Working Paper 3
Legal Ethics

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[1] https://sleei.law.ugm.ac.id/
[2] https://www.universiteitleiden.nl/en/research/research-projects/law/strengthening-legal-education-in-eastern-indonesia
[3] https://www.nuffic.nl/en/subjects/institutional-collaboration-projects/

Legal Ethics

Why is it important to include ethics as a subject in legal education at the university?

In this note we describe how the common way of teaching about legal ethics in Indonesia can be enhanced by integrating two additional perspectives on ethical analysis. While the common Indonesian courses focus on codes of conduct, the second perspective concentrates on practicing law in an ethical way, and the third emphasizes the internal morality of the law. The challenge for application in Eastern Indonesia is to find appropriate local examples for illustration and a level of analysis that fits the capacities of the local lecturers and students.

Courses emphasizing ethics of the legal profession

Most (or all) universities in Indonesia have a module on "ethics of the legal profession". The heart of these courses is often the explanation of so-called "codes of conduct" that exist in Indonesia for e.g. judges, lawyers, prosecutors. This is important because it concerns proper behavior of lecturers and legal professionals, and how they are an example for law students. In Indonesia, the popular term 'Court Mafia' (Mafia Peradilan) indicates how practices of collusion, corruption and nepotism have led to degeneration of professional legal ethics in the judiciary, making citizens reluctant to bring their cases to the courts. Ethics of the legal profession stress that "the professional is not thought of as engaged in the pursuit of his or her personal profit, but in performing services to her patients or clients, or to impersonal values like the advancement of science" (Parsons 1939).[4]

The topics of ethical consideration that repeatedly arise when reviewing codes of conducts internationally include:

1. conflicts of interest,
2. impartiality,
3. appearance of impropriety,
4. the acceptance of gifts,
5. confidentiality,
6. ex parte communications,
7. diligent performance of official duties,
8. abuse of position, and
9. protecting the prestige and independence of the judiciary.

These topics reflect the desire to create a fair, efficient and impartial judicial service that assists the public and is loyal to the judiciary. Practice in Indonesia is often different from the

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[4] Talcott Parsons, The Professions and Social Structure, Oxford University Press: Social Forces, Vol. 17, No. 4 (May, 1939), p. 457-467

ideal, as follows:

> The line that separates legal profession from doing business is very thin. Lawyers are often not purely practicing law but serve their business interests as well. Studying professional ethics helps to keep a clear focus on the essential values of the legal system, and how to distinguish them from norms that can be discussed and might change over time.[5]

An example of what is discussed in courses on ethics of the legal profession in Indonesia is the presentation that was part of a course on teaching methods by the Indonesian Ministry of education (see attachment E1). The presenter pays a lot of attention to the definitions of ethics, norms, morality and law, and on the role and responsibility of lecturers. A limitation of this common approach is that with the emphasis on the ethical conduct of the individual, there is little attention for the importance of an ethical learning environment for effective ethics education. At Airlangga University a recent initiative addresses this subject.[6]

Another limitation of the common way of lecturing about individual codes of conduct in Indonesia is that there seems to be little discussion or room for alternative views. If we take look at international literature on legal ethics it is exactly that discussion and debate between contrasting views that is central in teaching about legal ethics. The lecturer should stimulate her students to think about: What are ethics? Is there a right answer to an ethical dilemma? How are lawyers' ethics different from general ethics? These are the key issues in the introduction of the book "Legal Ethics" by Jonathan Herring (2017), who deliberately phrases these issues as questions to stimulate our thinking about it.[4]

Ethics and Law

That approach is immediately used when the author does not define ethics, but describes that "when we are undertaking an ethical analysis, we are seeking to answer the question: 'What is the right thing to do?' Another way of putting the question is to ask: 'How would we want people to respond to this situation?'"(Herring p 4). These question take the focus away from the teacher/lawyers own proper behavior to balancing the variety of opinions that exist in local society about the issue. "Good ethicists are not necessarily correct, but should be able to explain their views in clear ways, with reasoned arguments. So we cannot expect ethicists to give us the 'right answer'; we have to work that out for ourselves. But we can expect ethicists to provide us with tools that we can use to reach reasonable answers."(p 6)

In teaching about legal ethics it is important to distinguish between norms, general ethics or morality, legal ethics and law. Herring summarizes the difference between the last two as "Ethics and law are focused on different things. For law, the focus is on cases in which there is a sufficiently serious harm and a need for someone to be held to account in a public forum; for ethics, the focus is on whether the act is a good thing to do." (p 6)

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[5] Widodo Dwi Putro, Etika Profesi Hukum, delivered before law class at University of Mataram, 2018, p. 2

[6] The initiative is called "Zone Integritas di Lingkungan Kerja "– information available at SLEEI Surf Drive of from Herlambang Wiratraman.

A next step in this approach is that it always uses examples that show how the abstract phrases can be translated to situations in practice - which can be really short:

> "an act may be against the law even if it is not unethical. Such instances are rare, but a father who does not buy a parking ticket for a hospital car park because he has no change and has a seriously ill child whom he needs to take to the hospital may be behaving illegally even if not unethically." (p 5)

Because Indonesia is a multicultural and multi-religion country, the differences in opinion concerning legal ethics will be considerable. In such a context it is therefore important that teachers on legal ethics discuss the difference between general ethics, or morality, that often is strongly linked to religious values on the one hand, and legal ethics on the other.

Practicing law in an ethical way

Herring's book is written for law practitioners. He argues that "It hardly needs to be said that lawyers are people and so are bound by general moral principles just like anyone else. So lawyers must not kill innocent people-but that is true for everyone and so is not a special ethical obligation on lawyers. Because this book is about lawyers' ethics rather than general ethics, we need to go beyond the standard ethical rules and explore two questions, as follows.

1. Are there any additional ethical obligations that a lawyer has over and above the general ethical principles that apply to anyone else?

2. Are there circumstances in which lawyers are excused from the general ethical obligations that are imposed on others?" (p3)

The teacher on legal ethics can tell how these questions have been addressed in a famous case, or in a dispute that happened locally. Next the students can discuss "What would I do if I were the lawyer of part x?" Herring's book ends with a chapter on application of theory on legal ethics, in which he provides ingredients for a role play in which students play lawyers that each base their stance on another theoretical arguments concerning ethics. The point of the role play is the shared reflection and analysis afterwards.

The internal morality of Law

The third perspective on legal-ethical analysis does not concentrate on the behavior of legal professionals or lecturers, or on the ethical way of practicing law, but rather on the quality of law. Instead of asking: "What is a good thing to do?" the central question is "what is a good law?", or even, "what is a proper legal system?" Lon Fuller (1969)[7] offered a major contribution to this discussion when he proposed a set of necessary conditions. Specifically, Fuller argued that a social arrangement is a legal system insofar as that arrangement satisfies eight principles that he collectively called "the inner morality of law." Fuller suggests, are 'eight kinds of excellence towards which a system of rules may strive': the demands that law

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[7] Lon L. Fuller (1969) The Morality of Law. New Haven: Yale University Press; Donelson, Raff and Hannikainen, Ivar (2018) Fuller and the Folk: The Inner Morality of Law Revisited. Oxford Studies in Experimental Philosophy, Volume 3. Oxford: UK, Oxford University Press. Available at SSRN: https://ssrn.com/abstract=3283952

be general, publicly promulgated, clear, non-contradictory, possible to comply with, relatively constant through time, non-retroactive and that there be congruence between official action and declared rule (Fuller 1969, 41) (Rundle 2016)6. It is these eight principles, Fuller argues, that together they comprise the 'internal morality of law'. Rundle (2016)8 explains how this concept of internal morality introduces a strong, normative claim: a total failure to meet these eight principles does not simply result in a bad system of law, but in something 'that is not properly called a legal system at   all'. The basis for this conclusion is explained as that 'there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute' (Fuller 1969, 39).

The teacher on legal ethics could evaluate the quality of a specific part of legislation (for example a law and its implementing regulation) based on these eight criteria, and discuss with the students any discrepancies. Such a discussion will also link back to the ethics of the legal profession by questioning how the lawyer, judge or legal drafter play a role in creating and maintaining the internal morality of law of the Indonesian legal system.

End terms of teaching legal ethics

There is a discussion in academia on whether legal ethics should be taught as a separate course, or that ethical issues should be included in (every?) module of legal education. In the latter option, thinking ethically becomes more of an approach than a separate topic. Herring quotes a colleague who has listed the end terms of teaching legal ethics:

"the ethics curriculum should:

a) further appreciation of the relationship between morality and law

b) promote understanding of the role of the legal profession in supporting democracy and protecting justice and the rule of law

c) provide opportunities for ethical decision-making

d) promote understanding of the importance of values, including justice, honesty, integrity, critical self-reflection and respect for others

e) stimulate reflection on the ethical challenges of practice and lay a foundation for ethical behavior"

Application in Indonesian law curriculum

How could we translate this approach for enhancing teaching legal ethics in Indonesia? The few examples of courses on ethics that I have seen lead me to propose the following priorities for enhancement:

1. Understanding the concepts of ethics-norms-law-morality and the difference between

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8 https://doi.org/10.1111/phc3.12338|

them, but then most of all critical thinking about this, and application in real life cases. Accepting that there is no single answer

2. The ability to phrase independently what the elements of professional ethical behavior are (not just learning by heart)
3. The ability for logical reasoning on more than one ethical stance concerning practical cases (out of the box)
4. Evaluating (and discussing) the quality of laws making use of Fuller's eight criteria
5. Using examples or cases from other areas or foreign countries in order to lift the discussion to a more abstract level.

Particularly helpful is the material developed by the Education for Justice project of the UNOCD.9 It includes a Module on integrity, Ethics and law, and provides a number of cases for teaching about law and ethics. E4J has also developed a 54 page Teaching Guide for lecturers using the E4J University Modules on Integrity & Ethics, including exercises. It is accessible through : https://www.unodc.org/e4j/en/integrity-ethics/teaching-guide/index.html. However, this is just a tool for helping lecturers develop their own courses, which clearly need to be adapted to the local requirements and situation.

Realization – let's get practical

If your law faculty agrees on taking the approach to legal ethics as described above, this can be done to realize change:

Revise the existing ethics courses

- Suggest to introduce the content discussed above into the course plan
- Develop and suggest typical ethical dilemmas / cases for discussion with students
- Include gender linked dilemmas
- Encourage and build capacity of ethics teachers to use more interactive teaching forms

Insert legal ethics in other law courses

- Select one or more other law courses where ethical issues are very evident and where teachers are interested to improve their course
- Develop and suggest a shared teaching tool/way for introducing the ethics issue in such course in a simple and short way
- Suggest examples and dilemmas matching the topic of the course for discussion with students – including discussion questions
- Encourage and build capacity of these teachers to use more interactive teaching forms

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9 The Education4Justice initiative is developed by the United Nations Office on Drugs and Crime https://www.unodc.org/e4j/en/integrity-ethics/module-12/index.html.