

# The dignified practitioner: reflections

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ON the eve of my 50th birthday and my 21st anniversary at the Pretoria Bar, I asked a colleague and long-standing friend what I could look forward to, having seen and heard so much? “Menopause and death” was the solemn answer. I did not reply then. Here is my reply.

Judge Learned Hand’s\* father was reported to have remarked that the greatest honour a person could achieve was to be a successful practitioner in the United States Courts.<sup>1</sup> I beg to differ. The greatest achievement for a lawyer such as myself is to look back and to be able to say: I have practised with dignity.<sup>2</sup> To practise with dignity is to strive to seek justice.

“The aim of jurisprudence is justice, the most perfect of all the virtues, and as it were their joiner together: it is rightly defined as ‘the constant and perpetual desire to render onto everyone his own’...”

It is not so much from the occurrence of, and from the actual rendering of what is due to anyone, as much as from the desire itself, and the resolve to render it, that acts of justice are to be determined, and to be termed just or unjust.”<sup>3</sup>

## Justice

The question is therefore: did I and colleagues of similar experience and knowledge that we have or ought to have, desire justice and resolve to

\* Federal Circuit Judge Learned Hand is considered to be one of the truly great American judges of the twentieth century, together with Oliver Wendell Holmes Jr, Louis Brandeis and Benjamin Cardozo. He nevertheless never sat in the Supreme Court.

render it? I suggest that this is one of the essentialia of practising with dignity.

Ghandi expressed it differently but surely had the same ideal in mind:

“My joy was boundless. I had learned the true practice of law. I had learned to find out the better side of human nature and to enter men’s hearts. I realised that the true function of a lawyer was to unite parties riven asunder.”<sup>4</sup>

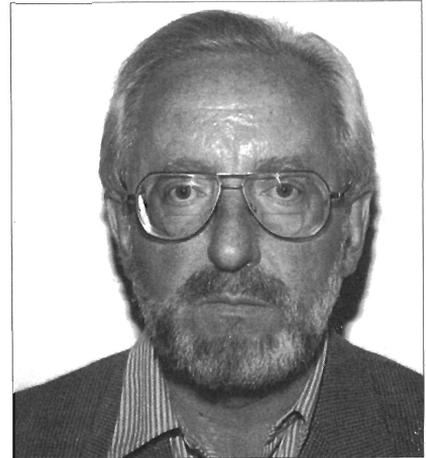
Olawale Elias put the same notion, quoting from Lambert as follows, but in the context of African customary law:

“The native method would tend to adjust disturbances of the social equilibrium, to restore peace and goodwill, and to bind or rebind the two disputing groups together in a give and take reciprocity. The European method would tend to widen the gulf between the two groups by granting all the rights to one of them to the exclusion of the other, because it would in general concern itself with facts and legal principles and take no cognisance of social implications...”<sup>5</sup>

It is clear that both Gandhi and Elias practised law with passion. Can one do otherwise? Passion must be controlled in *this* context of course, lest it overrules reason completely. Aristotle defined law as “reason free from all passion...”<sup>6</sup>

I leave it to you to choose.

Some of us at this stage of our career are more popular, and others less so – some of us have made a concerted effort to be attractive in the public eye, and others again do not deem this significant – some have found renown without seeking it. In my view renown is not an aspect of the concept of hav-



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ing practised with dignity. Let us look at Socrates in this context:

“But my dear Crito, why should we care so much about public opinion? Reasonable men, of whose opinion it is worth our while to think, will believe that we acted as we really did.”

Crito:

“But you see, Socrates, that it is necessary to care about public opinion, too. This very thing that has happened to you proves that the multitude can do a man not the least, but almost the greatest harm, if he is falsely accused to them.”

Socrates:

“I wish that the multitude were able to do a man the greatest harm, Crito, for then they would be able to do him the greatest good, too. That would have been fine. But, as it is, they can do neither. They cannot make a man either wise or foolish; they act wholly at random.”<sup>7</sup>

We have been exhorted to strive for justice as follows:

“To live honourably, to injure no one, to give to every man his own. Jurisprudence is the knowledge of things human and divine, the signs of the just and the unjust.”<sup>8</sup>

## Dignity

High standards are certainly required of us! This will no doubt have led to a certain cynical reflection when we look around and perceive the double standards that are still with us, power that is still being abused and misused by politicians and judicial officers. The constitution has practical implications only for the lawyers and none for the people [apart from the right to vote, I concede, and the dignity that can now at least bud]. The economy is struggling and our profession is at war with itself and our brethren, seemingly floundering without vision. This may all be so but yet there is a dawn as I will show you. Perhaps Justice Oliver Wendel Holmes was right when he told Judge Learned Hand that his job was not to do justice, but to play the game according to the rules.<sup>9</sup>

This may be the carefree way out. According to whose rules are we to play this game? Perhaps the game can only be played properly and with dignity, if the rules, whoever has made them, have a universal standard of morality as their basis. Lord Denning said that without morality there can be no law.<sup>10</sup>

Of course there is a lighter, more human and more exciting element to practising with dignity as well! Patrick Hastings KC put it as follows:

"I have been very fortunate. Nearly half a century ago I chose to be a member of what is perhaps the greatest profession in the world, and during all that time I cannot look back upon one moment when I was bored. I cannot remember one day which was not tinged with some element of adventure, either of hope or disappointment, or failure or achievement."<sup>11</sup>

As far as the duty of the English Bar and the barrister was concerned he referred to only two rules and very simple rules at that:

"To the client who you represent an advocate owes a duty to act with fearless independence; to the court before whom you appear you owe the duty of complete and absolute honesty in all that you say and do. If you fail in either of those duties you will sink into well deserved oblivion. If you main-

tain the tradition that you have inherited you will have earned your place upon an honoured roll."

The truth is not that easily discernable, but surely this is true! You will be on the honoured roll whether you achieve senior status or whether you sit on the bench or adorn the bench. [Not the same concept!] One can also practice with dignity whilst not possessing the qualities which Marshall Hall possessed to a marked degree; he was histrionic, crafty, courageous, eloquent, quick-minded, charming and great hearted. He was, however, also hot tempered, and indiscreet, two grave defects in an advocate. He also vigorously denied that a great advocate had to be learned in the law. "You must take this point", he reportedly whispered to his junior in court, "There is some law in it". On that basis he dreaded the Court of Appeal and only once appeared in the House of Lords. Nevertheless he was a great success in his profession.<sup>12</sup> Some eminent jurists judge your success by the number of times you have appeared in the Appellate Division. A grave standard indeed? He was also not conceited, another quality that is sadly lacking in our profession and on the bench. [There are exceptions of course, past and present, and I fondly and warmly remember the late Mr Justice Davidson and Mr Justice Franklin in this context.]

Despite his unrivalled experience of man's evil and weaknesses, Marshall Hall reportedly remained quite unhardened and loved beautiful things, whether flowers, or works of art.

There is little doubt that we need these endearing qualities. After all, Beethoven's Fifth Piano Concerto is not all demonic fury.

We are not all the same and we have not practised uniformly. When I opened my chambers in Nedbank Building in 1975, furnished not on the grandiose scale as many of us are wont to do these days, but with a few items picked here and there, and from time to time at the most convenient auctioneer [my first marked brief indicating the princely sum of R25,00], I did spend a few R c

return dates of restitution orders on having the following words by Alfred Lord Tennyson, from *Ulysses*, engraved upon a piece of canvas:

"...that which we are, we are,  
One equal temper of heroic hearts,  
Made weak by time and fate but  
strong in will  
To strive, to seek, to find, and not  
to yield."

These words have remained with me, although I have yielded but am still striving. Judge Learned Hand said in 1952:

"Our dangers... are not from the outrageous but from the conforming; not from those who rarely and under the lurid glare of obloquy upset our moral compliance, or shock us with unaccustomed conduct, but from those, the mass of us, who take their virtues and their tastes, like their shirts and the furniture, from the limited patterns which the market offers."<sup>13</sup>

He often asked how individuals would survive autonomously. He detested the normal reliance on "ambition" and "competition" as self-defeating. Nevertheless he would not endorse the escape route of the hermit. Instead, he argued, that individual self-realization came ultimately from choosing one's work on the basis of one's personal preference and then performing it well. The choice of job, he insisted, should not stem from yearnings for renown or riches, or even a desire to "serve mankind". [This is really shocking!] Rather, he urged work "because one likes it and for no other end" and for doing it with "an acute sense of craftsmanship" best assured personal satisfaction and creativity.<sup>14</sup>

## The Bench

Many of us, [of course we would!] feel that we ought to be on the bench. Some of us want to preside there, others need to grace it. Numerous colleagues have of course no such desire. Some of this intermittent desire, one must be honest, evaporates when competence and experience is now, as in the past, mostly not the decisive criterium. Perhaps we should all be glad, and no doubt we will be sooner rather than later: >

“... A Judge’s life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavour. These take an inordinate part of his time, they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work...”<sup>15</sup>

I find the remainder of his speech appealing and fascinating, and of course, as you can imagine, it did shock society:

“I had rather live forever in the company of Don Quixotes, than among a set of wraiths professing to be solely moved to the betterment of one another... A community of creatures engaged primarily in serving one another, except for the joy of meddling and other people’s business, appears, to me at least, so dreary and so empty, that I had as lief sing for eternity in the heavenly choirs as to have any part or parcel in their pallid enterprises. Let us then, if one insists on candour, do our jobs for ourselves; we are in no danger of disserving the State... You will have a chance to save yourself, and that is quite enough to ask in a time when the streets are so full of motor cars, and the radios bark at every other corner.”

## Independence

Many of our colleagues have spent most of their adult life toiling to achieve some type of independence, and I do not mean financial independence, but rather, independence from masters, authorities, the state or any other dominant creature. To that extent and only to that extent are we free and possess liberty, which concept, according again to Learned Hand is ...

“The product, not of institutions, but of the temper, of an attitude towards life; of that mood it looks before and after and pines for what is not. It is idle to look to laws, or courts, or principalities, or powers to secure it... It is secure only in that sense of fair play,

of give and take, of the uncertainty of human hypotheses, of how changeable and passing are our surest convictions.”

The real unhailed and dignified practitioner is the one who endlessly and fearlessly, and with little ostensible reward, appears in the so-called lower courts for clients who would otherwise be at the mercy of haughty judicial officers and irascible police officers. This dignified practice leads to true liberty as a lawyer.

Many of us have left the Bar for “higher” callings. Others have gone “higher” still! Some of those have remained humble and without conceit and by doing justice to those that required it, rendered a real service. Sadly, they are few and far between. Many judicial officers, far too many, are cold, aloof and unjustifiably removed from those that they have been appointed to serve. Their judgments are inordinately long, ponderous, moralising and ultimately self-defeating. They provide a great source of debate, and income to a select number of lawyers keen to be classified as “human rights” lawyers in the public eye, by way of example only. They are not easily understood and even less held in esteem. Perhaps one can discern a principle here, and an idea there. This one can applaud, although does one applaud the shoemaker and the candlestick maker for a job well done? Something else seems to be lacking, apart from the fact that, by way of example, constitutional law and its practical application means absolutely nothing to the woman in the dusty street waiting hours with a bucket for her family’s daily supply of water. Nor does it mean anything to those millions still without proper shelter, education, electricity and food. Perhaps then again, this is all of lesser importance. Perhaps narcissism and self-serving moral equations should be what we ought to strive after. I detect a sense of bitterness as I write this. Yet, it is not intended to be offensive nor hurtful. It is merely a reflection on what is generally perceived to be the true sad state of reality.

Let me again, through Judge Learned Hand, in spite all of the above, but perhaps even because of it, commit you to the “dawn”:

“Beware then of the heathen Gods; have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly scepticism and an open soul. Nor be cast down; for it is always dawn. Day breaks forever and above the Eastern horizon the sun is now about to peep. Full light of day? No, perhaps not ever. But yet it grows lighter, and the paths that were so blind will, if one watches sharply enough, become hourly plainer. We shall learn to walk straighter. Yes, it is always dawn.”

## Footnotes

- 1 Patterson L R *The Profession of Law* New York 1971
- 2 No doubt open to challenge.
- 3 Voet *Pandects* (translation J Buchanan) Vol 1, Bk 1
- 4 Ghandi M K *An Autobiography: The Story of my Experiments with Truth* (translation Mahader) Desai 1948
- 5 Olawale Elias *The Nature of African Customary Law* Manchester University Press 1956
- 6 Aristotle *Ethics* Book V (translation J Thompson) Penguin Books 1955
- 7 Plato *Crito* (translation F Church) New York: Liberal Arts Press 1948; Judge Learned Hand was of similar view. See footnote 13.
- 8 Digest 1, 1, 10
- 9 *Harpor’s Book of Legal Anecdotes* Peter Hay 1989
- 10 Alfred Lord Denning *The Changing Law* Stevens 1953
- 11 Hastings Patrick KC *Cases in Court* Heinemann 1949
- 12 Marjoribanks Edward *The Life of Sir Edward Marshall Hall* London: Gollancz 1929
- 13 Learned Hand *The Spirit of Liberty* Edition Dilliard 1952
- 14 Gunther Gerald *Learned Hand The Man and the Judge* New York : Knopf 1994
- 15 *Learned Hand* *ibid*; I have never read a more graphic sketch. 