and International Business Ethics*. And as Beijing becomes an increasingly important centre for business and the professions, we can applaud the University of International Business and Economics for its role in hosting this conference in Beijing. I hope that the few thoughts which I have been able to offer from across the region might be of assistance to the fine group of professionals and academics who have gathered in Beijing today. No matter that we have traditions from the common law, from continental law, or from soviet law, we can all work together to ensure that we are ethically sensitive and courageous.

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