Raising Issues on the Bar Exams, Ethics and Impeachment

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In August 1963, our first bar examinations subject was Civil Law, which I promptly and gloriously flunked. I had finished law, *cum laude*. I had gifted Civil Law teachers, such as Justices Edgardo Paras, Eduardo Caguioa and Ricardo Puno. It is only now that I reveal my secret shame in true confession style, maybe partly because I would earlier have broken their hearts. Professor Dick Puno survives but it happened, as the ballad goes, oh so long ago so, how important can it be?

That first Sunday, I was tentative in my first answers, which I crossed out and changed. Still, I felt I did well overall. But, first impressions are lasting; the untidiness may have struck the examiner negatively. I settled down as the weeks wore on. I took my time. On the last Sunday, we had Remedial Law, where I got 95%. I ended up sixth among 5,453 examinees,[1] the highest number to take the exams (in 2003, 5,357 did).[2] What if I got 49% in Civil Law? I would have had to repeat all eight subjects.

There must be a better way. Last year's leakage in commercial law forces us to pause and ask again whether there is a better way to test one's fitness for the bar. In my first year law in the University of Negros Occidental (now UNO-Recoletos), I obtained 1.6 in Persons and Family Relations and 1.8 in Obligations and Contracts. In San Beda, my other grades in Civil Law were 93% in Property, 91% in Agency, 84% in Sales, 88% in Credit Transactions, 88% in Partnership, 88% in Succession, and 85% in Civil Law Review. And I would flunk Civil Law?

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1. *1210 out of 5,453 pass bar tests,* MANILA TIMES, Feb. 25, 1964, at 1.
2. Per verification with the Office of the Bar Confidant, Supreme Court, on Jan. 20, 2004, as against the published number of 5,455 which must have been the number of those who applied to take the exams; not all might have started while other may have quit after starting.

But first, the restoration of the integrity of the bar examination must be decisively addressed. The results of the probe ordered by the Supreme Court have some out. The next step is to impose the proper sanctions. The person who caused the leakage must be prosecuted and convicted in a proper case.[3]

The grades may simply be "pass" and "fail", with "outstanding" or "excellent" in a proper case.[4] The inordinate hooplah associated with the bar examinations Top Ten should be down-played or eliminated, as in the tests in the other professions. "Bar operations," unknown in my time, leave me with mixed feelings. In my time it was essentially a solo effort.

Don Claro M. Recto and Gerry Spence did not make it the first time they took the exams. Senator Hillary Rodham Clinton did not make it either in Washington, D.C.[5] But, failure is largely a non-issue in the United States, just another bump in the road. The glamour must go.

On application, an examinee may be asked only to retake the subject or two he may have failed. He may write an appeal to show his failure was a fluke. Transcripts of grades from the consistently top law schools should count for something. (But, I see merit in the assertion that there is no bad school for a good student and no good school for a bad one).

Random chance plays a role. In our pre-week, I got hold of perhaps the only copy in San Beda of Judge Simeon Gopengco's commercial law reviewer, from which the examiner lifted many of her questions. I got 89% in the

3. The Supreme Court issued its Resolution, dated Feb. 4, 2004, concerning the leakage of the questions in Mercantile Law subject in the 2003 Bar Examinations (*In Re* Bar Matter No. 1222), which saw the nullification of the bar examination on the subject and the formal conduct of investigation by an Investigating Committee. The Resolution, adopting the findings of the Investigating Committee, decreed the disbarment of the associate lawyer of the examiner in Mercantile Law, whose act of downloading the questions from the computer of his superior (the examiner) and leaking them to friends was deemed to constitute "a criminal act of larceny." The Court also reprimanded the examiner with a requirement "to make a written APOLOGY to the Court for the public scandal he brought upon it as a result of his negligence and lack of due care in preparing and safeguarding his proposed test questions in mercantile law," and withheld the payment of any *honorarium*.
4. As in the case of a Justice's niece. People v. Romualdez, 57 Phil. 142 (1932). There, interestingly, exams "correctors" were employed.
5. She did pass the Arkansas bar exams which convinced her that her "test scores were telling her something" when she and Bill Clinton talked about their future. H. CLINTON, LIVING PRESIDENCY 64 (2003).

subject. A good chess player, they say, is always lucky but we should minimize the role of chance.

"Tips?" There also were, in our time, to which I would listen if only to test my readiness for any question. During pre-week, I barely slept from Monday to Friday. But, on Saturday, I slept long and well; the next day I would be as fresh as a daisy. The others looked bushed, having stayed up late looking for tips, 99.99% of which were spurious. But, there was indeed a widespread leak in International Law involving a few right-on-the-nose questions. The amiable woman reviewee from a southern law school who helped me, unbidden, I met again serendipitously in 1969 in Wisconsin. Yet, the other questions were quite tough. When unsure, I used Latin. I got 92%, a mark higher than I had thought I deserved, the reverse of my Civil Law experience. Things balance out?

Questions should be so framed so that the examinee is not tested on what correct answers to give, but on what questions to ask, "to spot the issues," in other words. In the real world out there, the client does not ask a lawyer to enumerate the ways of extinguishing an agency or define terms. Words tumble out of the client's mouth and the lawyer sifts the chaff from the grain.

A good command of the language is crucial.[6] I look for the ability to reason out with clarity some conclusion that is legally tenable, intellectually respectable and psychologically satisfying, even if it defies settled case law (but the examinee must show an awareness of it).

One problem with clarity is that one can be wrong clearly. But then, who is "wrong" in an 8-7 ruling? From unanimity originally, when no one might have been paying attention during the deliberations, votes may scatter on an edifying move to reconsider. Today, we have a Judiciary seen by some sectors as having members who are intrusive populist political operators and/ or economic regulators (and even regime changers).

Our country has arguably become a very risky place to invest in. Investors put in good hard-earned money. Years later, the Supreme Court rules that the contract, earlier reviewed by government and private lawyers, is illegal. On motions for reconsideration, the earlier unanimous voting gets scrambled. Predictability is gone and one who lives by the crystal ball may end up eating broken glass.

6. I got to Harvard on a full scholarship via a simple letter I dashed off to beat the deadline to gain entry into Brandeis' "sacred precincts of Harvard Yard." I had great grammar teachers from grade school (Makati Elementary School).

The examinees should be hammered as to ethics. The Supreme Court must show the way. For one thing, in controversial cases, the public gets to know the decision in advance. It would thus seem that a number of justices in the collegiate tribunals talk too much (and the rationale of client and counsel is that the other side is doing it and they need to level the playing field).[7]

Years ago, a woman graduate from a prominent Catholic law school (not San Beda), who I had not known existed, called from out of the blue and asked me if I knew Justice Florenz Regalado. I said, yes, very well indeed. Why should she have to know? Because, she said, he was the only one her firm had not yet spoken with. For crying out loud! She had thought that influencing justices was just another day in the office. I said for her not to even think about it. To me, when a friend gets to the Supreme Court, I lose a friend. After the felicitations, I would shun all contact. We should have 15 magistrates who we should help avoid familiarity, even among themselves, if possible.

The Supreme Court is given no role by the Constitution in picking its members. Yet, it intrudes and uses as criterion the ability to get along well with the incumbents, which does not conduce to getting the best composition. The U.S. Supreme Court plays no known role in picking its members who have even been called as "nine scorpions in a bottle," ensuring creative tension.

The U.S. Supreme Court is still criticized for its pro-Bush ruling in December 2000. But no one questions the integrity of the process by which it was reached. I doubt that any member of that Court was improperly approached or worse, initiated the contact. Today, we continue to have serious perceptual problems with our "activist judiciary." Knute Rockne said "[m]ost men, when they think they are thinking, are merely rearranging their prejudices."

7. Thus, one columnist reports confidential matters in the DAILY INQUIRER. *Bantay Katarungan* casually narrated how it obtained equally confidential information from sources in the Sandiganbayan on the issue of President Joseph E. Estrada's motion for permission to travel to the U.S. for medical purposes. This talkativeness would chill chamber debates because taking a devil's advocate position could be twisted in the media. Worse, outside forces could work to influence a rumored outcome. We comment journalistic enterprise but are uneasy with the way magistrates talk about what they say and do which perhaps can wait for their retirement. I continue to be uncomfortable with the idea of such *ex parte* contacts.

Here, to repeat, original decisions, when subjected to reconsideration, at times change drastically, creating the impression that in the first instance, not much attention is really paid to the case; then, someone is reached.[8] We should have 15 citizens, out of 80,000,000, willing to be recluses, forget school or fraternity ties, kinship, or connections and keep lips shut.

There must be transparency on money matters however. Up to now, we have seen no real compliance with the requirement of Section 3 of P.D. No. 1949 that the Commission on Audit must make a quarterly report of the Judiciary Development Fund (JDF). It sparked a fight that was really between the rank and file and the Chief Justice. But, the spinmeisters succeeded in portraying it as one between the Brat Pack and the Chief Justice. In fact, to the end, 77 Congressmen, including the House's most senior member, the widely respected Congressman Herminio Teves, voted to transmit the Articles of Impeachment to the Senate. They withstood the tremendous pressure from the so-called "civil society," whose ouster of a duly-elected President in 2001 helps explain the phenomenon of "the Inevitability of Ronnie." [9]

Ousting one of 15 justices would not have benefited anyone because the replacement could even be more tractable. But, the media here, unlike say the New York Times, which mainly reports, have king-making publishers and egotistical editors who want to decide for the country, nostalgic for their role as the "alternative press" which helped rid us of the dictatorship. They are, at once, too quick to condemn or absolve without due process.

It is the author's view that in the JDF impeachment case, the Supreme Court swiftly and remarkably judged its own cause.[10] The Senate should have been the proper forum, the constitutionally correct position advanced by Senator Jovito R. Salonga. When public money is involved, technicality is anathema. One accounts to the people. This has not really been done yet as

8. On the lighter side, lawyer jokes speak of the need to file a "motion for reconsideration," or a "motion to see each other." We laugh that judges rule, "Granted, as paid for." Or when the gratification is in the future, it is "Wherefore, promises considered, . . ." Judges are respected when they blurt out indignantly, "I never ask!" but, - in reference to so-called "smiling money," clarify, "I never refuse!" And "took no part" is translated to "*hindi pumarte*," as if the others did.

9. The title of my column in the June 21, 2002 issue of Today on Fernando Poe Jr. who would be leading a quiet life today had it not been for the unconstitutional misadventure in 2001.

10. Francisco v. De Venecia, G.R. 160261, Nov. 10, 2003; and 17 companion cases.

to the JDF which has become the counterpart of the Countrywide Development Fund of lawmakers. P.D. No. 1949 mandates that the Commission on Audit "shall quarterly audit the receipts, revenues, uses, disbursements, and expenditures of the Fund, and shall submit the appropriate report in writing . . . copy furnished the Presiding [Justice of the Court of Appeals] and all Executive Judges." It has not been done. If we go quarterly we will know what is being done with the JDF. Bulk reports mislead.

I would not mind if a Supreme Court Justice gets P300,000 a month all told as is said, or even more, but only the facts can make the whispers stop. No more rationalizations on how old certain Baguio facilities are.

The money is only for "cost of living allowances, and . . . for office equipment and facilities of the Courts located where the fees are collected." Else, we might imagine technical malversation, if not worse,[11] with all due respect.[12]

I have never understood the strange ruling in this country that an impeachable constitutional official may not be sued without first being impeached, a very difficult process which can hardly compete for the limited time of the legislature. Ombudsman Aniano Desierto was ruled that he may not be disbarred without first being impeached.[13] (What about impeachable non-lawyers?) We are told that the Supreme Court directed the probe of the Chairman and Members of the Commission on Elections for possible criminal

11. (hus, the Philippine Institute of Certified Public Accountants has agreed to conduct a special audit of the JDF, and the COA has agreed, according to Representative Jesli. A. Lapus. Court employees raised suspicions that Davide misused the JDF by apportioning amounts more than the allowed limit for the construction and repair of existing cottages in Baguio City and the renovation of the Supreme Court session hall in Manila, resulting in the reduction of the employees' allowances. "This is the only way to satisfy all parties . . ." he said. PEOPLE'S JOURNAL, Jan. 31, 2004 p. 13 col. 1. *See also* TODAY, Feb. 2, 2004, p. 10, col. 1 and DAILY INQUIRER, Feb. 2, 2004, at A6.

12. With all due respect, no public official, from the presidency to the barangay, should appoint his children to bids and awards committees. If the highly-regarded Chief Justice may do so, because he says he is entitled to appoint people of his confidence, then all other public officials, down to the Barangay level, may also do so. I am not sure if the term for this is nepotism, a huge problem in a country where we treat positions as all in the family, perpetuating dynasties.

13. Resolution En Banc dated Dec. 5, 1995 in A.C. No. 4059, Jarque v. Disierto (sic) (unreported).

complicity.[14] If true, why ever not indeed? And it is something which should likewise apply to Supreme Court Justices and the rest of officialdom. We borrowed the impeachment concept from the U.S. where even presidents for centuries have been sued. The last one was President Bill Clinton who was hounded by Paula Jones and Kenneth Starr. The busiest public official of the world had to deal with lawsuits and subpoenas.

My belief that local decisions comprise judicial witchcraft has long been on record.[15] We cannot have a royalty who are above the law. Yet, if the one sought to be sued is a member of a collegial body, its work could go on unhampered. The presidency, on the other hand, is the locus of so much responsibility. Yet, America survived and boomed, even with the Clintons being harassed by grand jurors and impeachers.

In the U.S., even convicted impeachable officials continue to receive their salaries because they have not been impeached and therefore continue to be in public office. But, this only serves to emphasize that an impeachable public official may be prosecuted meantime. Violations of law must be exposed and probed at once. Incumbent President Richard M. Nixon was sued in a civil case in relation to a government contract; he had to pay $142,000 to buy peace and settle the case.[16] Indeed, even in our jurisdiction, it is not at all clear what the source of the claimed immunity is. Maybe blue blood was, but our tradition is to look more to the U.S., born in revolt against royalty.[17] Our Supreme Court should go back to the time when by its compelling leadership by example, even a justice of the peace was respected.

14. Information Technology Foundation of the Philippines v. Commission on Elections, G.R. No. 159139, Jan. 13, 2004.

15. *See generally,* Rene A.V. Saguisag, *A Case of Judicial Witchcraft*, KILOSBAYAN MAGAZINE 9 (Jan. 1996).

16. Nixon v. Fitzgerald, 457 U.S. 731 (1982). Fitzgerald had lost his Air Force job after he revealed to a joint congressional committee, over $ 2 B in cost overruns on the C5-A transport aircraft. The Civil Service Commission ruled that it was illegal to fire him in bad faith in the guise of a general reorganization and ordered him reinstated with back pay.

17. But, I urge the reader not to follow what the Supreme Court says about not relying on American jurisprudence. I say let us look at that, and the traditions of other cultures as well, all the way to Mansfield, Puig, Hammurabi, Confucius and Genesis. I am disappointed we no longer have Roman Law, which I used to teach. Our insularity may lead us deeper into the wilderness and all we have to offer may be "derelicts on the waters of the law," to borrow from Justice Felix Frankfurter. Lambert v. California, 355 U.S. 225, 232 (1957).

Let's kill all the lawyers then? The Bard said this at a time when royalty was in flower, when he in fact paid us in the profession the supreme compliment: those who would take over should get rid of the Tañadas, Dioknos, Salongas and Arroyos. Marcos did not and they validated the widely misunderstood exhortation.[18] A little learning is a dangerous thing.

I write this in February, 2004. Another graduation is nigh. There will be the usual commencement speeches which Justice George Malcolm said, on one such occasion at the Philippine Women's University, no one cares for really. The graduates just want to be with their loved ones, the sooner, the better.

What I said to batch 1992 law class of Ateneo, on the kind invitation of then Dean Cynthia Roxas-del Castillo, not even I really remember. But, there is one commencement speech that, for me, will never be beyond easy recall. The late Justice Pompeyo Diaz delivered it in your great law school. Get a copy of it, read, cherish and live by it, and forget we do or tell you today.

He entitled it a *Passion for Justice*, delivered on March 25, 1981. I dip into it from time to time to help ensure that I do not get deflected from the fixed stars pointed out to us in law school. To borrow from H.L.A. Hart, during several re-readings of the speech, my interest never waned for a moment, and I am certain that I shall return to it to ponder its wisdom and to spur my ever-flagging efforts at self-criticism and self-improvement.[19]

We end where we begin. We must revisit the bar exams, reduce the role of chance and eliminate the conditions that have given the tests inordinate importance. Ethics must be stressed, stressed, stressed.

When Ives, a lawyer, became a saint, the people were astonished. Yet, we can settle for secular models like honest Abraham Lincoln, who did not have any formal schooling in law.

Be lawyers who cannot be bought. Learn to sail against the wind but keep the rudder true. Believe in the Constitution and its presumption of innocence. Do not be intimidated by Cardozo's "hooting throng."

Stay as sweet as you are.

18. "The first thing we do, let's all kill the lawyers." WILLIAM SHAKESPEARE, HENRY VI, Part II, Act IV, Scene II. The speaker was Dick the Butcher, a know-nothing thug in Jack Cade's gang.

19. I continue to admire this magistrate whose excellent judgment showed in his giving me 95% in Evidence. As the reader can see, much of reminiscence is vanity, to paraphrase the Durants.