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The Duty of Lawyers

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THE DUTY OF LAWYERS.

A Thesis Presented for Graduation from
The School of Law,
By
Matsugu Takemura.

Cornell University, 1890.
It is impossible to mark out accurately the boundaries of the duty of lawyers, or to define it as such, within a small compass. Any attempt to do this would fall far short of perfection, or even the effect of the task would unavoidably be a lame and superficial one, just as with the productions of a poet who, as a consequence of a minute analysis of human nature, gives us vague phrases instead of images, and personified qualities instead of men.

Thus having turned aside from a definition or limitation of the subject, our constant concern in this treatise shall be engaged to portray the image or man, but not the vague phrases or personified qualities of the vast duties of lawyers.

How can we expect to carry on that purpose to a successful end? Certainly it cannot be easily executed, because the extension of the field of their duty is too large, and the forms contained in it are too numerous for the purpose. I cannot but reflect that if the task is not performed in a correct and just way, it will fall under the same lot with the definition or limitation, and the reader will saunter through a vast field without clear and accurate thought but with dim and vague impressions, arriving at the goal at last.
with the disadvantage of confusion rather than the advantage of reason. But one thing we will venture to hope for,—and it certainly shall be our constant aim,—by diligence and attention, to paint precisely one after another every form in the field, and go on until we shall reach the goal where a whole comprehensive view can be taken.

The mode introduced above is the best of any, or perhaps is the only mode to expose a whole picture of the duty of lawyers before the reader, and we cannot help but rely upon it. To do this, however, requires doubtless a large extent of paper, as the duty of lawyers covers an immense space. A voluminous work is not consistent with our present intention, and our limits do not permit us to do it. For this reason we are obliged to omit to paint some portion of the subject, and take up particularly one division of it. This is not a contradiction of our inferences, but an inevitable result in the perfect execution of our present concern. Nor, we are convinced, will the severest of our readers blame us if, in a case like the present, we divide the subject as necessity requires of us. Nothing can be more idle than an intention to include an improperly large amount within a small compass.

The portion thus isolated from the whole circle of the subject, and committed to our survey step by step, is the duty
Lawyers must exercise a great influence toward their state; besides, they are great actors on the stage of court or university. Their fellow citizens would naturally elect their legislatures, magistrates, and other politicians from among their circle. So, I dare say there may be or were some lawyers who are not politicians, but there should not be, nor was there any true politician who is not a lawyer. If there is any politician who is not a law student, he should become a lawyer in the course of his pursuit of knowledge.

"That which sways human beings is not sword, but word" were the words of Ulysses in the famous productions of Homer. This is true when we regard them as an expression denoting the mighty influence of human thought. But if anyone shall ask me what controls man concerning the progress and preservation of human society, I am ready to answer that it is law. This needs scarcely any illustration. No matter whether it is ancient or modern, eastern or western in the world, there never has been nor is there any country or state, in the true sense of the words, existed or organized under the condition of government without law which consists of the revelation of God, or made by the people from their necessity for that purpose. Otherwise it must have perished in its
Cicero says: "Lex max vera atque princeps, apta ad iubendum et ad vetandum, ratio est recta summi Jovis."
And he also says: "Lex est recta ratio imparandi atque prohibendi".

So the material refinements in human society follow in the progress of law and even the former cannot be acknowledged by any one but the latter. Thus we logically deduce the proposition that lawyers, the managers of law, are representative of the promoters of human welfare. They can have a power to reform the order of society if it is not proper to be preserved and a power to interrupt its disorder, if it is detrimental, even though little, to the common welfare of all the people. Indeed their power is mightier than the army or perhaps than anything else. The Vedus says: "Law is the king of kings, far more powerful and rigid than they; nothing can be mightier than Law, by whose aid as by that of the highest monarch, even the weak may prevail over the strong".

How powerful it is! And it is extremely true that the lawyers' power should correspond to that of law.

But in as much as their power is great and formidable, their duty to discharge and service to perform must be of a great and formidable nature. The large and complicated phenomena of human affairs are the place in which to experience their duty. Lord Macauley discussed with strong an.
vigorous language, the duty of the poet to perform properly his function: "Perhaps no man can be a poet, or can even enjoy poetry, without a certain unsoundness of mind, if anything which gives so much pleasure ought to be called unsoundness. By poetry we mean, not of course all writing in verse, nor even all good writing in verse. Our definition excludes many metrical compositions which, on other grounds, deserve the highest praise. By poetry we mean the art of employing words in such a manner as to produce an illusion on the imagination; the art of doing by means of words what the painter does by means of colours, "----", and quoted a few lines from a great poet as the test of his argument.

"As imagination bodies forth

The forms of things unknown, the poet's pen

Turns them to shapes, and gives an airy nothing

A local habitation and a name".

These then are the maxims of that class. On the contrary, our duty as lawyers must concern the concrete things in the world, instead of a treatment of abstract imagination, as by the poet; and we must so regulate existing phenomena of things as to preserve the order of society and promote the common welfare of our fellow-subjects.

Although we will not, as we have already said, investigate and discuss anything beyond our destined sphere in
this treatise, yet we are assured a few lines of hurrying survey of another division which is situated by our passage, and which is not blamable or valueless to describe here.

It is not only as politicians that the lawyers are called upon to discharge their duty; it is by them alone that the commissions of the authors of text-books and professors of our law schools are filled. And here a very ample field is opened for the lawyers to exercise their talents, in supplying to young a competent knowledge of that science which is to be the guardian of their natural rights and the rule of their civil conduct. Therefore the lawyers must apply themselves to their tasks with great care and diligence, remembering that their mistakes are beyond any power to atone with something else.

To proceed a step, lawyers are required to establish the right, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subject by serving upon the bench. In this situation their whole consciousness must be kept ready to make its appearance on any occasion. Moreover, as far as the commission of peace as magistrate is concerned, lawyers, who would naturally be elected to it, ought to know that it is the productive implement of either happiness or calamity to the society.

Lastly, we will consider the so-called professional duty of lawyers, a more extended field than the others, and
one which the sickles of many great workers have been put upon, and reaped all its substantial harvests, so that we cannot have any remaining share therein. Hence to shorten our argument it is very wise and instructive to quote in this place, what was said of Alexander Hamilton, who was one of the greatest and most perfect lawyers that have ever lived, by one of his gifted contemporaries:

"It is rare that a man, who owes so much to nature, descends to seek more from industry; but he seemed to depend on industry, as if nature had done nothing for him. His habits of investigation were very remarkable; his mind seemed to cling to his subject till he had exhausted it. Hence the uncommon superiority of his reasoning powers; a superiority that seemed to be augmented from every source, and to be fortified by every auxiliary; learning, taste, wit, imagination and eloquence. These were embellished and enforced by his temper and manner, by his fame and his virtue. It is difficult, in the midst of such various excellence, to say in what particular the effect of his greatness was most manifest. No man more promptly discerned truth; no man more clearly displayed it; it was not merely made visible, it seemed to come bright with illumination from his lips. But prompt and clear as he was, fervid as Demosthenes, like Cicero, full of resources, he was not
"less remarkable for the copiousness and completeness of his argument, that left little for cavil and nothing for doubt. Some men take their strongest arguments as weapons, and use no other, but he left nothing to be inquired for more, nothing to be answered. He not only disarmed his adversaries of their pretext and objection, but he stripped them of all excuse for having urged them; he confounded and subdued as well as convinced. He indemnified them, however, by making his discussion a complete map of his subject, so that his opponents might indeed feel ashamed of his mistakes, but they could not repeat them. In fact it was no common effort that could preserve a really able antagonist from becoming his convert; for the truth, which his researches so distinctly presented to the understanding of others was rendered almost irresistibly commanding and impressing by the love and reverence which it was ever apparent he profoundly cherished for it in his own."

Again we will quote in this connection what was said of law students by the famous Judge Cooley:

"The law student must not forget that he is fitting himself to be a minister of Justice, and that he owes it to himself, to those who shall be his clients, to the courts he shall practise in, and to society at large, that he cultivate carefully his moral nature, to fit it for the high and responsible trust he is to assume. The temptations
"of dishonest gain and the allurements of dissipation are all the time leading to shame and ruin, from the ranks of our profession, a long and melancholy train of men, once hopeful, perhaps gifted; but the true lawyer is pure in life, courteous to his associates, faithful to his clients, just to all; and the student must keep this true ideal before him, observe temperance, be master of his actions, and seek in all things the approval of his own conscience, if he obtain the highest possible benefit from the study of law." This much is the result of our hurried survey of the above described divisions. We will now pass over and go into our destined place.

We have already remarked that law is the foundation of the organization of the state, and that lawyers must do great service toward their state in order to preserve its order and promote the welfare of their fellow-subjects. This is true so far as my opinion is concerned, and I am sure that no rational man would censure it. If, then, this be so, the lawyers must be inclined to intend, as a necessary duty, to keep all the minds of the state in the belief that law is the foundation of order, and above all that politics is a subject of law. How can we expect these things?

Before going farther, it is desirable first to define here, what is meant by law or politics in their proper
sense. But we will not go into the discussion of these points, because it would amount to a repetition of what we are well acquainted with. We will consider minutely the following two questions:

1. In order to make law the foundation of the state it is indispensable that the general feeling of the people must be inclined to regard law with reverence. How then can lawyers preserve a high degree of morality of the people, appropriate to that purpose?

2. In order to make politics a subject of law, the internal policy must not be influenced by political parties and the relation should not be modified by the different principles of any foreign power. Then by what process should lawyers consolidate the cooperation of law and politics?

These will be very important questions of the duty of lawyers in serving their state. So we will try to solve them with accurate thought, and consult either the facts of history or the inspirations of human reason. But I think it is better to deduce chiefly from human reason, rather than to induce from historical facts which are endless to mention. It is by this method that we shall consider these questions in their order.

1. How can the lawyers preserve a high degree of moral-
At the outset of the solution of this question we must as a necessary way of investigation, turn our eyes away and look at the character of human beings. It is well known that in man we distinguish two sides. On the one side, he belongs to nature and is a natural being like the other creatures.

In this connection he is only the most perfect of animals, and like all other creatures he is subject to the law of nature. On the other side, man is a spiritual being. He is distinguished above all other creatures by having the possibility given him of determining himself to something. He has a will and a choice. This possibility constitutes the freedom of men. Freedom, therefore, is a flourishing seed of the moral as well as the intellectual sphere of mankind if it is not planted beyond the boundaries of natural law. Where there is no moral freedom existing, morality cannot exert its influence; in other words, no moral freedom is no morals.

In this way, the progress of morality may be judged by the fact that mankind sinks into the mere condition of animal life without the directions of knowledge and moral freedom.

For this reason, to assure a high degree of morality it is essentially necessary that the moral freedom must not be disturbed. Then is this the only means to promote morality? No; we have positive means to that purpose.
It must be kept in mind that the moral freedom is a proper application of moral sense, the virtue of honesty, hope and charity. Before we step on farther, it is desirable to propound several questions as to the origin of that moral sense. Does man himself have the moral sense? or does he get it from outside? or does some degree of civilization induce its appearance? or evolution of human society?

These questions have attracted the attention of many great thinkers and are worthy of our consideration. But we should say that the discussion of these questions is of no avail for our present purpose. Nevertheless it is very necessary to assert that in every society of human beings there exists this moral sense as a matter of fact, and that it is a thing indispensable to the happiness of man and preservation of society. Suppose it to be excluded from a society, what would become of it? Do you think that society can keep on the prospects of science, literature, and art, or even society itself? Then, how may it be enlarged and promoted, by and by, until it reaches a higher degree of perfection? Is it the best mode to advance only the formal and material civilization of the state? It is not. The consequences of material civilization should be a production of embellished morality.

Embellished morality! Thou hast thought numerous na-
tions to have degraded their conditions! Thou hast also been a source of despotic government and of destruction of human rights! Take care, lawyers, the guardians of law.

Don't forget that the injudicious institutions of the nations rights corrupt the morals of the people. You ought not to approve such an institution, but should adopt a proper and effectual one to refine morality.

We have now come to the most minute and complicated part of our subject, namely the question whether the legislature has the power to make a quite new law or not. This question may appear very paradoxical when we look upon a well settled principle of government of civilized nations. But scientifically, it gives us a sufficient place to dwell upon it and is occupying already the attention of enlightened men of the European continent. Some hold positive and others negative opinions. We will sum the opinions which are negative:

The laws of civil conduct of human beings are governed by the law of evolution of society, just as are the customs, manners, necessities, and ideas of the people.

So the reformation of law is imputed upon the gradual refinement of the constitution of the people, especially the development of science and conscientiousness among them, and not upon the acts of the legislature. The legislature
could not perform it at a premature time or by a harsh and dishonest method. If they were to do it under such circumstances the effect would be more formidable than the calamities of war, pestilence and famine. Indeed the history of improperly adopted laws forms a most lamentable chapter. Hence the function of legislature is confined to adopt or rather acknowledge, but not to make more refined laws as the condition of the people and the civilization of the state advances. This argument is true so far as its reasoning might reach, but we think it is far from perfection.

The true reasons should be:

(1.) As the customs of the people have a great influence upon the law of the land, so the law modifies in turn the customs, as for example the prohibitory law does. So the legislature must prevent the degradation of the customs by the foresighted passage of new law.

(2.) On the scientific investigation of the true character of man or of natural law, if it can be discerned that the law has a power to influence man who has a corresponding action of character, capacity and tendency, the legislature must improve the customs, manners &c., by making a time serving law.

(3.). When a new law is required by a new relation of rights or by a recent necessity of man, the legislature must
take up that task according to the scientific testimony, or the movement of the general feeling of the people.

(4.). If the reformation of law is necessary for the preservation of dignity and the capacity of the state against foreign powers, the legislature must not fail to do it without delay.

(5.). Generally speaking, law is a manifestation of the general feelings and ideas of all men, and not of the characteristics of particular people and nations. Therefore, if any state advances to the degree of civilization which requires new law, the legislature must reform old laws with the approval of the science of law.

These propositions may serve to assert the function of the legislature. What, then, is the mode as to the preservation of a high degree of morality? As a conclusion of our reasoning we shall lay down the following rules:

a. Law must be justice itself, and the legislature must not be influenced by some interest as an individual is.

b. The power of law must be clear, right, supreme, and rigid.

c. The legislature must allow the people freedom of speech and impress, although it may seem very dangerous at certain times. This is of great interest to the legislature in order to know the general tendency of minds and thereby
to encourage good, and root out the evils of the state.

d. The legislature must not only endeavor to sweep away the existing corruptions of the state, but also their cause by a scientific investigation.

To repeat the above rules briefly, the governmental function, in order to preserve a high degree of morality, must practice these things: (1). The action of the government must be fitting to the spirit of the law; (2). The condition of social existence must be investigated in order that the law may be based upon good foundations.

If these conclusions are not erroneous the duty of lawyers should be very clear:

(1). The lawyers must perform their duty by the aid of science.

(2). They must endeavor to apply to law, the fundamental principles of law.

(3). They must not neglect the fact that public functions should be given by law, and should be practiced according to law.

(4). They ought to protect the freedom of man and the power of law and reason.

(5). They must investigate the cause and effects of evils to the state, without listening to their passion and misapprehension in order to prescribe medicine to cure the sick.
It will be too obvious to remark here that the state where no government and no law exist, lacks the practical mode of keeping the people in a high degree of morality. Undoubtedly there are other things which have a great influence upon it. Such are education and religion. Indeed, their valuable acts on the stage of civilization are inestimable. But they cannot exert their influence unless there exist the two elements described above. We will not enter into the discussion of them, because they deserve a separate treatment, but pass to the second question.

2. By what process may the perpetual cooperation of law and politics be assured?

We cannot deny that there exists some difference between law and politics, and also between law and morality. But if we look upon sociology as a single tree, they can be nothing but its branches. So their relation to each other ought to be very close in order to advance the civilization of the state or country.

It is said that politics may be divided into two classes,—a science, the object of which is to investigate the true reasons and to acquire knowledge, and an art, which is an application of the principles to the given affairs; and that the science therefore, may push its way forwards without
any obstruction, while on the contrary the art is not so, for it must answer to the present necessity of the state. We admit and acknowledge that division. But what is the division to our present purpose? It would not perhaps obviate or aid our conclusion. Indeed the condition of the state not only influences the political affairs, but surely it modifies the application of law. How vigorous and strong minds legislature could do to apply the law contrary to the condition of the people if they are acquainted with the science and experience or even have common sense?

Again it is said that the pursuitance of science is to be made with a general and collective idea, but art manifests its characteristics in a particular case and at a particular time. It may be so, but in my opinion, nothing is more dangerous if the above doctrines are absolutely pursued. The general and collective idea could not be dispensable on both sides. Moreover they say, with a casual glance, that politicians must take up their function with knowledge which is derived from both science and art, because, if they rely upon science alone, a disorder falls upon the government. From this reasoning, they deduce the proposition that politicians have to look at the present necessity which accrues from competition of political parties or to meditate feelings of opposite parties or rely on some party to keep in their positions.
We can not help thinking that these ideas are fallacious. Competition is a necessary element for the improvement of human affairs, and so political affairs cannot be well off without the interposition of it. But the foundation of government ought never to be fluctuated by that. To prevent this there arises some necessity to discover a fundamental principle as to the preservation of the dignity of the state or the rights of the people. Where should you seek that principle? You must search in vain everywhere but in law. Politics must array its forces on the side of law, and not against it. Moreover, we are assured by the facts of history that whenever politics have felt the hands of law, it has been at a time when they escaped from this destined line, that is to say, the politics had gone far beyond the interest of the state.

Experience shows that the politics which follow the principles of law are the strongest protections of lands, on the stage of international relation. The triumphal banner of recent law is flowing over the independence and freedom of nations throughout all the world. Such is the tendency of modern international regulation of political and commercial affairs and the effect of advancing civilization. But will it be possible that the history of battles on either sea or land shall be excluded hereafter from the history of human affairs and the records of arbitration of mutual rights be
substituted for it? Will sword and shield change their office of peace? Shall we hear no more the cannon except in times of joy? The questions puzzle us and we cannot give a favorable answer anyhow. Nay, we wonder whether (but we hope not with all our heart,) or not the dreadful phrases of ancient history "The sun rose and sank and the battle still raged. (Throughout all the wild October day,) the clash and din resounded in the air. In the red sunset, and in the white moonlight, heaps upon heaps of dead men lay strewn, a dreadful spectacle, all over the ground", will easily find a chance to reappear in the history of our generation.

It is always lamentable that the modern civilization is far from the point which it is to reach, and the refining international law is obstructed in its advancement by the complicated affairs of nations. Some people are fond of the savage methods through mistake of true interests, and others by the pretention of historical course. Therefore every country cannot take a nap upon law, but must be ready to rise according to the change of political phenomena of other nations. But we are of the opinion that even in such a case, law which regulates the mutual rights solemnly lords over all matters. No power can move it, nor any one escape from its control. Moreover the most wholesome mode to treat properly the struggle with foreign powers will be to make all people
adherents to their constitution, freedom and morality,—in other words to make them vigorous beings cling to their rights and duties.

In summing up what I have said, we see that the only means which is to preserve the freedom and independence of the nation or to promote the welfare of the state, is to avoid the conflict of law and politics. Then the question arises, How can it be executed? It will not be improper to say by way of answer, that it is to elevate the minds of the people to venerate law highly, and more emphatically to make all minds law itself. This task falls under the dominion of the lawyer’s duty.

Now we will treat in more detail the above proposition as to the cooperation of law and politics within a country or state. And in this, lawyers must wish that:—

1. The constitution of the state must be obeyed or revered by all people, but not satisfied with its existence.

This proposition, at first sight, may appear evident to all men of common sense, but its practical application has puzzled the profoundest thinkers, and its misapprehension has been a source of conflict between law and politics.

The constitution is a fundamental law of the state which regulates mutual rights and duties between the governor
and the governed, and so is a law of laws. All people, governor or governed, must obey it absolutely and all regulations or rules must follow it invariably. But is the constitution not governed by the law of evolution? Yes, it is. It must be changed by the advancement of the state and so its amendment often becomes desirable. This is true, but a formidable danger lies here. Why? I say that because every political party thinks very easily by passion that the constitution is not proper for the condition of the people. The conflict between the constitution of the state and the passion of any political party should not be the source of amendments to the constitution. The mode of amendment is different according to written or unwritten constitution. No matter, however, which constitution it may be, the amendment must be a concurrent desire of all the people, and must be made necessary by the condition of the state. We do not design to treat of amendments to the constitution, but will simply say that the fundamental law which is the basis of all regulation must not be easily altered and must be obeyed or observed by all.

2. Judges must have the power not to apply the law which is contradictory to the constitution.

This proposition has been discussed by all enlightened minds of both America and Europe. Some say that the judges have no power to decide whether the law is in conflict
with the constitution or not, because their function is to
decide any case in accordance with law, but not to decide law.
But others insist on the opinion that in a case of conflict
of two laws, judges must adopt the law which is consistent
with the constitution, which is the fountain of all laws, and
must not decide contrary to it. It seems to us that the
latter is the more reasonable and prevails throughout the
civilized world. But in that case, judges would do better
to look at the article of the constitution, but not repudiate
any law on account of a spirit unfavorable to the constitution
and the principles of natural law. If it is so, they are
not only out of the protection of law, but equally out of the
veneration of the constitution.

3. All people, governor and governed, must be respons-
ible to the constitution for their acts besides having the
highest veneration for it.

This proposition need not be illustrated any farther.

The foregoing paragraphs are the general survey of
the duty of lawyers. The lawyers must cling to the opinion
that the foundation of civil order ought to be based upon the
preservation of all minds to honor and law, and that politics
must be subject to law. Thus the freedom and independence
of the state may be perpetuated. And moreover, they must
decide the difficulties which beset them, by the principles of science and by the aid of experience.

And thus each of them shall say at another time: that "I thank Thee, to-day I have discharged my duty and performed my function without staining the name of lawyer, and transgressing the benevolent design of my ancestors and teachers."