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ETHICS AND THE JUDICIARY

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A few days before the last general elections, the Chairman of the Board of Pardons, prominent alumnus of the Ateneo, resigned his position in apparent protest against what many considered as abuse of the Presidential pardoning power for electioneering purposes. Without questioning the authority, he doubted the morality of its exercise under the surrounding circumstances. It was not pure coincidence that this punctilious gentleman was Acting Secretary of Justice when that Department officially endorsed for the Philippine Judiciary, the Canons of Judicial Ethics framed and adopted by the American Bar Association in 1924.

This article, prepared at the request of the Editors of the Ateneo Law Journal, does not attempt to appraise or discuss that Code of Judicial Conduct. Justice Malcolm's book has adequately covered the subject for local information. These are rather brief comments on the relation between Ethics and the local Judicature, with special reference to peculiar national conditions.

Ethics here signifies, not the broad science of customs, whose object is morality, or the goodness or badness of human actions. Not that branch of philosophy engaged in the methodic investigation of the ultimate problems of human behaviour in connection with mental processes reacting to physical environment and social phenomena.

Many writings on the matter from Socrates, Plato, and Aristotle down to St. Augustine and St. Thomas Aquinas and the evolutionary theories of Spinoza, Spencer and Nietzsche and Bentham (not to enumerate a legion of other thinkers), have shed brilliant light on the moral ideal, its motivations and sanctions.

The field is rather extensive, perhaps all-embracing. It borders on Philosophy, Psychology, Religion, Law, Equity, Sociology and the so-called social sciences.

In this paper, the topic is approached along the avenues of that zone touching Civil Law and its interpreter, the Judge

No claim is made to complete originality. Having taught law in schools, and administered justice for almost twenty years, I have oftentimes caught glimpses of such neighboring territory, even strayed into it once in a while, thru actual experience in given cases or thru the experience of others. And as usual "we cannot but speak the things which we have seen and heard".[1] To be sure the landscape has not altered noticeably, but there is interest in revisiting old scenes and profit in observing familiar landmarks from new angles. It is difficult to determine which is my view-point, and which belongs to others who have trod the same fields in which I tread. For it frequently happens that in bestowing written shape to one's premises and conclusions he insensibly draws from nameless inferences produced by tangled and imperceptible impressions defying identification or analysis even in moments of deliberate introspection.

The stream of ethical principles crosses the judge's field of activity at two vital points: his official work and his personal conduct. In administering the law he is now and then required to check contending juridical claims against the framework of the dictates of sound morality. And in leading his own life, he is expected to observe the highest canons of honorable behaviour, so that he may rightfully be addressed "Your Honor", as he is every day in court.

Early in his career the lawyer is taught that the sources of the law applicable to any juridical controversy are: the

[1] Acts 4:20.

Constitution, the statutes and rules, the jurisprudence, customs, etc. When no positive law applies, the custom of the place shall be consulted, says the Civil Code. According to the commentators, such custom must not conflict with morals. (Scaevola, Vol. I, p. 210.)

Article 1255 says that parties in a contract may not validly establish pacts, or clauses contrary to morals. The Philippine Reports describe several instances wherein courts declined to give validity to obligations contrary to morals.[2] And Article 1116 provides that conditions contrary to morality shall annul any obligation dependent upon them. Services contrary to good morals may not be contracted for (Art. 1271). A consideration, for contract, is illicit if it is contrary to morals (1275). Spouses may not in their marriage settlements stipulate anything contrary to good customs (1316). Customs are to be taken into consideration in construing contracts (1287).

In the eyes of Spanish Civil Law customs or good customs admittedly appear to be the equivalent, or nearly so, of good morals. Manresa attributes binding force to those generally acknowledged moral principles which may be included in the term "good customs".[3] (Manresa, Comments under Art. 1255.) And Scaevola believes that good customs constitute definite examples of the general ethical principles observed by the community. For that reason, he holds that in the sphere of jurisprudence both are deemed equivalent concepts. (Scaevola, Vol. 20 p. 501).

This confusion or overlapping is nothing to be wondered at. For at bottom the two notions are intertwined. "In ethics custom and theory are in constant and close interaction," says Hobhouse[4]. At one end the unthinking acceptance of tradition (custom), and at the other "the thinker seeking a rational basis of conduct and end of life"; and "between these two the influences, rational and half-rational, which are at work with increasing assiduity as civilization advances remodelling custom" by substituting

[2] Batarra v. Marcos 7 Phil. 156; De los Reyes v. Alojado 16 Phil. 499; Ibarra v. Aveyro 37 Phil. 273.

[3] The New Civil Code, advancing with the times, has deemed it proper to recognize both morals and good customs as separate spheres, though frequently overlapping each other, and has named both as supplementary sources of principles governing juridical relations. (Arts. 21, 1306, 1346, etc. Report of the Code of Commission, p. 134.)

[4] Morals in Evolution, p. 18; Cardozo, Paradoxes of Legal Science, p. 17.

principle for "blind tradition". This occasional modification of custom necessitated by intelligent perception of new needs of society's welfare has given rise to the dispute whether moral principles are eternally immutable, or as maintained by Hobhouse and others, are subject to periodic mutation. Scaevola thinks that moral principles depend upon circumstances of time and place, and invokes the authority of Laurent whom he quotes as saying "Morality is progressive, changeable... In every period of Human History, there is a doctrine on morals which the collective conscience approves." (Vol. 20 p. 499). Sanchez Roman however asserts that moral precepts are permanent and invariable. (Vol. I p. 58).

Between these antithetical extremes it is possible to find a path of compromise: Those rules of conduct which man must observe towards his Creator in matters of the spirit or the conscience, the God-given laws, are unalterable and permanent. This is, to be specific—religious morals. As to standards of behaviour affecting men and their temporalities, statutory law and judge-made law has developed with the changing *mores* of the community. This is social morals. Justice Cardozo, supplies an apt illustration of the mutable character of permissible deportment: "The husband at common law might restrain his wife by force if there was danger of her leaving him." "That right is gone today", like "the right to maintain the marital authority by moderate castigation"[5].

Undoubtedly family relations, political institutions and social improvements have unfolded abreast of the new conceptions of acceptable or desirable conduct in civilized society. Most of the changes eventually find their way into new legislation. But there are many which, undefined or unexpressed, are obviously at work in the formulation of policies and bases of adjudication, until they are definitely tagged and officially proclaimed as binding principles of social behaviour. We may cite, for example, the social justice principle and its concomitant ideal of recent coinage: Human rights are above property rights.

Of necessity this ebb and flow of ethical standards affect the labor apportioned to the judges. They must resort to

[5] Cardozo, *op. cit.*, p. 18.

them on occasion. When written law, jurisprudence and legal texts fail to furnish an adequate solution to the jural controversy before him, the judge must search for guidance into the practice of the community or the prevalent opinion of right and wrong therein, and then adjudicate accordingly. Now, if it should happen that his moral notions differ from his community's, which shall he follow? There may be some ground for honest differences of opinion.

Cardozo in his Nature of the Judicial Process discourses in this way:

> "Let us, suppose, for illustration a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the mores of the times. This does not mean, however, that a judge is powerless to raise the level of prevailing conduct. In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to entrench themselves if not dislodged. Despite their temporary hold, they do not stand comparison with accepted norms of morals. Indolence or passivity has tolerated what the considerate judgment of the community condemns. In such cases, one of the highest functions of the judge is to establish the true relation between conduct and profession." (Cardozo, The Nature of the Judicial Process, pp. 108-109.)

On the other hand Gray of Harvard, takes the opposite view and declares:

> "We all agree that many cases should be decided by the courts on notions of right and wrong, and of course every one will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community,—which ought he to follow—his own notions, or the notions of the community? Mr. Carter's theory requires him to say that the judge must follow the notions of the community. I believe that he should follow his own notions." (Gray, The Nature and Sources of the Law, pp. 287-288.)

But where the preference of the nation on a moral issue has been translated into a positive statutory direction,

the judge's sense of right and wrong should never prevail over the legislative determination. This idea was put to a test several years ago, in the Supreme Court, when the law required the unanimous vote of all the justices for the imposition of the death penalty. When in several cases unanimity was not obtained, one justice, thinking aloud, inquired what would happen if a member of the court should entertain the opinion that, capital punishment was morally indefensible and should for one reason or another regularly vote against its imposition. The response was spontaneous: That member had no excuse to permit his private opinion to influence his stand, inasmuch as the Legislature has spoken and approved the legality of death penalty.

That could not, of course, be interpreted as a sweeping declaration that everything permitted by statute is necessarily moral. It was rather a holding that the judge is morally and legally bound to adjudicate in accordance with the ideas of good and right of his community, as determined by its appropriate mouthpiece: the Legislative Department.

While it is not always true that every juridical act is moral, it is undeniable that *it could be* or *should be* moral. Statute law often serves morality, for instance, when it prohibits immoral or indecent publications, or when it nullifies actions to recover that which is won in a game of chance. (Art. 1798 Civil Code.)

In his effort to discover the moral values controlling a given situation, the judge is liable to mistake his own prepossessions or predilections for a reading of the accepted social opinion. His assessment or calibration of the country's conflicting values should therefore be guided by sound moral foundation, in thought and in action, sticking to established tradition yet unwilling to block the onward movement of modern civilizing influences.

Judges we are told are human beings sharing the virtues and the vices of mortals, and their humanness may affect their perspective. However, they are early forewarned, and should not find it difficult to adjust their conceptions, and keep in check their purely personal preferences, ever on the alert that unconscious psychological factors arising from their individual, social, political or economic backgrounds might, like colored glasses, affect their official determinations.

For this reason the Government wisely insists, in the selection and appointment of judges, in inquiring not only on their technical knowledge, character and integrity, but also into their lives and experience so that no harmful, unconscious biases or predispositions shall seep thru and influence their estimate of the right and the wrong of a given juridical situation.

Except in a few exceptional instances, lawyers actively in politics are not suitable timber for appointment, not only because politics is generally regarded as the art of horse-trading and of expediency,—practices thought to be incompatible with judicial high standards—but also because it often is associated with trickery, even treachery or deception. For if "Politics has no Morals" as Beasley attempted to prove, the people demand that morality shall preside every courthouse throughout the land.

If I remember right, it was a German thinker who declared, there is no guarantee of justice except the personality of the judge. At times there has been a great deal of diversity even uncertainty in the administration of justice due to the individuality of magistrates. But by and large our judges though working in a complex legal structure resulting from the amalgamation of the Roman Civil Law and the Common Law, have managed to work out a practicable system of jurisprudence adapted to local conditions and needs.

To Cardozo is attributed the interesting idea that for collegiate courts there is less danger arising from the judge's prejudices (he calls it excentricity), because "the different excentricities of the several judges will balance one another". I have to agree with him if, as I think, he does not mean by excentricity, peculiar ideas or queer notions. Otherwise, the collective judgment might all the more be excentric.

Now, if ethics or morals influences the judge's mind and his adjudications, with greater reason it should guide his daily conduct for it is perfectly legitimate to deduce from one's behaviour the trend of his thoughts, and from these, to measure the purity and respectability, and there-

fore acceptability, of his official pronouncements. Realizing this association of ideas, and conscious of the inevitable connection of the Bar with the Bench, the American Bar Association took the initiative in the formulation of canons for the guidance of judges "as a reminder for judges, and as indicating what the people have a right to expect of them". Based on the American version, the Philippine Bar Association and the Manila judges and the People's Court's judges approved Canons of Judicial Ethics, which upon their recommendation was adopted by the Department of Justice "for the guidance and observance by all the judges" under its administrative supervision, including municipal judges. (Administrative Order No. 162 signed by former Justice Ozaeta, Aug. 1946.)

There is now no room for doubt that violation of such canons would be misconduct, which if serious would justify removal from office after appropriate proceedings (Rule 129 Rules of Court).

It is interesting to note that whereas formerly it was possible for a judge to claim in his defense a distinction between his official actions and his personal conduct, the new judiciary act Republic Act No. 296 has erased the difference. For both he is responsible before the eyes of the law.

Unlike other Supreme Courts in the States, notably Florida, Virginia, Michigan and West Virginia, our Supreme Court has not, by court order, adopted Canons of Ethics for its own observance. Yet there can be little question that its members feel bound to observe it, in a higher degree of course, if only to set an edifying example for the others of the fraternity. Perhaps in explanation of the omission it may be explained they feel no need of "ethical strings around their fingers" to remind them to do their duty or to behave. On the other hand they realize they have no means to discipline any erring member, the latter being removable only thru impeachment proceedings for "culpable violation of the Constitution, treason, bribery, or other high crimes" upon the affirmative vote of three-fourths of all the Members of the Senate. Error it would be, however, to suppose the Supreme Court is entirely helpless against a member violating the tenets of judicial propriety or indulging in reprehensible practices. Not long ago, provoked beyond endurance, it approved a resolution publicly censuring one of its members for his inordinate love of publicity and unbecoming pursuit of personal popularity.

Summarizing the essential conduct of a judge, the Canons declare "he should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts he should be studious" of the law and diligent in ascertaining the facts. In my opinion, of all these cardinal virtues, impartiality takes the lead. Impartiality means honesty, independence and integrity: Utter ignorance of the personalities involved in the litigation. In ascertaining the law applicable and the facts of the litigation the judge is helped, even checked, by the parties and their attorneys. Any mistake is subject to correction or appeal to the record. But the hidden motives or sympathies, only the judge knows—and they are not correctible, because hard to verify. How important then for the litigant that the judge be absolutely impartial. More so in the Philippines, where His Honor adjudicates issues of fact and of law.

Copied on a piece of paper beneath the glass cover of my office desk are the phrases of Rufus Choate, describing the best judge, to the Constitutional Convention of Massachusetts:

> "In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning. x x x In the next place, he must be a man, not merely upright, not merely honest and well intentioned,—but a man who will not respect persons in judgment. x x x He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his sovereign. If on one side is the executive power and the legislature and the people,—the sources of his honors, the givers of his daily bread, and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the 'trepidations of the balance.' x x x."

Reading it everyday, I never fail to linger on "man who will not respect persons in judgment" and the words that follow.

Needless to add, I have every reason to believe my

colleagues on the Court are imbued with the same feeling. Witness the repeated defeats of the administration in major litigations involving acts of the President—notwithstanding the well-known circumstance that there is a majority of Quirino appointees in the Court. In this connection, many were shocked when after the promulgation of one decision in favor of litigants belonging to the opposition, the Court was branded "a tool of the Nacionalistas", in the daily newspapers by responsible leaders in the Government. Like others affected I kept my peace, because, allowing for the heat of the electoral fight, I did not resent being considered protector of the victorious litigant—the minority—my conscience being clear, having merely attended to the "trepidations of the balance". And the Court, I was certain, was not excessively interested in "which side ought to win".

Besides, it is not wrong to be protector of the opposition or the minority, whenever it is in the right. The majority needs not the protection of the courts. Moreover if the courts are conceded to be guardians of the Constitution, and that Magna Carta is primarily intended as protection of the minority against abuse by the majority, what is there to criticize if the court "protects" the minority against errors or wrongs of the majority?

In contrast, Senator Wiley, Chairman of the U. S. Senate Committee on the Judiciary, discloses the startling information that according to Dr. Vladmir Gsovski "the doctrine of impartiality and independence of the judge was repudiated by the Soviet jurists". (Am. Bar Association Journal, Vol. 341, p. 443.) There the Courts are by nature an organ of the Government power, "a weapon for the safeguarding of the interests of a given ruling class". (*Ibid.*)

Further to assure absolute impartiality in fact and in appearances, the Rules of Court specify the occasions in which a judge shall be disqualified to sit in judgment.

> "No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record." (Sec. 1 Rule 126.)

These prohibitions are being observed by the members of the Supreme Court, although several of them doubt the binding efficacy of the provision as to them. They think the Court—and for that matter the Legislature—has no authority to hinder, by rules of disqualification, the exercise of their constitutional prerogative. They even believe —questioning the earlier doctrine,—that when the disqualification of a justice is requested, he alone—not the Court—decides the petition. They are of course sensitive of the delicacy of their position, but when it comes to vacating their seat of judgment, even temporarily, they are doubly careful lest any "extreme delicacy" may amount to dereliction of their sacred functions and duties, or toleration of minor invasions of judicial power and independence. This indicates the undisclosed common denominator of their actuations in several instances wherein they had to smother squeamish scruples and sat in judgment, notably the Vargas case, the Perfecto income tax litigation and other controversies involving the Electoral Tribunals.[6]

Enough of disqualification. Back to the main topic of impartiality for some concluding remarks:

Sitting high and lonely at the Bench, in his plain black robe, His Honor remembers with some deeper part of his mind, that all the laws in his big books are different ways of saying one simple thing: *The people want fair play for every man.*

The reader is apt to guess that the thought in the preceding paragraph expressing the people's desire for impartiality has come from a bar association, or a judicature society, or a legal journal or textbook. But no. It is taken from an advertisement of an insurance corporation. Formulated by laymen for laymen it must be truly the popular conception and mandate. Vox populi, vox Dei. Justice means impartiality, and impartiality is Justice.

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6 Vargas v. Rilloraza, G. R. L-1612, Feb. 26, 1948; Perfecto v. Meer, G. R. L-2348, Feb. 1950.