

---

## Good Legal Education

### 1.1 Introduction: Forget Money

There are a range of reasons for choosing to study law. Some students are unsure what to do while some are really interested in the idea of law as a concept and do not intend to become lawyers, but many are attracted to the possibility of courtroom excitement and have a desire to ‘make a difference’. Advocacy in courts, in negotiation, mediation and in numerous lawyers’ offices has great potential to improve the law and the lives of others. Assuming you have a choice, how will you decide which law school will be best for you?

All law schools in Greater China must cover a specific set of subjects that will develop a base level of legal knowledge and some skills. Many will prepare you for the broad range of lawyers’ roles. Some do it better than others. If you can comfortably make a decision on your own about which law school to go to, then go ahead. But some parents and families also want to get involved with choosing law schools, and while they (of course) want a rewarding and secure career for you, they are sometimes thinking about big incomes too. When that happens, identifying preferences for a particular law school can get more complicated. The important thing is to know what your own motives are for aiming at a particular law school and law degree. Large incomes are available in some types of legal practice, but not as commonly as you may think. A small number of lawyers make a great deal of money, but many do not. If you think your priority is to make a lot of money quickly from business and you don’t really mind how, then this book will not help you greatly. However, if you like reading, problem solving, negotiating, arguing, working independently and as a team; if you want to be a lawyer and make a reasonable income that is less likely to disappear when the economy turns down; if you want to contribute to a stable society and do justice, but not at the cost of your self-respect or your friends and relationships, then keep reading.

Law students and new lawyers will also find much to engage them in this book, because the primary focus is on the moral (ethical<sup>1</sup>) challenges of legal practice. There are many publications and short courses that address the technical knowledge and skills of lawyering, but fewer in the area of ethics and morality. Morality remains difficult for many people, including many lawyers, and represents a professional risk that is often left lying around until a problem appears. The main problem areas are in truthfulness and lying, in keeping and divulging secrets, and in conflicts of interest, though these do not exhaust the list.

In Greater China, the number of lawyers relative to total population has increased over the years. However, there are too few of us in the regional and rural areas and in occupations pursuing justice, and probably too many in business, banking and finance. The competition for legal work is increasingly fierce, particularly in commercial and corporate areas. Sometimes, that competition causes problems. Even though many lawyers are vaguely aware of ethical danger, corners are cut, bills are overloaded, reputations are damaged and justice suffers. As a consequence, the wider community can be wary of us and wary of our priorities, even if everyone wants to know and trust their own lawyer. So while many regions are training more lawyers, what our communities actually need are better lawyers.

This book aims to make you a better person and, we hope, a better lawyer. 'Better' does not mean clever or more highly skilled – although that is necessary and should go without saying; better means more socially and morally responsible. That is, a 'good' lawyer. Confucius said that:

Wisdom, compassion, and courage are the three universally recognized moral qualities of men.<sup>2</sup>

And if this is true for non-lawyers, how much more true must it be for good lawyers?

This focus on the *good Chinese lawyer* should guide you in a decision to study law and help you to decide what type of law practice to aim for and how to be ethical – wise, compassionate and courageous – in whatever area you work.

## 1.2 Types of Law Degrees

You may think you want to be a lawyer, but don't really know what is involved in studying law or the 'lawyering' that comes afterwards. You

What degree options are available? After over thirty years of reform and development, legal education in the People's Republic of China (PRC, 中华人民共和国) has become a multi-level, multi-type degree system. Figure 1.1 sets out the connections.

```
graph TD; A[Specialty of Laws (Diploma/Technical Secondary School)] --> B[Bachelor of Laws]; A --> C[Bachelor of Laws (double degree)]; B --> D[Master of Laws]; B --> E[Juris Master (in Law)]; B --> F[Juris Master (not in Law)]; C --> D; C --> E; C --> F; D --> G[Doctor of Laws/ Juris Doctor]; E --> G; F --> G; D --> H[non-academic legal education]; E --> H; F --> H; F --> I[Legal vocational education]; H --> I;
```

The flowchart illustrates the legal education system in the Netherlands. It begins with the 'Specialty of Laws (Diploma/Technical Secondary School)' at the bottom, which leads to two paths: a 'Bachelor of Laws' and a 'Bachelor of Laws (double degree)'. The 'Bachelor of Laws' leads to three master's programs: 'Master of Laws', 'Juris Master (in Law)', and 'Juris Master (not in Law)'. The 'Bachelor of Laws (double degree)' also leads to these three master's programs. From the 'Master of Laws' and 'Juris Master (in Law)', the path leads to the 'Doctor of Laws/ Juris Doctor'. From the 'Juris Master (not in Law)', the path leads to 'non-academic legal education' and 'Legal vocational education'. The 'non-academic legal education' also leads to 'Legal vocational education'.

**Figure 1.1** Types of law degrees in the People's Republic of China

with compulsory courses in Administrative law, Constitutional law, Criminal law, Criminal Procedure law, Civil law, Civic procedure law, Commercial law, International law, Intellectual property law, Jurisprudence, Legal logic, the Legal history of China and Legal English. Some Chinese law schools have introduced three-year Master's (LLM) degrees (*faxue shuoshi* 法学硕士) as well as two- or three-year JM degrees (*fali zhuan ye shuoshi* 法律专业硕士) modelled on the JD degree in the United States.

In Taiwan, there are also LLB and JD degrees, both regulated by the Ministry of Education, the Ministry of Justice and Examination Yuan.<sup>4</sup> The law school curriculum is one of civil law, and has compulsory courses in Administrative law, Constitutional law, Civil law, Criminal law, Commercial law, Family and succession law (身分法), International law, Jurisprudence, Labor law, Legal ethics and Legal English.<sup>5</sup>

The Hong Kong Special Administrative Region (HKSAR) of the PRC (also hereinafter referred to as Hong Kong) has an English common law curriculum with LLB and JD degrees and a Postgraduate Certificate in Laws (PCLL), but the compulsory courses are still quite similar to China (including Taiwan): Administrative Law, Constitutional Law, Criminal law, Commercial Law, Equity and trusts, Jurisprudence, Land law, Law of tort, Law of contracts, Legal system of the PRC, Legal theory and Legal ethics.<sup>6</sup>

The problem, however, is that there is no simple way to compare different law schools or an automatic way to work out whether a single law school will provide you with a good legal education, as defined above.

### 1.3 Being Good Requires More than Expertise

If your ambition is to be a good lawyer and to find the right law degree for this, then knowing what good *is* seems important. Some 40 years ago, US legal ethicist David Luban edited a book entitled *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*.<sup>7</sup> Luban's objective was to set out, for that era and culture, what good lawyering was and all the reasons why good lawyering makes more sense than any other approach. Luban defined a good lawyer as a moral (ethical) person, not just someone who knows the law well. His radical – and some said his heretical<sup>8</sup> – prescription was to turn legal ethics on its head by suggesting a move away from dependence on sets of rules about what to do or not do in difficult or illegal situations, or simply prioritizing their client's wishes no matter what, and look carefully at the idea of goodness. He and his co-authors proposed a difficult question: *who* is the good lawyer? Luban and his colleagues hoped the ground would shift under legal ethics to such an

## 1.3 BEING GOOD REQUIRES MORE THAN EXPERTISE

5

extent that *who* we are as lawyers, rather than *what* we do, would be the first concern.

Luban's approach followed *virtue ethics*, derived from the Greek thinker Aristotle in the pre-Christian era,<sup>9</sup> which asserts that goodness depends on character and that good character is shown by the virtues we display in our behaviour. Luban's argument, simply stated, was and is that we lawyers cannot get away from wider moral obligations that impact on the rest of society and claim that we are permitted (almost automatically) to lie and cheat, providing we do it within rules. In China, Confucius and his disciples took a similar path, and referred to the need to recognize that we all have wider responsibilities:

'I slept and dreamt life is beauty, I woke and found life is duty'; or, to put it another way: 'The superior man understands what is right; the inferior man understands what will sell.'<sup>10</sup>

You may think that Luban's and Confucius' recipes for goodness are a bit weak or soft or idealistic. You would be right, and even though Luban was not overly successful in his quest,<sup>11</sup> the impact of his book was still considerable, as has been Confucius' thinking in Greater China for over 2,000 years. Interest in *who we are* as men and women lawyers – and not just in what we do and what rules apply to us – has never disappeared.

*The Good Chinese Lawyer* is about being a lawyer, and its thesis is astonishingly simple. Being a lawyer is not unconnected with being a person ... Further, being a good person does not preclude you from being a good lawyer – if anything, lawyers should be 'more moral' than citizens in general. These assertions are not astonishing because of their simplicity but rather because of the heresies they contain and because of their complexity. They are heretical because they are contrary to over a century of orthodoxy in the thought, writing and institutionalization of professional ethics.<sup>12</sup>

Despite the hundreds of thousands of lawyers in Greater China who struggle conscientiously with ethics, there continue to be both major and minor moral disasters in the practice of law throughout our region (and globally). Notorious cases and headlines have demonstrated a lack of interest in *who we are* as lawyers and a too-common readiness by our fellow lawyers to argue that 'no rules were broken', or that the rules were ambiguous. For example, you may have seen the disciplinary cases of lawyers being suspended from practice and sometimes imprisoned for 'offering bribes by a unit', 'accepting entrustment privately and receiving money' and 'accepting instructions and charging clients illegally'. Some

of the more notable instances, covered later in this book, have resulted in much injustice and millions of lost money by ordinary citizens. There is now not just a moral reason to revisit good lawyering, but a powerful economic incentive as well. To address this need, a variety of topics are covered in this book, as set out in the next section.

### 1.4 Coverage of This Book

The following sections of this chapter discuss the questions that you should consider asking a law school in order to get an idea of its credentials and capacity for teaching ‘goodness’. There is no website that provides the answers. Not surprisingly, just as law firms tend not to proclaim their attitudes to ethics to prospective clients, law schools slip in behind them and emphasize other things, such as their ‘practicality’, excellence and graduate career destinations. All of these claims are possibly true, but they are not about being a *good* lawyer. So you need to investigate this issue for yourself, using a questionnaire set out at Section 1.6.

Later, the issues involved in selecting so-called elective or optional subjects are also addressed, along with the hot topics of:

- what is involved in ‘thinking like a lawyer’ – benefits and disadvantages
- the essence of how to study law – continuous assessment; on campus or online study
- life-study and part-time paid work – keeping a balance
- why volunteering in the law is healthy – in addition to undertaking part-time work with law firms
- the emotional and physical stress of individual courses
- consciousness of depression risks – keeping talking. . .
- entering legal practice – what it means and what to beware of!

Chapter 2 turns to the moral realities of law practice and government legal work. Recent ‘headline’ cases emphasize the risks and opportunities in different types of ‘lawyering’. The leaders of large firms and global firms tend to consider law as pure business. They have very different attitudes from other lawyers, for instance, criminal and family lawyers. As a generalization, the larger the law firm the more pressure there is for each lawyer to count every minute of their time. There are other particular ethical issues associated with larger legal practices, especially a degree of nervousness among new lawyers about exercising ethical choice in the face of the business and other priorities of the firm.

Chapter 2 also explores a range of economic, structural and technological challenges to lawyering, including so-called legal process outsourcing. There is a major trend all over the world to automate transactional and litigious legal work with the aid of artificial intelligence (AI), to the point where the lawyer's contribution in major transactions – ethical judgment – is not as obvious as it used to be. Over time, this may reduce demand for lower-level commercial lawyers and routine-focused law clerks. The financial challenges to good lawyering are also considerable, because no one can afford to be a good lawyer at the cost of not making a living.

Chapter 3 addresses the core complexities of values, ethics and virtue arising from a choice to be a good lawyer. The major systems of *general morality* (*consequentialism*, *Kantianism*, *virtue ethics* and *Confucian teaching*) are analysed and compared in a large table (Table 3.2) for their potential to simplify debates about what is 'legal' or 'ethical'. In the face of all the 'system' challenges that lawyering throws up to income, well-being and our personal relationships, being a good lawyer is just a smart choice. But that does not mean it is easy to do. Ethical concepts are often difficult to 'see', and if seen, are then avoided because the essence of goodness means work: it involves making a careful judgment. Exercising judgment is hard because it's difficult to reduce any particular situation to a formula or rule.

AI is not yet the answer to improving ethical judgment. We do not yet know how to build an algorithm that is complex enough to balance – without any human lawyers' involvement – *all* the elements of individual values, ethical systems and 'practical wisdom'. Ethical judgment is still too difficult for computers, and this is why we often prefer to work with so-called definite legal rules, because they give the illusion that no judgment is required. Law students are known for saying in legal ethics' classes: 'just tell us the rules'. But rules can hardly be applied without judgment – that is, without ethical awareness and conscious choice. There is judgment involved in acting intentionally in all ethical decision-making, rather than just lazily 'going with the flow' or doing what one is told (that is, following a command or rule, without thought). Here, the major challenge for some commercial lawyers is their appreciation of the difference between something that is legal but unethical, a point eloquently emphasized by former US president Abraham Lincoln<sup>13</sup> but not so often taken to heart. In our communities, proposals for new economic development projects versus the need for environmental sustainability frequently throw up this difference.

In Chapter 4 we suggest that virtue and character are a stable foundation for modern legal ethics in Greater China, but we resist the temptation to simply adopt virtue ethics as the framework of choice and not bother with consequentialism, Kantianism or Confucian teaching. It may be that virtue alone is sufficient to guide all decisions, but as will be seen, tolerance, judgment and respect for relationships – as well as the views of others – are important virtues in themselves. Our capacity to make the truly good decision is likely to be enhanced if we allow ourselves to compare, in each case, what each of these four approaches – virtue, consequentialism, Kantian methods and Confucian teaching – would suggest is appropriate, and what others think of the merits of each approach in particular circumstances.

Although there are many philosophers who have written about each of these approaches,<sup>14</sup> it is beyond the focus of this book to analyse their separate contributions, and for similar reasons, we have not attempted to discuss and distinguish the many Chinese philosophers who have refined and extended Confucius' teaching.<sup>15</sup> But it is still important to identify the virtues as they are generally understood and attempt a justification of virtue ethics in response to the criticism, often (erroneously) made, that something as apparently amorphous as a virtue can hope to provide a practical guide to action in tough situations.

It is the *active* comparison of these four frameworks or systems that offers us the best chance of making the right judgment in any ethically challenging situation.

In the global environment of legal ethics, there is a traditional way of thinking about legal ethics: zealous advocacy, or role morality. Role morality, also known as the 'dominant' form of legal ethics in Western countries, allows lawyers to say and do things on behalf of a client that they might not be able or willing to say or do in their private lives. Some have described role morality as nothing more than licensed lying and cheating,<sup>16</sup> but a milder description tones this down a bit to merely passionate advocacy and involves the justification (in its simplest form) that lawyers on both sides of a dispute should *properly* put their client's case as strongly as possible. For example, a criminal defence lawyer may – and sometimes must – hassle and accuse prosecution witnesses in an effort to make sure they are not lying to the court. A zealous advocate does this because they are confident in the knowledge that a sensible judge will work out which version of events and which interpretation of the law is most credible. In many Western countries (and some Asian jurisdictions influenced by this tradition), role morality is



accepted for the defence of criminal charges because the prosecution often has greater power to pursue a defendant than he or she has to defend themselves.<sup>17</sup> It is important for lawyers in Greater China to know how role morality operates because it affects things like trade law, anti-money laundering and international criminal law. But it is not appropriate for all lawyers in all situations. This book does not discount the importance of role morality, but suggests it is insufficient for a good lawyer. When zealous advocates subject themselves to the scrutiny of general morality, even better lawyering will result.

Chapter 4 then covers the relatively recent insights of positive psychology, which is not the same as the increasingly discredited notion of ‘positive thinking’. Positive psychology provides a respectable method to connect us to our own sense of general morality and allows us to be – and remain – ‘positive’ about life as a lawyer. Chapter 4 concludes by centring the whole debate about morality and law inside the special case of the large law firm. These are the workplace settings where many law students want to work and where it seems that new lawyers are under the most pressure to conform to a culture that is intrinsically profit-focused.

Chapters 5 to 8 deal sequentially with specific areas of legal ethics that provide you with many opportunities to demonstrate general morality, even though few will see you functioning in this holistic manner. Since good lawyering tends to be less visible to the community than bad lawyering, these chapters must unfortunately make use of examples of bad lawyering in order to get the point across. In each of these chapters, the choices open to us in determining a course of moral action are illustrated with specific cases and analysed according to the four general moral approaches discussed above, in the light of the formal rules for lawyers’ behaviour in Greater China. The method used to analyse the illustrations in each of these chapters involves reflection on the contrasting ethical approaches in order to discern the mature decision.

Chapter 5 tackles the painful agendas of truth and deception, often in a criminal law context. It might be said that role morality justifies just enough deceit to ensure a fair criminal law trial, but the concept still fails to satisfy almost every non-lawyer and is not well regarded in China. Perhaps more than in any other area of legal ethics and lawyering, we need to combat the popular idea that as lawyers we are intrinsically crooked or dodgy and are profoundly unable to tell the truth. Key situations where this challenge must be taken up are discussed, including the difference between active and so-called passive deceit, the

disguising of the true purpose of a legal transaction, 'knowing too much' and tax evasion.

Chapter 6 explores the idea of professional secrecy, which can both support and confuse the subtleties of truth and deception by providing a justification for saying as little as possible. Lawyers' secrets now come in two varieties: the fairly bland concept of legal confidentiality, and its altogether sharper sub-category, client privilege, which only exists in Hong Kong within Greater China. Confidentiality is said to underpin everything a lawyer does, which is accurate as far as it goes, but in practical terms it is really the narrower idea of *client privilege* that is important in Hong Kong. Privilege is very important in litigation in common law countries like the United States and is therefore relevant to international trade, information security and, for example, Chinese law students who wish to become diplomats in common law countries. It is only privilege that allows a party to litigation to keep something secret from a court in Hong Kong.

Nevertheless confidentiality has its limits, and in defining those limits general morality is useful, particularly where the formal conduct rules in Greater China prove again to be simply a set of rules, albeit rules that are enforceable by regulators. Several examples are explored, where our capacity to keep quiet is linked to the use of social media and covering up for corruption and bribery.

Although truth-telling and secrecy are well understood by the general public, there is an undiscussed underbelly of legal practice that has a more insidious effect on our character – conflicts of interest. Chapter 7 explores these conflicts of loyalty and interest as a recurring and sometimes nightmare challenge to large and small firms. For example, we are constantly conflicted by our desire to do the best for our clients but also to charge them enough for us to earn a living. The rules in many parts of the world say we can charge a 'reasonable amount', but it is difficult to work out what is 'reasonable' without some wider general moral framework to guide you. Conflicts are also a challenge when we find ourselves suddenly acting for two current clients who are in an argument with each other or who could be in such an argument – or a current client finds themselves opposed to a former client. Do we not owe some loyalty to the former client, or at least an obligation to keep their secrets secret from our newer and current client? The temptation for lawyers to earn double fees by acting for all parties at the same time is often seductive, but just as often the seduction leads to tears all round, and then winds up in the public arena.