


Previous Exam Questions & Answers '09 – '14
10 pointer Questions & Answers

“The crisis in professionalism is not restricted to law, and similar concerns have been raised in connection with other professions such as the medical profession”. **Do you agree or disagree that the legal profession is in an ethical crisis? Motivate... 5x (10)**

I agree that the legal profession is in an ethical crisis and I base my opinion on the following arguments:

Legal morality declining:

The **ethical ideal** of the “morally good” lawyer is closely linked to the idea that legal practice is a profession, and not merely a job.

The **unscrupulous pursuit of money and status** is achieved at the expense of the basic values which members of their profession are supposed to profess.

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Pathological desire for wealth:

The **desire for wealth** has eroded civic and community values and has reduced what was once an honourable profession - to **market-driven sellers of expertise**, solely driven by the pursuit of fame, fortune and profit at the expense of morality.

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Uncontrolled competition and commercialisation:

Fierce competition and commercialisation have also led to unethical, even fraudulent, behaviour as not to be left behind in the wealth race. **Pierre Schlag** describes lawyers as

nothing other than **freelance bureaucrats, willing to sell their souls to the highest bidder.**

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Climate of lawlessness & economic recession

This **“survival morality”** in a **climate of lawlessness and sluggish economic environment** has led to increasing competition, a blunting of moral sensitivities and justification for the violation of the rules of ethical behaviour and decency. **Already in 1996 the Krugel Commission** bore witness to the loss of ethical direction on the profession.

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Desire for financial success & influence:

The **desire for wealth** has eroded civic and community values and being financially well-off is unfortunately **now the most important life goal of university students**. **Schlag** refers to lawyers as **freelance bureaucrats, willing to sell their souls to the highest bidder.**

The consequences of these developing trends include:

- Job satisfaction and fulfillment has declined into anonymity, alienation and diminished collegiality and civility among their ranks.
- Practitioners make use of *truth, rationality, justice and other moral values in an instrumental sense - only insofar as these values aid them to manipulate other legal actors to reach pre-determined outcomes for their clients.*
- While **some still adhere to a positivistic** approach to ethical rules as definitive of moral responsibility, **others** go even further and regard these rules of professional conduct as irritating and as **outdated** relics of the past. They will perhaps *pay lip service to these rules but ignore them in their daily practice.*

- In Schlag's description, the **ethical and professional ideal** of the good lawyer has **completely collapsed**.

Rules of conduct pertaining to attorneys i.r.o their clients

(10)

Attorneys should be committed to the **aggressive single-minded pursuit** of their **client's legal objectives**, regardless of their personal opinion of the character or the moral merits of the client's objectives.

Whilst attorneys are not obliged to accept client's brief, an attorney should - if he does accept a client's mandate - carry out the work with the necessary **due diligence** - **encompassing the care, skill and commitment** that may reasonably be expected from any legal practitioner including to:

- seek to balance the interests of clients with the interests of the community.
- endeavour to reach a solution by settling out of court, rather than initiating legal proceedings, if it is in the client's interests.
- be **honest** in **advising the client on the merits of his case** and should tell a client when he is wrong, even if this might mean that the client goes elsewhere for advice.
- **act fairly towards unrepresented party** to a contract.
- **not acquire a financial interest** in the subject matter of a case which you are conducting.
- **consider any possible conflict of interests** and whether the mandate involves any illegality or other impropriety.
- **refuse to co-operate or withdraw if dishonesty is required** of the practitioner himself by the client or any party.

- once an attorney has accepted a mandate, he has to **see the matter through**; he may withdraw only with the client's consent, or with good reason, such as the client's **improper or fraudulent behaviour**.
- **keep a separate banking account** in which all money held or received by them on account of other persons must be deposited.
- **honour his duty of confidentiality** i.r.o confidential communications made with a view to litigation, as well as all confidential communications made for the purpose of giving or receiving legal advice or assistance, which are considered to be **privileged information**.
- **facilitate access by the client to an advocate**, should the client's brief or circumstances require.
- **This is also known as the referral rule - which includes to:**
 - **initiate contract** between advocate and client;
 - **negotiates and receives fees** from the client;
 - **instruct the advocate specifically** in relation to each matter affecting client's interest;
 - **oversees each step advised or taken** by the advocate;
 - **keeps the client informed**, and is present as far as possible during interactions between the client and the advocate.

The role played by legal practitioners and judges to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts? (10)

Attorneys and advocates are officials of the court and should always **act with dignity** and give the courts their **due respect** and maintain and promote the **dignity of the court**.

- The court should be able at all times to rely on their **honesty** and on the **veracity of their statements**. There can be no effective administration of justice without legal practitioners being **scrupulously truthful** in their dealings with one another and the courts.
- Their sense of integrity should guide them to **keep abreast of the law** and to **inform the court of all the relevant case law** of which they are aware, even if this may be to the detriment of their client's case.
- They **may not act in contempt of court** [insulting a judge or magistrate *R v Silber 1952*] or **mislead the court**, whether directly or indirectly, for example by making misrepresentations or false statements. *Contempt of court is a common law as well as a statutory offence.*
- They may not **conceal** anything that the court requires for the administration of justice or **abuse** court procedures through the use of **delay tactics**. *Ex Parte Jordaan: In Re Grunow Estates (Edms) Bpk v Jordaan 1993* – application in excess of 800 pages.
- **If material facts are withheld** from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. *Ex parte Swain 1973*
- In **ex parte applications**, practitioners are **obliged to act in the utmost good faith** and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case. *Ex parte Cassim 1970* prior convictions withheld. *Estate Logie v Priest 1926* full circumstances not divulged.

- **In motion court proceedings**, advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation for this. *Ex Parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk 1984.*
- **Matters should be settled by the courts and not the media.** Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.
- Legal practitioners' duty to the court is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts. The lawyer must subordinate his or her own interests to those of the court and the client.

The 'fit-and-proper' imperative also applies to judges of the courts

- **Section 174(1) of the Constitution** provides that **judges** must be **South African citizens** who are "**appropriately qualified**" and "**fit and proper persons**".
- They should have the **moral integrity** to sit in judgment of others, and should behave with the **propriety** expected of judges.
- They should be **able to judge** the impression created by their **own conduct** with the same rigour as they are able to judge the conduct of parties appearing before them.
- In terms of **section 165** of the Constitution, **judges are independent and subject only to the Constitution and the law**, which they must apply impartially and without fear, favour or prejudice.
- Given the power and influence they have, **judges ought to be impartial and independent of government and outside financial interests.**

- Court judgments should be **free from outside influence**. No judge may therefore accept, hold or perform any other office for profit or receive remuneration, apart from their salaries, without the permission of the Minister of Justice.
 - The judiciary relies on public acceptance of its moral authority and integrity.
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Law is practised as a profession and is not merely a job. What distinguishes a profession from other jobs, businesses or trades? 4x (10)

Law is practised as a profession and is not merely a job. Bruce Ackerman referred to the law as a “calling” based on “...a sound moral character is essential to professionalism.

- A legal professional’s conduct should justify the trust placed in you by your clients, adversaries, and the courts and the whole of society.
- Lawyers find their social role permeated by ethics from which may be inferred that a lawyer should be *worthy of public trust*, and carry out his professional duties with public-spiritedness and the highest standards of ethical conduct.

Complimentary hereto - the following requirements are also set for professionals:

Professionals:

- are required to have **specialised intellectual knowledge** and skills before they will be granted access to their chosen profession
- are expected to have **a commitment to promoting the basic good of society**. i.e. the basic good is justice.
- are expected to have **a commitment to serving the public** in matters related to their particular field.

- enjoy **relative autonomy and discretion in the execution of their duties** and do not blindly accede to their clients or other authorities.
- should have a **willingness to accept personal responsibility for their actions** and for maintaining public confidence in their particular profession.
- share a sense of **common identity** and an established moral community.
- are **self-disciplined and abide by a code of legal ethics** based upon what the best thinkers in their particular profession regard as proper conduct for a member of that profession.

The above standards of **professional conduct are enforced by the profession itself or by the courts**, taking into account the views of the controlling body of the particular profession.

What are the rules of conduct pertaining to attorneys i.r.o their clients? (10)

Attorneys should be committed to the **aggressive single-minded pursuit** of their **client's legal objectives**, regardless of their personal opinion of the character or the moral merits of the client's objectives.

Whilst attorneys are not obliged to accept client's brief, an attorney should - if he does accept a client's mandate - carry out the work with the necessary **due diligence** - **encompassing the care, skill and commitment** that may reasonably be expected from any legal practitioner including to:

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Ethical responsibility involves more than strict compliance with rules. Discuss? (10)

The formalistic idea that legal ethics is no more than the compliance with a legal code makes, according to our view, a mockery of this justification, reduces law to another business enterprise, and exposes the continued existence of the law and bar societies as no more than agencies created to protect vested interests.

Stan Ross comments that: When law and ethics are approached from this wider **philosophical perspective**, it becomes clear that legalistic or rule-based approach to ethical responsibility frequently results in strangely unethical approach to legal ethics amongst lawyers.

Ethical philosophy suggests that **ethical responsibility** involves **much more than**, or even something completely different, to strict **compliance with rules**.

In spite of the lofty ideals and the strong disciplinary prescriptions, there is criticism from both the side of the profession and the public against the legal code of ethics.

Practitioners raise certain practical concerns – being:

- Professional codes are not always enforced by law societies and those who transgress them are not always dealt with effectively. Hence practitioners argue that the

profession might as well abandon them, or replace them with codes of business ethics.

- Others are afraid of upholding ethical values and sticking to the rules, when their colleagues are not. They fear that by trying to encourage their clients to do the right thing, these clients may go to somebody else who is willing to carry out their wishes.

They also raise certain theoretical concerns:

- The very idea that the practice of law is a profession (and not merely a job in which bureaucratic tasks associated with a business are executed) counters the idea that legal ethics can be reduced to the “rules of ‘professional conduct’ ”.
- One justification for the self-regulation of the profession is that the practice of law requires complex professional judgments, the reasonableness of which can be judged only by fellow professionals.
- **Self-regulation** presumes that the conduct of a practitioner will not be judged against a code, but by colleagues who exhibit those virtues inherent in morally good practitioners.

Do you think that one should distinguish between the professional and the private life of a legal practitioner? Substantiate your view. (10)

- In my opinion there should be no distinction between the professional and private life of a legal practitioner. As with charity - good moral ethics - begins at home...
- The American Bar Association’s Model Code does not distinguish between professional and personal conduct, stating that a lawyer must comply with the rules at all times whether or not he or she is acting in a private or professional capacity.

- Professional codes tend to reflect this lack of precision and differ in their approach to the requirement of a good moral character in private life, as opposed to professional life.
- There are a number of obvious difficulties with the application of the “fit and proper person” standard. Distinguishing between private and professional morality or ethics is but one difficulty with character screening.
- The issue of whether there should be a distinction between professional and personal conduct has not been settled in South Africa, and there seems to be a discrepancy in this respect between the application of the rules of the bar and the side-bar. For example, the purpose of ethical rules of professional conduct at the side-bar has been stated to be to “regulate an attorney’s conduct not only in his professional career but also in his personal life” while such a rule does not apply to members of the bar.
- The fitness of a lawyer who has embezzled funds will be suspect, whereas his or her sexual indiscretions may not have such a negative effect. Professional codes tend to reflect this lack of precision and differ in their approach to the requirement of a good moral character in private life, as opposed to professional life. This shows their ethical superfluous and pragmatic nature.
- In South Africa - the rationale for the regulation of the “personal life” of the legal practitioner is probably that if you do something which brings you into disrepute, the profession and the administration of justice will also be brought into disrepute.
- In essence the legal practitioner practices his ‘craft’ in the public domain and is placed in a position of esteem due to his professional status. Similarly his conduct - in the private or professional domain is subject to public scrutiny. Hence he is compelled to

act with moral-, ethical- and professional integrity at all times... This is in the interest of himself and the profession... There is no other choice!

Morally good lawyers argue that they only play a role as legal practitioners? (10)

Morally good legal practitioners try to justify reprehensible conduct by means of the *role-differentiated or role-based approach*.

They argue that they only play a role, and that their aggressive and unethical conduct goes with their role as legal practitioner.

When legal practitioners act in their professional capacity they do not act as ordinary people, but as occupants of a role.

- » Their role insulates them from moral censure.
- » Their conduct cannot be assessed by the standards of ordinary morality.
- » The only question is whether their appearance in court was good or bad, whether their arguments were clever, and whether their cross-examination was skillful.

The question whether they abused other people or told lies is not relevant.

The “fit-and-proper” test has been constitutionally challenged on two occasions. Refer to case law and indicate the Constitutional court’s verdict in both cases? 5x (10)

The fit-and-proper test was constitutionally challenged in

Prokureursorde van Transvaal v Kleynhans 1995 ⁽¹⁾ SA 839 (T) – and –

Law Society of the Transvaal v Machaka 1998 ⁽⁴⁾ SA 413 (T) – and –

Prince v President, Cape Law Society 2002 ⁽²⁾ SA 794 (CC).

In *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) the court held that standards could be set for the legal profession, both as far as “competence” and “unquestionable integrity” was concerned, either on the basis of the internal limitation of the section 26 right or in terms of the general limitations clause, section 33(1) of the Interim Constitution.

In *Law Society of the Transvaal v Machaka* 1998 the constitutionality of the power of the court to strike somebody off the roll was again challenged under the final Constitution of 1996.

It was argued that the **fit and proper person standard** violated the right:

- to dignity, equality and freedom (s 7(1)),
- not to be subjected to cruel, inhuman and degrading treatment (s 12(1)(e))
- to choose one’s trade, occupation or profession freely (s 22).
- Relying on the judgment in *Kleynhans*, in 1995 under the interim constitution the court rejected these arguments as well as the idea that membership of the legal profession should not be subjected to the character screening of the person involved. The court held that character screening prevented the right to freely choose one’s profession from being abused by criminally minded attorneys and that the limitations placed were in fact justifiable i.t.o the 1996 Constitution.

In *Prince v President, Cape Law Society* 2002 it was raised in the constitutional court:

- First - that the prohibition of the use and possession of dagga was unconstitutional in so far as it did not make provision for an exception for its bona fide religious use - and

- that even if the prohibition were not unconstitutional, his contravention of the prohibition in the past (and in the future) **would not by itself prove that he lacked the character traits that would make him a fit and proper person to practise law.**

Both these arguments were rejected.

From these cases it is clear that the constitutional challenge to the admission requirements currently applicable to the legal profession has thus far met with very little success.

The “fit and proper person” standard and the principle of character screening have both been accepted as constitutionally valid, without any serious consideration given to the exclusionary impact this test has had in the past.

Nor have stricter rules for the application of the character test been laid down to curb further and future abuse of this open-ended standard.

Discuss *Rosemann* with reference to the constitutional challenge i.r.o the division of work between attorneys and advocates? (10)

The admission requirements for the legal profession were also challenged in ***Rosemann v General Council of the Bar of South Africa*** 2004 (1) SA 568 (SCA). In this case it was argued that the division of work between the professions (advocates and attorneys) and the referral rule was irrational, and as such an unreasonable limitation on the right to freely choose one’s profession (s 22 of the Constitution). The Court once again rejected the argument and held that the freedom to choose a profession was not violated by the dual structure of the profession. The applicant was at all times free to choose whichever profession he wanted to pursue. Even if it was accepted that the restriction on attorneys

to do the work of advocates violated section 22, the restriction remained justifiable because of the benefits which accrue to the general public from the specialisation of legal services (par [30]–[31]). SG pp 7

It seems as if the duty test and not the character test, is applied by the courts in the new South Africa. Illustrate this view by referring to case law where an applicant's belief has brought him into conflict with the law? 3x (10)

Whilst it may be important, politically correct, convenient or the vogue to be critical of most decisions taken by our courts in the past in respect of character measured against duty, I believe it is of equal importance to consider the trend which was established - in a varying degree - by these decisions wherein either character or duty prevailed wherein belief or conviction brought a person into conflict with the law.

- **Ex parte Krause** 1905 Krause was convicted in England of attempt to incite murder, and was subsequently disbarred by the Benchers of his Inn. After the South African War, the Transvaal Bar Council took a resolution stating that it had no objection to either his reinstatement in the Middle Temple, or his admission to the Transvaal Bar. The court decided in favour of Krause's admission to the Transvaal Bar.
- In **Incorporated Law Society, Transvaal v Mandela** 1954 the court confirmed that the fact that an attorney has been convicted of a crime, is prima facie evidence of misconduct. However, the fact that he deliberately disobeyed the law did not necessarily disqualify him from practising law.
- In **Society of Advocates of SA (Witwatersrand Division) v Fischer** 1966 the courts' decision went the other way. The court found that Fischer had deliberately misled the

court when he applied for bail, that his contempt of court amounted to dishonest conduct, and that it reflected negatively on his character. The court held that it would be inconsistent with that duty for the court to allow an advocate to remain on the roll when he is defying these laws and instigates others to defy these laws.

- In *Incorporated Law Society, Natal v Hassim* (also known as *Essack*) 1976 - 1979 the court found that any attempt to conspire with others to violently overthrow the government was disgraceful behaviour, and a reprehensible method of voicing protest.
- *Prince v President, Cape Law Society* 2002 the majority decision in the Constitutional Court held that Prince's remedy sought as special exception for Rastafarians for the use of Cannabis based on their religious practices and convictions contrary to the law, could not be condoned based on his constitutional right religious freedom, as the right could justifiably be limited i.t.o section 36 of the Constitution and the practice constituted a contravention of the law. The court preferred to adopt the rule or duty approach, and emphasised the objective duty of legal practitioners to obey the law. It would thus seem as if the duty test, and not the character test, has been carried over to the new South Africa.

There are however indications in the Constitutional Court judgment that the position taken by the Cape High Court and the Supreme Court of Appeal on this issue does not find universal support among South Africa's senior judges. In a minority judgment in *Prince* Sachs J of the Constitutional Court had no problem to concede that, in spite of his open defiance of the dagga prohibition, Prince has shown himself to be "a person of principle, willing to sacrifice his career and material interests in pursuance of his

beliefs". From this obiter remark one can infer that Sachs J is of the opinion that Prince's religious (but illegal) use of dagga does not render him an unfit or improper person for the legal profession. This inference is supported by a further statement by Sachs J to the effect that the Law Society in the past impoverished itself by excluding persons of honour and integrity because their beliefs had brought them into conflict with the law.

In conclusion...

- I believe that the modalities of character and duty should be measured on an equal footing as the one informs the other and vice versa.
- Social- Political and Religious prejudice invariably stifles objective argument. If one's mind is clouded by any of these prejudices neither a character nor duty based approach can objectively succeed - rational discussion is blocked due to such prejudice.
- A steadfast moral character remains an essential trait of any practitioner of the law in his relentless pursuit of justice which includes a duty to- and respect for- the law. It is however exactly that moral character and respect for the essence of law - which justifies and hones critical- and vehement opposition to that which is unjust. Both balance the scale...

Write down meaningful arguments indicating whether you support a character based or a duty based approach? (10)

In my opinion a combination of the character and duty based approaches should prevail in the determination of the worthiness of a candidate to be admitted to the profession.

To only consider one modality is to either render a disservice to the character of the individual who stands to be admitted or disbarred or in the alternative, to render a disservice to the law we are committed to uphold.

- Whilst it may be important, politically correct, convenient or the vogue to be critical of most decisions taken by our courts in the past in respect of character measured against duty, I believe it is of equal importance to consider the trend which was established - in a varying degree - by these decisions wherein either character or duty prevailed.
- **Ex parte Krause** 1905 TS 221 - Krause was convicted in England of attempt to incite murder, and was subsequently disbarred by the Benchers of his Inn. After the South African War, the Transvaal Bar Council took a resolution stating that it had no objection to either his reinstatement in the Middle Temple, or his admission to the Transvaal Bar. The court decided in favour of Krause's admission to the Transvaal Bar.
- In **Incorporated Law Society, Transvaal v Mandela** 1954 (3) SA 102 (T)), the court confirmed that the fact that an attorney has been convicted of a crime, is prima facie evidence of misconduct. However, the fact that he deliberately disobeyed the law did not necessarily disqualify him from practising law.
- In **Society of Advocates of SA (Witwatersrand Division) v Fischer** 1966 (1) SA 133 (T) the courts' decision went the other way. The court found that Fischer had deliberately misled the court when he applied for bail, that his contempt of court amounted to dishonest conduct, and that it reflected negatively on his character. The court held that it would be inconsistent with that duty for the court to allow an

advocate to remain on the roll when he is defying these laws and instigates others to defy these laws.

- In **Incorporated Law Society, Natal v Hassim** (also known as Essack) 1976 (4) SA 332 (N); 1977 (2) SA 757 (A); 1978 (2) SA 285 (C); 1979 (3) SA 298 (A) the court found that any attempt to conspire with others to violently overthrow the government was disgraceful behaviour, and a reprehensible method of voicing protest.
- Bar the decision in Fischer - a trend established was that, mere transgression of the law did not necessarily lead to disbarment, but morally reprehensible actions in fact did.
- Usually, removal will follow where the offence: is related to your professional capacity - or - involves dishonesty & raises doubts whether you can be trusted as an officer of the court, which indicates that you “are of such a character that you are not worthy to remain in the ranks of an honourable profession”.
- It is apt that a practitioner of the law, by the very nature of his calling and character should vehemently oppose any law which infringes the democratic values of human dignity, equality and freedom - including the infringement of such laws in order to protect the same... provided all other legal options have been exhausted.
- Conversely, such vehement opposition should stop short of the encouragement or incitement of violence and murder of the innocent bystanders to any conflict with an oppressive state. Such incitement cannot be morally justified as the death or injury of an innocent person for any political gain or objective, is morally reprehensible.
- Hassim’s conspiracy to promote violence, which included the recruitment of persons to participate in an armed insurgency which in fact resulted in the murder and injury

of those whom it was supposed to liberate, was in fact reprehensible and beyond the calling of a legal practitioner to protect the values of human dignity, equality and freedom for all.

- Mahatma Gandhi followed a course of passive resistance and of civil disobedience, which at times included transgression of the law, but at no stage did he encourage or justify violence. The fibre of his moral character and stance is clear, as is his legacy which has now blossomed to the democracy South African's hold dear today.

In conclusion...

- I believe that the modalities of character and duty should be measured on an equal footing as the one informs the other and vice versa.
- Social- Political and Religious prejudice invariably stifles objective argument. If one's mind is clouded by any of these prejudices neither a character nor duty based approach can objectively succeed - rational discussion is blocked due to such prejudice.
- A steadfast moral character remains an essential trait of any practitioner of the law in his relentless pursuit of justice which includes a duty to- and respect for- the law. It is however exactly that moral character and respect for the essence of law - which justifies and hones critical- and vehement opposition to that which is unjust. Both balance the scale...

Do you believe a virtue-ethical or rule-ethical approach to the moral character of a practitioner should be encouraged? Base your answer on case law. (10)

The first approach (virtue-ethical) emphasises the **moral character** of the legal practitioner and asks whether the offence discloses a dishonourable or disgraceful character.

The second approach (rule-ethical) focuses on the objective duties of the legal practitioner who is an officer of the court. In general, this includes the duty to obey all the existing laws of the land.

In a political context...

Open defiance of the law and incitement of others to defy the law are serious breaches of this duty, irrespective of the good moral character which the political offender may exhibit.

It was argued that the second approach (in which it is asked whether the legal practitioner fulfilled his or her duty to uphold the law of the land) gradually displaced the first one (the character approach), and that the courts showed a growing reluctance to investigate the character of struggle lawyers as reflected in their political convictions. The courts tended to focus on the seriousness of the crime involved and on apparently objective standards such as criminal conduct (divorced from its political context).

In a religious context... SG pp24

In a totally different context (no longer political, but religious), are the attempts of Gareth Prince, a devoted Rastafarian, to be admitted to the legal profession (see *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 C); *Prince v President, Cape Law Society* 2000 (3) SA 845 (SCA); ***Prince v President, Cape Law Society*** 2002 (2) SA 794 (CC)).

- First, he argued that the prohibition of the use and possession of dagga in section 4(a) of the Drugs and Drug Trafficking Act 140 of 1992 was unconstitutional in so far as it did not make provision for an exception for its *bona fide* religious use.
- Secondly, he argued that even if the prohibition were not unconstitutional, his contravention of the prohibition in the past (and in the future) would not by itself prove that he lacked the character traits that would make him a fit and proper person to practise law.

Both these arguments were rejected in the High Court (and eventually in the SCA).

The courts now had to deal with an offence stemming from deep-seated religious feelings, and had to answer the question whether the unlawful use of dagga for religious purposes reflected adversely on the good character of the person. SG pp25

The Supreme Court of Appeal, after being invited by Prince to do so, refused explicitly to follow the character approach developed in *Krause* and *Mandela*, on the ground that the facts of the *Prince* case were materially different. The court preferred to adopt the rule or duty approach, and emphasised the objective duty of legal practitioners to obey the law. It would thus seem as if the duty test, and not the character test, has been carried over to the new South Africa.

There are however indications in the Constitutional Court judgment that the position taken by the Cape High Court and the Supreme Court of Appeal on this issue does not find universal support among South Africa's senior judges. In all the three judgments delivered in the *Prince* case, the possibility is raised that Prince may still be a fit and proper person to practise law in spite of his criminal convictions and continued defiance of the law.

In a minority judgment Sachs J of the Constitutional Court had no problem to concede that, in spite of his open defiance of the dagga prohibition, Prince has shown himself to be “a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs”. From this obiter remark one can infer that Sachs J is of the opinion that Prince’s religious (but illegal) use of dagga does not render him an unfit or improper person for the legal profession. This inference is supported by a further statement by Sachs J to the effect that the Law Society in the past impoverished itself by excluding persons of honour and integrity because their beliefs had brought them into conflict with the law.

This implicit reference to the struggle lawyers is significant. It suggests that the Constitutional Court may well in the future return to the older character approach of *Krause* and *Mandela*. Such a return would be significant because it may reopen the door for a more fully developed virtue-ethical approach to the professional conduct of lawyers

The question also arises on which grounds legal practitioners may decide to practise civil disobedience, or to engage in violent resistance. Various answers are possible. It may be argued, for example, that resistance is justified when

- the laws are immoral. It would then be a matter of the individual conscience to decide whether or not to obey them (with no guarantee that this conscience is always correct, or that it does not conflict with somebody else's conscience)
- it is based on the individual's religious beliefs. The idea is that one should obey God rather than man (but we know that the Bible, for example, can be [and has been] interpreted in different ways. There have been attempts to justify race discrimination on the basis of specific interpretations of the Bible)
- positive law is unjust, and not worthy of respect. In this regard, appeal is generally made to natural law (as a higher law against which positive law is measured) and man's reason. Locke's social contract theory stems from this idea. According to Locke's theory, the primary function of government is to protect individual, inalienable rights (eg, the right to life, freedom and property) in equal measure, and to act in the interests of all. The state and its laws need be obeyed only as long as they fulfill this function. Civil disobedience and violent resistance would be justified if the state fails to uphold its side of the bargain. But again there are no explicit criteria to measure the failure. SG pp26
- utility so dictates. Disobedience to the laws of the land is regarded as an instrument for bringing about the greatest good for the greatest number. Conduct A (sabotage) may, according to the utilitarian viewpoint, hold greater benefit for society than conduct B (obedience to the laws), since eventually it will result in a democratic state, even though it may mean that some people will be hurt or will suffer loss in the process. But, consequentialism is not generally accepted. Also there is no guarantee that the promised outcome will materialize, not all may agree that the present situation is not acceptable.

The religious commitments of attorneys may bring them into conflict with their duty to uphold the law of the state. **Discuss whether such commitments render them unfit and improper to practice law? Refer to case law? 4x (10)**

The question of suitability for acceptance into- or to remain in the legal profession is also based on the influence of an individual's religious beliefs.

More recently the Law Society of the Cape of Good Hope refused to register a contract of community service of a prospective attorney (**Prince**). As a committed Rastafarian, he had in the past used dagga (which is illegal) during R ceremonies and stated his intention to do so in future (*Prince v President, Cape Law Society 2000* ⁽³⁾ SA 845 (SCA)). This issue was finally challenged in the Constitutional Court.

In *Prince v President, Cape Law Society 2002* ⁽²⁾ SA 794 (CC), the majority decision in the Constitutional Court held that Prince's remedy sought as special exception for Rastafarians for the use of Cannabis based on their religious practices and convictions contrary to the provisions of Drugs and Drug Trafficking Act 140 of 1992 read with the Medicines and Related Substances Control Act 101 of 1965 - could not be condoned based on his constitutional right religious freedom, as the right could justifiably be limited i.t.o section 36 of the Constitution and the practice constituted a contravention of the law.

The minority decision of Ngcobo J and Sachs J held that the exception for Rastafarian was justifiable and that the character based approach to Prince's admission as attorney should prevail. One can probably argue the case on its peculiar merits and based on this minority decision.

The Supreme Court of Appeal, after being invited by Prince to do so, refused explicitly to follow the character approach developed in *Krause* and *Mandela*, on the ground that the facts of the *Prince* case were materially different. The court preferred to adopt the rule or duty approach, and emphasised the objective duty of legal practitioners to obey the law. It would thus seem as if the duty test, and not the character test, has been carried over to the new South Africa.

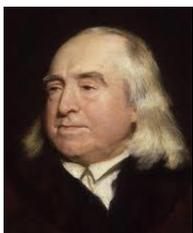
In all the three judgments delivered in the *Prince* case, the possibility is raised that Prince may still be a fit and proper person to practise law in spite of his criminal convictions and continued defiance of the law as a result of his religious convictions.

In a minority judgment Sachs J of the Constitutional Court had no problem to concede that, in spite of his open defiance of the dagga prohibition, Prince has shown himself to be “a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs”.

From this obiter remark one can infer that Sachs J is of the opinion that Prince’s religious (but illegal) use of dagga does not render him an unfit or improper person for the legal profession.

This inference is supported by a further statement by Sachs J to the effect that the Law Society in the past impoverished itself by excluding persons of honour and integrity because their beliefs had brought them into conflict with the law.

Discuss utilitarianism as one of the philosophical approaches to legal ethics. Your discussion should also make mention of the problems attendant to this approach? (10)



Jeremy Bentham’s (1748 – 1832) **teleological theories of ethics**

Utilitarianism or Consequentialism - postulate that, ultimately, the only thing that is relevant in determining whether or not an action is right or

wrong is the purpose which the action is intended to achieve. **Jeremy Bentham** argued

that the whole of the legal system should be based on the utilitarian idea that all **laws should aim to achieve the greatest good for the greatest number.**

Whilst care should be taken that endeavours to find utility in all things are not reduced to a hedonistic pursuit of only what is useful, and what creates the most good and happiness for all, it has been argued that in the context of legal ethics, professional guidelines as such could also be justified on utilitarian grounds.

Clearly – professional guidelines are useful in that they help the practitioner avoid making errors that could lead to disciplinary action.

- From a utilitarian perspective they are there to satisfy clients so that the practitioner's practice may benefit.
- They may even help to improve the public image of the profession and promote the public perception that the professions are regulating themselves properly, thereby avoiding government regulation.

The requirement that a lawyer must have good moral standing before admission, for example, not only protects the public, but also the profession's interests and image.

- An unethical lawyer brings disrepute to the whole profession.
- Character screening, as well as censure for those who break the rules, are seen as useful tools in preserving professionalism.

But, by granting all this we are not saying utilitarianism is the final answer to legal-ethical worries.

Utilitarianism may at most be considered as one of a number of outcomes or purpose-oriented or teleological theories of ethics.

- The basic idea behind teleological theories of ethics is that, ultimately, **the only thing that is relevant in determining whether or not an action is right or wrong is the purpose which the action is intended to achieve.**

- **Here, purpose is understood in the sense of end-result or consequence.**
- Hence, teleological ethical theories are often called **consequentialist**. Moral judgment in the case of utilitarianism boils down to the decision whether or not a given **result is useful**.
- A useful result is one that induces and promotes the greatest happiness of the greatest number in society. Hence **usefulness is the criterion of moral judgment here**, not a sense of duty and respect of legal rules as in Kantian or rule-based ethics.
For example: The condition 'of the greatest number' is very important. For a lawyer to get someone accused of murder off the hook, is not good ethically speaking because that will make only the two of them happy while the rest of the community will feel unhappy!

The problem with utilitarian ethics is on the one hand that there are **no clear cut criteria for usefulness** - to introduce the happiness of the greatest number is only to replace the problem namely, criteria for happiness and the greatest number.

On the other hand not everything that is useful is by necessity right. There are useful things that may be ethically wrong, for example the abuse of scientific and technological processes. Also, a person's objective may not be realised, someone may jump into a river to save a drowning child and he may be too late, however, his attempt is evaluated as morally good.

The question arises whether any means may be used to achieve the happiness of the greatest number or in pursuit of a good purpose. **Whereas some ethicists hold that the end justifies the means, others hold the opposing view that the end does not always justify the means.**

To hold that the end justifies the means, would mean, for example, that if a lawyer is convinced of the innocence of his or her client, he or she may lie in court or even plot the murder of the judge in order to vindicate his or her client's innocence.

In other words, the outcome is an important aspect of judging an act good or bad, but people are also held responsible for what they bring about or fail to bring about, how they do it and why they do it.

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. 3x (10)

In spite of the lofty ideals and the strong disciplinary prescriptions, there is criticism from both the side of the profession and the public against the legal code of ethics.

"Insider" criticism: Practitioners are suspicious of codes of ethics i.r.o:

Practitioners are suspicious of codes of ethics and this suspicion concerns two different aspects: (i) Practical concerns and (ii) theoretical concerns.

(i) Practical concerns

Professional codes are not always enforced by law societies and those who transgress them are not always dealt with effectively.

Since many practitioners feel that the codes are not properly enforced, they argue that the profession might as well abandon them, or replace them with codes of business ethics.

Others are afraid of upholding ethical values and sticking to the rules when their colleagues are not.

They fear that by trying to encourage their clients to do the right thing, these clients may go to somebody else who is willing to carry out their wishes.

(ii) Theoretical concerns

The very idea that the practice of law is a profession (and not merely a job in which bureaucratic tasks associated with a business are executed) counters the idea that legal ethics can be reduced to the “rules of ‘professional conduct’”.

One justification for the self-regulation of the profession is that the practice of law requires complex professional judgments, the reasonableness of which can be judged only by fellow professionals.

Self-regulation presumes that the **conduct** of a practitioner **will not be judged against a code**, but by colleagues who exhibit those virtues inherent in morally good practitioners.

The formalistic idea that legal ethics is no more than the compliance with a legal code makes, according to our view, a mockery of this justification, reduces law to another business enterprise, and exposes the continued existence of the law and bar societies as no more than agencies created to protect vested interests.

“Outsider” criticism: The public are suspicious of codes of ethics i.r.o:

- Outsiders (the public) feel that they have no access to a simplified, easily understandable professional code, and hence do not know what conduct is regarded as unethical or dishonest. They are therefore not able to lay complaints which may be investigated by enforcing agencies (the various law societies or bar councils).
- Some ethical rules are seen as protecting members of the profession against the public, or as serving only the interests of the members of the legal profession themselves. (eg, rules that create barriers excluding newcomers to the profession).

- Neither are the rules regarded as having universal or timeless value. Rules sometimes change as times change. For example, the rule that practitioners who write articles may not be identified in the press with reference to their firms (which could be considered a form of touting) no longer applies.
- The public furthermore feels that since complaints are handled by colleagues of the accused in the legal profession, the latter will be protected against accusations from the public.
- Practitioners are also reluctant to report colleagues to the enforcing agencies and are often not willing to testify against them during hearings. If practitioners turn a blind eye to what their colleagues do, there is no way in which the profession may be disciplined.
- The legal profession is consequently sometimes regarded as “a conspiracy against the laity” or as an “unusually effective monopoly”.

Conclusion

- We argue that the **conscience and disposition** of the practitioner remain the **touchstones for your conduct**. Although it is often said that many of the virtues which a lawyer should possess, cannot be learnt or acquired but are inborn, it is also argued that most of these can be worked upon and improved, provided that they are at least latent by nature. (See Du Plessis “*The ideal legal practitioner [from an academic angle]*” 1981 *De Rebus* 424.) **For this reason any code of professional conduct must include both aspirational values and directional norms.**
-

Discuss the lawyer's relationship with the courts? 3x

(10)

Swain v Society of Advocates, Natal 1973 (4) SA 784 (A)

Society of Advocates of Natal and the Natal Law Society v Merret 1997 (2) AllSA 273 (N)

- Attorneys and advocates **are officials of the court** and should always give the courts their **due respect**.
- They should not only conduct themselves in a **dignified fashion**, but **maintain and promote the dignity of the court** (Du Plessis 1981 *De Rebus* 425).
- **They may not mislead the court**, *whether directly or indirectly, for example by making misrepresentations or false statements*.
- Lawyers **may not conceal** anything that the court requires for the administration of justice. The court should be able at all times to rely on their **honesty** and on the **veracity of their statements**.
- There can be **no effective administration of justice without** legal practitioners being **scrupulously truthful** in their dealings with one another and the courts.
- If **material facts** are withheld from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. (*Ex parte Swain* 1973 (2) SA 427 (N) and *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A)).
- In the case of *Society of Advocates of Natal and the Natal Law Society v Merret* 1997 (2) All SA 273 (N), an attorney was removed from the roll because he had misled the court in a divorce matter, which meant that the court would never be able to trust him again.

- In *Ex parte Cassim 1970* (4) SA 476 (T) and *Ex parte Singh 1964* (2) SA 389 (N), the court found that the prior convictions of the applicants had to be disclosed in their applications to be admitted as an advocate and an attorney respectively.
- In *ex parte* applications, *practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court* so that the court may have full knowledge of the circumstances of the case (*Estate Logie v Priest 1926* AD 312).
- In *motion court proceedings* advocates should bring to the attention of the court **any deviations from the usual forms and offer an explanation for this** (*Ex Parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk 1984* (4) SA 347 (W)).
- Advocates and attorneys should **keep abreast of the law, including the newest authorities**. Their sense of integrity should guide them to inform the court of all the **relevant case law** of which they are aware, even if this may be to the detriment of their client's case.
- **They may not abuse court procedures or use delay tactics**. In *Ex Parte Jordaan: In Re Grunow Estates (Edms) Bpk v Jordaan 1993* (3) SA 448 (O) it was held that an application, which ran to more than **800 pages** where it could be presented in far less, amounted to this kind of abuse.
- **They may not act in contempt of court** by, for example, insulting a judge or magistrate *R v Silber 1952* (2) SA 475 (A); *R v Rosenstein 1943* TPD 65, acting with **disrespect or breaking the sub judice rule**. *Contempt of court is a common law as well as a statutory offence*.
- **Matters should be settled by the courts, and not in the media**. Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

- Legal practitioners' **duty to the court** is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts.
- In both cases, however, **the lawyer must subordinate his or her own interests to those of the court** and the client.
- **Integrity demands** that they disclose facts, evidence and legal arguments, even though these may be detrimental to a client.
- They must have **impeccable court manners, even under the most provocative circumstances.**

The roles played by legal professionals are not very different from those played by actors on the stage. Discuss the role differentiated approach to legal ethics? 5x (10)(20)

When legal practitioners act in their professional capacity they do not act as ordinary people, but as occupants of a role.

- » Their role insulates them from moral censure.
- » Their conduct cannot be assessed by the standards of ordinary morality.
- » The only question is whether their appearance in court was good or bad, whether their arguments were clever, and whether their cross-examination was skillful.
- » The question whether they abused other people or told lies is not relevant.

The *concern of moral and legal philosophers* about the way in which lawyers approach legal ethics *is compounded* by the *“role differentiated behaviour”* of lawyers.

It means that **lawyers are expected to respond differently to moral problems in their role as lawyers as they would as private individuals** outside that professional capacity.

This gives the law and the **judicial system a bad name** because it is either **not linked to real life** or it is **nothing but a game** which you should not trust.

Several philosophers have examined the behaviour of lawyers and have found little, if any, value in the way lawyers deal with ethical problems. *They argue that the professional regulation of lawyers causes lawyers to be client-orientated and to lose focus of the broader ethical and civic responsibilities attached to the practice of law.*

For one, this leads lawyers to do things for their clients that they would have normally found immoral or unethical.

The role of the lawyer requires one to ignore moral considerations that would otherwise be crucial in determining one's actions.

Lawyers are forced by the nature of their profession; it is said, to **disregard their own views** on whether their client had acted ethically or not. *The lawyer is required to pursue with the utmost skill, aggression and diligence the client's objectives, as long as he or she does not violate the law.* This is sometimes called the **"ethics of the hired gun"**.

Markovits ("*Legal ethics from a lawyer's point of view*" 2003 *Yale Journal of Law & The Humanities* 209–293) argues that in order to survive legal practitioners have to prefer their clients over others in a way that would otherwise be immoral.

For example, legal practitioners sometimes **cross-examine** truthful opposition witnesses in an **aggressive** way, and try to **undermine their credibility**, or to **confuse** them.

They also take part in **"sharp practices"** which include unnecessarily delaying a case, manipulating facts, making statements they themselves do not believe, and pleading technical defenses (such as prescription) *when they know that their client has a moral duty to compensate the claimant.*

Morally good legal practitioners try to justify such reprehensible conduct by means of the *role-differentiated or role-based approach*. They argue that they only play a role, and that their aggressive and unethical conduct goes with their role as legal practitioner.

Markovits feels that the morally good legal practitioner will be uncomfortable with the role based approach, for two reasons:

- » **First**, this approach regards legal practitioners as mere players of roles or as agents for others, and not as autonomous, self-driven entities who have to be judged on their own moral merit.
- » **Secondly**, this approach forces morally good lawyers to betray their own moral ideals according to which they normally live their private lives.

Morally good persons strive always to act honestly and justly, and to treat other people in a friendly and cordial manner. When their professional role requires them to tell lies, to cheat or to abuse people, their ideals are subordinate to the claims of the adversary system, and they are reduced to mere cogs in the machine of the legal system - resulting in a loss of integrity & an own life plan & ideals, & acceptance that immoral conduct is part of their professional character.

Morally good people have the need to be able to identify with their own conduct and to know that it contributes to the fulfillment of their moral ambition. They do not wish to live estranged from their moral life, and wish to retain their integrity because this gives meaning to their lives.

A second possibility is for morally good practitioners to try to **redescribe their professional role** in such a way that they do not have to renounce their own ethical ideals or integrity.

They can, for example, declare that they act virtuously because they strive for:

- » the professional virtues of **loyalty** (towards their clients) meaning that practitioners act selflessly and renounce themselves when promoting the interests of their clients - and...
- » **statesmanship** (towards the community) ^(See virtue ethics below.) meaning that practitioners uphold the political culture and community, since they are able to promote a variety of interests.

According to this approach – which **advocates the “lawyerly virtues”** – it is, for example, the task of legal practitioners to expose the weaknesses of all positions through aggressive cross-examination. **This would not amount to the abuse of people.**

Redescribing the professional role of legal practitioners will solve the moral dilemma the morally good practitioner finds him- or herself in **only if** these arguments are **accepted by** the **outside world**, which is unlikely to happen.

Wasserstrom (“Lawyers as professionals: some moral issues” in Davis & Elliston (ed’s) *Ethics and the Legal Profession* (1986:114–131) developed a critique of the ethics of the hired gun. He suggests that the concept of a hired gun can best be defended in the case of the criminal lawyer but that it cannot serve as model for lawyers in general.

Lawyers should see themselves (122) *“less as subject to role-differentiated behaviour and more as subject to the demands of the moral point of view”*.SG pp 61

Wasserstrom (123–124) investigates the possible justifications for the hired-gun approach to legal practice but steers the argument in the opposite direction for the following four reasons:

- (1) The legitimacy of role-differentiated behaviour can be sustained only if the adversarial criminal law system (where prosecutor and accused act as opponents) is itself legitimate. However, we have some cause for skepticism about the justice and effectiveness of the present legal system.
- (2) Role-differentiated behaviour justifies a cut-throat, “winner takes all”, capitalistic ethic, competitiveness (rather than cooperation), aggressiveness (rather than accommodation) and ruthlessness (rather than compassion).
- (3) Lawyers cannot adopt a purely role-differentiated perspective as easily as medical doctors can, because it is intrinsically good to cure a disease, but it cannot be intrinsically good to win every lawsuit at all costs, especially where lawyers need to portray that winning at all costs is the essence of justice.
- (4) Lawyers pay a price for their role-differentiated professional behaviour because it is hard, if not impossible, to divorce one’s professional way of thinking from other aspects of one’s life. “Cleverness” and ruthlessness in professional life may have a devastating effect on a lawyer’s private life. The professional life one chooses often determines what kind of person one becomes.

We must therefore come to the conclusion that there can be no moral justification for the immoral conduct of legal practitioners. Markovits believes that legal practitioners are cast in the role of villains by historical forces over which they have no control, and that they must often abandon their integrity to be able to have really successful practices.

Write an essay in which you discuss the following: NB!!!!

- (i) **the traditional approach to legal ethics as it is put forward by writers such as Lewis?**
5x **(10)**
- (ii) **the critique against the traditional approach as it is put forward by writers such as Wasserstrom** **2x** **(10)**
- (iii) **the philosophical approach to legal ethics which, according to you, holds the most promise to address the current crisis in the legal profession?** **4x** **(10)**
-

- (i) **the traditional approach to legal ethics as it is put forward by writers such as Lewis?**
5x **(10)(20)**

- **Lewis** in his book *Legal ethics: A guide to professional conduct for South African attorneys* (1982) contends that a **code of rules** prescribing conduct for attorneys is **as much a part of the positive law as any other field of law** and can be objectively described without concern for a deeper philosophy or history behind this code. He describes this as an ‘entirely practical’ approach to the professional conduct of legal practitioners.
- Critical of this view Prof Chris le Roux et al maintains that this “practical” and positivistic approach to the ethical conduct of legal practitioners is one of the main reasons for the growing crisis in the profession. They further argue that both ethical and legal philosophies are of decisive importance in both the study of practical legal ethics and the application thereof.
- *Lewis’s attempt to reduce “ethics” to “a code of conduct” which lawyers must obey, creates some doubt about whether he should be using the term “ethics” to describe his project at all.*
- Indeed, many ethical and legal philosophers have found very little of value in the way lawyers approach ethics.

- Accordingly **Thomas Shaffer** (*"The legal ethics of radical individualism"* 1987 *Texas Law Review* 963) states boldly that "most of what American lawyers and law teachers call legal ethics is not ethics and that most of what is called legal ethics is similar to rules made by administrative agencies as:

 - » it is regulatory;
 - » its appeal is not to conscience but to sanction;
 - » it seeks mandate rather than insight."
- Daniel Coquilette** in (*Lawyers and Fundamental Moral Responsibility* (1995:61) argues that lawyers that ascribe to a rule based approach, are true believers of the positive legal mentality as representing the democratic and objective legal norms of our society, and they will see spiritual or cultural values as far too "subjective" and "individualistic" to provide reliable guides to conduct, and also will comply strictly with these rules even when personal spiritual or cultural values are jeopardized.
- Lawyers with a skeptical view of human nature** will also put a **high premium on enforcement** of these positive rules through coercive punishments by boards of bar overseers. Other lawyers will see the positive rules as secondary, and even subordinate, to spiritual and cultural sources of ethical guidance.

Coquilette further argues that a lawyer with a formalistic and positivistic approach to law or legal philosophy, tends to understand his or her ethical responsibilities as a question of complying strictly with a codified set of legal rules. This approach encourages a tendency to focus only on those minimum standards and rules which could be strictly enforced by law societies.

Thus the legal philosophy of the lawyer will influence his or her understanding of his or her ethical responsibilities as a lawyer.

- **Stan Ross** in *(Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (1998:26), for example, mentions that the technical application of 'the law' in interpreting ethical rules leads to a very narrow moral universe. It emphasises the use of logical or rational thought without giving proper concern for values. When law and ethics are approached from this wider philosophical perspective, it becomes clear that legalistic or rule-based approach to ethical responsibility frequently results in strangely unethical approach to legal ethics amongst lawyers.
 - **Ethical philosophy** suggests that **ethical responsibility** involves **much more than**, or even something completely different, to strict **compliance with rules**.
 - **A legalistic or rule based mind-set leads to "role-differentiated" behaviour of lawyers i.r.o their professional lives i.e. association with clients and colleagues vs their private lives.** Their relationship is stripped of all moral depth and public or civil responsibility and becomes driven by Holmes's "bad man's perspective" on the law: Nothing is relevant to this relationship other than a knowledge of the rules which the lawyer (the "bad man") knows will be enforced and which will impact on his or her clients to achieve his or her objectives.
 - **Many critics of this type of lawyer-client relationship suggest** that a richer, more rewarding and ethically defensible lawyer-client relationship is possible if the legalistic mind-set is discarded. **For example, consider what happens if rules are no longer the bottom line of the relationship, but concern and care or the virtue of good judgment.**
-

(i) **the critique against the traditional approach as it is put forward by writers such as Wasserstrom 2x (10)**

- **Wasserstrom** (*“Lawyers as professionals: some moral issues” in Davis & Elliston (ed’s) Ethics and the Legal Profession*) developed a critique of the ethics of the hired gun. He suggests that the concept of a hired gun can best be defended in the case of the criminal lawyer but that it cannot serve as model for lawyers in general.
- **Lawyers should see themselves** *“less as subject to role-differentiated behaviour and more as subject to the demands of the moral point of view”.*
- **Wasserstrom** investigates the possible justifications for the hired-gun approach to legal practice but steers the argument in the opposite direction for the following four reasons:

 - (1) The legitimacy of role-differentiated behaviour can be sustained only if the adversarial criminal law system (where prosecutor and accused act as opponents) is itself legitimate. However, we have some cause for skepticism about the justice and effectiveness of the present legal system.
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 - (3) Lawyers cannot adopt a purely role-differentiated perspective as easily as medical doctors can, because it is intrinsically good to cure a disease, but it cannot be intrinsically good to win every lawsuit at all costs, especially where lawyers need to portray that winning at all costs is the essence of justice.

(4) Lawyers pay a price for their role-differentiated professional behaviour because it is hard, if not impossible, to divorce one's professional way of thinking from other aspects of one's life. "Cleverness" and ruthlessness in professional life may have a devastating effect on a lawyer's private life. The professional life one chooses often determines what kind of person one becomes.

- **We must therefore come to the conclusion that there can be no moral justification for the immoral conduct of legal practitioners.**
- **Markovits** believes that legal practitioners are cast in the role of villains by historical forces over which they have no control, and that they must often abandon their integrity to be able to have really successful practices.

(i) the philosophical approach to legal ethics which, according to you, holds the most promise to address the current crisis in the legal profession? 4x (10)

In my opinion ethical responsibility in the legal profession should involve much more than-, or be something completely different to strict compliance with rules - and - should aim to shape and direct the morality and moral experience of a good lawyer.

The professional ideal of the good lawyer may be recognised from different ethical perspectives including:

- his sense of duty; ➤ his virtues and character;
- consequences he effects; ➤ his sense of absolute responsibility to "the other",

This leaves room for an inclusive approach of all legal philosophy's including - a rule-, virtue-, consequentialist- and post-modern philosophical approach to solve the ethical problems in the profession.

- **Historical fact reflects that dispassionate rule-based adjudication** of challenges to legal ethical or professional conduct, blinded by stubborn reliance on archaic rules, which few dared to contradict, afforded legal sanction to a socio-political system in South Africa which was geared to discriminate and oppress the slightest inkling of change or freedom of opinion.
- **We owe it to future generations** - to never again be trapped in a system wherein difference of opinion, intellectual- religious- and political freedom, creative thought and discourse in the interest of positive change, human dignity, equality and the freedom of all men are stifled or oppressed by rigid rules or laws.
- **Principles of academic discourse dictate** that all related modalities to the consideration, debate and solution of any matter of research in the broadest sense, ought to be explored prior to the making of a scientifically reliable deduction or the application thereof.
- **Certainly it will be a disservice to the rule of law** and the development of an ethical- and morally accountable legal profession in South Africa, not to apply these tried- and-tested principles in order to secure credible consideration of the non-rule based arguments of leading philosophers, legal practitioners and academics, whom have contemplated these in the past.
- Clearly - objective- though creative exploration of non-rule based approaches to professional conduct should be encouraged when the reconstruction of the legal profession is debated...
- **of these the following are prominent:**

- **Whilst the Deontological ethics of Immanuel Kant (1724–1804)** inter alia postulates that morally good conduct imposes a universal duty on all to act accordingly for no other reason than it being one's duty - which is the first principle of Kant's **categorical imperative** - he clearly qualifies what may seem to be a rule-based philosophy by insisting that in contemplation of what is universally morally good, freedom of decision (which exists next to causality) is always a pre-condition.
- Based on Kant's acknowledgement of the freedom of decision of man, which reflects that his categorical imperative is **not a draconian imposition on man**, I believe that consideration of his philosophy is worthy to contemplate in the development of an ethical- and morally accountable legal profession in South Africa.
- **Jeremy Bentham's (1748 – 1832) teleological theories of ethics Utilitarianism** or Consequentialism - postulate that, ultimately, the only thing that is relevant in determining whether or not an action is right or wrong is the purpose which the action is intended to achieve.
- Whilst care should be taken that endeavours to find utility in all things are not reduced to a hedonistic pursuit of only what is useful, and what creates the most good and happiness for all, it has been argued that in the context of legal ethics, professional guidelines as such could also be justified on utilitarian grounds.
- Clearly – professional guidelines are useful in that they help the practitioner avoid making errors that could lead to disciplinary action. They are there to satisfy clients so that the practitioner's practice may benefit. They may even help to improve the public image of the profession and promote the public perception that the professions are regulating themselves properly, thereby avoiding government regulation.

- The requirement that a lawyer must have good moral standing before admission, for example, not only protects the public, but also the profession's interests and image. An unethical lawyer brings disrepute to the whole profession. Character screening, as well as censure for those who break the rules, are seen as useful tools in preserving professionalism. But, by granting all this we are not saying utilitarianism is the final answer to legal-ethical worries.
- **Greek philosopher and proponent of Virtue ethics - Aristotle** - did not base his ideas about ethics on rules that had to be obeyed, but on excellence of character. He argued that virtue allows the virtuous person to flourish, because a person's ethics and his or her personal success are intertwined.
- He believed that the *bios politikos* - a life devoted to public-political affairs of the polis was the highest level of life that could be attained. To take part in public life demanded courage. The courage to stand up for your beliefs therefore became virtue par excellence. The public realm was permeated by a fiercely competitive spirit, where individuality and human excellence could be demonstrated by being courageous.
- The crucial point about **contemporary virtue ethics** is that it centres on the search for the specific virtue (excellence) required in order to act ethically in a given situation, and not by what a rule prescribes or what results you want to achieve.
- Whilst virtue ethics does not represent the quintessential touchstone for professional conduct, public service, steadfastness of opinion and belief, a competitive spirit and courage are certainly traits which every professional lawyer should aspire to!

- This clearly confirms that virtue ethics are worthy to be creatively explored when the reconstruction of the legal profession is debated.
- **A proponent of Feminist Ethics Prof. Carrie J. Menkel-Meadow** contends that women are less confrontational in dispute resolution through mediation and more sensitive to clients' needs and interests and those of clients' families or employees than their male counterparts.
- **Women do not focus on independence, autonomy and rules**, but focus the care, empathy on the reduction of harm. They value virtue, care, contextualization and responsibility to others over rules, decisions, justice and rights of the common law adversarial system.
- **The extremes of the adversarial system** may very well be tempered by a caring and empathetic concern for not only the other, but also with the objective of solving conflict through mediation and dispute resolution outside the formality of the court room.
- Clearly - in any debate concerning the reconstruction of the legal profession the interests-, and contributions of women and others, need to be protected and encouraged by advocating legal and doctrinal changes and eliminating bias, to transform the legal emphasis from rights to needs and in exposing if and when the law disadvantages women and others, even when framed in neutral terms.
- **Proponents of Postmodern ethics** reject that the law constitutes and establishes a sole, definite and authoritative point of reference in terms of which human conduct must be judged and claim that to be receptive to otherness and difference in a truly open, pluralistic and democratic world, practical norms cannot take the form of general rules or principles.

- This position has stifled the development of a substantive moral or ethical code for the postmodern period.
- They further hold that the ethical response to somebody's otherness and difference, can never be reduced to the legal response which law prescribes. In this context ethics acquires a new meaning. Ethics is no longer the substance or content of law, politics and morality, but becomes a warning flag.
- It reminds us of the fact that no legal or rule-like response to a new situation can ever be a fully responsive or just response.
- Ethics can thus only point to what is *not yet* or what *is not* justice. It cannot state what justice is or prescribe a substantive content to our laws or morality. Ethics reminds us that it is never sufficient to follow universal rules, or to achieve universally beneficial consequences, or to develop virtues universally found in good human beings. It encourages us to remain aware of the hidden violence in the particularity of things, situations and people that such appeals to universality contain.
- Ethics thus emphasises the paradoxical nature of morality and the law. Without rules, there is a threat of anarchy, which would make any claim to justice impossible (rules make justice possible). In rules there is a threat of bureaucratic rigidity, which would make justice towards unique persons in unique situations impossible (rules make true justice impossible).
- That postmodernism has raised important points and opened up interesting perspectives especially for us in a multi-cultural context on a continent vastly different from Europe cannot be denied. It is, however, interesting to notice that they use the same universalisation style as they criticize.

- The key to the debate regarding the creative reconstruction of the legal profession must lie somewhere within an objective analysis of divergent ethical philosophies, cognizant of the fact that the moral character of conduct is determined, depending on the ethical philosophy which is adopted:
 - » by either the obedience to rules which are obeyed out of a sense of duty, or
 - » by the consequences which will flow from the conduct, or
 - » by the qualities of character which are exhibited and strengthened by the conduct in question (including those character traits which feminists claim have been neglected in male dominated Western societies), or
 - » by the nature of the response to the uniqueness or differences encountered in plural postmodern societies.
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Discuss post-modern ethics? (10)

In summary, postmodernism is characterised by

- (1) the demise of the belief in the universal validity of a particular life-style or morality,
- (2) the celebration of difference,
- (3) the rejection of absolutes as well as universals, and
- (4) recognition of necessity to accept uncertainty and indeterminacy as a way of life.

One of the characteristics of postmodernity is the view that universal morality has come to an end. A single and universal ethical code applicable to and binding on everyone at all times is not part of postmodern ethical thinking. Particularly the Kantian model of the categorical imperative which was to guarantee a rational basis for all ethical thinking was attacked.

Diversity confronts the postmodern human being in all aspects of life (in food, in clothing, in entertainment, in international travel, in the international media). The challenge is how to deal with diversity or **difference**.

A problem associated with this challenge is that diversity is not a given for all time. Nor is it immutable. (unchangeable)

Uncertainty and unpredictability not only underlie diversity, but permeate it as well. Thus the moral domain for the postmodernist is the **terrain of uncertainty**. This leads to the question whether it makes sense to try to seek and determine rules (or absolutes) in a situation that is fundamentally uncertain, flexible and thus indeterminate.

The dramatic catharsis of the 19th century culminating in the 2 world wars of the 20th century created a post-modernistic ethic and a new reality of human endeavour and interaction, which yearned to break away from the rule based morality of the earlier age - even in the professional life of man.

- One of the characteristics of postmodernity is the view that universal morality had come to an end.
- A single and universal ethical code applicable to and binding on everyone at all times is not part of postmodern ethical thinking.
- Hence - diversity confronts the postmodern human being in all aspects of life, keeping in mind that diversity is not a given for all time, nor is it immutable. (unchangeable).
- Uncertainty and unpredictability not only underlie diversity, but permeate it as well. Thus the moral domain for the postmodernist is the terrain of uncertainty.

- This leads to the question whether it makes sense to try to seek and determine rules (or absolutes) in a situation that is fundamentally flexible and thus indeterminate.

From a rule-based perspective - traditionally law is underpinned by universal rules and principles which can be applied to all situations. A legacy from the past is that the law constitutes and establishes a sole, definite and authoritative point of reference in terms of which human conduct must be judged.

However, this is precisely what postmodern ethics denies and rejects.

- This is the reason why we end up without a substantive moral or ethical code for the postmodern period.
- The uniqueness of the particular situation, or the difference involved in every other person, cannot be captured through general or universal rules.
- To be receptive to otherness and difference in a truly open, pluralistic and democratic world, practical norms cannot take the form of general rules or principles (as Kant claimed).
- In this context ethics acquires a new meaning. Ethics is no longer the substance or content of law, politics and morality, but becomes a warning flag.

The fact that ethical philosophy suggests that ethical responsibility involves much more, or even something completely different, to strict compliance with rules - reminds us of the fact that no legal or rule-like response to a new situation can ever be a fully responsive or just response.