The question of ethics revisited

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Abstract | Umongo

The author shares some thoughts on what is meant by ethics. She discusses issues regarding ethics and the legal profession and practical problems in relation to ethical conduct by legal professionals. She concludes with thoughts on the place of Ethics in the curricula of law schools.

1 Introduction

The title of my address is indicative of the fact that I had addressed the topic ten years ago. At the time I was concerned by, as I put it,1 ‘recent revelations of mismanagement and even of misappropriation of public resources’ in high places and this against a background of what then seemed to have become a ‘culture of crime’.

1 See J Church ‘The question of ethics’ (1998) 1 Codicillus 7.
Ten years on and we are unfortunately not as yet, as I had hoped, a society occupying ‘the moral high ground’ (at least not in practice) and this is still a real concern; a concern which was re-affirmed when I sat in a recent high-profile disciplinary hearing together with a senior retired judge and a practicing silk. My concern was directed at the conduct of legal practitioners which in my view was unprofessional and even unethical. I will return to this later.

In this paper I will share more thoughts on what is meant by ethics and then, as well as focusing more specifically on issues regarding ethics and the legal profession, share some thoughts about the place of Ethics in law school curricula. No doubt much of what I will be saying is already trite but I hope at least to stimulate further conversation.

2 The difference between values and ethics

The terms ‘values’, ‘ethics’, ‘morality’, ‘community standards’, ‘legal mores’ and ‘professionalism’ often intertwine and are sometimes used interchangeably. At the outset, however, I would like to make a distinction as I perceive it, between ‘values’
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and ‘ethics’. Simplistically put ‘values’ may be seen to pertain to what is good and desirable while ‘ethics’ may be seen to relate to what is right and correct. The latter, then, would be principles adopted by an individual or group to provide rules for proper conduct. Both values and ethics may be seen to stem from, and be determined by, a broader social morality that involves an evaluation of societal conduct on the basis of some broader cultural context or religious standard. Here a caveat should be voiced: clearly what is regarded as moral in one society may be regarded as immoral or at least amoral in another. It is important always to recognise difference. As Narnia Bohler-Muller puts it in a recent excellent article, an ‘unrelenting drive for certainty and truth can lead to a kind of brutal imperialism where the underlying aim is the possession and/or annihilation of difference’. This may happen even where there is no such ‘underlying’ intention and no mala fides. Having voiced such caveat, however, it seems clear that the Constitution of the Republic of South Africa of 1996 provides a benchmark or broader framework for a general guiding morality, particularly in the preamble, in its founding provisions and in the bill of fundamental rights. With regard to the legal profession and the ethical codes, these should then be informed by the precepts and principles of the South African Constitution which has already been interpreted in a flexible manner to be a post-liberal and post-colonial document in which there is room for the recognition of not only the individualistic western tradition, but also of the indigenous African tradition. Thus the concept of ubuntu early on found its place in constitutional interpretation.

3 Two regulatory models

In the context of professional ethics two regulatory models may be distinguished: The first emphasises the lawyer’s role as advocate or attorney and his or her duty of loyalty to the client (this may be called a client-centred model). The second emphasises the role of the lawyer as an officer of the court and her duty not only to

3 In terms of s 39(1) of the Constitution, the Bill of Rights must be interpreted so as to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.
4 In the celebrated decision of S v Makwanyane 1995 (6) BCLR 665 (CC) eg the indigenous concept was interpreted as analogous to the western concept of human dignity; also N Bohler-Muller op cit (n 2).
her client but to the court and the public at large. In addition to these two models sketched only in crude terms, there is a third model which serves to provide for what Prof William Simon of Stanford University calls ‘ethical discretion in lawyering’. It seems that the broader ethical duty to the court and the public is sometimes neglected where the attorney or advocate deems loyalty to clients of prime importance. I will return to this later when I look at practical examples of what amounts to unethical conduct.

But first, in the context of legal ethics, it is possible to determine what the general perception is of the legal profession, both in the minds of the profession itself and of the general public. Theoretically at least, the tradition that ours is a ‘noble profession’ still holds sway. Thus the Roman-Dutch writers endorsed the sentiments of imperial Rome as expressed in the Digest namely that not only soldiers with their swords, shields and cuirasses protected the empire but also the advocates who, contending cases as soldiers and relying on the glorious power of their eloquence also protected the hopes, lives and children of those in distress. These sentiments have been equally upheld in modern times. The tradition that conduct should not be self-serving is also evident in the traditions of the advocacy relating to the very robes that are worn.

The principle that legal professionals should have a high sense of honour and be persons of incorruptible integrity, doubtless underlies the provisions of the professional codes. Moreover, it is clear that the members of the profession are accountable for transgression of the rules of ethics not only to the professional associations to which they belong, but also to the court itself, as the institution that sanctioned their admission to the practice of law. Even members of the so-called ‘independent bar’ are subject to the code of ethics of the professional bar associations. In terms of the decision in General Council of the Bar of SA v van der Spuy they may be called to book by the court for transgressions of such code.

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6 D 27 14 (Scott’s Translation vol 18 191).
7 For further interesting details see Van Dijkhorst ‘Legal Practitioners’ LAWSA (Re-issue) Vol 14; JW Wessels History of Roman Dutch Law (1908) 191 192.
8 2002 (10) BCLR 1092 (CC). This case concerned the so-called referral rule. As the Constitutional Court intimated, the matter of referral would be a matter dealt with in the Legal Practice Bill in the context of the envisaged general transformation in practice that included the fusion of the so-called ‘bar’ and ‘side-bar’. However, the Bill has engendered a deal of controversy and has not yet been enacted.
A major problem with regard to a professional code and training is that there is an inherent danger in following a rule-centred approach with the result that the code may be applied formalistically and the ethical spirit of the law masked by the mere letter of the law. It may well happen that in the client-centred model this could well be the case where a narrow formalistic interpretation results in the negation of the wider interest and is justified by the practitioner on the ground that the interests of the client are paramount.

There may also be problems with the code being merely a professional code, and, as such, determined, contained, and disseminated by the profession itself to its aspirant members, candidate attorneys or pupils as the case may be. In other words, where the ‘schooling’ in ethics is conducted only by the profession itself, admirable and well-intentioned though this may be, there is a danger that the code will be interpreted narrowly. In a very interesting article by Professor Jonathan R Macey of Cornell University Law School the author criticises what he terms a ‘gate-keeper’ approach to the education of professionals. He holds that this approach encourages maintenance of self-interest groupings and militates against critical self examination and even cynicism. Once the initiate has met the qualifications for entry into the profession and undergone training and certification by those already designated as ‘lawyers’, he or she would be more than willing to accept rigid control within the hierarchy of the profession and the resultant maintenance of what may be termed ‘an interest group’ culture. This could lead young lawyers to see only the benefits and none of the drawbacks of a society in which they play a dominant role, and to make the assumption that lawyers are good, more lawyers are better so that the interests of justice are best met by expanding their role. Although one may not agree with all that Professor Macey says, his suggestion that a self-critical and even sceptical approach is called for not only by lawyers in respect of lawyers, but also of the legal system as a whole, is sound. Perhaps a course in Ethics is best offered as part of a course in jurisprudence and not only included in the more practical procedural courses offered both at universities and by the profession. With regard to the latter, the School for Legal Education of the Attorneys’ profession offers an excellent course at present.

Although the profession is regarded as ‘noble’ by lawyers themselves, the question that arises is whether public perception of the profession and its members is

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9 JR Macey ‘Civic education and interest group formation in the American law school’ 1993 *Stanford LR* 1937; also J Church ‘Reflections upon reconstruction and legal education’ 1996 *THRHR* 114 121.
positive or negative? Although critical sentiments and even cynical caricatures abound in literature, legal or otherwise,\textsuperscript{10} there is no recent scientific research on the subject.

Research with regard to the profession was conducted some ten years ago and strong views were expressed in this regard by an eminent practitioner who went as far as to ask whether the profession was ‘suffering from an ethical collapse’.\textsuperscript{11} Certainly the responses to his questionnaire then were a cause of concern. For example, the answers to the following question posed in order to determine whether certain conduct was regarded ethical or not, are disturbing. The question was:

In order to induce a deeds office examiner to expedite examination of deeds or an Inland Revenue official to expedite the issuing of transfer duty receipts you:

(a) pay him or her an amount for each and every expedition (52 respondents answered Yes and 765 answered No);

(b) shower him or her with elaborate gifts to express your appreciation (24 answered Yes and 792 answered No);

(c) make small gifts (bottle of wine or chocolates) on a regular basis to show your appreciation (141 answered Yes and 673 answered No);

(d) take him or her to an occasional lunch (280 answered Yes and 531 answered No).

Clearly in an ethical profession all answers to in these instances should have been an unequivocal ‘No’.

As far as public perceptions go, there is also no recent scientific research. Even earlier than the research referred to above, were the findings in a project initiated by the Communications Department of the then Association of Law Societies which was conducted in the late 1980s. This study indicated that the public image of attorneys was very negative in that they were regarded as biased, slow and inefficient and their services were considered to be too expensive for the ordinary person and not worth the cost. There were positive responses too, to the effect that attorneys would assist anyone in need of assistance, not only the rich; that they were honest and that the public needed their advice in specific instances. Interestingly enough, those who had had actual dealings with attorneys provided the more positive responses. Be that

\textsuperscript{10} Even in the Gospels lawyers are not regarded kindly and likened to the hypocritical Pharisees; eg Luke 11:46.

\textsuperscript{11} G Radloff ‘Professional ethics – The response of legal practitioners to a questionnaire’ 1996 De Rebus 524.
as it may, clearly up-to-date research is now called for. Most universities no longer require their senior LLB students to submit dissertations, but this topic would be an ideal research project for a senior student.

4 Practical problems

One of the practical problems in relation to ethical conduct by legal professionals relates to what is termed ‘delaying tactics’. Judicial officers commonly experience conduct from counsel (advocates and attorneys alike) aimed at delaying the proceedings. Perhaps such conduct is in the interest of their clients, but this is seldom in the interest of justice or its demand for a speedy and fair trial or hearing. For example, on the first day of a trial, counsel appears only to withdraw on account of a ‘lack of funds’ the next day. Consequently a postponement is asked for and granted. Such conduct may be repeated over and over, thus delaying the proceedings at great cost to the opposing party and the court itself. In an effort to be impartial and fair, the judicial officer will allow what are often only thinly disguised delays based on technicalities, though he or she has the inherent power to do otherwise. Moreover, there is always the risk of the matter going on review. Thus delay will be condoned until it becomes intolerable and is revealed as nothing but delaying tactics. It is difficult to determine when unethical tactics are being used and the codes leave the question open.

The procedural system itself needs to be changed. In a predominantly adversarial system, where the system is lawyer-driven and not controlled by the judge, it seems the system itself militates against determining whether or not counsel is resorting to delaying tactics. In a recent article, Van Dijkhorst argues with regard to the South African judicial process and the procedural right to silence, that there should be greater involvement of the judicial officer similar to that of his or her counterpart in a non-adversarial system and that thereby justice and fairness would better be served.12 The same argument applies here. It seems that the harmful effects of delaying tactics could be ameliorated by allowing for greater involvement and control by the judicial officer much in the same way as in the continental non-adversarial systems.

Another example of what might in effect amount to a delaying tactic is the application for recusal where a legal basis for this is lacking. There are appropriate

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12 K van Dijkhorst ‘The right to silence: Is the game worth the candle?’ 2001 SALJ 26.
norms that serve to protect a judicial officer from frivolous and sometimes scurrilous allegations. Conduct that falls foul of the precepts laid down would be unethical and could lead to dire consequences for the practitioner concerned. The test for recusal was set out by the Constitutional Court in *President of the RSA v SARFU.* The court held that an application for recusal was a ‘constitutional matter’ within the meaning of s 167(3) of the Constitution. It was further held that the correct approach to an application for recusal of members of a Court was objective and that the onus of establishing it rested upon an applicant who sought such recusal. The question was whether a *reasonable*, objective and informed person would, on the correct facts, *reasonably* apprehend that the judicial officer in question had not or would not bring an impartial mind to bear on the adjudication of the case. Clearly where an attorney, say, on behalf of a client submitted allegations that were scurrilous and based on incorrect facts, the attorney would be acting improperly even if this was on the instruction of his or her client and was perceived to be in the client’s best interest. The making of such scurrilous allegations without a legal basis could have dire consequences for the practitioner concerned.

5 Ethics in the law school curriculum

Ethics should be a component in the offering of jurisprudence. Traditionally courses in jurisprudence are seen to serve the inculcation of critical self analysis. In a post-modern sense this includes deconstruction and the telling and re-telling of stories. In this way the traditional notion of law as an uncontaminated and discrete system directed at judgment independent of justice may be dispelled. Exposure to ethics requires an almost unassumable responsibility of the self to the other in the form of a responsiveness which depends on what is communicable and sayable. Ethics in this sense will bring the law which is ‘said and not sayable’ into sharp relief and perhaps even bring students to the realisation that sometimes the law *is* an ass as Charles Dickens says. Its obligations are not finite and need to be seen as such. Moreover, since ethics must play a real role in practice, perhaps such a course will also serve to bring students down from the heady high ground to earthily reality.

Clearly we are a society in transition and the growing pains we are experiencing are, in many ways, part of the process. Perhaps we should celebrate this but we would be missing the point if we did so in a spirit of complacence. We should rather

13 1999 (7) BCLR 725 (CC).
14 Mr Bumble, the character created by Dickens in *Oliver Twist.*
be critical of the past but retain what is good for the present and for the future, which is part of the same story our past is part of. We should be ever vigilant and critical of ourselves and our own conduct.