Book Review of Daniel Markovits' A Modern Legal Ethics

Dorothy M Hong
Daniel Markovits’ book on legal ethics is a timely commentary to the rapidly changing and evolving law practice and composition of lawyers challenging the legal community to review current roles of attorneys vis-à-vis current Democratic form of government upholding US Constitution where albeit a multi-ethnic and racial constituents in composition giving rise to potential rivalries and conflicts, all citizens have faith in the belief that “All men are created equal,” whose statement was uttered by revolutionists during the colonial America presumably in comparing their stature to the royal family, aristocrats, landed gentry and other citizens of England. Because of cosmopolitan aspect of Bar membership reflective of the total population which inhabits United States soil today, Markovits impliedly concedes that accuracy, timeliness and ascertained or verified truth are deemed not as important as First Amendment issues, human dignity and decency, efficiency and utilitarian concerns juxtaposed with limitation of human knowledge at any snapshot of time in history in addition to the rules of procedures and evidence observed in each court system in the US. Ostensibly, with periodic and frequent change of leadership at all level of government, United States is at a point where a segment of population considers social justice as being unfair each time it is dispensed because this kind of gesture can be construed as shift in power instead.

Daniel Markovits in *A Modern Legal Ethics* writes “Modernity has for good egalitarian reasons dismantled traditional insular social roles and replaced them with impartial cosmopolitan forms of social organization and governance. ... [A]ny backwardly-looking attempt to recreate the traditional, insular role of the lawyer comes (if at comes at all) only at a very great cost. ...[T]o embrace this cosmopolitanism ... not as a negatively capable servant of his clients but as a positively capable manager of conflict (on the model of Brandeis’s “lawyer for the situation”) who produces, through skill and expertise, the best long run
Extracted from the corollary to this issue that Markovits points out then, it is arguable that some long for paternalistic insular social role of lawyers of bygone days, even though if we were to set the clock back, these lawyers who espouse the view and stance of the conservative establishment by stepping into their shoes first and making them central to their own legal discourse would have been marginalized at best and probably would have been made voiceless and invisible back then. It goes without saying that some of these lawyers are so grateful to be part of the prestigious clique in this land after rigorous training from law school to private law firm practice that some mistakenly imitate, for instance, Oliver Wendell Holmes in their adoption of culture or, alternatively, make erroneous analogy with the lawyers’ calling with a caste system whereby scholar/gentleman inclusive of lawyers who are meant to occupy ruling class as a matter of hereditary birth right in Confucius State under tributary system of imperial China, that they seem to want to alienate and belittle others who are similarly situated or less fortunate rather than be inclusive, stemming probably from fear and symptomatic reaction syndrome encompassing inferiority complex, hostile work place, repressed personal anger and frustration often times exhibiting as misdirected hostility or anxiety surrounding any undesirable change that any legal measure or recourse will bring about. That is to say, Mill’s idea of “tyranny of majority” implies feeling of helplessness stemming from trepidation that minority and newcomer are at mercy in the hands of the majority ruling group which means that these silent minority members are dissuaded from asserting their rights and privileges in so far as their potential to surmount minority problems and issues are concerned.

While the cost of misplaced nostalgia as explained above may be costly and grave, Markovits assesses that dispassionate evaluation of lawyerly virtues require prioritization in this modern and complex America. Markovits writes, “This is the idea that the structure of value entails that

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persons must always choose among incompatible goods—that the pursuit of some virtues forecloses the pursuit of others so that there can never be, as Isaiah Berlin might say, a social world without loss.” Markovits notes that “lawyerly virtue of fidelity” to client transcends other virtue such as seeking justice giving rise to discernment of the absolute and complete truth. He argues at the same time, however, that lawyer is able to preserve integrity by limiting himself to a “role” rather than in staying a permanent being which may require from time to time stepping up from “his own first-personal ambitions” and thus redefines lawyer’s professional obligation in terms of “integrity-preserving role-based redescription.” In fact, the NYS Ethics Standard changed the language in the Code from zealous advocacy to diligent and competent representation in line with Markovits’ comments which is to say a more loose requirement of persuasiveness is all that is needed in advocacy to appeal to authenticity rather than relying generally on pervasive and inevitable prejudice appealing to transient sense of order requiring minimum work i.e. making things as is. According to the New Rules of Professional Conduct effective April 1, 2009, Rule 1.7, Disciplinary Rule (“DR”) 5-101, DR 5-105 modify waiver provisions from a) standard of “disinterested lawyer” to “lawyer reasonably believes” lawyer can provide competent and diligent representation to each client, replacing the old language of zealous advocacy b) adds requirement that representation is not prohibited by law; and c) adds outright prohibition on direct adversity in same litigation or proceeding before tribunal.

This “role” although with good intention seeks to curtail liability may unwittingly impose unnecessary burden on newcomers to the Bar membership including those from gender, sexual-orientation, race and ethnicity who are not historically associated with as being a natural role player having authenticity in their proper role as attorneys with the

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2 Id. at 251
3 Id. at 222
4 Id. at 222
5 Id. at 223
weight of tradition, custom, practice and precedents in the US legal history and jurisprudence. In essence, these newcomers and outsiders who may have seemed to have appeared from “harmless subculture” are nevertheless still portrayed and perceived as “strange.”\(^7\) With role playing, Markovits argues that lawyers become “occupant of a role” instead of an ordinary person with professional activities with specialized professional capacities.\(^8\) This relieves the appearance of Australian style Kangaroo court system where in the US court, on the other hand, through role playing, a lawyer can occupy a partisan belief that rings truth that is believable but they do not, at the same time, necessarily have to judge the merit of the truth of the matter outside the lawyer’s duty to resolve doubt in favor of client or, for that matter, of any defamatory utterance in the court room in the heat of zealous advocacy because the standard of professional conducts codified to observe in various courts with each court adhering to varying standard of proof of evidence affords the lawyer, the role player, to play various “Tragic Villains.”\(^9\)

Markovits concedes that “Lawyers cannot employ role based redescription to avoid the charge of partiality because the very role on which such redescription is based is itself in need of impartial moral justification.”\(^10\) That is to say, a lawyer’s descriptions may appear accurate because they seem appropriate and predictably understandable based on generally accepted stereotypes in the eyes of the attorney’s audience may in fact be lies or not truthful because this kind of comfortable description of the “lawyer’s actions that stand outside the lawyer’s role” calls for what lawyer is and not what the lawyer is doing in the confines of the contracted role in the specified duration of attorney-client relationship.\(^11\)

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\(^7\) Markovits, *supra* at 225

\(^8\) *Id.* at 156

\(^9\) *Id.* at 221

\(^10\) *Id.* at 159

\(^11\) See *Id.* at 156–160
Nowadays, departmentalized specialization in law practice, lawyer’s residences and the size of the place of employment point to human limitation that prejudice with aging and experience is unavoidable and conflict of interest inescapable. The concern over ethical wall in place among lawyers with best of intentions may prove to be counterproductive, if not unethical, given the inertia of some but noticeable members of the Bar to embrace cosmopolitan, realist approach in lawyering as Markovits hinted has been incorporated into the New Rules of Professional Conduct effective April 1, 2009 wherein New York Rule departs from the Model rule in Rule 3.7 in that attorney cannot be advocate if another attorney in the firm is likely to be called as a witness and the testimony may be prejudicial to the client, or if there is a conflict. (Similar to DR 5-102)\textsuperscript{12}

Markovits aptly deals with increasingly difficult task for lawyers to put on the benevolent image of "interested and impartial" human being to any potential client and compels the legal community not to make comedy/tragedy drama on par with Dreiser’s American Tragedy in the court room in making arguments that are understandable without lawyer’s understanding completely the client’s and/or opponent’s arguments.

\textsuperscript{1} Dorothy M. Hong is a member of Law and Literature Committee of NYCLA and the author of three books dealing with integrative modern American society.