PROFESSIONAL ETHICS QUESTIONS:

QUESTION 1:
X is approached by the law society to check on the drafting of a new code for legal ethics. Write a memo in which you express your views on the following:

a. The legitimacy crisis which existing comprehensive codes of ethics suffer among both outsiders and insiders” to the profession

<table>
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<tr>
<th>OUTSIDERS</th>
<th>INSIDERS</th>
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| • There is no access to a simple, easy to understand set of professional codes = the public don’t know what conduct is unprofessional  
• Some ethical rules protect the professionals against the public or serve the members of the profession  
• Rules aren’t universal and change with the times  
• Complaints are handled by colleagues  
• Practitioners aren’t willing to testify against one another | • The codes aren’t always enforced by law societies  
• Those who don’t obey the codes aren’t dealt with properly  
• Since the codes aren’t applied they should be replaced with business rules  
• By trying to force their client to do the right thing, the client will go somewhere else  
• Legal ethics should be reduced to rules of professional conduct, this would justify self regulation |

b. The idea that a code of ethics should comprise a number of levels. Refer to the approach of Nicholson and Webb (20)

They believe that the problem with ethics is due to formalism – the focus is too much on rules.
RULES:
1. In legal education: students are taught the legal rules and not the practical application of the law
2. Adversarial system: creates the belief that rules will always provide the correct answers

According to the ethics need to be CONTEXTUALISED – using 3 levels of codes:

1. General statement of values: good faith is required

2. Specific principles:
   a. Loyalty – confidentiality
b. Integrity – moral responsibility
    c. Candor – used with good faith
    d. Consent – consultation

3. Contextual factors:
   - The clients needs: emotional, financial and psychological
   - Requirements which show the lawyer what is expected of him in order to avoid removal
   - The type of case: criminal, civil, mediation

These codes help to develop moral character and helps the law student to make a more informed decision on why to study law and what field of law to go into = shows them the moral dilemmas that they might face.

This contextual approach has been criticized:
   - Too hard argument: it is too hard for lawyers to be expected to know all the codes that apply to a situation
   - Its too easy for a lawyer to be immoral – they already don’t respect the rules that exist

The plan to make the ethics more contextual includes:

1. **Micro regulation:** compliance officer at each firm
2. **Fees:** more transparent
3. **Firms dealing with the community:** requires more creative advice giving
4. **Demography of the profession:** allow for more woman in the profession as they have an ethic of care (community based approach) rather than the male ethic of justice (individualistic approach)
5. **Change the adversarial system:** to an inquisitorial system = encourage co-operation rather than competition
Question 2:
The residents of Sandton are upset about new traffic lights, which have been erected outside the house of the local representative of the town council. The purpose of the traffic lights is to allow the representative access to a busy road in peak hour traffic. The residents have written letters to the town council requesting the traffic lights be removed; they have not received a reply. You are an attorney in the area and the residents approach you to take their case. They want to organize a campaign of civil disobedience in which they will deliberately refuse to stop at the traffic lights for a certain period. You are uncertain on whether you should get involved. The residents remind you of the important role that lawyers such as Mandela and Ghandi have played in other campaigns of civil disobedience in SA.

Write a memo in which you address:

a) The duty of lawyers to uphold the law and the state

- Lawyers must respect the law of the state
- The oath they take on admission includes an undertaking to be faithful to the Republic.
- Behrman: an attorney who tried to corrupt a policeman and was found guilty of bribery, corruption and defeating the ends of justice was removed from the roll.
- Lawyers cannot contravene the law or encourage others to do so = they mustn’t help their clients break the law – even if it is to their client’s advantage.
- They can however advise their clients how to organize their affairs so that they limit their liability and to use loopholes in the law (avoid paying taxes).

Personal life – he must be an honorable citizen and should act morally in his personal relationships:

Kleynhans: an attorneys conduct – giving gifts to the magistrate hearing his case and previous conviction (malicious damage to property and being drunk in public) = isn’t the image of a legal practitioner and he wasn’t a fit and proper person to practice.

b) The meaning of civil disobedience

If it’s argued that the character test be used today rather than the rule based approach – there is a danger of civil disobedience – each person can decide which laws they are going to obey.

Civil disobedience could occur on the following grounds:

1. If laws are immoral
2. If its based on religious beliefs
3. If positive laws are unjust
4. Utility
c) Why you are inclined, or not inclined, to rely on the examples of Mandela and Gandhi in this regard  (30)

When a person is to be certified the onus is on the applicant to prove that they are fit and proper.
REASON: if a person doesn’t know someone they must approach them like a defensive driver – the problem with this is that a client can’t do this – they have to trust the professional.
This is why they require good moral character as a requirement for licensing.

2 tests have been applied by the court to establish whether a lawyer is fit or proper
1. Character test: look at the moral character of the lawyer – does it affect his job, what was the motive (subjective)
2. Rule ethics: look at the lawyers duty to obey the law – objective
   = look at the rules: the fact that a lawyer swears allegiance to the law of the Republic

CHARACTER TEST:
Krause: wrote letters stating that a newspaper writer who said that the Boer forces were outlaws should be killed = was convicted of an attempt to incite murder.
Q: does the conviction reflect negatively on his moral character, does it have anything to do with his practice as an attorney?
POLITICAL MOTIVE.

Mandela: was convicted in terms of the Suppression of Communism Act.
The conviction had nothing to do with his practice as a lawyer, the motive was political.
According to the character test – this action didn’t reflect badly on his character as a lawyer.

RULE BASED APPROACH:
Matthews: the courts changed to the rules based approach – they refused to register his articles because he had 2 previous convictions under the Suppression of Communism Act.
The court looked at the fact that an attorney has a duty to uphold the law that he swore allegiance to = don’t look at the motive.

Fischer: was arrested and charged in terms of the suppression of communism Act – he applied for bail and it was granted based on his standing as a lawyer, he absconded = RULE BASED = don’t look at the political motive, look at his duty to uphold the law.
Rice
TRC: apartheid lawyers, by obeying the laws were legitimizing the apartheid government = the rule-based approach is too narrow when the rules themselves are unjust. Gandhi, Fischer and Mandela all tried to oppose apartheid in SA – they all claimed that they were doing their duty as a lawyer = achieve justice = look at the law as it ought to be.

VIOLENCE- RULE BASED APPROACH
Hassim: armed resistance to apartheid – rule based approach = didn’t look at the fact that the action was political and unrelated to his practice as an attorney.

Maqubela: convicted of High Treason – he argued the character test stating: it had nothing to do with his profession and that it was done with a political motive = court used the rules based approach.

TODAY:
Prince: the court refused to register his articles as he had 2 previous convictions of possession and intended to continue using.

On appeal: he requested the character test and the court said it wasn’t a political motive.

CC: Sachs, minority judgment: constitution requires the tolerance of differences and the fact that he was willing to sacrifice his studies for his religion showed a good character.

**Question 3:**
The power of making good judgments is considered to be a virtue which morally good lawyers have, discuss

a. Virtue ethics as a theory of ethics (5)
Virtue ethics are part of the philosophical theory on ethic and include morals into the practice of law – such virtues are given to everyone and have to be developed in the study of law or the participation of politics. The feminists have also developed this idea – see page 18 notes

b. Feminist ethics as a version of virtue ethics (5)
Woman according to Gilligan think with an ethic of care in which they focus on morals, the community and relationships, whereas men think with an ethic of justice in which they look at rules, rights and the individual. Woman will play a big contribution in making law more cooperative and bring morals back into the making and practice of law.
c. Whether one can expect all lawyers to act virtuously, even those who haven’t been born virtuous (5)

According to Kronman and Aristotle all people are born with virtues and must develop this – others believe that virtue is a natural gift, you either have it or you don’t – in such a case the only thing that will stop an immoral person would be the `RULES = see page 26

d. Kronman’s ideas on the role of deductive reasoning, intuition and deliberation in the making of good judgments (10)

Character traits:
- Deduction and intuition: when deciding how to behave doesn’t depend on the rules = there must be a choice between conflicting interests
- Deliberation and choice: requires that someone look at all the possibilities, and consider values which aren’t your own

= Deliberate with sympathetic detachment = GOOD JUDGMENT.

Llewellyn’s 3 Law Jobs:

a) Adjudication: OBJECTIVE, a judge is required to consider both sides and improve the law = find the best solution for the community.

b) Counseling: SUBJECTIVE/OBJECTIVE. Client comes to a lawyer confused in order to get advice. The lawyer must sympathetically detach himself and give the client objective advice.

c) Advocacy: SUBJECTIVE, his job only begins when a course of action has already been decided

According to Kronman: to successfully represent your client, put yourself in the position of the judge (sympathetic detachment = good judgment).

There are 2 types of arguments:
- Clever argument: use the law to prove the clients case
- Wise argument: look at the case from the judges position = needs of the community

Wise arguments win cases.
To do what a judge does = imaginatively look at the conflicting interests with sympathetic detachment.

REASON why people study law = to get good judgment.
Question 4:

a) Under what circumstances can a legal practitioner refuse to accept the client’s mandate? (5)

Advocate can refuse if he doesn’t have the time or expertise
Mandate need not be accepted if:

1. Conflict of interest: this includes a financial interest in the case
2. Fraud, illegality: its suggested by the client that the lawyer should participate
3. Competence: where the lawyer is unsure of his ability

b) Name 5 characteristics which distinguish the legal profession from other businesses (5)

1. Specialized knowledge
2. Common good – justice
3. Serving the public
4. Discretion and autonomy
5. Accepting responsibility for their actions
6. Self-discipline = ethical
7. The profession is enforced by the courts

c) Explain the ambit of the protection given to confidential communications made by clients to their attorneys (5)

An attorney who wants to withdraw must have the client’s consent, or a good reason (client’s improper behavior) – withdraw in time so that the client can make alternative arrangements.

Client admits guilt: the advocate must still present the clients case, leaving it to the state to prove the element of the crime.

Duty of confidentiality:
He cannot divulge confidences/communications made to him by the client in the course of their relationship – whether oral or in writing and even if the client admits that he committed the crime.

Professional privilege plays a role: for it to exist the following requirements must be met:

1. The legal advisor must act in a professional capacity – privilege doesn’t apply if he was just giving advice to a friend
2. The communication must be made in confidence –
3. The communication must be aimed at getting legal advice – lawyer hears a confession from client during consultation = privileged – lawyer hears confession during an interview with a witness = not privileged

4. The communication mustn’t have been made with the intention of furthering a crime.

= **Privileged information.**

This privilege belongs to the client; it must be claimed in court and doesn’t arise automatically.

**Exception to privilege:**
- Where the legislature gave an exception
- Client gives his consent

Advocates cannot cross over to the opposition after getting information related to the client’s case = abuse of confidential information.

d) **Explain when and how SA judges may be removed from office**

S177: **removal of judges:**
A judge may be removed if:

- JSC finds that he suffers from:
  - Incapacity
  - Gross incompetence
  - Gross misconduct
- The NA can call for the removal of the judge with a 2/3 majority
- The president can remove a judge on adopting a resolution
- The president, on the advice of the JSC can suspend a judge
Question 5:
Write short notes in which you explain the importance of rules, consequences and virtues for the ethical assessment of human conduct

This is based on the philosophical approach to legal ethics:

Rules must be accepted as a duty = Deonic ethics

KANT: look at an ethical situation like a reasonable person would – he deems that there should be a universal ethic.
This is approached in 2 ways:

a. Categorical imperative: conscience = obey the laws out of a sense of duty (correct approach)

b. Hypothetical imperative: use RULES = obey the rules as failure to do so would amount in punishment

POSTMODERNS: say that there can’t be one universal ethic

CONSEQUENCES:
The only thing, which is relevant in determining whether an action is right or wrong, is the purpose, which the action is intended to achieve. Is the result useful?

Moral judgement = greatest happiness to the greatest number of people.
Bentham: said that usefulness is part of moral judgement and isn’t a sense of duty and respect of legal rules (rule based approach).

BUT: not everything, which is useful, is necessarily right = there are things which are useful which are ethically wrong (abuse of science).

Q: whether any means can be used to achieve the greatest happiness to the greatest number?

• Sometimes the ends justify the means = if a lawyer is convinced that his client is innocent – he may lie in court in order to vindicate his clients rights

• Others believe that the end doesn’t always justify the means
With regard to legal ethics = according to utility they are useful because they help lawyers who are making errors that could lead to disciplinary action
  • It helps improve the public image of lawyers
  • Satisfies the clients need

The requirement that a lawyer must have moral standing before admission doesn’t only protect the public but also the professions interest and image. An unethical lawyer can give them all a bad name.
VIRTUES:
You can discuss:
- Kronman
- Aristotle
- Menkel meadow

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**Question 6:**
According to Carrie Menkel-Meadow, the way in which legal practices are run will change if more women were admitted into the profession. Write an essay in which you critically discuss, why this would be the case and how the profession would change? (20)

**Difference feminism:**
Gilligan believed that woman and men had a different ethic

- **WOMAN:** ethic of care: focus on the community and relationships, more focused on ethics
- **MEN:** ethic of justice: look at the individual and rules (more comfortable with the HIRED GUN)

Woman could bring a more community based approach to the law.

**McKinnon:** Dominance Theory = men dominate and woman are dominated – the difference is the difference in power.

**Law practice:** woman are more non-confrontational and sensitive to the needs of others and their clients.

**There is still segregation in the workplace - family law is still seen as a woman’s work.**

**Legal knowledge:** Women analyze law differently:
- They include all minorities to disrupt the dominant male thinking.
- Woman in their studies focus on ethics rather than rules – while men are more comfortable with the rule based hired gun approach.
**Question 7:**
Write an essay in which you discuss the following 2 cases and compare how the court understood the duty of a legal practitioner to obey the law: Incorporated Law Society, Transvaal v Mandela and Natal Law Society v Maqubela

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<tr>
<th>Certification:</th>
<th>Decertification:</th>
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<tr>
<td>Onus on the applicant to prove he is fit and proper</td>
<td>Onus on the person applying for decertification (law society)</td>
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<td>Subjective test</td>
<td>Objective test</td>
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<td>Ex post facto</td>
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A SHIFT FROM VIRTUE TO RULES
Q: does a political motive mean that a person has a bad character?

2 tests:
3. Character test: look at the moral character of the lawyer – does it affect his job, what was the motive (subjective)
4. Rule ethics: look at the lawyers duty to obey the law – objective = look at the rules: the fact that a lawyer swears allegiance to the law of the Republic

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Civil disobedience could occur on the following grounds:

5. If laws are immoral
6. If its based on religious beliefs
7. If positive laws are unjust
8. Utility
Question 8:
In light of the recent controversy’s surrounding SA judge’s behavior, write an essay in which you discuss the following:

i. The need to maintain the dignity and integrity of the courts

S165: judges are independent and subject only to the law = impartial and independent of government.
Judicial independence: functional and personal:

Freedom of expression: public have a right to have opinions about judgments and make these opinions public = debate is part of democracy and it’s an NB check and balance on the court and its unelected judges.
BUT statements, which are harmful to the public or undermine the judiciary aren’t allowed and amount to contempt of court.

Contempt of court: the unlawful and intentional violation of the dignity, repute or authority of the judicial body or the interference with the administration of justice.

CC held that while freedom of expression is recognized = public interest and the admin of justice justifies keeping the offence of scandalizing the court.
Contempt of court is: the court must be able to attend to the proper admin of justice – with no public confidence in the system and in the integrity of judges = justice will be obstructed.
The rule of law requires that the dignity, authority and capacity of the courts must be maintained.

ii. When and how may judges be removed from office in terms of the constitution

S177: removal of judges:
A judge may be removed if:

- JSC finds that he suffers from:
  - Incapacity
  - Gross incompetence
  - Gross misconduct
- The NA can call for the removal of the judge with a 2/3 majority
- The president can remove a judge on adopting a resolution
- The president, on the advice of the JSC can suspend a judge
Question 9:
Write a short note in which you distinguish between Kant’s categorical imperative and Bentham’s utilitarianism as philosophical bases for professional ethics for legal practitioners (10)

The only thing, which is relevant in determining whether an action is right or wrong, is the purpose, which the action is intended to achieve. Is the result useful?

Moral judgement = greatest happiness to the greatest number of people.
Bentham: said that usefulness is part of moral judgement and isn’t a sense of duty and respect of legal rules (rule based approach).

BUT: not everything, which is useful, is necessarily right = there are things which are useful which are ethically wrong (abuse of science).

Q: whether any means can be used to achieve the greatest happiness to the greatest number?

- Sometimes the ends justify the means = if a lawyer is convinced that his client is innocent – he may lie in court in order to vindicate his clients rights
- Others believe that the end doesn’t always justify the means

Markowitz: gives an example:
20 people are held prisoner – one is told if he kills one of the prisoners the others will be released.
Utilitarianism = kill the one for the benefit of the others – the fact that his moral integrity is in jeopardy and the murder of an innocent person is wrong is of no consequence = people are a means to an end.

With regard to legal ethics = according to utility they are useful because they help lawyers who are making errors that could lead to disciplinary action
- It helps improve the public image of lawyers
- Satisfies the clients need

The requirement that a lawyer must have moral standing before admission doesn’t only protect the public but also the professions interest and image.
An unethical lawyer can give them all a bad name.

RULE GOVERNED ETHICS:

Rules must be accepted as a duty = Deonic ethics

KANT: look at an ethical situation like a reasonable person would – he deems that there should be a universal ethic.
This is approached in 2 ways:

a. **Categorical imperative**: conscience = obey the laws out of a sense of duty (correct approach)

b. **Hypothetical imperative**: use RULES = obey the rules as failure to do so would amount in punishment

**POSTMODERNs**: say that there can’t be one universal ethic

**Question 10:**
Write notes in which you illustrate with practical examples how the legal practice can be transformed, should virtue ethics and feminine virtues described by Menkel-Meadow be used as a guideline (15)

Gilligan believed that woman and men had a different ethic

- WOMAN: ethic of care: focus on the community and relationships, more focused on ethics
- MEN: ethic of justice: look at the individual and rules (more comfortable with the HIRED GUN)

Woman could bring a more community based approach to the law.

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**Law practice**: woman are more non-confrontational and sensitive to the needs of others and their clients.

**There is still segregation in the workplace - family law is still seen as a woman’s work.**

**Legal knowledge**: Women analyze law differently:
- They include all minorities to disrupt the dominant male thinking.
- Woman in their studies focus on ethics rather than rules – while men are more comfortable with the rule based hired gun approach.
**Question 11:**
Write an essay in which you discuss the following cases and compare how the court understood the duty of the legal practitioner to obey the law – Mandela and Maqubela (30)

See above

**Question 12:**
Write an essay on the need to maintain the dignity and integrity of the court and the legal process. In this essay you should cover the following:
- When judges should resign
- When and how many times a judge may be removed from office

S176 provides that judges of the constitutional court are appointed for a non-renewable term of 12 years – but they must retire at the age of 70. Other judges may serve office until the age of 75 or until they are discharged from active service in terms of an act of parliament = judges enjoy security of tenure so there is no need for them to seek favor from politicians to make sure that they keep their jobs

S177: removal of judges:
A judge may be removed if:
- JSC finds that he suffers from:
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  - Gross misconduct
- The NA can call for the removal of the judge with a 2/3 majority
- The president can remove a judge on adopting a resolution
- The president, on the advice of the JSC can suspend a judge

**Question 13:**
Write notes on the following:
- a) The duty of confidentiality owed by the attorney to his client (5)

Duty of confidentiality:
He cannot divulge confidences/communications made to him by the client in the course of their relationship – whether oral or in writing and even if the client admits that he committed the crime.

Professional privilege plays a role: for it to exist the following requirements must be met:
➢ The legal advisor must act in a professional capacity – privilege doesn’t apply if he was just giving advice to a friend
➢ The communication must be made in confidence –
➢ The communication must be aimed at getting legal advice – lawyer hears a confession from client during consultation = privileged – lawyer hears confession during an interview with a witness = not privileged
➢ The communication mustn’t have been made with the intention of furthering a crime.

= Privileged information.

This privilege belongs to the client; it must be claimed in court and doesn’t arise automatically.

Exception to privilege:
- Where the legislature gave an exception
- Client gives his consent

Advocates cannot cross over to the opposition after getting information related to the client’s case = abuse of confidential information.

b) The lawyer’s relationship with and duty towards the court (10)
➢ Treat the courts with respect = conduct themselves in a dignified manner= they cannot mislead the court- by making false statements.
➢ He cannot conceal anything the court requires for the administration of justice.
➢ If material facts are withheld by the attorney, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practice law (Swain/ Meret)
➢ In Ex parte applications – lawyers must use good faith and put all the relevant facts before the court = so court had full knowledge.
➢ They mustn’t abuse court procedure or use delay tactics.
➢ Matters must be settled by the court and not the media = lawyers cannot make statements to the media with regard to cases they are involved with.
➢ Their duty to the court is greater than their duty to the client = except with regard to confidential information.
➢ Professional dignity means that they cannot sell their services.
c) 5 characteristics which distinguish the legal profession from other businesses

1. Specialized knowledge
2. Common good – justice
3. Serving the public
4. Discretion and autonomy
5. Accepting responsibility for their actions
6. Self-discipline = ethical
7. The profession is enforced by the courts

Question 14:
Write notes in which you explain the following:

(i) The privilege of advocates and attorneys to make defamatory statements in court;

Lawyers have a relative privilege in court = they can put their client’s case forward and they shouldn’t be hampered in their pursuit for justice.
But this may be abused = slander 3rd parties.
If the privilege is abused by making false statements, or slanderous statements unconnected to the case = exceeded his privilege and may be liable.

(ii) The circumstances under which an advocate may refuse to accept a mandate;

Mandate need not be accepted if:

1. Conflict of interest: this includes a financial interest in the case
2. Fraud, illegality: its suggested by the client that the lawyer should participate
3. Competence: where the lawyer is unsure of his ability

(iii) The duty of confidentiality owed by an attorney to his or her client;

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Advocates cannot cross over to the opposition after getting information related to the clients case = abuse of confidential information.

(iv) **The duty owed by an advocate towards the court when he or she appears in an ex parte application;**

*Ex parte applications* –
- Lawyers must use good faith
- Put all the relevant facts before the court
- Court must have full knowledge.
- *Meret case*
QUESTION 15:

a. “Canons”, “ethical considerations” and “disciplinary rules” make up professional codes of ethics. Compare and contrast these different levels/standards of conduct, Use examples in your discussion.

(10)

Professional codes are a mixture of:

Canons: rules which are expressed in general terms, about the standard of conduct that is expected, this includes:

- Integrity
- Objectivity
- Fairness
- Judgment
- Dignity
- Respect

Ethical considerations: sets the standard of conduct, which tells a lawyer which actions to avoid, as they would damage his reputation

Disciplinary rules: are directional = state the minimum level of conduct required from a lawyer to avoid disciplinary action

b. Discuss the role of rules, consequences and virtue as approaches to assessing ethical conduct.

(25)

This is based on the philosophical approach to legal ethics:

Rules must be accepted as a duty = Deonic ethics

KANT: look at an ethical situation like a reasonable person would – he deems that there should be a universal ethic.

This is approached in 2 ways:

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POSTMODERNS: say that there can’t be one universal ethic

CONSEQUENCES:

The only thing, which is relevant in determining whether an action is right or wrong, is the purpose, which the action is intended to achieve. Is the result useful?

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BUT: not everything, which is useful, is necessarily right = there are things which are useful which are ethically wrong (abuse of science).

**Q: whether any means can be used to achieve the greatest happiness to the greatest number?**

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- *It helps improve the public image of lawyers*
- *Satisfies the clients need*

The requirement that a lawyer must have moral standing before admission doesn’t only protect the public but also the profession’s interest and image.

An unethical lawyer can give them all a bad name.

VIRTUES:
You can discuss:

- Kronman
- Aristotle
- Menkel meadow

Page 19
QUESTION 16:

“Mahatma Gandhi, Nelson Mandela and Bram Fischer ... at one point or another, had to turn against the law to which they had sworn allegiance when they entered the legal profession. All three claimed, in doing so, that their duty as lawyers was to serve justice, not the existing law”.

Wessel Le Roux ‘Conscience against the law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as practicing lawyers during the struggle’ 2001 (1) Codicillus 2-35 Discuss this statement. Refer to readings and cases in your discussion. Include in your answer a discussion about whether the approach taken by Mahatma Gandhi, Nelson Mandela and Bram Fischer and other people is relevant for lawyers today.

(30)

<table>
<thead>
<tr>
<th>Certification:</th>
<th>Decertification:</th>
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<tbody>
<tr>
<td>▪ Onus on the applicant to prove he is fit and proper</td>
<td>▪ Onus on the person applying for decertification (law society)</td>
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<tr>
<td>▪ Subjective test</td>
<td>▪ Objective test</td>
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<td></td>
<td>▪ Ex post facto</td>
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Eshete: does a lawyer’s character matter?

1. Lawyer doesn’t serve the public good (lawyer v doctor)
2. In legal education students are taught the rules
3. Adversarial system – looks at the interests of the client

Fit and proper requirement:

- S15 Attorneys Act: courts have a discretion to only admit fit and proper people (onus on applicant)
- S22 Attorneys Act: person will be struck off if in the courts opinion they are no longer fit and proper
- S3 Admissions of Advocates Act: to be admitted an applicant must be 21 and a fit and proper person

Whether someone is a fit and proper person = discretionary judgment by the court.

Challenges based on the Bill of Rights:
Kleinhans: said that this requirement violated his right to free economic activity = the court found that is was a valid limitation in terms of S36.

Machaka: said that the fit and proper requirement violated the following rights:
- Dignity
- Equality
- Freedom
- The right to choose one’s profession

The court held that it was a valid limitation in terms of S36, as it prevented the abuse of the law by criminally minded attorneys.

Problems in the past with the court’s discretion:
Gandhi: was found not to be a fit and proper person because he was Indian.

Wookey: the court refused to register her articles because she was a woman.

Roman Dutch law: found the following not to be fit and proper:
Jewish, Pagan, anyone who denounced Christianity, Blind and deaf people and woman

Fischer: was struck off the roll as he opposed apartheid

People in the past have been excluded on an arbitrary basis.

A SHIFT FROM VIRTUE TO RULES
Q: does a political motive mean that a person has a bad character?

2 tests:
5. Character test: look at the moral character of the lawyer – does it affect his job, what was the motive (subjective)
6. Rule ethics: look at the lawyer’s duty to obey the law – objective
   = look at the rules: the fact that a lawyer swears allegiance to
   the law of the Republic

CHARACTER TEST:
Krause: wrote letters stating that a newspaper writer who said that the Boer forces were outlaws should be killed = was convicted of an attempt to incite murder.
Q: does the conviction reflect negatively on his moral character, does it have anything to do with his practice as an attorney?

POLITICAL MOTIVE.

Mandela: was convicted in terms of the Suppression of Communism Act.
The conviction had nothing to do with his practice as a lawyer, the motive was political.
According to the character test – this action didn’t reflect badly on his character as a lawyer.
RULE BASED APPROACH:
Matthews: the courts changed to the rules based approach – they refused to register his articles because he had 2 previous convictions under the Suppression of Communism Act. The court looked at the fact that an attorney has a duty to uphold the law that he swore allegiance to = don’t look at the motive.

Fischer: was arrested and charged in terms of the suppression of communism Act – he applied for bail and it was granted based on his standing as a lawyer, he absconded = RULE BASED = don’t look at the political motive, look at his duty to uphold the law.

Rice

TRC: apartheid lawyers, by obeying the laws were legitimizing the apartheid government = the rule-based approach is too narrow when the rules themselves are unjust. Gandhi, Fischer and Mandela all tried to oppose apartheid in SA – they turned against the law to which they had sworn allegiance – they all claimed that they were doing their duty as a lawyer = achieve justice = look at the law as it ought to be.

VIOLENCE- RULE BASED APPROACH
Hassim: armed resistance to apartheid – rule based approach = didn’t look at the fact that the action was political and unrelated to his practice as an attorney.

Maqubela: convicted of High Treason – he argued the character test stating: it had nothing to do with his profession and that it was done with a political motive = court used the rules based approach.

TODAY:
Prince: the court refused to register his articles as he had 2 previous convictions of possession and intended to continue using.

On appeal: he requested the character test and the court said it wasn’t a political motive.

CC: Sachs, minority judgment: constitution requires the tolerance of differences and the fact that he was willing to sacrifice his studies for his religion showed a good character.

If it’s argued that the character test be used today rather than the rule based approach – there is a danger of civil disobedience – each person can decide which laws they are going to obey Civil disobedience could occur on the following grounds:

- If laws are immoral
- If it’s based on religious beliefs
If positive laws are unjust
Utility

Ghandi:
- Preferred co-operation rather than litigation
- He believed in public spiritedness.
- Believed that law was political.

Gandhi, Mandela and Fischer all turned against the law to which they had sworn allegiance = in doing so they claimed that they were serving justice: the duty of a good lawyer was to serve justice

QUESTION 17:

“What sets such a lawyer apart and makes him a model for the profession as a whole is not how much law he knows or how cleverly he speaks, but how wisely he makes his judgements that his professional tasks require”. Kronman “Living in the law” 1987 University of Chicago Law Review Vol 54 at 861-2. According to Kronman, good judgement is not logical deduction nor is it an intuitive grasp of what is right and wrong. Write an essay in which you explain the role of good judgement in the lives of different legal practitioners. Distinguish, for example, between attorneys, advocates and judges. Also explain what a good judgement entails if it is not based on logic or intuition.

KRONMAN

Q: why does someone decide to study law?

2. Power and Money: people are a means to an end = problem with this is that a person has no time for a personal life – what you do for a living determines what type of person you will be.
3. Public spiritedness: practice of law to serve the common good

Character traits:
- Deduction and intuition: when deciding how to behave doesn’t depend on the rules = there must be a choice between conflicting interests
- Deliberation and choice: requires that someone look at all the possibilities, and consider values which aren’t your own

= Deliberate with sympathetic detachment = GOOD JUDGMENT.

Llewellyn’s 3 Law Jobs:
d) **Adjudication:** OBJECTIVE, a judge is required to consider both sides and improve the law = find the best solution for the community.

e) **Counseling:** SUBJECTIVE/OBJECTIVE. Client comes to a lawyer confused in order to get advice. The lawyer must sympathetically detach himself and give the client objective advice.

f) **Advocacy:** SUBJECTIVE, his job only begins when a course of action has already been decided. According to Kronman: to successfully represent your client, put yourself in the position of the judge (sympathetic detachment = good judgment).

There are 2 types of arguments:

- **Clever argument:** use the law to prove the clients case
- **Wise argument:** look at the case from the judges position = needs of the community

Wise arguments win cases.

To do what a judge does = imaginatively look at the conflicting interests with sympathetic detachment.

**REASON why people study law = to get good judgment.**

**Question 18**

1. **Critically discuss the argument that legal ethics is no more than compliance with a legal or professional code.**

   (5)

**Formalism:**

- Lawyers with a formalistic approach of the law – will see if their ethical responsibilities comply with a codified set of rules = which will say what he can and cannot do in a certain situation (RULES) = looks at the rule based approach to ethics
- This approach focuses on rules which can be strictly applied by the law society

  The lawyer following this approach adopt the same approach as Justice Holmes: if you want to know what the law is look at it as a bad man – who only cares about the consequences of his action (fear of punishment) and not at the good man who looks at the reasons for his actions (conscience)
- This approach is still philosophical because it rests on the assumption (formalism/positivism) which applied in legal circles in the 20th century

**This was criticized by Nicholson and Webb see page 15**
2. Briefly explain postmodern ethics. (5)

Look at:

1. The end of a universal morality
2. Celebrate difference
3. Reject absolutes
4. Recognize the necessity to accept uncertainty and indeterminacy as a way of life

3. You are a practicing advocate who receives a brief from an attorney’s firm to defend a person accused of child molesting. Is there a duty on you to accept the brief? (5)

An advocate can refuse if the doesn’t have the time or knowledge

Mandate need not be accepted if:

1. Conflict of interest: this includes a financial interest in the case
2. Fraud, illegality: its suggested by the client that the lawyer should participate
3. Competence: where the lawyer is unsure of his ability

4. In an attempt to maintain the ethical basis of the legal profession, comprehensive codes of legal ethics were adopted, but these ethical “rules” are also suffering a legitimacy crisis among both the “outsiders” and the “insiders”. Discuss. (10)

<table>
<thead>
<tr>
<th>OUTSIDERS</th>
<th>INSIDERS</th>
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<tbody>
<tr>
<td>• There is no access to a simple, easy to understand set of professional codes = the public don’t know what conduct is unprofessional • Some ethical rules protect the professionals against the public or serve the members of the profession • Rules aren’t universal and change with the times • Complaints are handled by colleagues • Practitioners aren’t willing to testify against one</td>
<td>• The codes aren’t always enforced by law societies • Those who don’t obey the codes aren’t dealt with properly • Since the codes aren’t applied they should be replaced with business rules • By trying to force their client to do the right thing, the client will go somewhere else • Legal ethics should be reduced to rules of</td>
</tr>
</tbody>
</table>

Critical Law Studies CC ©
5. Discuss the lawyer’s relationship with the public. (5)

Lawyers render services to the public. The community should be shown that lawyers who do not comply with the standards of professional behavior would not go unpunished.

Reyneke: the attorney was found guilty of contravening the Insolvency Act and statutory perjury = such misconduct makes his integrity questionable and makes him unfit for the practices of law.

Witnesses: who are subpoenaed to court are performing a public duty in coming to court and should be treated with respect = cannot be intimidated.

Roman Dutch law states that lawyers have a relative privilege in court = they can put their client’s case forward and they shouldn’t be hampered in their pursuit for justice. But this may be abused = slander 3rd parties. If the privilege is abused by making false statements, or slanderous statements unconnected to the case = exceeded his privilege and may be liable.

6. The impeachment and removal from office of a judge in terms of the Constitution is available in extreme cases only. Discuss. (5)

S177: removal of judges:
A judge may be removed if:

- JSC finds that he suffers from:
  - Incapacity
  - Gross incompetence
  - Gross misconduct
- The NA can call for the removal of the judge with a 2/3 majority
- The president can remove a judge on adopting a resolution
- The president, on the advice of the JSC can suspend a judge
7. Discuss the lawyer’s relationship with the courts. (10)

➢ Treat the courts with respect = conduct themselves in a dignified manner = they cannot mislead the court - by making false statements.
➢ He cannot conceal anything the court requires for the administration of justice.
➢ If material facts are withheld by the attorney, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practice law (Swain/ Meret)

➢ In Ex parte applications – lawyers must use good faith and put all the relevant facts before the court = so court had full knowledge.

➢ They mustn’t abuse court procedure or use delay tactics.

➢ Matters must be settled by the court and not the media = lawyers cannot make statements to the media with regard to cases they are involved with.
➢ Their duty to the court is greater than their duty to the client = except with regard to confidential information.
➢ Professional dignity means that they cannot sell their services.

Question 18

Is the traditional approach to legal ethics ethically acceptable? (10)

TRADITIONAL APPROACH TO ETHICS

LEWIS: didn’t look at ethical philosophy – the purpose of his book was to set out the rules of condition, which an attorney is required to obey. It amounts to a code of rules = positive law

He wanted to reduce ethics to a code of conduct, which a lawyer must obey.
He discussed legal ethics without any reference to ethics/morals = this approach is a formalistic philosophy

Coquilette:

1. Lawyers with a positivistic approach to law, understood his ethical responsibility as a question of complying with a codified set of legal rules = RULE based approach
2. Formalistic attitude, looks to the minimum standards and rules which could be enforced by law societies = he looked at it from the bad man approach of Justice Holmes
UNISA: the crisis in the legal profession today could be attributed to the use of rule.

Shaffer: lawyers don’t obey the rules out of conscience but out of fear of punishment.

Justice Holmes: **bad man approach**: believes that you should approach the law like a bad man, who obeys the law out of fear of punishment rather than a good man who obeys the law due to his conscience.

Role differentiated behavior = HIRED GUN – you need a lawyers skills not his ethical beliefs.

MARKOWITZ:
Believes that the adversarial system is part of the crisis in the legal profession.
Lawyers often employ **SHARP PRACTICES** including:
- Examining witnesses aggressively
- Delaying cases
- Manipulating facts
- Making statements that they don’t believe

To justify the use of these practices they make use of role-differentiated behavior = they focus on the argument in court and not on the moral issue of the case.

To prevent this it’s suggested that the professional role be redescribed = make lawyers more moral in their private and professional lives.

There are 2 ways to look at legal ethics:
1. The lawyer client modes: inhumane system
2. Moral context: environment where one can be more human – with being a moral (Menkel-Meadow) or Virtuous (Kronman) person

**Answer according to your opinion**

**What other approach to legal ethics could, according to you, help to change the profession for the better?** (5)

**Discuss one of the philosophical approaches:**
Virtues, rules or consequences = page 18
Question 19

“….. An applicant who has stated and repeated in unequivocal terms that he or she intends contravening the provisions of the Drugs and Drug Trafficking Act relating to the possession and use of cannabis, does not meet the ‘fit and proper’ requirement imposed by section 4A of the Attorneys Act…. conduct of that sort reflects adversely upon an applicant’s character, is inconsistent with the duties and obligations of members of the profession and is contrary to the standards of behaviour expected of officers of the Court…”

Discuss the above referring to case law. [20]

Prince v President, Cape Town Law Society:
Prince applied to the Law Society to have his articles registered – this was refused as he had 2 previous convictions of possession of dagga and he intended to keep using it in the future.
Prince opposed this decision on 2 grounds:

1. The prohibition of use and possession in S4 of the Drugs and Drug trafficking Act was unconstitutional in so far as it didn’t make an exception for religious purposes
2. His contravention in the past didn’t prove that he lacked the character traits which would make him a fit and proper person to practice law

To determine certification the onus is on the applicant to prove that subjectively he is fit and proper (S15 Attorneys Act and S3 Admission of Advocates Act

Both were rejected by the High Court – the court had to determine whether the unlawful use of dagga for religious purposes reflected badly on his character.
Used the RULE based approach:

Matthews: the courts changed to the rules based approach – they refused to register his articles because he had 2 previous convictions under the Suppression of Communism Act.
The court looked at the fact that an attorney has a duty to uphold the law that he swore allegiance to = don’t look at the motive.

Fischer: was arrested and charged in terms of the suppression of communism Act – he applied for bail and it was granted based on his standing as a lawyer, he absconded = RULE BASED = don’t look at the political motive, look at his duty to uphold the law.
Rice
**APEAL:**

SCA: after being requested to do so refused to follow the character approach developed in Krause and Mandela on the ground that Prince’s facts were materially different.

Mandela: was convicted in terms of the Suppression of Communism Act.
The conviction had nothing to do with his practice as a lawyer, the motive was political.
According to the character test – this action didn’t reflect badly on his character as a lawyer.

The court preferred the Rule/ Duty approach and looked at an attorneys objective duty to comply with the law = DUTY TEST HAS BEEN CARRIED OVER TO THE NEW SA.

**CONSTITUTIONAL COURT:**

In the 3 judgments delivered in the Prince case, the possibility is raised that Prince might still be a fit and proper person to practice law in spite of his previous convictions.

Challenged the fit and proper requirements based on the BOR: **Sachs:** judges the defiance of Prince against the politics of open democracy and of the reasonable accommodation of differences = Prince shouldn’t be forced by inflexible laws to make a choice between his conscience and his career = from this perspective Sachs believes that in spite of his open defiance, he has shown himself to have principles in willing to sacrifice his career for his beliefs.

His religious use of dagga therefore doesn’t make him an unfit person.
In the past the Law Society has excluded honorable people because their beliefs brought them in conflict with the law (Mandela).
This suggests that the character approach should be used.

It’s argued that if this character approach is used rather than the rule based approach = there is a danger of civil disobedience= if each person were to decide which Challenges based on the Bill of Rights: **Kleinhans:** said that this requirement violated his right to free economic activity = the court found that is was a valid limitation in terms of S36.

**Machaka:** said that the fit and proper requirement violated the following rights:
- Dignity
- Equality
- Freedom
- The right to choose ones profession

The court held that it was a valid limitation in terms of S36, as it prevented the abuse of the law by criminally minded attorneys
Laws he is going to obey = makes the country ungovernable.

On which grounds would a legal practitioner decide to disobey?

- **If the laws are immoral** = it’s a matter of individual conscience on whether to obey them or not
- **If it based on religious beliefs** = this is the idea that one should obey God and not man
- **Positive laws are unjust** = appeal is made to natural law and man’s reason – according to Locke: the function of government is to equally protect the individuals rights and act in everyone’s interests = civil disobedience would be allowed if the state failed to fulfill this function
- **Utility** = disobedience to the law is a way to bring about the greatest happiness to the greatest numbers

**Question 20**


Discuss the role-differentiated approach to legal ethics.

[20]

**WASSERSTROM**

Looked at the concept of role-differentiated behavior.

It’s believed that law and morals are a contradiction.

- Laws are followed out of fear of punishment
- Morals are followed out of conscience

The lawyer-client relationship is:

- Immoral
- Unequal

**IMMORAL:**

**Role differentiated behavior**: allows a lawyer to act in a way, which might be different from their own moral beliefs.

The only requirements are:

1. Make your expertise available to the client and
2. Don’t break the law

Criminal defence lawyer: defend the client irrespective of the belief in his innocence = you might have to do something, which is immoral.
This could be justified by the fact that the A is allowed a trial (S34 and S35).

- The state has the resources to investigate crimes
- The accused’s rights are limited

**Reasons why role differentiated behavior can’t be used:**

1. This will only work if there is confidence in the legal system – i.e. a guilty man wont be set free
2. It encourages competition rather than co-operation
3. You need to distinguish it from other professions – doctors can use it more easily as it is always justified to save a life- whereas its not always best to allow all people to go free
4. Its hard for someone who uses role differentiation in his profession to stop this way of thinking from infiltrating your personal life

**UNEQUAL**

**Lawyer-client relationship:** is believed to be unequal = a client is treated as a means to an end.

This relationship is unequal due to the fact that:

a) The lawyer has professional knowledge and uses technical language
b) The legal profession is self regulating

Wasserstrom: to change this impersonal relationship:

- Simplify legal language
- Make the legal profession more accessible