Should Law Lecturers be Allowed to Teach and Practice at the Same Time? A Look at the Regulatory Framework in Malaysia

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Introduction

One of the most frequently-asked-questions of practitioners turned law lecturers by students is, "Sir why did you leave practice? Was it because it was too tough?"

No, I reply. Practice is interesting. There is something about going to court, the long hours of research, preparation and presenting submissions and the aura of winning. It is addictive, as most lawyers will tell you. For the law " ... is a jealous mistress and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage."[1] It is an affair most lawyers cherish.

However in Malaysia, it is not possible to practise and also be engaged in full-time employment. The law pertaining to the legal profession forbids such an arrangement. This article will address the legal impediments facing law lecturers who wish to practise. It will primarily address this from the point of "skills based education". It will also examine the issues which such an arrangement may give rise to. Lastly, it will suggest possible solutions.

Legal Impediments to Practise

The legal profession in Malaysia is governed by the Legal Profession Act 1976 ("LPA"). The LPA is not extended to East Malaysia. The law that governs the admission of lawyers in Sabah is the Advocates Ordinance CAP. 2R.E. 1953 and Act 3/1960. In Sarawak, the law that governs the legal profession is the Advocates Ordinance CAP. 110 Rep. 1966. Active lawyers in Peninsular Malaysia are governed by the Bar Council Malaysia. The Sabah Law Association governs lawyers in the Sabah state.[2] Lawyers in Sarawak are governed by the Advocates' Association of Sarawak.[3] There are, therefore, three separate Bar associations in Malaysia with independent jurisdictions over their members.

The LPA confers powers on the Bar Council to make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.[4] Amongst the rules made are the Legal Profession (Practice and Etiquette) Rules 1978.

Rule 44(b) of the Legal Profession (Practice and Etiquette) Rules 1978 provides that an advocate and solicitor shall not be a full-time salaried employee of any person, firm (other than advocate and solicitor or firm of advocates and solicitors) or corporation so long as he continues to practise. It further states that anyone taking up such employment shall intimate the fact to the Bar Council and take steps to cease to practise as an advocate and solicitor so long as he continues in such employment. A breach of this rule by an advocate and solicitor constitutes "misconduct"[5] and he may be struck off the Roll of advocates and solicitors or suspended from

1 "Quote by Joseph Story" (n.d.) <http://www.quotery.com/quotes/the-law-is-a-jealous-mistress-and-requires-a-long/> accessed 2 May 2016.

2 "Sabah and Sarawak told to open up their legal services to Peninsular lawyers" (The Malaysian Bar 14 Aug 2005) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/sabah_and_sarawak_told_to_open_up_their_legal_services_to_peninsular_lawyers.html> accessed 4 May 2016.

3 "Sabah and Sarawak told to open up their legal services to Peninsular lawyers" (The Malaysian Bar 14 Aug 2005) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/sabah_and_sarawak_told_to_open_up_their_legal_services_to_peninsular_lawyers.html> accessed 4 May 2016.

4 Legal Profession Act 1976, s 76.

5 Legal Profession Act 1976, s 94(3).

practice for any period not exceeding five years [or ordered to pay a fine or be reprimanded or censured, as the case may be].[6]

Therefore, an advocate and solicitor who fails to comply with rule 44 of the Legal Profession (Practice and Etiquette) Rules 1978 risk facing sanctions by the Advocates and Solicitors Disciplinary Board.

Further, section 30(1)(c) of the LPA states that no advocate and solicitor shall apply for a Practising Certificate if he is gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor. Section 30(1)(c) was considered by the Court of Appeal in *Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia*.[7] The appellant is a practising public accountant, who was admitted and enrolled as an advocate and solicitor of the High Court Malaya. His application to the respondent for the annual certificate (Practising Certificate) was rejected on the ground that he was disqualified under section 30(1)(c) of the LPA. His application to the High Court for the Practising Certificate, under section 34 of the LPA was rejected and he then appealed to the Court of Appeal. The issue before the Court of Appeal was whether an advocate and solicitor may simultaneously practise another profession.

In dismissing the appeal, Gopal Sri Ram, JCA (delivering the judgment of the court) held that:

> The object of Parliament is to maintain high standards in the profession. That is because the general public must have confidence in the integrity and the independence of the legal profession. It is obvious that Parliament intended that persons who choose to be advocates and solicitors must exclusively practise as such.[8]

Based on the above, it is settled that the law in its current state does not permit an advocate and solicitor to be engaged in another profession at the same time. Therefore, law lecturers may not practise at the same time. The only time law lecturers appear in court is when they are charged, for example with sedition.[9]

It begs the question as to whether the law ought to accommodate law lecturers who wish to practise. Closely related is the issue of what benefit can accrue if law lecturers are allowed to practise. This in turn relates to the way legal education is conducted by law schools.

Law Lecturers, Practice and Benefits

The way law schools teach law has come under intense scrutiny and criticism.[10] Law schools have often stressed the doctrinal aspects of the law while ignoring practical skills.[11] The result has been a disconnect between legal education and practice. Law graduates entering practice find that the substantive law they have pored over during their undergraduate days to be of little assistance in practice. The 1992 Report by the American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap[12] noted "complaints and recriminations from legal educators and practicing lawyers. The lament of the practising bar is a steady refrain, 'they can't draft a contract, they can't write, they've never seen a summon, the professors have never been inside a courtroom'".[13] The point was further reinforced by The Carnegie Report titled "Educating Lawyers: Preparation for the Profession of Law" 2001/2007 which came to similar findings. In Malaysia, the Report on Future Directions of Legal Education in Malaysia 2012–2013 also acknowledged such issues in our legal education.[14] Traditional legal education left many graduates deficient in the skills needed to succeed in practice.

Law schools have recognised this and have sought to bridge the divide. Most law schools have components on skill which may vary but which carry the same objective to inculcate basic lawyering skills in their students. Law students are taught how to write pleadings, negotiate, conduct mooting and advocacy. Such skills are " ... important aspects of a law".[15] It is in this regard that the expertise of law lecturers who are skills-proficient becomes important.

For law lecturers to teach such skills, they themselves must be honed in such skills. Those from practice will have such skills but by barring them from practising, such skills become redundant over a period of time. As Professor Bruce Green wrote, "[S]ince law professors'

6 Legal Profession Act 1976, s 94(2).
7 [2000] 3 AMR 3048.
8 [2000] 3 AMR 3048.
9 Tan Li Yiang, "UM lecturer Azmi Sharom faces sedition charge" (2014) <http://www.thestar.com.my/news/nation/2014/09/01/azmi-sharom-faces-sedition-charge/> accessed 1 May 2016.
10 See Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) (also known as the MacCrate Report), the Carnegie Report titled "Educating Lawyers: Preparation for the Profession of Law" 2001/2007 and the Report on Future Directions of Legal Education in Malaysia 2012–2013.
11 MacCrate Report.
12 See (n 11).
13 See (n 11).
14 Faridah Jalil, "A Report on Future Directions of Legal Education in Malaysia" (1 Jan 2013).
15 Faridah Jalil (n 14) at p 21.

memories of their pre-academic experience may fade or become increasingly irrelevant as the nature of law practice changes, there may be reason to encourage law professors to dip their toes back in the water from time to time".[16] Similar points have also been echoed by other academicians.

Professor Amy Cohen had practised law in Boston before leaving to join the faculty of Western New England University School of Law in 1982.[17] According to her:

> I had left the practice of law after a mere four years. Since that time, I have become increasingly bothered by the fact that I was spending my career preparing students for a world that was more and more removed from my daily existence and memory. Although I stayed in touch with many practicing attorneys, including former colleagues, classmates, students, and lawyers in my community, I personally had not engaged in the practice of law in any meaningful way since 1982 when I joined the faculty of Western New England. I was bothered by the fact that I knew law practice had to have changed in twenty years, but I was only indirectly aware of these changes-through conversations and reading about the ways computers and the Internet were being used in the practice of law. I was also bothered by the realization that I had lost touch with the realities of day-to-day practice. In addition, I was curious about what kinds of legal issues were being handled by lawyers, particularly in the areas of law to which my teaching and scholarship are primarily devoted copyright and trademark law.[18]

Professor Amy Cohen undertook a sabbatical at a legal firm which dealt with intellectual property in order to re-acquaint herself with developments in practice. She was allowed to shadow their lawyers to learn about the practice of law. Her experience is illustrative of the benefits law lecturers can gain by "dipping their toes in practice". She stated her experience as follows:

> What I learned from this experience was more valuable than I had expected. First, I learned quite a bit about the practical aspects of copyright law and trademark law that I had not and probably never would have encountered in the ivory towers of academia. For example, I learned how actual trademark searches are done and what issues are frequently raised by trademark examiners who evaluate trademark applications. I also learned how to search for a design mark and where to look for descriptions of goods and services that are acceptable to the trademark office. These may seem like simple and perhaps even trivial matters, but in reality these are the type of matters about which students often ask and with which I previously had no direct experience.[19]

Clearly there are benefits to be gained when law lecturers engage in practice albeit for a limited time. In the United States, it has become the norm for faculty members to be engaged in practice.

Stanford Law School Professor Joseph Grundfest and University of Michigan's Adam Pritchard filed amicus briefs in the case of *Halliburton Co v Erica P. John Fund* in 2014.[20] Alan N Young, an Associate Professor at Osgoode Hall Law School at York University has brought constitutional challenges to gambling, obscenity and drug laws while maintaining a small practice specialising in criminal law and procedure.[21] Alan Dershowitz , Felix Frankfurter Professor of Law at Harvard has handled numerous cases ranging from civil liberties to murder. Among his most prolific case is the OJ Simpson trial in 1995.[22] This development is also notable in other countries.

In India for example, Dr Nandini Sundar, a professor of Sociology at Delhi School of Economics had filed a petition before the Supreme Court alleging widespread human rights violation by State of Chattisgarh through its counter insurgency programmes against Naxal/Maoist operations through its armed civilian vigilante group called "Salwa Judum".[23] Shamnad Basheer, then-Ministry

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16 Bruce A Green, "Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach Symposium: Ethics of Law Professors" (2001) 42 S. Tex. L. Rev. 301 at p 330.

17 "Western New England University" (Faculty Listing 2016) <http://www1.law.wne.edu/faculty/index.cfm?selection=doc.9735&uid=99> accessed 1 May 2016.

18 Amy B Cohen, "The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law" (2004) 50 Loy. L. Rev. at p 623.

19 Amy B Cohen (n 18) at p 636.

20 Alison Frankel, "RPT-INSIGHT-Behind major US case against shareholder suits, a tale of two professors" (Reuters 2014) <http://www.reuters.com/article/shareholders-suits-supreme-court-idUSL1N0O90GI20140523> accessed 2 May 2016.

21 "Osgoode Hall Law School of York University" (Faculty Listing n.d.) <https://works.bepress.com/alan_young/> accessed 5 May 2016.

22 "Alan M. Dershowitz" (Harvard Faculty n.d.) <http://hls.harvard.edu/faculty/directory/10210/Dershowitz> accessed 2 May 2016.

23 Abhilash Agrawal, "Indian professors as amicus curiae, industry-academia divide and the birth of the practitioner-academic" <http://startup.nujs.edu/blog/indian-professors-as-amicus-curiae-industry-academia-divide-and-the-birth-of-the-practitioner-academic/> accessed 5 May 2016.

of Human Resources Development Chair Professor for Intellectual Property Rights at WB National University of Juridical Sciences ("NUJS"), filed an intervention application before the Supreme Court in order to provide academic assistance to the Court in what was probably the most important patents case to be decided by the Supreme Court in its history.[24]

Some have referred to these developments as the beginning of the era of practitioner-academicians.

Other Issues

Even if the legal impediments can be overcome, there are other issues. The literature indicates three main reasons which discourage law lecturers being engaged in practice simultaneously. Chief amongst these is the issue of academic freedom. Academic freedom is regarded as an " … indispensable requisite for unfettered teaching and research in institutions of higher education".[25] Law lecturers who practise may not be able to maintain such academic freedom. They will become beholden to the interest of their clients and their views will become clouded by the issues they litigate. This in turn will lead to a loss of objectivity as teaching becomes fettered.

Further, the role of an advocate differs significantly from that of a scholar. It calls " … for constructing persuasive arguments that will generate favorable outcomes for clients … There are reasons to question whether the academic views of legal scholars who do significant consulting are truly their own views, undistorted by the interests of their clients. And if consulting activities distort the views that law faculty espouse as scholars, then academic freedom is failing to perform its essential function."[26]

The second reason relates to the relationship between law lecturers and their institutions. Involvement in practice may be at odds with the institutional regulatory framework governing the conduct of faculty. The Association of American Law Schools ("AALS") Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities expresses a fear that:

> excessive involvement in outside activities, however, tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations.[27]

The same sentiment was shared by Professor Bainbridge who observed that "given how intensive trial work is, a law professor who is spending much time first chairing cases is a law professor who likely is not spending all that much time preparing for class, mentoring students, and so on."[28]

The final reason relates to balancing the varied duties which a practising lawyer owes. This was stated by Lord Reid in *Rondel v Worsley*[29]:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

Allowing a law lecturer to practise not only results in conflict between his various duties as a lawyer and his obligations to his academic institution but the myriad duties imposed upon him as a lawyer which can place him in situations involving conflicts of interest.

So where does all this leave us? Clearly there are advantages and disadvantages in allowing law lecturers to practise. This issue was canvassed in Malaysia in a study commissioned by the Ministry of Higher Education.[30]

The Way Forward

There is a recognition that "legal education in Malaysia should shift from the scholarly approach to professional approach. Thus, integrating theory, doctrine and practice

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24 Abhilash Agrawal (n 23).

25 "Protecting Academic Freedom" (2014) <http://www.aaup.org/our-work/protecting-academic-freedom> accessed 1 May 2016.

26 Rebecca S Eisenberg, "The Scholar as Advocate" (1993) J Legal Educ. 43 at p 393.

27 Amy B Cohen, "The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law" (2004) 50 Loy. L. Rev. 623 at p 626 citing Association of American Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, in Handbook 95(2003).

28 Stephen Bainbridge, "Is being a trial lawyer the measure of a law professor's competence?" (Stephen Bainbridge's Journal of Law, Politics, and Culture 2014) <http://www.professorbainbridge.com/professorbainbridgecom/2014/10/is-being-a-trial-lawyer-the-measure-of-a-law-professors-competence.html> accessed 22 Apr 2016.

29 [1969] 1 AC 191.

30 Faridah Jalil (n 14) at p 88.

is imperative in legal education."[31] This can only be done if the restriction imposed by the LPA is removed. Such restriction " … is not in line with the international practice. In most countries such as, United States of America and Indonesia, law lecturers are allowed to practice as advocates, hence, teaching at those law faculties is interwoven with practical knowledge".[32]

Allowing law lecturers to practise will enable them to keep abreast with evolving legal arguments, court procedure and also develop their advocacy skills.[33]

Alternatively sabbaticals can be arranged for law lecturers having no experience practising law.[34] This will enable them to " … refresh their skills and their memories by reconnecting with the world of practice".[35]

And to ensure that there is no conflict with a law lecturer's primary responsibilities, the number of hours or any additional compensation that a lecturer can earn from such endeavours can be restricted.[36]

Conclusion

There is a need for legal educators and practitioners to work together. The MacCrate Report puts it succinctly when it states:

> Both communities are part of the one profession … legal educators of practising lawyers should stop viewing themselves as separated by a 'gap' and recognise that they are engaged in a common enterprise - the education and development of members of a great profession.[37]

Allowing law lecturers to practise will at the end of the day benefit the students. It not only bridges the gap between academia and practice but provides a more engaging legal instruction at undergraduate level.

31 Faridah Jalil (n 14) at p 88.
32 Faridah Jalil (n 14) at p 23.
33 Faridah Jalil (n 14) at p 91.
34 Amy B Cohen (n 18) at p 636.
35 Amy B Cohen (n 18) at p 623.
36 Amy B Cohen (n 18) at p 623.
37 MacCrate Report (n 11).