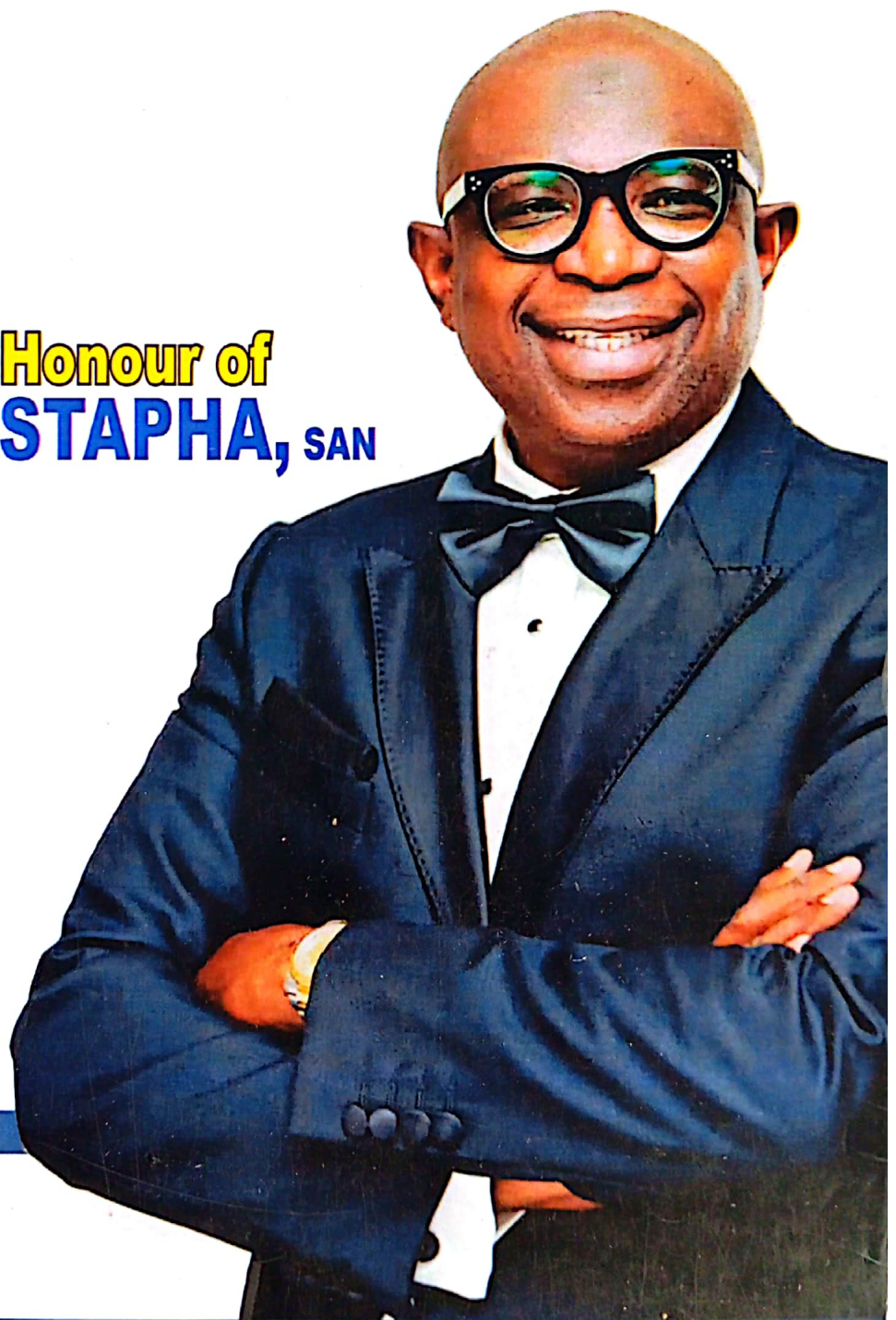


Trends

in Law, Practice and
the Shari'ah in Nigeria

Essays in Honour of
A. U. MUSTAPHA, SAN



Editors:

Prof. A. I. Abikan

Prof. A. O. Sambo

Dr. A. S. Ishola

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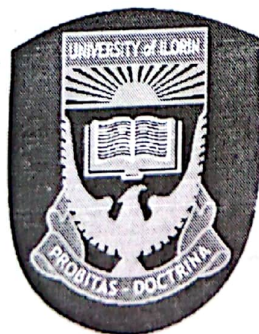
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CHAPTER TWO

CRITICAL THINKING NEEDS OF A LEGAL PRACTITIONER

Abdulqadir Ibrahim Abikan* & Ahmad Husseln Folorunsho**

Umar wrote to AbuMusā Al-Ash'ari: "Profound understanding is the grasp of what is evident to you from outside the Qur'an or Sunnah. Then weigh matter on its basis, know the resemblances and similarities then discern them from what is liked by Allah the Almighty and compare it with the truth"
Al-Bayhaqi¹

"To draw inferences has been said to be the great business of life. Everyone has daily, hourly and momentarily needs of ascertaining facts, which he has not directly observed; ...because the facts are of importance to his interests or to his occupations.... It is the only occupation in which the mind never ceases to be engaged."

John Stuart Mill

2.1 Introduction

The above quotations show that thinking or reasoning is a thing by which everyman lives whether or not he is conscious of the fact. However, while the latter is accommodative of everything that passes through the human mind, the product of which may be informed, properly reasoned, or effective decision otherwise, the former does not embrace all types of thinking. It is assertive thinking as a duty directed towards problem-solving, through the making of best judgment and prescribing the best way of going about it. That is, think critically. This leads to asking a pertinent question: what is critical thinking about?

According to Dewey, critical thinking is active, persistent, and careful consideration of any belief or supposed form of knowledge in the light of the grounds

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¹ See SayyidSabi, *FiqhusSunnah*, vol. 3, p. 321 Arabic version.

support it and the further conclusion to which it tends.² It includes the evaluation of the worth, accuracy, or authenticity of various propositions, leading to a supportable decision or direction for action. Nothing describes the professional calling of a legal personality better, be he a legal practitioner,³ judge or jurist, law teacher, etc.

The thinking goal of a legal personality is to identify and validate the rights, duties, powers, and privileges that exist among individuals or entities under a given set of circumstances.⁴ For instance, a layman would conclude that there is no remedy for a bank customer who signed documents exonerating the bank from liability arising from improper handling of his cheque book but found that his account was debited with some unauthorized withdrawal through forgery of his cheque. A legal mind would be instantly put at work to discern where the duty of care lies according to the law, to sustain an action against the bank for breach of contract, negligence, and loss of reputation, irrespective of their earlier agreement.⁵

However critical thinking may not be sufficient to ensure the best judgment of a particular case. This is because a rule of law establishing a right may be so generally framed to accommodate more than one meaning. For this reason, a legal personality also has to be creative. Creativity, although not susceptible to universal definitions,⁶ has been defined as the ability to juxtapose ideas in a new and unusual way to find solutions to problems, create new inventions, or produce works of art.⁷ Lawyers employ their creative minds and take advantage of the plurality of meaning of rules of law and technicalities to canvass arguments in support of their client's claims. A judge is also creative in scrutinising the evidence and filling in the gap in the law to do justice in the case before him.

² See Dewey, J., *Experiences and Education*, (New York: Macmillan, 1938) p. 9.

A legal practitioner is a person entitled to practice as a barrister (advocated) or as a barrister and solicitor in Nigeria either generally or for the purposes of any particular office or proceedings, see S. 24, Legal Practitioners Act, Cap. L11, Laws of the Federation of Nigeria, (LFN) 2004; unlike the case in England where differences exist in the practice of Barristers and Solicitors with the former having right of audience in court and the latter having to work in the office, every legal practitioner in Nigeria is a barrister and solicitor, see J. O. Asein, *Introduction to Nigerian Legal System*, 2nd ed., (Surulere: Ababa Press Ltd, 2005); M. C. Ogwezzy The Legal Practitioners Act: A Code for Regulating the Conduct of Lawyers in Nigeria, *AGORA International Journal of Juridical Sciences*, (2013): 3, p. 110; and *CAMAC (Nig.) Ltd. v. Cabaco Ltd.* (2016) LPELR – 20520 (CA).

⁴ See Vandevelde, K. J., *Thinking like a Lawyer*, (Oxford: West view Press, 1996) p. 1.

⁵ This is the fact of *Haston (Nigeria) Limited v. African Continental Bank* [2002] 7 S.C.N.J. 376.

⁶ See Badi, J. and Tajdin, M., *Creative Thinking: An Islamic perspective*, (Kuala Lumpur: International Islamic University Malaysia, 2004), pp. 154-155.

See Eysenck, M. W. (ed.), *Blackwell Dictionary of cognitive psychology* (Oxford: Basil Blackwell Ltd., 1991), p. 86

As complex as this process may seem, the last few generations produced men who were well-grounded in both critical and creative thinking and left indelible marks on legal and judicial development⁸. The present era may not be able to boast such personalities. The reason for this is not unconnected with the fact that the quality of legal education of the sixties which competed favourably with other countries of the world has waned.⁹

This chapter explores the causes of this decline and proffers practical solutions. It proceeds to examine the relationship between critical and creative thinking and the various stages of lawyers' advocacy. It then looks into the ingredients of legal reasoning skills that produced the past legal luminaries and compares them with the reasoning tools embedded in the content delivery of law courses in the present time.

2.2 Critical legal thinking of a Modern advocate

Critical thinking is an umbrella term that covers different forms of learning acquisition or a wide range of thought processes. It occurs when students are analyzing, evaluating, interpreting, or synthesizing information and applying creative thought to form an argument, solve a problem, or reach a conclusion. It is used to describe forms of learning, thought, and analysis that go beyond the memorization and recall of information and facts.

Critical thinking entails several intellectual skills, which include:

- a) Developing well-reasoned, persuasive arguments and evaluating and responding to counterarguments;
- b) Examining concepts or situations from multiple perspectives, including different cultural perspectives;
- c) Questioning evidence and assumptions to reach novel conclusions;
- d) Devising imaginative ways to solve problems, especially unfamiliar or complex problems;
- e) Formulating and articulating thoughtful, penetrating questions; and

These include, in the Bar, late Rotimi Williams, Senior Advocate of Nigeria Senior Advocate of Nigeria (SAN), the rank of SAN is an equivalent of Queen's Counsel in the UK, late GaniFawehinmi SAN, J.B. Majiyagbe SAN, late G.O.K Ajayi SAN; and on the bench, AdetokunboAdemola, Chief Justice of Nigeria (CJN), Teslim O. Elias CJN, Fatai Williams JSC, Niki Tobi JSC amongst others

⁹MammanTahir, "A Review of the Framework of Legal Education in Nigerian Universities" *being the 3rd Mustapha Akanbi Faculty of Law Annual Lecture* delivered at the University of Ilorin on 8th November, 2010, p. 17.

- f) Identifying themes or patterns and making abstract connections across subjects, amongst others.¹⁰

These skills are expected to be part of the learning process for law students and they become handy tools in every stage of advocacy while proffering solutions to their clients' legal issues as legal practitioners. The skills are needed to inform legal opinion concerning a set of facts and take decisions to institute legal action, researching the facts, and the applicable laws and framing legal arguments in court.

2.2.1 Giving Legal opinion and deciding to institute legal action

Whenever parties to a dispute¹¹ consult a lawyer on a disputation, the aim is to ascertain their legal rights and duties and to possibly establish them before a competent court and obtain a remedy. The legal rights sought to be ascertained are types of legal relationships governed by a set of rules that influence the way others behave towards the holders of the rights. They often imply the existence of correlative duties among people or entities. They may be "claimed rights" which imply duties on others; "liabilities" which prevent actions by others; "powers" which allow holders to do what others cannot do; and "immunities" which exempt the immune from obligations applying to others.¹²

The first hurdle an advocate would have to cross would be to ascertain whether there is any disputable claim that gives rise to a cause of action based on the preliminary facts.¹³ This decision requires a general knowledge of the law. His

¹⁰ See Critical Thinking available at <http://edglossary.org/critical-thinking/> accessed on January 9, 2017.

¹¹ Dispute is conflict of claim or right which arises, for instance, when a party to a contract requests something under the terms of the contract and the request is not met; see Sherman, *Dictionary of Law*, (Kuala Lumpur: Golden Books Centre Sdn. Bhd, 1998) p.102; it is a conflict or controversy, especially one that give rise to a particular lawsuit, see Bryan A. Garner (ed.), *Black's Law Dictionary*, (9th ed.) (U.S.A.: West Publishing Co., 2009), p. 540.

¹² See AbdulQadir I. A., "Impoverishment in the Muslim world: A consideration of the legal cause and solutions," in *International Journal of Muslim Unity*, (August 2005), vol. 3:1, p.306; however, the usual correlation between rights and duties do not justify the saying that "whenever there is a right, there must always be a duty". This is not always the case as right to freedom of religion, for instance, does not impose duties on others but only refrains them from acting in certain circumstance; see Spicker, P. "The right of the poor: Conceptual issues," in Robson, P. and Kjonstand, A. (eds.) *Poverty and the Law* (Oxford: Hart Publishing, 2001), p. 6.

A cause of action is the entire facts that give rise to an enforceable claim; it comprise every fact which if traversed, the plaintiff must prove in order to obtain judgment, see, James, J. S., *Stroud's Judicial Dictionary of Words and Phrases*, (London: Sweet & Maxwell, 1986, 5th ed.) pp. 378-379.

legal reasoning ability is called to play to ensure that he does not suppress the right of his client on the one hand and does not lead his client to pursue a frivolous and vexatious claim on the other. Once such a right is ascertained, he proceeds to research the facts, researches the applicable laws, analyses the laws to determine the applicable rules, and presents the argument to support the claims before the court.

2.2.2 Researching the facts and the applicable laws

At this stage, an advocate does not rush to court. This is so because apart from the preliminary briefing that indicates the need to pursue the claim, probing further into the facts leading to the disputation and the applicable laws would reveal whether a good case is at hand.¹⁴

The two processes involved in this stage of legal reasoning are interwoven. The process of fact-finding permeates through the whole of this preliminary stage of litigation so that even when the applicable law is being researched an advocate may require more facts that would suit the applicable principles of law before a right can be established. The lawyer asks questions on what has transpired between the parties.¹⁵ Critical legal reasoning involved at this stage relates to the investigative mechanism applied by the legal practitioner.

The mechanism applied by an advocate is to sieve the facts as presented by his client and determine which of them is relevant to his claim, as not all the stated facts are relevant. He also has to determine which of the facts is admissible, as not all relevant facts are admissible; and which of them is reliable, as not all admissible evidence is reliable.¹⁶ Of all the materials led in evidence, the only ones that constitute facts to be found by a judge are those relevant to the fact in issue, admissible, and reliable¹⁷. This investigation is essentially governed by the laws of evidence and procedure.

Having streamlined the facts, an advocate goes ahead to research the applicable law and rules of law. The laws applicable to a set of facts will vary from one jurisdiction to another, depending on the sources of law in that jurisdiction. In Nigeria for instance, the sources of law consist of Nigerian legislation, Islamic law, customary law, and judicial precedent or case law. Others include English law, comprising common law, the doctrines of equity, and statutes of general

A good case here does not mean a total assurance of winning a case and get 100 percent of the desired remedy. Yet, critical legal reasoning requires the chances of winning that is above average.

¹⁵ See Vandeveld, p. 57.

¹⁶ See SS. 5-16, 136 & 153, Evidence Act, 1950 (Act 56, Laws of Malaysia) and SS. 7-19&211, Evidence Act, 2011.

¹⁷ *MTN v. Mundra Ventures (Nig.) Ltd.* (2016) LPELR-40343(CA)

application in force in England on January 1, 1900. They also include English statutes and subsidiary legislation on specified matters and English law made before October 1, 1960,¹⁸ extending to Nigeria.¹⁹ Thus, in disputes arising out of marriage under Islamic law, for instance, an advocate would have to direct his search to the principles of Islamic law appropriate to the set of facts in issue. This would also invariably lead him to the determination of the court having jurisdiction to decide the matter.

The critical legal reasoning required here is in the analysis of the applicable law to determine the rule that governs the set of facts in issue. A rule of law contains a factual predicate and legal consequence which creates rights and duties. In irrevocable divorce under Islamic Law for instance, "if a man divorces his wife for the third time, the divorce becomes irrevocable. He cannot remarry her until she gets married to another man and divorced voluntarily."²⁰ The factual predicate here is the three-times divorce and the legal consequences, which refers to its irrevocability.

The set of provable facts presented by a client must match the factual predicate in the rule of law before a legal right can be established. Where a rule is susceptible to more than one interpretation, however, an advocate is expected to be creative enough to obtain more facts that would make his argument more plausible than any other that may be presented by the other party.²¹

At this point, an advocate should be able to determine whether there are issues²² of facts or law or mixed issues of facts and law that would require a full-length trial

Nigeria secured her independence from the British colonial Government on that day from whence no such extension obtains, yet, retention of English laws, which are not only obsolete even in England but are also not relevant to the sociological and cultural orientation of Nigerians as source of Nigeria laws after 56 years of independence is expressive of lack of legislative development in the country; it has long been recommended to be scraped out of the Nigerian legal system, see Niki Tobi JSC "Relevance of Curricula of Faculties of Law of Nigerian Universities to the needs of the Legal Profession and Society," in *Proceedings of the 18th Annual Conference of the Nigerian Association of Law Teachers*, held at the Nigerian Law School, Lagos, 26-29 March, 1980, p. 73.

¹⁹ See Obilade, A. O., *The Nigeria legal system*, (Lagos: Spectrum Laws Publishing, 19993, rept.) pp. 55-56.

²⁰ See Qur'an *Al-Baqarah*(2): 229-230; see also Al-Qarafy, *Kitabu Adhakhirah*, vol. 10, pp. 246-247.

²¹ See Vandeveld, p. 19-20.

An issue is a point that has arisen in the pleadings of the parties, which forms the basis of the dispute or litigation and requires resolution by a trial court, see *Unity Bank Plc v. Bouari* (2008) 7 NWLR (Pt.1086) 372 at 402, paras. F-G (SC), *Metal Construction (WA) Ltd v. Migliore* (1990) 1 NWLR (Pt. 126) 299; *Egbe v Alhaji* (1990) 1 NWLR (Pt. 128) 546; and *Ishola v Ajiboye* (1998) 1 NWLR (Pt. 532) 7." Per Ogbuagu, J.S.C.; see also Moore, B. N. and Paken, R., *Critical Thinking*, (7th ed., New York : McGraw-Hill Companies Inc., 2001), p. 4.

by the court. He should determine whether the issues involved are pure issues of law that can be decided by way of motion, issues sufficient to sustain the perceived right and entitle the client to the desired remedy, or whether there is no issue at all. Where the issues involve law only on a non-issue, the lawyer pursues his case by filing a motion and arguing it on the point of law. An example would be when a lawyer discovers that an action instituted against his client discloses no cause of action or the claimant has no *locus standi* as required by law. He merely files an application by way of notice of preliminary objection for striking out the case for non-disclosure of a cause of action or lack of *locus*.²³ That is, the action contains no issues to be joined. In any case where there is no triable issue, a lawyer worth his salt is expected to advise his client accordingly. Where there are issues of fact or law or mixed fact and law, however, the legal practitioner proceeds to the presentation of the argument.

2.3 Presentation of legal arguments

This stage is divided into three parts: pre-trial, leading evidence, and legal argument. We consider each of the parts in turn.

2.3.1 Pre-trial briefing

The advocate sorts out all the rules of law applicable to the factual situation of his client, brings them together, and analyzes them in a way that they can form a framework applicable to the facts. Here, he determines whether a rule having a general provision is specifically defined, limited, applied, or contradicted by another rule. This analysis leads to adjustments in the researched facts and obtaining additional facts where necessary. For instance, it is a rule of case law that a bank owes its customer a duty of confidentiality concerning the latter's account. Under this duty, a banker who acts on a forged mandate, no matter how perfect the forgery is liable to bear any loss resulting from his negligence. However, this rule is limited by another one restricting the duty to those within the meaning of what transpires in the ordinary course of the bank's business and does not cover situations beyond the bank's control and powers.²⁴ Thus, the advocate would have to synthesize these rules in preparing the argument that his bank client is not liable for negligence where, after it has carried out its customer's instruction to transfer some money into an international account, an unknown person forged some documents purportedly issued by the customer instructing the international bank to further transfer the sum to an unknown account and the latter duly obliged. This stage involves a form of logic syllogism whereby a

²³ *Dim Chukwuemeka Odumegwu-Ojukwu v. Umaru Musa Yar'adua & Ors.* (2007) LPELR-9008(CA); (2008) 4 NWLR (Pt. 1078).

²⁴ See *Habib Nigeria Bank Ltd. v. Fathudeen Syed M. Koya* [2003] 3 NBILR 257 at 283.

conclusion is drawn from the application of a major premise (statement of law) to a minor premise (factual situation at hand).²⁵

The critical thinking requirement of an advocate here is to predict the likely defense and the witnesses to be called by the adversary party and to prepare a counter argument in advance. He would need to ask himself questions like: "What do I need to establish?" "Where do the strengths and weaknesses of the case lie?" "How could the adversary witnesses damage my case?" And "How much advantage can I take of their pieces of evidence?" etc.²⁶ No magic provides answers to these questions. Rather, a critically thought questioning of one's client presents a lead to the most probable answers. The advocate then prepares his witnesses along his line of argument and the possible areas of the adversary's attack on cross-examination.

2.3.2 Leading Witnesses in Evidence

Leading evidence is the most important aspect of a trial in an adversary system of litigation. The whole essence of a trial is to discover the truth of what happened between the parties. Unfortunately, however, under this system, nothing can be truer than the facts found by a judge from the evidence adduced by the parties through the examination, cross-examination, and re-examination of the witnesses on both sides. As such, the successful litigant is the one who presents the best evidence.²⁷ There are two critical parts of this stage. The first is the ability of the counsel to limit his witness(es) to only the evidence relevant to the case of his client and admissible by the court.²⁸ The second is to present only the truth of the case frankly. To this end, the Supreme Court of Nigeria held in the case of *NewsWatch Communications Ltd. v. Atta*²⁹ thus:

Litigation is not a matter of planting mines to deceive the opponent with a view to destroying his case undeservedly in *limine*. On the contrary, litigation is a process where the parties set out their cases frankly and fully for the determination of the court. A trickish (sic)

See Salhany, p. 28; see also Neal Ramee, "Logic and Legal Reasoning: A Guide for Law Students" available at <http://www.unc.edu/~ramckinn/Documents/NealRameeGuide.pdf> retrieved on January 20, 2017.

See, Aldisert, R. J., *Logic for Lawyers: A guide to Clear Legal Thinking*, (3rd ed., Indiana: National Institute for Trial Advocacy, 1997), p. 40.

For a detailed comparison of this system as against the inquisitorial system, see Salhany, R. E., *Cross-examination*, pp. 5-9; see also, Yadudu, A. H., "Colonialism and the transformation of Islamic law," in *Journal of Legal Pluralism*, No. 32, 1992, pp. 131-132; and Veal, D., *The popular Movement for Law Reform 1640-1660*, (Oxford: Clarendon Press, 1970), p. 32.

See *MTN v. Mundra Ventures (Nig.) Ltd.* (2016) LPELR-40343(CA), see also *Ilesanmi v. Ogunleye & Anor* (2016) LPELR-41348(CA); and Ss. 7 and 8, Evidence Act, 2011.

²⁹(2006) ALL FWLR (Pt. 318) 580 at 602 (SC),

and miserly presentation of a client's case is not part of good advocacy.

Presuming that the advocate's preparation in the preceding sub-head is carried to the trial perfectly, the advocate is left with the most critical aspect of this part, which is cross-examination.

2.3.3 Cross-examination

During examination-in-chief, litigants would most likely withhold some facts leading to a dispute, especially those that weaken their case. The only means permitted by law to elicit the truth from them or put a lie to their testimony is by the process of cross-examination.³⁰ By this process, a lawyer is not only expected to elicit information to establish facts favourable to his client's case from the adversary witnesses but also to weaken the adversary's case by discrediting the evidence-in-chief of his witness. The lawyer's position is made precarious by the double-edged-sword nature of cross-examination. It can make his case and produce the desired result if the questions are properly couched or mar his case and strengthen the adversary's case if the questions are not critically thought out.³¹

A counsel has a very short time to think out a way of achieving this result. Apart from the conjuring process, a careful advocate undergoes while researching the facts of the case, he only comes to the reality of the line of the adversary's argument in the open court. The facts manifesting in the court may be different from the conjured facts and his cross-examination follows immediately after each of the adversary's witness testimony.³² Therefore, the thinking required of an advocate in this case has to be both critical and creative.

To conduct a critical and creatively thought-out cross-examination, an advocate would need to combine the personality of the witness, at least for that moment, with his personality. He would momentarily be acquainted with the skills of men of various fields like medical practitioners, engineers, farmers, traders, cab drivers, accountants, etc. He should possess a good knowledge of men and affairs to be able to quickly identify the fallacies³³ in an ongoing testimony of a tainted or

See SS. 138 & 146 Evidence Act, 1950 (Act 56, Laws of Malaysia) and SS. 214– 217 and 219, Evidence Act, Cap. 112, LFN, 1990; cross-examination is the examination, through questions, of the veracity of the testimony of a party or his witness by the adverse party in the court proceedings of a given case, see S. 137 (2) Evidence Act, 1950.

³¹ See Salhany, p. 63

³² The practice of reserving cross-examination until after the ruling of *prima facie* case against the accused person, as obtains in criminal cases in the Magistrate Courts, is an exception in this regard.

³³ A fallacy is an error in reasoning, it is an invalid argument which appears to be valid at first glance, thereby requiring analysis to point out its invalidity, see Jamal B. and

untruthful witness and expose them firmly, yet treat the witness fairly. He should also know how to sympathize with the truthful but mistaken witness while scoring points for his side.³⁴ Within that short time, he should be able to decide which of the various available tools of cross-examination to adopt. The tools range from deciding the opening question, and use of language, through putting himself in the witness' shoes, to appealing to the improbabilities of the rendered testimony and probabilities of the withheld information. This is most probably the reason a lawyer is called a learned gentleman.

The result achieved by F. E. Smith (later Lord Birkenhead) by putting himself in the shoes of a young boy he was cross-examining was the cheapest a critically and creatively thinking advocate can achieve. The boy's parents had brought a claim for damages for the injury he purportedly sustained to his left arm while aboard a bus. Under cross-examination, Smith, with a sympathetic and appealing voice asked the boy: "Please lift your arm as best as you can." The boy raised his left arm with efforts (feigning pains) to shoulder level. "Thank you," said Smith in the same tone. "Now please show us how high you could lift it before the accident." The unsuspecting boy quickly shot his arm high up into the air, thereby rubbing the testimony of his suffering pains and inability to use the hand.³⁵

The Supreme Court of Nigeria emphasized the importance of cross-examination in the case of *Fowosere v. State*³⁶ where it held thus:

After all, the noble art of cross-examination constitutes a lethal legal weapon in the hands of the adversary to enable him to effect the demolition of the case of the opposing party. It is, therefore, good practice for counsel not only to put across his client's case through cross-examination but he should, as a matter of the utmost necessity, use the same opportunity to negative the credit of that witness whose evidence is under fire.³⁷

2.3.4 Counsel Address

After the close of the cases of both parties to litigation by their respective counsel, each of the lawyers is allowed to address the court on behalf of his client either orally or in written form. In an address, a counsel gives an analysis of the entire trial applying the facts as they emanated from the evidence to the applicable rules

Mustapha T., *Creative Thinking: An Islamic Perspective*, (Kuala Lumpur; IIUM, 2nd ed. 2005) 225.

³⁴ See Salhany, p. 26.

³⁵ See Campbell, J., *F. E. Smith- First Earl of Birkenhead*, (London: Johnathon Cape, 1983), pp. 112-113

³⁶(2016) LPELR-40634(CA)

Quoting the decision in *Oforlete v. The State* (2000) 7 S.C.N.J. 162 at 184; (2000) LPELR-2270 per Achike J.S.C. with approval.

of law and justifies why the court should uphold his client's claim and reject the adversary's.³⁸ The critical thinking of a lawyer is exercised here by articulating the various premises of the rules of law alongside the testimony of his client. Testimony of other witnesses and that elicited from the adversary through cross-examination are also articulated to reach the desired conclusion and justify the claims of his client. While doing this, he is also expected to bring to the fore all the fallacies, both formal and material, and the ambiguities contained in the adversary's evidence and arguments. These are done in a way that it would become inconceivable for a reasonable judge to find in the latter's favor after such expositions. In the *Federal Republic of Nigeria v. Alhaji Sani Kalgo & 4 Ors.*,³⁹ the defense counsel dislodged all the prosecution's evidence as being insufficient to ground conviction for charges of stealing proffered against his client. His client as a bank manager was alleged to have granted credit facilities beyond the approved limit. The court discharged and acquitted the accused person on the count of stealing. It also held that where an accused had been found not guilty of committing the specific offence charged, it would be unreasonable to convict on a count of conspiracy to commit the offence, especially if, as in this case, the facts relied upon for the two counts are the same.

2.4 The present state of critical legal reasoning

Different nations of the world have produced quite several eminent legal personalities many of whom having carved a niche for themselves in the area of advocacy went ahead to prove an amiable worth on the bench. A few of such personalities are Sir Rufus Isaacs (later Baron Reading Chief justice of England), Charles Russell, Norman Birkett, Patrick Hasting, F. E. Smith and A. T. Denning in England; Samuel Liebowitz in the U. S.; Arthur Martin in Canada; Professor Ahmad Ibrahim in Malaysia and Chief F. R. A. Williams in Nigeria. The success story of these great advocates and many others was the appreciation of their strengths and weaknesses and taking the optimum advantage of both. Lord Denning for instance decided to pursue a career in law despite his mastery of Differential Calculus, Dynamics, Statistics, and a first class in the mathematical final school. He eventually took silk, became a Lord Justice in the House of Lords, and eventually Master of the Roles of the Court of Appeal of England.⁴⁰

In Nigeria, Justice Teslim Elias was an accomplished advocate, called to the Bar by The Inner Temple in 1979 and became a Doctor of Law in 1949. He became the first Attorney General of the Federation in 1960, Professor and Dean of Law

Right of address is a unit of the Fundamental Human Right to fair hearing which if denied could, on appeal, render the whole trial a nullity; the right has even been extended to include right to cite legal authorities by a party to advance his case, see *Justice F. O. M. Atake v. Chief Nelson Asigboro Afejuku* [1994] 9 NWLR (PT. 368) P. 379 at 386.
³⁹ [1998] FBTLR 14 at 21

⁴⁰ See Lord Denning, *The Family Story*, (London: Butterworth's, 1984, repr.), pp. 33-37, 184 and 201.

in 1966, Chief Justice of Nigeria in 1972, and judge of the International Court of Justice in 1975 and became its president in 1982.⁴¹

They all adopted different styles of advocacy suited to their respective personalities and the forum before which they appeared. They made use of every tool of advocacy at their disposal, ranging from eloquence, vigour, passion, humor, wit, flexibility, logic, and compassion to tolerance; and were versatile in choosing the proper tool for the appropriate occasion.⁴² And above all, they were widespread. No claim is laid here to a total absence of dumb-skull advocates in the era of these eminent legal personalities,⁴³ yet, their number was so insignificant to taint the vibrancy and versatility that embellished the practice of advocacy at that time.

The level of critical and creative thinking among the Nigerian lawyers of the present time is incomparable with what is obtainable in the era described above. Currently, law schools are turning out solicitors and advocates who have wrongly reasoned their decision to be members of the noble profession in the first place. They are worse for it in terms of what it takes to be a successful advocate or become eminent in the profession. The general falling standard of education did not exclude legal education.⁴⁴ There are now lawyers who can hardly think for themselves. They do not have a proper grasp of the principles of law and therefore cannot practice it successfully. Many factors are responsible for this state of affairs some of which are hereunder considered.

See Miriam Mbah, "Celebrating Diversity at the Bar: Taslim Olawale Elias -QC LLD CFR GCON - 1914 - 199", *The Inner Temple*, available at <https://www.innertemple.org.uk/celebrating-diversity-at-the-bar/taslim-olawale-elias/>; also available at <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/taslim-olawale-elias> retrieved on 2 February, 2024.

⁴² See Salhany, p. 32.

Like Robert Segar whom Lord Denning described as an unsuccessful barrister on the Northern Circuit and as the tutor who knew no law, see Denning, p. 38.

See Onolaja M. O. (JCA), Problem of Legal Education in Nigeria, available at <http://www.alimiandco.com/publications/ACCREDITATION%20AND%20LEGAL%20EDUCATION%20IN%20NIGERIA.pdf> retrieved on January, 22, 2017; and Ladan M. T. The

Future of Legal Education in Nigeria, being a discussion paper presented at the 2015 Annual General Conference of the Nigerian Bar Association, held at International Conference Center, Abuja on August 25, 2015, available at <https://ssrn.com/abstract=2649373> or <http://dx.doi.org/10.2139/ssrn.2649373> and Oba,

A.A. (2007): Towards Regaining Learning and Correcting Learning in the Legal Profession in Nigeria. CALS Review of Nigerian Law and Practice, Vol. 1 (1) pp. 14- 26

2.5 Causes of the declining state of legal reasoning

Critical legal reasoning among legal practitioners has continued to be on the decline for several reasons which are for clarity classified into two: the wrong perception of the legal profession as a career and the appalling falling standards of education. Each of these is treated below.

2.5.1 Wrong career perception

The foundation upon which the legal profession is built is a call to the service of humanity or as Roscoe Pound puts it, "for the interest of public service". It was a vocation designed to rescue the less privileged and the oppressed from the clutches of the feudal lords and the services were almost for free. The traditional small pocket at the back of a lawyer's gown near the right shoulder symbolizes how little a client who could afford and was willing to give a token of appreciation for his lawyer's services was expected to part with without asking.⁴⁵ Today, law practice goes beyond mere vocation. It is a type of business concern from which a practitioner must make a living. His professional fee is now "much more than the whole of his gown can take".⁴⁶

This fundamental change in the perception of the duty of an advocate coupled with some privileges the society accorded him for his initial role, which privileges, ironically, did not change along with the change in perception, made people plunge, head first, into the profession. Unfortunately, the race to the membership of the noble profession is engaged with little consideration for the individuals' ability for the rigor, patience, tolerance, and high reasoning standard required to make headways therein.

With the very high demand for law programmes⁴⁷, a fall out from the syndrome of becoming a lawyer or having one in the family at all costs, corrupt parents assist their wards in beating the high standard entry prerequisite for admission into the programmes. Malpractices are perpetrated in high schools and universities' entry examinations and students with fraudulent results are wrongly admitted. Until recently, when ICT was deployed to screen such candidates' results at the entry point, many less intelligent students were admitted into universities for various programmes including law.⁴⁸ Such students follow their

See Akin, I., "The jurisprudence of social justice in Nigeria," in *Essays in Honor of Andrew Obaseki JSC (Rtd.)* (Lagos: NLREDP., 1995), p. 186.

See AbdulQadir, I. A., "The Concept of Justice under the Common law and Shariah," in *Al-Mujtahid*, vol. 1:1, 1999, p. 22.

⁴⁷MammanTahir, *supra*, p. 5.

Admissions records in the university of Ilorin, Nigeria show that hundreds of candidates offered admission for programs, including law, in successive academic session were unable to register because their O' level results were 'unacceptable' being fake or misrepresented results.

teachers around with cards, gifts, and text messages to be assisted in passing examinations. In practice, therefore, if such students manage to become lawyers, they cause a lot of costly damage to their clients' cases.⁴⁹

2.5.2 Falling standards of education

Apart from the adverse effect the corruption in the educational system described above would have on the products of the law schools, defects in the packaging of the law school curriculum and law teachers' method of imparting knowledge also contribute to the decline in the critical thinking ability of advocates.

(a) *The Law Schools' Curriculum*

The curricula of many law faculties, especially in Nigeria, are designed in such a way that it would be assumed that it is possible to teach a law student all the laws on earth. Contrary to the Basic Minimum Academic Standard (BMAS) set by the National Universities Commission, students are now made to take law courses all through their program and are hardly allowed to borrow subsidiary courses from other fields. God forbid that a lawyer knows all the laws, what he should know is where and how to find the law. As shown above, legal practice, especially advocacy is not all about laws. A good advocate is expected to have the personalities of other professionals along with a legal personality in him. He should be able to combine the elements of a thorough understanding of the law with the knowledge and understanding of men and affairs.⁵⁰ This justifies the need for a law degree curriculum to encompass as many fields of human endeavor as possible.

(b) *Method of Teaching Law Courses*

When the critical thinking movements and authors in education were clamoring for its being taught across the discipline,⁵¹ one would almost hazard a retort that it is not required for law students. This is because teaching law courses used to include critical and creative thinking embedded. The event of how the interest of my class in the law of Torts was triggered by the lecturer in charge would remain green in our memory. The teacher had simply begun her class by asking us for the foreseeable consequence of carrying on the act of welding a ship at a Wharf when there had been an oil spill and the culpability of the owner of the other ship from which careless bunkering operation the spillage had occurred. We all became very excited to discover that our hypothetical case was the facts in *Overseas Tankship (U. K.) Ltd. v. Morts Dock Engineering Co. (The Wagon Mound)*.⁵² More

⁴⁹ See Denning, p. 93.

⁵⁰ See Salhany, p. 28.

⁵¹ See Meyers, C., *Teaching Students to think critically* (San Francisco: Jossey Bass, 1985).

⁵² [1961] 1 All E. R. 404.

exciting is the fact that our various opinions represented the different thinking of the judge of the trial court, justices of the Court of Appeal, and their lordship in the Judicial Committee of the Privy Council.

Law lectures, assignments, term papers, tests, and examinations were in such problem-solving and application forms that law students could not but think critically. It is however appalling to note that this system has drastically changed. It is not uncommon now for law teachers to lay more emphasis on the course content (what the students should think) than on the correct way of understanding and evaluating the subject matter (how to think). This practice also extends to other parts of the teaching and learning process. Today, a law student may comfortably graduate from law school relying only on, mostly dictated, lecture notes that he memorized and reproduced. This method of teaching is, to say the least, antithetical to the critical thinking requirement of the products of such institutions. Worse still, the employment of artificial intelligence platforms like Chat GPT has taken over almost every opportunity or the need for students, including law students to engage in critical thinking.

Closely related to the above is the absence of practical training in the law degree programs. The majority of law schools reserve practical law training for the vocational training institutes after the degree program. Of about seventy-seven Nigerian Universities offering law degree programmes⁵³, only a very few of them have Moot Court/mooting as a compulsory credit course.⁵⁴ The danger in this system, especially for countries like Canada, Malaysia, and Nigeria where law graduates as solicitors and advocates can prosecute cases a day after his/her call to the Bar, is that the period of their vocational training is barely sufficient to equip the students with the skills of critical legal reasoning required of good advocacy.⁵⁵

2.6 Suggested ways out

Having identified some causes of decline in the critical legal reasoning of legal practitioners, we hereby suggest the following solutions to each of the identified problems as possible ways out.

- i. Firstly, concerning the wrong career perception, the Bar Council of every nation has the duty of collaborating with the government to ensure that advocates are made to render the services forming the foundation of their

According to data on the Nigerian Law School website available at <https://www.nigerianlawschool.edu.ng/Notices/AccreditedWithQuotas.pdf> retrieved on 3 February, 2024.

⁵⁴Bayero University Kano (BUK) offers it as a compulsory course while it is elective at the University of Ilorin and a few other universities.

This is more particularly so as the one year vocational training especially in Nigeria Law School is also more of theoretical teaching of procedures than practical training.

professional calling. This collaborative effort should be expected to produce a result of periodic assessment of their services in juxtaposition with the privileges they enjoy and making adjustments either way. This approach would force the Bar Councils to evolve an internal assessment mechanism to assess the contribution of every member of the profession to society and change the tide of enjoying societal privileges on the Plata of being called to the Bar.

In addition, the governments of nations have an onerous duty to protect their educational system from corruption and falling standards. The first step in this direction is to improve the quality of teaching and teaching materials. Governments' expenditure on education should continually be improved to give incentives to educators and bring the best out of them. Then, the need for adequate supervision of examination processes and meeting appropriate penalties for any perpetrator of examination malpractices becomes pertinent. This would in the long run ensure that only the truly qualified candidates are admitted into the law schools. In the interim, the law schools should pursue and obtain the mandate to conduct their separate entry-qualifying examinations which will be a true test of the candidates' ability in addition to their performance in high schools and/or other general examinations⁵⁶.

- ii. Secondly, the trooping in unproductive new entrants to the profession should be stopped. To do this, Bar Councils should research to determine at what age a person would be able to graduate from law school, undergo all the stages to equip him for good advocacy, and be able to contribute meaningfully in effectuating the objects of the profession. The purpose of such research should be to set a benchmark for the age group admissible into law schools.
- iii. Thirdly, regarding the law schools' curriculum, Nigeria has a good example that can be used as a standard. For a university law degree to be approved as admissible for the one-year vocational training leading to the award of B.L. (barrister-at-law) at the Nigerian Law School, the Council of Legal Education looks into the contents of the courses leading to the degree to ensure that the subject taken and the depth covered are such that will provide the minimum basic knowledge of the law.⁵⁷ These are referred to as the core courses of the Common law⁵⁸ and once they are contained in the curriculum, a university is free to fill up the minimum credit requirement set by the National Universities Commission for law degree with other law courses and courses in any other

The practice in Bayero University, Kano, Nigeria until early 1990s was to interface with each students and conduct interview for them before they were admitted into the university.

See The Nigerian Law School, "Regulation for Admission and Training," available at <http://www.nigerianlawschool.com>, visited 20/11/05; see also, Zubair, A., *Shari'ah in our citadels of learning*, (Ilorin: University of Ilorin, 2003), p. 33.

These include: The Nigerian Legal System, Law of Contract, Law of Tort, Constitutional Law, Law of Evidence, Criminal Law, Nigerian Land Law, Equity and Trust and Commercial Law, see The Nigerian Law School, "Minimum requirement for accreditation of Law faculties," available at <http://www.nigerianlawschool.com>, visited 20/11/05.

human endeavor. This Council's liberal requirement has allowed many universities to combine their Common law program with Shariah courses and their students are also able to take subsidiary courses in economics, sociology, political science, history, English Language, Arabic Language, and general studies. The products of this system are competing favorably with good advocates around the world.

- iv. Fourthly, the way out of the problems relating to the methods of teaching law courses is *res ipsa loquitor*. There cannot be a better option than to return to the *status quo ante*. The teachers have not only to reintroduce the thinking impetus that hitherto characterized law lectures, assignments, term papers, tests, and examinations but also to ensure that students have a taste of every aspect of this learning and testing process in every law course being taught. There is still no need to introduce critical and creative thinking as a teaching course to law students as the dynamism of the law imbued its courses with enough of such thinking skills and tools. One more thing here, the law schools should introduce some assessment mechanisms to ensure that the teachers truly adopt this method.
- v. Finally, the experience of Lord Denning which this author was fortunate to have a share of⁵⁹ is instructive on introducing practical training as a compulsory credit course into law degree programs. Although on a personal initiative, the Master of the Rolls started pupillage while still in law school. This according to him was because the reading of law books in the libraries or attending lectures by professors only gives a blurred and incomplete picture of what law is all about. To understand the law, one must see it work in practice. One needs to see what a writ and pleadings look like; in what ways counsel gives his opinion; and how he conducts a case in court. All these he learned in pupillage and they put him in a good stead to come top in the Bar final examinations.⁶⁰ Formal adoption of this system is suggested for law schools' LL.B. curriculum, especially where the students graduate as barristers and solicitors. It is a necessary ingredient of their training to become good advocates.

The Law Attachment Program (LAP) run by Ahmad Ibrahim Kulliyah of Laws (AIKOL)⁶¹ is a step in the right direction. Becoming a prerequisite program for all 1st, 2nd, and 3rd-year students of AIKOL up to 2006, LAP seeks to give a hands-on experience to law students, honing their advocacy skills and

In B. U. K., Moot Court is a 4 credit compulsory course with a supplement of a 2 credit course in legal research methodology, competition and best performance was encouraged in the course by putting the best Mooter, an award won by this author in 1995/1996 academic session, and the best Oralist on the roll of honor of the faculty; students chambering societies were also encouraged and sometimes supervised by the lecturers that a student has the chances of appearing as witness, counsel, or even as judge in the chambers' activities before taking moot court as a course.

⁶⁰See Denning, p. 93.

⁶¹ AIKOL is the faculty of Laws, International Islamic University Malaysia.

boosting their confidence in the profession they have chosen to pursue.⁶² However, the assessment part of the programme would still deny it the desired result. The assessment is presently comprised of confirmation of the student's attendance in a Log Book meant for that purpose, a report of the host or law firm's principal, and an oral interview by a lecturer in charge.⁶³ A better result would be achieved if mooting, which is presently an optional course but with brief writing and oral argument as its component, is made compulsory after passing LAP. This would provide a true test of the students' learning from the attachment program. The Islamic Law program of the university of Ilorin also introduced Shariah Court Attachment recently to enable students to observe the proceedings in the court and frame their long essay topics around the attachment experience. Apart from the hands-on experience, the students are gaining through the programme, their thinking skills are honed/activated by the discussion of each of the cases they observed in the open court.

2.7 Conclusions

Attempts have been made in this chapter to examine the critical and creative thinking processes involved in the A-Z of an advocate's work. Every stage from the initial briefing, researching the facts, researching the applicable laws, and synthesising them with rules and applying them to the facts, to leading evidence, especially cross-examination and addressing the court requires critical and creative thinking of an advocate. Possession and exhibition of critical thinking tools and skills were the hallmarks of the professional eminence attained by legal practitioners of different times. The tools and the skills have however continued to be waning in the contemporary advocates as a result of a combination of a change in perception of the duties of a lawyer, the packaging of the law school curriculum, and teaching methods. The solutions proffered to these problems are practical and adaptable by a mere change of pattern and more effective monitoring. As for the introduction of practical training into the LL.B. programme, however, more affirmative action is required. This may involve declaring a whole semester for court and chambers attachment with an effective supervision system culminating in moot court as a course and the consequential adjustment of other courses. This method has worked a tremendous result in colleges and polytechnics awarding Diploma in law⁶⁴ with students' better appreciation of the law and it can certainly have better results in LL.B. degree programs to produce critical and creative thinking-equipped advocates.

⁶² See Sri Yogamalar, S., Ashgar, A. A. M. and Farheen, B. S. B., *Law Attachment Handbook*, (Kuala Lumpur, Harun M. Hashim Law Centre, 2005), p. 6.

⁶³ Ibid. p. 7.

Kwara State College of Arabic and Islamic Legal Studies and later, Kwara State Polytechnic in Nigeria have taken advantage of the method with the cooperation of the State judiciary.