The ideal legal practitioner

(from an academic angle)

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The title of this article, it may seem, bears testimony to academic presumptuousness: How dare a "man of theory" offer his opinion on an issue so thoroughly practical? Academics are, as far as matters of practice are concerned, by definition and by nature presumptuous. Practitioners unfortunately have to cope and bear with this – that is to say if they want to have their ranks reinforced with young men and women who have been taught those things which, as Jean-Jacques Rousseau put it, "they ought to forget". And in the realm of the very need for human raw materials, the academic and the practitioner find a common interest or, should I perhaps say, they have found it at last! This article is but another attempt – sufficiently modest, I trust – to exploit this common interest from a theoretical point of view.

Qualities

To my mind a successful practitioner, be he an attorney or an advocate, should possess and display certain qualities, most of which cannot in toto be acquired learning. An appropriate academic training may, however, play a vital part in improving them – that is to say if "by nature" they are at least latent. It will be noticed that many of – or even all – the qualities mentioned and discussed here, also befit jurists active in other branches of the honourable profession, such as judicial officers (judges and magistrates), public prosecutors and in most cases also legal advisers. In fact I shall, to at least a certain extent and with certain adaptations, rely on Ferreira[1] in trying to explain what *integrity*, *objectivity*, *dignity* and *power of judgment* are all about – even though Ferreira refers to them mainly as prerequisites for the judicial officer's sound administration of justice. The "remaining" *knowledge and technical skill*, *capacity for hard work*, *respect for the legal order and legal procedures* and *sense of equity* should also not be alien to the non-attorney and non-advocate jurist. First, then, certain remarks as to the desired qualities and their "material teachability".

Integrity

"Integrity" can be described as "upright steadfastness" or "impeccable honesty" – the immunity against the temptation to do something dishonest or irregular for the sake of personal gain. With judicial officers integrity includes inter alia the quality of incorruptibility.

It is sometimes believed that legal practitioners – being "businessmen" with a first duty "to make as much money as possible" – are allowed to yield to at least some of the taboos which judicial officers are obliged to avoid at all cost. This (of course!) patently incorrect view, is also perilous. Legal practitioners are officers of the court – the very court that allows them to practise. In consequence they are and should be measured by the same stringent criteria which apply to judicial officers. It is no mere coincidence that judges are appointed mainly from the ranks of practitioners. Practitioners are supposed to be trained servants of a *public* legal order.

The ability also to disclose to the court facts, evidence and legal arguments detrimental to one's client is, for instance, a quality of integrity. To a practitioner, this ability is an unavoidable duty.[2] "Counsel," says Eric Morris[3] (and this includes the attorney) "has a duty to the court which, subject to his duty not to disclose the confidences of his client, over-rides his obligations to his client."

May a practitioner never assist a dishonest client? I think he may – he may supply him with legal advice and aid (even scoundrels are entitled to that) *but* the member of the honourable profession may not help him or advise him in such a way that his dishonesty or knavishness is promoted. If something dishonest is required from the practitioner himself, he should refuse to co-operate and should even consider withdrawing from the case. Within these limits a practitioner may, for instance, "defend a guilty man"[4] and he even has a duty not to fail his client if – as appears from evidence adduced or cross-examination conducted during the trial – his "story" is shattered.

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What is at stake is the maintenance of a proper balance between *never* misleading the court and *never* walking out on one's client just because a "lack of success" seems inevitable.

I need not elaborate on the many temptations to which practitioners in the ordinary course of practice are at times exposed: Would a rather trivial loan from my trust account matter all that much? Am I not entitled to have my success achieved, reflected in the bill I am about to send my client? Why should I – as an attorney – fully brief counsel as to the financial means of my client – if that would mean a reduction of my own fee?[5] Why help an opponent by telling him exactly the whole truth?[6] Why should I – for the sake of my "meritorious" client of course – not offer a witness a few rand or so in order to wipe out his unpleasant or detrimental memories?[7] Why not – having the inside knowledge – pull a quick one on my client . . . for my bank manager's sake?

In principle it does not really matter whether a bribe is R1 000 or a bottle of whisky, a new Mercedes or a piece of biltong. A practitioner's inner disposition is decisive. If he displays a talent for dishonesty in smaller matters, an old proverb may prove its truth in a somewhat unfamiliar fashion: One wicked turn deserves another, the last tending to outdo the first.

Integrity cannot be taught. The academic would, however, be neglecting his duty if he were to fail to keep reminding his students that the legal profession is a profession of impeccable integrity, bearing in mind also that example is preferable to precept. The evil of cribbing eg among students should be met with

severity. The academic is, as a matter of fact, obliged to come to the aid of the honourable profession in its attempts to safeguard its ranks against contamination.

Objectivity

Objectivity is frequently identified with fairness and impartiality. "Possessing integrity" inter alia amounts to not having one's judgment determined, blurred or simply influenced by *considerations of personal gain*. Objectivity, on the other hand, requires that *no irrelevant considerations whatsoever* should bear upon one's judgment. From judges and magistrates objectivity – authoritatively embodied in the precepts *audi et alteram partem* and *nemo iudex in re sua* – is expected and required and required as a judicial matter of course – hence its name "natural justice". If, however, one is convinced that practitioners, as administrators of justice, have a cause and not merely the personal interests of their clients to further, objectivity is indispensable to them as well. The best interests of his client within the authoritatively permissive and prohibitive framework of a prevailing (public) legal order, is a practitioner's first and foremost concern. Ascertaining what "best interests" of his client means, involves a choice between various possibilities: Shall I tell my client that – in order to remain reasonably realistic – our hopes in this case cannot even equal that of a snowball or shall I obediently yield to his lust for litigation? Shall I, when presenting his case, "put my client in the box" or rather – for his own sake – have him exercise his right to remain silent? How can I satisfactorily reconcile the conflicting interests of (two or more of) my "best" clients? All these and similar questions call for answers which, in the absence of a healthy detachment and objectivity, may run a serious risk of insufficiency and inappositeness.

As with integrity, objectivity also tends to be an inborn quality. It can, however, be practised and improved. This is where the academic's responsibility comes in. He should teach his students how to distinguish facts from emotions. This is best done by convincing them that "the total absence of preconceptions in the mind of a judge" or a practitioner is but a myth: "The human mind, even at infancy, is no blank piece of paper."[8] The very recognition and consciousness of the presence of preconceptions in the human mind immediately calls for their elimination in cases where they are irrelevant. Exactly this is what objectivity is all about. And if, in passing, I may put in a word for my own subject: legal philosophy or jurisprudence is one of the best "educational gimmicks" enabling students to recognize that preconceptions in the human mind do have a decisive bearing upon a jurist's view of the law in general and his interpretation of concrete situations in which legal precepts are to be applied or decisions are to be made.

In the final analysis we jurists will have to accept the fact that where human beings are concerned, the ideal of total "mechanical" objectivity can never be attained. As consolation it may, however, be said that if complete objectivity were to be achieved, courts of law for the settling of disputes and the legal profession in general would have been redundant. While the legal profession still exists, let us then, in striving for objectivity, be objective by recognizing our subjectivity. Objectivity with man is no commensurable state of affairs. It is more of a disposition, a state of mind, dependent upon a knowledge and recognition of his own predispositions.

Dignity

It is not only considerations of professional pride and tradition which require dignity from the members of the legal profession. The man in the street ought to know that those who look after his legal interests will display deliberate earnestness and will maintain a healthy judicial aloofness in deciding and managing his affairs. Worthily keeping a level head provides the setting for the pronouncement of honest and objective judgments – for justice also manifestly to be seen to be done.[9]

For this highly relevant reason dignity is required from legal practitioners. Not only should they conduct themselves in a dignified fashion, but they also have a duty to maintain and promote the dignity of the court. Contempt of court is a common law as well as statutory[10] offence and may display itself in various shapes such as obstreperously shouting at a witness,[11] intentionally or negligently casting gross reflections on the judicial abilities of the presiding officer[12] and carelessly phrasing an application for a judge's or magistrate's withdrawal from a case.[13] More difficult to enforce, though not less worthy of pursuit, is the maintenance of impeccable court manners – even under the most provocative circumstances.

Considerations of professional dignity also require that practitioners should not "sell" their services as if they were hawker's wares. Consequently advertising and touting, the sharing of fees with non-practitioners and the reflection of success or failure by the amount of a fee – to mention only a few obviously unworthy practices – are prohibited. The late R P B Davis J said:[14]

> "Barristers and attorneys are not hucksters peddling their wares or auctioneers selling them to the highest bidder; for that reason they are not allowed to turn themselves into limited liability companies, or to tout for work; they are not allowed to advertise, and they may not filch each other's clients. They are as much part of the court in which they practise as the judges who preside over them."

Legal experts – on account of their very expertise – often enjoy the respect and trust of the man in the street. Practitioners are required to be worthy of this respect and trust. Thus, for example, it is improper for an attorney to write a menacing letter to his debtor "convincing" him that his failure to pay his debts will result in certain less favourable consequences for him and that the attorney will spare nothing to see to the factual occurrence of the consequences.[15]

Surely it is not too difficult for an academic to convince his students that the legal profession is a dignified profession. First and foremost example will once again have to prove its preference to precept. A legal academic training members of a dignified profession should ex necessitate conduct himself in a dignified fashion. A sound knowledge of our legal tradition and heritage may, however, also serve as an educational aid providing students with an insight into the worth and dignity of perhaps the oldest honourable profession known to Western man.

Power of judgment

A vaccillating, irresolute waverer should not enter the legal profession. Apart from the fact that the jurist should decide or judge matters *objectively*, he should also possess the very skill of decision-making or judgment which, though to a certain extent inborn, is also susceptible to training and improvement.

I am not going to attempt to list examples of situations in which the power of judgment is required from a practitioner. That would be carrying my academic presumptuousness too far. I should, however, hasten to add that power of judgment alone, exercised in vacua can often – especially with a younger, "exceptionally learned" practitioner – be more of a menace than a boon. A practitioner should therefore be able to link up his power of judgment with a sound knowledge of the law and a sensitive regard for the peculiarities of each unique concrete situation. The latter skill is also inter alia a prerequisite for equitable judgments.

Improving a student's power of judgment requires a good deal of academic skill from a law teacher, the secret being that a student should not only not be discouraged from using his power of judgment, but should also be taught how to judge correctly, carefully and deliberately. "Decide by all means, but festina lente" should perhaps be the motto in this regard. The value of teaching students legal precepts with reference to

practical problems can hardly be overemphasized. Lectures in the form of seminars, leaving ample opportunity for students to give their own opinions and employ their own judgment, can also be of help. Faulty opinions should not be rejected outright, but if a student does make a mistake, he should be guided in his reasoning towards finding the correct answer himself.

Knowledge and technical skill

If the well-known dictum of an English Lord Chancellor that he liked his judges to be gentlemen and if they also knew a little law, so much the better, holds any good and can claim at least some truth, then – for heaven's sake – let at least legal practitioners be legal experts! I am not going to elaborate on this point at all. Suffice it to say that perhaps the only justification for academic presumptuousness may be sought in the fact that all branches of the profession are looking for academically trained members, as their respective admission requirements amply prove.[16]

Capacity for hard work

The legal profession – as we "outsiders" are able to gather – guarantees a sluggard's failure. Therefore the academic should help to protect the practising profession against those with an exceptional talent for laziness. High demands should be made of law students in regard to their capacity for work. Not only should a law student be able to master a considerable volume of work, but he should also be able to do it in a relatively short time. To meet this educational demand, diligent academics are of course also required.

Respect for legal order

This essential quality for any legal practitioner, slightly rephrased, also means "respect for the path(s) of the law" or "the pursuit of legality". In order to avoid misunderstanding, this somewhat complicated quality calls for clarifying elaboration. A case in point is *Society of Advocates of South Africa v Fischer*.[17] The respondent (F) was a senior member of the Johannesburg bar. While standing trial before a regional court on three counts alleging certain contraventions of Act 44 of 1950 (the Suppression of Communism Act as it was then named), F applied for bail. The regional magistrate – ostensibly trusting F – granted the application and F did in fact thereafter stand his trial up to a stage when – after certain evidence on behalf of the state had been adduced – it became clear that, as an accused, he had a strong case to meet. He then deliberately estreated his bail, furnishing his counsel with two letters in which the reasons for his conduct were explained. While F was still at large the Society of Advocates of South Africa lodged an application with the Transvaal provincial division for F's name to be removed from the roll of advocates. On behalf of F it was contended that his "breach of faith in estreating his bail is, firstly, conduct not related to his profession as an advocate and, secondly, should not be stigmatised as dishonourable conduct".[18] De Wet JP, dismissing both contentions, granted the application, setting forth the following two reasons:

(i) F had relied on his status as senior counsel in order to induce the magistrate to grant his application for bail. His breach of confidence set a bad example to non-lawyers – to members of the public at large – who were also expected to respect and obey the orders of a court of law.[19]

(ii) F had been guilty of subversive conduct and – according to his own letters – he intended to persevere with it. For this very reason he was an unfit member of a profession which requires that the administration of justice be furthered. Referring to *Incorporated Law Society, Transvaal v Mandela*[20] in which it was held that an attorney's contravention of the provisions of Act 44 of 1950 had no bearing upon his status or fitness as a practitioner, the judge-president remarked inter alia:[21]

> ". . . [T]he Court appears to have overlooked the fact that it is the duty of an attorney to further the administration of justice *in accordance with the laws of the country* and not to frustrate it" (my italics).

It is respectfully submitted that, in so far as F's very act of estreating his bail amounted to a striking disrespect for the legal order and legal procedures, the application was correctly granted. The matter is, however, not quite so simple and the political strings attached to *Fisher's* case rendered the relevant issues somewhat contentious. Many of the cases in which a practitioner's disregard for legality had been an issue were politically tainted.[22]

The problem of political convictions and actions reflecting on a practitioner's fitness to remain in office cannot be fully discussed. Suffice it to say that a deviation from current or "passable" political views, convictions or "mores" should not in itself constitute a reason for a dissentient's name to be removed from the roll. That, on the other hand, a chaos-instigating anarchist or inciter is no fit and proper legal practitioner, was confirmed by Galgut J who said in *Ex Parte Cassim*:[23]

> "It is the duty of all legal practitioners . . . not to incite persons to commit breaches of the law and I go further and say that it is also their duty to administer and to further the administration of justice."

Legal practitioners ought not to be pale or colourless legal bureaucrats, frivolously succumbing to legal precepts merely because they prevail. A legal order, right down to its most minute component should, in order to justify its very existence, be aimed at the preservation and furtherance of those conditions necessary to provide for the security and well-being of citizens. Should a legal order fail this test, legal practitioners as servants of law and justice are (*a natura ipsius rei*) called upon to protest in the positive sense of *pro te stare*, that is, themselves to speak in favour of a legal order and adjustments or alterations to the status quo which would enhance those objectives tantamount to justice as legality.

Law societies

Orderly protest is ordered. The safest and most desirable course of protesting is, therefore, first to employ and exhaust existing means or "channels" for lodging one's objections. Law societies and bar councils are eg suitable institutions providing the necessary channels for positive or orderly protest. Sections 58(j) and (to a lesser extent) (k) of the Attorneys Act 53 of 1979 list two objects of the various law societies which readily befit practitioners' duty to speak their minds regarding law reforms:

> "The objects of a society shall be . . . to initiate and promote reforms and improvements in any branch of the law, the administration of justice, the practice of the law and in draft legislation" (s 58(j)) and "to represent in general the views of the profession" (s 58(k)).

Object

While it is also the object of law societies and, presumably, bar councils "to maintain and enhance the prestige, status and dignity of the profession" (s 58(a)), it is respectfully submitted that a professional society should not, neither by off-handedly approving of nor by vehemently opposing specific political groupings, involve itself in the atrocities of party politics where often persons and personalities rather than the very cause of law and justice are at stake. On the other hand practitioners are automatically involved in politics in its broader context, politics in this sense being a corpus of coherent activities directed towards the realization, maintenance and promotion of a legal order in the state, according to certain directives (or policies).

A student who knows about the importance, the meaning, the origin, the nature and the objects of a legal order, is ready to fulfil his function as a non-anarchistic, non-bureaucratic legal practitioner with a due regard to and with due respect for legality in general and a given legal order in particular. It is in this context that a sound knowledge of

jurisprudence linked with a moderate sensitivity to political theory may bear the desired fruits. Apart from that, a law-teacher should not merely equip his students with a knowledge of the bare, preceptive rules and technicalities of his subject. Each and every legal precept should be critically and reflectively contextualized with reference to its being an essential component of a legal order aiming at the promotion of justice. In the final analysis, law students should be convinced that

(a) legality, for the sake of justice, ought to pay; and

(b) that not being the case, that orderly channels for changing the status quo do exist and should first be exhausted.

Sense of equity

Equity is often, rather inaptly, identified with justice. The ancient Greek philosopher, Aristotle, described equity as "a rectification of law in so far as law is defective on account of its universality".[24] Equity may therefore be defined as the capacity to relate the objectives of a legal order as an order of justice via the application of its normative precepts, to the peculiarities of each unique, concrete situation. Equity allows for exceptions in order to accommodate "hard cases" without frustrating the objectives of a justice promoting legal order. The old saying that "hard cases make bad law" should not be understood in an absolute sense. The notion of *summum ius, summa iniuria* can also, as experienced jurists ought to know, claim at least an equal amount of truth.

A healthy sense of equity which legal practitioners as counsellors of legal subjects with concrete legal problems in life's concrete situations ought to display, can in principle be cultivated in law students as well. When teaching any law subject, continuous reference to concrete problems should be made. Never should the belief that the application of a legal precept to a legal problem is "all that simple" be nurtured. "Every legal precept may have its exceptions when applied to concrete problems" should become a law-teaching rule . . . without exceptions!

Conclusion

I have listed only eight qualities which, to my mind, a legal practitioner ought to display. Experienced practitioners can comfortably add to this list. The point that to my mind, however, ought to be stressed, is that these qualities can *at least in principle* be taught to or, rather, cultivated in law students as practitioners in-the-making.

The institution of university courses in "professional ethics" or "professional conduct" may without subtracting from the force of all the foregoing arguments prove to be a boon to the training of students who are ready to accept and deal with the challenges of the profession, especially if such a venture can attest to a close co-operation between academics and practitioners. Teaching such a course would, to mention but one advantage, provide an opportunity to systematize and reflect on the conditions for and qualities of being a practitioner in keeping with the strict requirements of an honourable profession. In the end jurists are not primarily serving the interests of a profession or of the academics but of a legal order sufficiently vouching or providing for the well-being of citizens with a status worthy of protection. It is beyond any question whatsoever that in order to achieve this common end, presumptuous academics and all too busy practitioners should co-operate!

Footnotes

[1] J C Ferreira *Strafprosesreg in die laerbowe* 2 ed Cape Town: Juta & Co (1979) 25–30.
[2] See e g *Schoeman v Thompson* 1927 WLD 282; *Katzenellenbogen v Katzenellenbogen & Joseph* 1947 (2) SA 528 (W).
[3] E Morris *Technique in litigation* 2 ed Cape Town: Juta & Co (1975) 38.
[4] F van Blommestein *Professional practice for attorneys* Cape Town: Juta & Co (1965) 47–49.
[5] See e g *Law Society of South West Africa v Orman* 1933 SWA 47.
[6] See e g *Ben Baron and Partners v Henderson* 1958 4 SA 270 SR.
[7] See e g *Incorporated Law Society v Behrman* 1957 (3) SA 221 (T) and *Incorporated Law Society v Van Rooyen* 1935(2) PH M 56 (O).
[8] Jerome Frank J in *In re JP Linahan* 138F 2d 650 at 652. See also J Dugard 1978 *Human rights and the South African legal order* Princeton University Press 279 et seq.
[9] See *R v Leber* 1955(3) SA 130 (SR) at 133.
[10] See s 108 of Act 32 of 1944.
[11] *R v Benson* 1914 AD 357.
[12] *R v Rosenstein* 1943 TPD 65.
[13] *R v Silber* 1952(2) SA 475 (A).
[14] In a preface to J Herbstein, L de V van Winsen, J D Thomas and A C Cilliers *The civil practice of superior courts in South Africa* 2 ed Cape Town: Juta & Co (1966) V.
[15] *Incorporated Law Society v Michau* 19 SC 355. The fact that the debtor was an insolvent was of course an aggravating circumstance.
[16] See for instance s 15 of Act 53 of 1979 and s 3(2) of Act 74 of 1964.
[17] 1966(1) SA 133 (T).
[18] 136F–G.
[19] 136G–H.
[20] 1954(3) SA 102 (T).
[21] At 137F.
[22] See also Randell and Bax *Attorney's handbook* (1968) 94.
[23] 1970(4) SA 476 (T) at 477.
[24] *Ethika Nikomacheia* 1137b. □