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COMPARATIVE SIDELIGHTS ON THE ETHICS OF THE BENCH AND BAR

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The subject of the relationship of lawyers and judges does not appear as a separate topic in the digests, as does the subject of attorney and client. It is under the latter topic that one encounters the various cases where either a member of the legal profession has been found guilty of some punishable breach of ethics, or where it has been held that the charges brought against counsel were unfounded or unwarranted. Meanwhile, under the separate heading of "judges," are the cases collected dealing with those members of the judiciary whose judicial conduct has been called in question. That the cases in the latter group are smaller in number does not necessarily warrant an inference in favor of the judiciary. There are fewer judges. Whether the cases involving their derelictions are in the same proportion as those involving practicing attorneys cannot be determined without further study. In theory, at least, the proportion should not be as high, as the judge at the time of taking office is subjected to a second screening to which the practitioner is not.

The separate treatment of the bench and bar applies also in the field of ethics—doubtless from the fact that the one group acts in a non-partisan or impartial role, the other as advocates or protagonists. Because of this difference in functions, the American Bar Association has promulgated canons of professional ethics for the lawyer and separate canons of judicial ethics. Both canons have been the subject of amendment, the former during the period from 1904 to 1942, inclusive. Amendments were made in the Canons of Judicial Ethics between 1924, when the original draft was adopted, and 1937, inclusive. The Canons of Judicial Ethics prepared by the American Bar Association have been adopted by order of the Supreme Courts in at least four states: Florida, Michigan, Virginia and West Viriginia. In at least eight other states, California, Georgia, Iowa, Kansas, New Mexico, New York, Oregon and South Dakota, the state bar associations have adopted codes of judicial ethics. The Conference of California Judges in 1949 adopted its own self-prepared code, differing in some details from that of the American Bar Assocation. Not having read the former, I intend no adverse reflection on it when the comment is made that the latter seems to me an excellent statement.

As is well known, the attempt to codify is not new in this world—either in the field of law or ethics. And it is interesting

to trace the development of these codes over the ages and to note the basic similarities that appear in them, as well as the variations.

One system which gives as much space to the judiciary as to the practitioner, and yet is so brief that it can be set forth in this article, with the hope that it may both edify and at times amuse, is "The Damathat," or "Laws of Menoo." The book from which quotation is taken was translated from the Burmese by D. Richardson, Esq., and published in Rangoon by the Hanthawaddy Press in 1896. It was given to me by Mrs. William Fitzwilliam Grahame and her late husband, the latter having been for many years in the British Civil Service in India.

PROPER AND IMPROPER JUDGES—BURMESE FASHION

The subject of judges is separately treated in the sixth volume. Its 12th section concludes with this sentence:

> * * * O excellent king! there are five descriptions of men who are proper to be made judges, which are as follows:—the king, who, abiding by the ten laws (for his guidance,) gives his decisions in accordance with them; the judge, who abiding by the Damathat, gives his decisions so as to avoid incurring the pains of hell; the judge who decides like a blind man who feels his way with his staff, and takes the way that is best; the judge who decides between the parties impartially, like the index of a pair of scales; these five men may be appointed judges.

It will be noted that only four types of men are actually described as being proper to be made judges, although reference is twice made in the paragraph to the fact that there are five descriptions. Whether this apparent omission of a fifth type comes about through an error in the translation or whether the omission also occurs in the original Burmese, the writer so far has been unable to determine and would be glad to hear from anyone who is conversant with the Burmese language, as the book in his possession contains the original Burmese on one page and the English translation on the opposite—like the Latin and Greek trots used by students.

The 13th section then goes on to state the negative side as follows:

> The seven men who should not be made judges, are as follows:—the man who decides in favor of the party who ought to lose his cause, because he is of high family; the man who takes bribes, and decides in favor of the party who should lose; the man who decides in favor of the party who should lose, because he is his relation; the man who, from fear of death or other evil, decides in favor of the party who should lose; the man who decides against the party who should gain the cause, because he is his enemy; the man who decides without ascertaining the facts of the case; the man who knows the facts, but because he has the power, decides falsely. These seven men whose decisions are influenced by inclination, enmity, fear, or folly, the king taking council with his ministers shall dismiss from their situations, and oblige them to return all expenses incurred for these decisions. Then will the country be happy and flourishing. * * *

In the pastoral country of Burma, it further is interesting to note that in the 20th section of the second volume of Menoo "Pleaders" and "Doctors" were put on somewhat the same basis:

> Any good pleader, though the statement of his case may not have been taken down, if he has only just sat down, or put up the sleeve of his jacket, shall have a right to his pay. There shall be no plea that the case was not noted.
>
> If the client shall run away, or conceal himself, the pleader shall bear the whole amount of the decree. If he produce, or hand over the client, he is free, and shall have a right to ten per cent for his pay and security. If a pleader be bad, he must take the consequences; if a court messenger commit any wrong, he must take the consequences; the case he is employed in shall not suffer.
>
> If a pleader shall have gained a cause, he has a right to a percentage. If he lose it, he has a right to a reasonable remuneration. If it be a matter of life or death, or redemption for the same, and the client shall not suffer death, or pay the forfeit; the pleader has a right to a fee of thirty tickals of silver, the price of his client's body.
>
> If a man shall say to a doctor, 'give me medicine—if I recover, take me as a slave;' if he do recover, and do not wish to become the slave of the doctor, he shall have a right to the legal price of his body, thirty tickals of silver.
>
> If the sick man's parents, wife or children, shall have given him up as beyond the chance of recovery, and the doctor shall sleep by him and use his utmost endeavours for his recovery, and he shall recover, he shall have a right to thirty tickals, the price of his life; if he do not recover, but die, the relations shall offer to the doctor the pure waters of friendship. With pleaders and doctors it is the same. In no case should they recover a smaller remuneration than three tickals of silver.
>
> After the statement of the case has been written out, the client shall not call another pleader. If he do call another, who shall plead, the first called, for his presence, shall recover an equal amount of of remuneration.
>
> * * * Let doctors and pleaders be considered the same; neither shall have a right to demand payment after the expiration of seven months. Though it is thus said, if the patient or client can not pay at the time, (and) the demand is made, or if they go to another village or district, and remain away for a length of time, when the (doctor or pleader) shall see him, he has no right to plead length in time. Because they have saved him from death, or from redeeming his life, they ought to have an offering of the pure water of friendship. As regards this offering—a man who understands holding the pure water, the cover of a dish, a pot, cup, or the glass, is worthy of three tickals. This is what is meant. * * *

These Burmese provisions have been set forth because they do not seem to be available in the libraries in this area. They also somewhat modify the impression given in Rudyard Kipling's poem, "On the Road to Mandalay," about Burma being a place where there "ain't no ten commandments and the best is like the worst."

In England, due to the division of the legal profession into solicitors, who have their respective clients but who do not appear in court, and barristers, who are not exposed to what some call

the "contaminating influence of clients" but who are retained by the solicitors for the latter's court cases, the relation between bench and bar is somewhat different from what it is in this country. The barristers, who thus are advocates, have their position as officers of the court more definitely emphasized. And yet, even as between barrister and judge, the British reticence and leaning toward demarcation shows itself in the custom that judges eat separately from members of the bar. British justice in its very training and setting thus makes for the impersonal, impartial decision, "like the index to a pair of scales," whether in the London courts or in the jungles of Burma. One suspects there may be more *esprit de corps* in respect to the things that are proper and the things that are not done.

Ethics of Bench and Bar Interdependent

On the European continent, where the civil law is more prevalent, one might expect the same thing—that the judges might go one way and the practicing lawyers another. It is interesting therefore to come across the following statement from a member of the bar in Italy:[1]

> In a system such as ours, where the lawyer is invested with public functions, he is placed morally if not materially on the same plane with the magistrate. The judge who does not respect the lawyer or the lawyer who does not respect the judge forgets that the two professions are like communicating vases. The level of one cannot be lowered without equally affecting the level of the other.

If the foregoing can be said of the European system, how much more does the statement apply to the bench and bar in this country and particularly in those states like Colorado where judges are elected. Tennyson's lines in his poem, "The Princess," describing the role of man and woman, apply with like force to the relationship of the bench and bar:

> "They rise or sink together
> Dwarfed or God-like, bond or free."

The Denver firm of Bancroft, Blood and Laws has been dissolved by reason of the recent death of Frank N. Bancroft and Arthur H. Laws, and a new firm has succeeded it under the name of Blood, Silverstein and Torgan. Partners in the new firm are Walter W. Blood, Harry S. Silverstein, Jr., Harold D. Torgan, Martin J. Harrington, and Robert C. Tallmadge.

Frank L. Hays, Jr. and John W. Patterson have announced the opening of offices at 602 California Bldg., in Denver.

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[1] Calamandrei, Piero. Eulogy of Judges. (translation printed by the Princeton University Press 1942) p. 26.