THE TEACHING OF LEGAL ETHICS AT THE UNDERGRADUATE LEVEL

A Working Paper by Peter MacFarlane[*]

It is hoped that university law schools will introduce courses in legal ethics. It is regrettable that there has been so little interest in this fundamentally important topic on the part of our higher academic institutions. An appropriate ethical foundation is critical to the future generation of lawyers. [1]

I particularly welcome the emphasis in the [Australian Law Reform] Commission's report on the responsibilities of professional bodies and law schools to develop high-level professional skills and an appreciation of ethical responsibilities in future lawyers. [2]

Introduction

Commissions, Reports and individual judges have, for a number of years, been calling on legal educators to place more emphasis on the teaching of legal ethics as part of the undergraduate degree. [3] Warren Burger former Chief Justice of the United States Supreme Court said in 1980 that the law school has a "profound duty and a unique opportunity to inculcate principles of professional ethics and standards in its students". [4] This is because the ethical perspective is fundamental to the teaching of law.

Ethics is not something that can be taught and understood by means of a two or three week series of lectures subsequent to graduation. Ethics needs to be understood within the context of learning the law. How can one teach and understand the basic elements of rule of law or the legal process, or the notions of justice or equity, if there is nothing about conflicts of interest, the duty to the court, the ethics concerning the rights of an accused who confesses guilt; or the competing public policy considerations concerning confidentiality.

Whether a law graduate is going to practice as a private lawyer, or as a public prosecutor, or as a government lawyer, or become a plumber or an accountant or a journalist; my view is that, as teachers in law, we cannot ignore the ethical considerations that support and guide the law and the practice of law. [5]

"You cannot teach people to be ethical"

It is sometimes said that although you can teach and examine rules of professional practice, 'you cannot teach someone to be ethical.' [6] At one level of course this is true; however the development of an understanding of what is regarded by the profession as acceptable and moral conduct can be taught. [7] Ethical principles, as they relate to the law, for example the notion of the law as a profession [8] , or the role of lawyers in the administration of justice, the giving of undertakings, the lawyer as an officer of the court; these principles and traditions can be passed-on and this is the most that can be expected of any area of knowledge.

Whether the knowledge is applied, depends upon a number of considerations, not the least being the view of life taken by the individual in terms of what is right and wrong. However, like teaching in any other disciplinary area, teaching legal ethics can persuade and challenge and sometimes change a students' perspective on questions of moral conduct and good practice. Psychological research indicates that significant changes occur during early adulthood in peoples' basic strategies for dealing with moral issues. Over 100 studies evaluating ethics courses found that well-designed currcicula can significantly improve capacities for moral reasoning. [9]

Quite apart from these challenges, for many students, these discussions can be among their most memorable classroom experiences.

The 'problem method' approach to the teaching of legal ethics

Having said this, there are various approaches to the teaching of legal ethics. How best to teach it has been the subject of debate for a number of years. The most common approach is to offer a one semester course on legal ethics or professional responsibility. This is sometimes called the 'problem method' approach.

This method of teaching takes ethical dilemmas and poses them to students as a set of problems within a discrete unit. Generally questions of substantive law are not touched upon.

This can be said to have the advantage of focusing the attention of students on ethical issues. It also means that over a single unit a student is able to confront a whole range of problems in a systematic way.

The objection to this approach is that it is far removed from the context of how and when ethical problems arise. They do not arise in a vacuum; they arise from the giving of advice concerning an accused or in the drafting of a contract or in the application for an ex-parte order or in the conduct of a settlement or the cross-examination of a witness. That is, this approach ignores the fact that the law as a discipline as well as a practice is influenced and informed by ethics.

One of the leading exponents in the area of legal ethics, Deborah Rhode, has noted:

To confine professional responsibility discussions to a single required course marginalises their importance and undermines their most important message: that moral responsibility is a crucial constituent of all legal practice. [10]

Furthermore it is generally the case that these courses are offered in the final year of study, at which time it might be seen as being too late to effectively incorporate an ethical approach to law – especially after three years of law that emphasises the adversarial system, the notion of a battle and reluctance to compromise.

The 'pervasive approach' to the teaching of legal ethics

The second approach is sometimes called the 'pervasive method'. This refers to the process of incorporating or inculcating ethics instruction into all aspects of the legal curriculum. Under this approach, substantive law courses devote a portion of class time to studying questions of professional responsibility as they arise in the context of that course.

The primary rationale for addressing ethical issues throughout the curriculum is that they arise throughout the curriculum. In law, professional responsibility considerations figure in all substantive areas. Treating these considerations as they emerge in conventional classroom analysis can make clear that they are crucial constituents of practice and can expose students to a broad range of faculty perspectives. [11]

Clearly this is no easy task because it requires a considerable degree of institutional support. The proper incorporation of material on ethics into substantive law subjects requires a necessary reduction in time devoted to these areas – or at least that is what colleagues often perceive to be the case. However, it need not be so.

The common objection to the pervasive method relates to curriculum integration. Ethical questions can and do cut across all areas of the curriculum and so the treatment as part of the substantive law can become repetitious and shallow. This highlights the importance of a comprehensive and systematic development of the curriculum so that particular areas of law deal with particular ethical situations in the context of that subject area, for example ethics concerning advocacy and the role of prosecutors might be incorporated within criminal law, the ethics concerning negotiation might be dealt with in torts; examination, cross-examination and dealing with witnesses could be picked up in civil or criminal procedure or evidence, conflicts of interest might be incorporated into contract or property law, the ethics concerning confidentiality might be taught as part of equity.

Comprehensive materials have been developed in other places that demonstrate this can be done. [12]

The 'clinical simulation' approach

The final approach is sometimes called the clinical simulation approach. This approach has a number of facets. It usually involves the teaching of legal ethics in a legal aid (or a clinical) situation or, as used at Griffith University in Brisbane, in the form of 'legal offices' [13] to which all undergraduate students belong. One supporter of this model has written:

Our model and our goal has been the law office. The cases and dilemmas we proposed to use – and have used – are current moral problems student lawyers in the clinic and their supervising attorneys have to solve or ignore, because they involve real people in real situations. [14]

The benefit to students of this model is that they learn about ethics in the light of how the law works in practice; ethical problems have to be worked out through negotiation and decision-making which has a direct impact on other players or stakeholders in the clinical setting. Hoye gives the following example:

They understand that when one of their office mates has represented the "wrong" party in a domestic dispute, they may not help the vulnerable abused spouse who may not find another advocate. It hurts to say no – and they remember the lesson of the profession's rules that prohibit law partners from acting for conflicting interests. [15]

Such a programme, especially where undergraduate student numbers are high, is very resource intensive; however it has the benefit of 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 professional legal practice. There is some empirical evidence supporting the view that graduates find this approach a better preparation for legal practice than either the pervasive method or the problem method. [16]

Conclusion

Ethics is more than knowledge and adherence to rules of conduct; as former United States Supreme Court Chief Justice Earl Warren said: "the law floats on a sea of ethics." [17]

Legal ethics is increasingly being regarded as a fundamental and essential part of the undergraduate LLB degree. It is something which is of concern to the judges. It is something that impacts on the quality of legal services and the administration of justice. It is something for which we, as teachers of law, have a responsibility.

Faculty who decline, explicitly or implicitly, to address ethical issues encourage future practitioners to do the same.

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[1] Justice Ipp (Western Australian Supreme Court); *Reforms to the Adversarial Process in Civil Litigation*, 69 Australian Law Journal (1995) at 705.

[2] The Hon Daryl Williams, Commonwealth of Australia Attorney-General in the keynote address presented at the Australian Law Reform Commission 25th Anniversary Conference, May 2000.

[3] Various Law Reform agencies and Committees in Australia, the UK and the United States have called for more intensive training of law graduates in the area of legal ethics and professional responsibility. See for example the Australian Law Reform Commission Report No 89; the McCrate *Report on Legal Education and Professional Development*, American Bar Association Chicago 1992. Quite apart from this the legal profession generally has come under increased criticism from courts for its lack of attention to ethical considerations; see for example *Flower and Hart (A firm) v White Industries* [1999] FCA 773.

[4] Burger WE; *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*; Cleveland State Law Review Vol 29 at 377.

[5] Modjeska L; *On Teaching Morality to Law Students* Journal of Legal Education Vol 41 1991 at page 71: "Not long ago Michael I Swygert wrote that "law teachers have a responsibility to examine routinely the claims of moral obligations in our classrooms, in our writings, and in our roles as citizens and as legal educators".

[6] Schnapper E*; The Myth of Legal Ethics*; American Bar Association Journal Vol 64 at 202: "Legal ethics, like politeness on subways, kindness to children, or fidelity in marriage, cannot to great effect be taught in school or enforced by third parties."

[7] The capacity of a court to discipline lawyers is regarded as necessary in order to protect the public interest; however it might also assist in learning. I am grateful to my colleague Mr Myint Zan for his article: *Woe Unto Ye Lawyers: Three Royal Orders Concerning Pleaders in Early Seventeenth-Century Burma*; The American Journal of Legal History Vol XLIV 2000 at page 40 where it is noted at 48: "The *shay-nay* [pleaders] should argue their cases only in conformity with ancient doctrines and traditions and say what is truthful or righteous. If they persist [in distorting their cases], officers must prohibit them from doing so. If, after such prohibition they still continue to engage in their errant ways, then such young shay-nay must be given 100 lashes." The same article considers the Three Royal Orders in terms of their regulation and control over the legal profession, which even in 1607 seems to have been challenged with questions concerning legal ethics.

[8] WLF Felstiner: *Lawyers' Obligations for Managing Justice 2000;* ALRC Managing Justice 25th Anniversary Conference: "When we turn to evidence of the behaviour of lawyers in general, we see that the notion that lawyers are motivated more by financial returns than professional values has wide currency in the socio-legal world. This is, of course, the familiar litany that law practice has been transformed from a profession into a business". See also the ABC Radio program *Background Briefing*, Sunday 25th August 2002 and the comments of Street CJ in *Re John Cameron Foster* (1985) SR NSW 149 at 151 and 152.

[9] Rhode DL; *Into the valley of ethics: Professional responsibility and educational reform*; Law and

Contemporary Problems Vol 58 Nos 3 and 4 at page 149.

[10] Rhode DL; *Into the valley of ethics: professional responsibility and educational reform;* Law and Contemporary Problems Vol 58 Nos 3 and 4 at page 140.

[11] Rhode DL; *Ethics by the Pervasive Method*; Journal of Legal Education Vol 4 March 1992 No 1 page 50.

[12] See for example the materials prepared by Guy Powles and the staff at the Faculty of Law Monash University.

[13] Described by leBrun, M (1998) in *The 'offices' project at Griffith University and the use of video as a tool for evaluation*; the Journal of Professional Legal Education Vol 12(2)

[14] Hoye W; *A new approach to teaching legal ethics;* Notra Dame Law Review Vol 71:4 at page 606.

[15] Ibid at page 609.

[16] Moliterno JE; *Professional preparedness: a comparative study of law graduates' perceived readiness for professional ethics issues*; Journal of Law and Contemporary Problems Vol 58 Nos 3 and 4 at page 259.

[17] Referred to by Preston N; in *Understanding Ethics;* Federation Press at page 22. Warren went on to suggest that the relationship between law and ethics may be summarized with a few simple propositions: (i) the development of law has been influenced by ethics, but ethics is not necessarily based n law; (ii) the reasons for the law being concerned about people and their relationships with each other are overwhelmingly ethical reasons; (iii) law is commonly a public expression of and sanction for certain social and moral values.