

THE RHODESIAN LAW JOURNAL

Editor: R. H. CHRISTIE, Q.C.

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DEPARTMENT OF LAW
UNIVERSITY OF RHODESIA

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NON-ACADEMIC QUALITIES OF LAWYERS

BY

THE HON. MR. JUSTICE H.N. MACDONALD

Judge President

In this address to the Hudson Society Mr Justice MacDonald reminds law students that the academic study of law is not enough. To play his proper part in the pursuit of justice the lawyer must develop a sound moral judgment allied to integrity. He must also be able to apply reason and logic to the facts of each case and must be able to reveal the facts by cross-examination without abusing this powerful weapon.

In the time available to me tonight I would like to dwell on the non-academic qualities which should be possessed by lawyers if they and the administration of justice are to prosper.

In emphasising the non-academic qualities I must not be understood as in any way minimising the desirability that lawyers should attain the highest academic qualifications possible.

Nothing has made a deeper impression on me in the course of my legal career than the disparity which exists in some countries of the world between the very high academic standards insisted upon for practice in the legal profession and the very low standards of justice prevailing in those countries. It would be invidious for me to mention such countries by name but I think you may have no difficulty in identifying countries in which because of the inefficiency of the legal processes justice is denied partially or in some cases completely by delays or in which justice is administered badly because persons appointed to judicial positions are unfitted by training and experience to fill them.

Persons, for instance, who may be appointed because of political reasons rather than for their legal ability. The imbalance which sometimes exists between a highly qualified legal profession on the one hand and a markedly poor system of administration of justice on the other has always seemed to me to be not only the height of anomaly but also a shocking waste of all the endeavour which has gone into the creation of a highly qualified legal profession.

I do not believe that that is the situation which obtains in this country and I mention it only to make the point that the success of the administration of justice in a country does not depend solely on the academic qualifications of those practising any more than the individual success of the lawyer depends solely on his academic qualifications.

Qualification as a lawyer places a person in the position where he is concerned with regulating the relation and affairs between man and man, between man and the community in which he lives and man and the State. The proper regulation of these relationships is vital to the well-being of the State as a whole and no higher responsibility is placed on the shoulders of its members by any other profession. But I emphasise again that the discharge of this responsibility rests as much and perhaps even more on non-academic than academic qualities.

We speak of the administration of justice. We do so because we are not in general concerned simply with whether the law has been applied in a particular case but with whether its application has resulted in justice. If we say that justice has been done we express the idea that what has been done satisfies our sense of what is morally right. If on the other hand, when we simply say that the law has been applied we may or may not be satisfied of this.

The courts do not always succeed in doing justice. The law in its quest for certainty of necessity lays down fixed and inflexible rules and there are hard cases which, if the law is not to be strained, result in decisions which cannot be satisfactory to the persons aggrieved. But the object of certainty is to promote justice so that even here the underlying purpose of the law is a moral one.

No jurist would attempt to maintain however that all laws are moral any more than he would maintain that every moral precept is law. Unless he has misunderstood Kelsen, however, any jurist would I think agree that in much of its work the court is concerned almost exclusively with the quest for the moral solution to the problem before it. It does so when it decides whether a person has acted in good faith, whether he has just or good cause for doing or not doing something, whether he has acted fairly or whether he has acted reasonably. (In considering whether he has acted reasonably we postulate the *diligens pater familias* and speaking generally what the *diligens pater familias* must or must not do in law would be approved by the moralist). And again when a judicial officer has to exercise a discretion in a case he will necessarily be influenced by moral considerations; as for example where he has to decide on sentence in a criminal case. It is frequently necessary to consider whether natural justice has been done when the proceedings of an administrative tribunal are under review. Indeed it would be possible to continue ad nauseam with examples of issues which involve in part at least questions of morality and not simply the application of legal precepts. So much is this true that I do not believe that a lawyer will make a success of practice unless in addition to being well versed in the law he is a person with sound moral judgment. In the absence of such judgment he is unlikely to be able to give sound advice of the probable outcome of a case before the courts involving a moral issue. Here therefore is a non-academic

quality of the utmost importance in the practice of a lawyer. So important that it has often occurred to me that we would perhaps achieve a better balance in the training of lawyers if it were possible to include in the curriculum a course on ethics. And here I use the word ethics in the wider sense and not simply as embracing ethical conduct in the practice of law. Perhaps however the subject is too nebulous to admit of this.

But I would make this point that the standard of administration of justice depends not upon the excellence of the laws which are in force but upon the quality of the persons responsible for their administration - judicial officers, lawyers, members of legal departments of the government and of the police - and also on the existence of a law-abiding community. This of course is an obvious point but it is surprising how often in this modern world the emphasis is placed not upon the quality of the persons behind the law and responsible for its enforcement but rather upon the law itself as the be-all and end-all. But the law itself is a lifeless abstract conception; it is the people responsible for its enforcement who give it life and by so doing either reveal its full promise or pervert it to despicable ends.

Unhappily we have not up to the present devised any means of ensuring that persons who will be concerned with justice as lawyers are persons imbued with a sense of justice and dedicated to the promotion of it; that they are persons who will use their legal knowledge to further and not defeat justice.

Allied to the need for sound moral judgment is the need for integrity. And here I do not refer to the obvious requirement that a lawyer should not be corrupt but in the main to two less obvious aspects of practice in which the need for integrity is imperative.

Persons who become involved in acrimonious disputes often lose their sense of judgment and in time come to believe in the complete justice of their cause. It is a simple matter for an unscrupulous lawyer to foster this belief and lead the person concerned into costly litigation which in the end will only profit the lawyer and not his client. Persons labouring under a sense of injury and morally indignant do not welcome sound advice. You will find that they resent being told that their sense of outrage is misconceived or exaggerated and that to become involved in litigation would be against their interests. Rarely will you earn their gratitude by giving sound advice and sometimes they will depart - even more indignant than before, to seek the advice of a lawyer with a better understanding of their grievances. A lawyer of integrity will not allow persons to become involved in fruitless and costly litigation no matter what the financial sacrifice of giving sound advice may be.

The second aspect of integrity arises from the fact that there are always persons in any community who wish to escape the consequences of their criminal conduct and persons who wish to avoid fulfilment of

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The second aspect of integrity arises from the fact that there are always persons in any community who wish to escape the consequences of their criminal conduct and persons who wish to avoid fulfilment of

civil obligations and the payment of debts. No lawyer of integrity will use his skill and legal knowledge to bring about an unjust result either in the criminal or civil courts. Unfortunately instances do occur from time to time of lawyers misusing their legal ability, misusing the rules of procedure and exploiting every technicality of the law to deny justice by securing the acquittal in the criminal courts of a person who is in fact guilty or of defeating or delaying the just claim of a litigant in the civil courts. A lawyer who gains a reputation for such conduct will not lack clients, indeed the path to his door will be well worn. The courts do all in their power to prevent the abuse of legal processes but in the end it is the integrity of practitioners, which to a very large extent determines standards of justice.

The ability of a lawyer to apply the law to the facts is another quality which is wholly non-academic. The application of law to the facts depends upon the ability of a person to reason logically. This ability is I would think more inherent than acquired and it sometimes happens that persons with the most distinguished academic qualifications fail lamentably in practice because of an inability to apply their profound knowledge of law to the facts.

But first of course the facts must be ascertained and assessed. This is a facet of practice which I entertain not the slightest doubt receives too little emphasis in the training of lawyers. It has been my experience time and again that civil suits are commenced and defended without a thorough and searching examination of the facts; time and again this examination only takes place at a late stage in the proceedings and after heavy costs have been unnecessarily incurred.

A lawyer if he is to advise his clients wisely must be a good judge of facts. If his judgment on the facts is wrong his legal advice is likely also to be wrong. The longer one is concerned with the practice of the law the more aware one becomes of the importance of a close and careful study of the facts. Time and time again one finds that apparent legal complexities in a case disappear when the facts are carefully scrutinized and analysed.

The hallmark of the indifferent lawyer is his attempt to reach a solution to a problem not by the application of reason and logic to the facts in the light of the legal or moral precept applicable but by the search for the elusive decided case on "all fours".

The melancholy truth is that there seldom is a case on "all fours" and lawyers who place their trust in such a case as often as not fail.

Close on forty years have passed since I commenced to read for the Bar in London and if, in the light of the experience I have gained since then, I could have my time at the Bar over again, I would spend a great deal more time studying the facts and pondering the application of the principles of the law to those facts and a lot less time reading

case after case in the hope of discovering one in which the task of applying the law to the facts has already been carried out for me by a judge. I have learnt from experience that this is usually a fruitless exercise. I would be much more conscious too of the moral element in law and in advising clients would give much more weight to moral considerations because I know that judges wherever permissible arrive at judgments which are not only legally sound but which also satisfy the dictates of morality.

Bound up with the question of the need to explore and closely analyse the facts is the ability to reveal them by cross-examination. Cross-examination depends first on a detailed and thorough knowledge of all information which can be confidently relied upon as true; if the cross-examiner has this knowledge he should be able to recognise answers which because they are inconsistent with the known facts are likely to be untrue. He must make an assessment well in advance of trial of the areas of dispute and the areas of common ground. He must decide as far as it is possible to do so, the points on which his opponent's witnesses are likely, having regard to the pleadings or affidavits, to be untruthful and form an assessment of whether such untruthfulness will be deliberate or a result of faulty recollection. He must have, well in advance, a very clear appreciation of the points which he wishes to establish in cross-examination and an even clearer appreciation of the strategy he will adopt to establish them. He must anticipate the escape hatches through which the witness will attempt to dive and must set about closing them. He must have the ability to estimate the character and intelligence of the person he is cross-examining and consider his possible motives for not telling the truth. Successful cross-examination is the product of hard work and deep thought. I can assure you that persons with a reputation for brilliance in this field spend long hours in preparation and you will be well advised to do the same.

But a word of warning. Cross-examination is a powerful weapon in the armoury of a lawyer. It is a weapon entrusted to him because he is a member of an honourable profession and the assumption is made that he will not abuse it. If you are convinced that a witness is untruthful use the weapon remorselessly; if, however, you are not, use it with the greatest circumspection. It is quite wrong to impugn the honour of an honest man. If a witness is not telling the truth this should be revealed by the questions put and should not be asserted in the form of a question. Here again it is the moral sense of the lawyer which will tell him where to draw the line.

There are therefore two main aspects of cross-examination: the technique and the moral question of how far in the circumstances of the case it should be taken. Both these aspects I believe receive too little attention in the course of a lawyer's training but I could well be wrong in thinking this.

It is my belief that in the end stable and good government depends to a very large extent on the manner in which justice is administered. If the administration of justice falters it is not long before abuses creep into every department of government.

And there are new factors which are coming into play which make it more than ever imperative that the highest standards should be maintained in the administration of justice. A spirit of carelessness, amounting almost to anarchy in some countries, is to be observed. Organised religions which in the past played a prominent role in assisting in the maintenance of civilized standards of law and order in some instances now openly support violence and in others have to a marked extent exchanged the spiritual role for a political one. Once a religious organisation embraces a political cause its authority on moral issues is of necessity diminished. All these developments mean that the burden of ensuring the maintenance of civilized standards of existence will fall increasingly with the passage of time upon the administration of justice and the success of the administration of justice in shouldering this burden will in turn depend upon the calibre of the persons entering its ranks - that is upon persons such as your selves.

NOTARIAL DEED OF SEPARATION

"The Second Party further undertakes that she will not allow the said child to be in the company of disreputable persons or persons of bad character, and that she will not allow the said child to dance the tango or attend bioscope performances or wear any dress of an immodest description."

Manfred Nathan, *Contracts, Deeds and Forms* (1914), p. 378



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