Discuss the requirement of being a ‘fit-and-proper’ person to practice as a lawyer in South Africa? 3x

The practice of Law as a Profession?

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.

A formalistic and legalistic philosophy of law, focuses exclusively on rules and can easily lead to an ethically restricted approach when it comes to the question of professional responsibility.

As will be shown later the rule-based approach to professional conduct has led to a very restrictive interpretation of three claims traditionally made in the name of a lawyer:

(i) that he or she acts like a professional,

(ii) that he always remains morally a fit and proper person for the legal profession - and

(iii) that he or she has a duty to obey the law.

The requirement of a good character or of being a “fit and proper person”

Even those with all the relevant legal qualifications and degrees will be admitted to the legal profession only once they have proven that they are indeed “fit and proper persons” for the legal profession. This is subject to extensive character screening.
Admission of Attorneys:

Section 15(1)(a) of the Attorneys Act 53 of 1979 states that a court may only enroll an applicant if “such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled”.

Section 22(1)(d) of the Act states that a practicing attorney may be struck off the roll, if that attorney “in the discretion of the court, is not a fit and proper person to continue to practice as an attorney”.

Admission of Advocates:

In terms of section 3 of the Admissions of Advocates Act 74 of 1964, if you wish to be admitted as an advocate you need to satisfy the court that you are “over the age of twenty-one years and is a fit and proper person to be so admitted and authorized”.

Section 7(1)(d) of the Act likewise authorises a court to remove an advocate from the roll if the court “is satisfied that you are not a fit and proper person to continue to practice as an advocate”.

Roman Law:

The Theodosian Code, a compilation of Roman law issued in 438 AD, required that advocates be of “suitable character” with praiseworthy lives.

Reason for character screening:

The reason for the character requirement is generally stated as follows: Lawyers are entrusted with matters related to the affairs, honour, money, property, confidential information and lives of their clients, and should be worthy of this trust and confidence.
“Moral character” has been described as embracing truthfulness, a high degree of honour, a good sense of discretion, and a strict observance of fiduciary responsibility. The standard of a “good moral character” [while often a fuzzy concept] has often been applied in arbitrary and prejudicial fashion, favouring those of a particular race, gender, politics and economic worth.

Rhode “In the interest of justice: Reforming the legal profession (2000)” argues that in the 19th century in the United States, the character requirement was used to keep unpopular groups of people out of the legal profession. Today, individuals in the United States (and in South Africa) are typically denied admission on account of violations of the law (the violation of criminal law being considered as more reprehensible than that of civil law), acts involving dishonesty or fraud, abuse of the legal process, disregard for financial obligations and failure to file tax returns, mental or emotional instability, and evidence of alcohol and drug abuse.

In this respect, McDowell maintains that, if possible, a distinction should be made between non-conformist actions that are valuable and enrich society, and those that are unethical and damaging.

While the concept of a “good moral character” should not be used to stifle innovation, difference and social criticism, it should nevertheless be retained as a powerful inhibitor of unethical conduct and as something to which to aspire.

Whether somebody is a “fit and proper person” to practice law as an advocate or attorney is essentially a discretionary value-judgment on the part of the court (see Jasat v Natal Law Society 2000 (3) SA 44 (SCA) 51E.).
The court has an inherent common law power to regulate the legal professions and therefore remains the final arbiter of what is appropriate in this regard (see Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA 762 (TPD) 770G–784D).

The role of politics:

In SA the court’s judgment i.r.o who is “an appropriate person” was often influenced by politics.

Mahatma Ghandi - applied to be admitted as an advocate of the High Court of Natal, his application was opposed by the Law Society of Natal opposed because he was a person of Indian origin and as such not a “fit and proper person” (In re Gandhi 1894 NLR 263) but extensively dealt with in Gandhi’s autobiography (An Autobiography; Or my Experiments with Truth (1927) 121–123).

Madeline Wookey - wished to enter into articles of clerkship as a future attorney, the Cape Incorporated Law Society objected and refused to register her articles because she was a woman. In this case (Incorporated Law Society v Wookey 1912 AD 623) a full bench of the Appellate Division relied on Roman Dutch law and its exclusion from legal practice of persons who could be termed “unfit and improper”, including the deaf, the blind, pagans, Jews, persons who denounced the Christian Trinity, and most importantly, women.

Bram Fischer - The political abuse of the “fit and proper person” standard is well illustrated by the case of Bram Fischer, a brilliant, highly regarded, senior advocate attached for many years to the Witwatersrand Bar.
Fischer was struck off the roll of advocates in 1965 because of his opposition to apartheid

(Soc of Advocates of SA (WWR Div) v Fischer 1966 (1) SA 133 (T).

The role of the Constitution:

A denial of admission to practice law could have serious consequences for one’s career. In this respect it must be kept in mind that the right to choose your trade, occupation or profession freely, although subject to regulation by law, is recognised in section 22 of the South African Constitution 1996. The right to follow a (legal) profession may not be limited without fulfilling the requirements set out in section 36 of the Constitution.

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 religious ceremonies and stated his intention to do so in future (Prince v President, Cape Law Society 2000 (3) SA 845 (SCA)).

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 (4) SA 413 (T) the constitutionality of the power of the court to strike somebody off the roll was again challenged. However, the challenge was brought under the final Constitution of 1996 and was much broader in scope than that in Kleynhans.
It was argued that the **fit and proper person standard violated**:

- the right to dignity, equality and freedom \( (s\ 7(1)) \)
- the right not to be subjected to cruel, inhuman and degrading treatment \( (s\ 12(1)(e)) \)
- and the right to choose one’s trade, occupation or profession freely \( (s\ 22) \).

**Relying on the judgment in Kleynhans**, 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.

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.

*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.

Regulation of a lawyer’s professional life

There are a number of obvious difficulties with the application of the “fit and proper person” standard. One question is whether a clear-cut distinction can be drawn between the professional and private life of a lawyer.

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.

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.

Regulation of a lawyer’s personal life

In SA - 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.

Write down arguments in favour of the rule-based approach and some arguments against it.
It would seem that (some) lawyers are indeed not interested in moral philosophy or ethics but are, in accordance to their legalistic mind-set, only interested in the prescriptions regulating their conduct as legal practitioners.

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**Positivistic rule-based approach**

Lewis 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.

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**Criticism:**

**Le Roux - positivistic approach is the reason for the growing crisis in the profession:**

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.

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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.”

Coquilette - compliance at all cost

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.

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. 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.

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 between lawyers and clients. 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.**
Do you agree that the prescriptive rules of professional conduct should be supplemented by a number of aspirational values and virtues?

Case law confirms that our courts primarily subscribe to a rule based ethic in the adjudication of matters of admission-, scrutiny and or disbarment of legal professionals in the South African context. Decisions such as those in *Prince v President, Cape Law Society* 2002 and *Society of Advocates of SA (WWR Division) v Fischer* 1966 bear witness to this approach.

On the other hand decisions in *Incorporated Law Society Transvaal v Mandela* 1954 and *In re Gandhi* 1894 have shown that our courts do consider aspirational values and virtues positively, provided such values do not inherently cause or confirm dishonest, disgraceful or dishonourable conduct by exponents of the legal profession.

Several others - including Mandela at a later stage were however found guilty of and jailed for “disrespect for law” and disbarred for “disgraceful or dishonourable” conduct. Clearly the aspirational ideas of liberty, equality and dignity inherent in the South African Constitution, were already present in the defiance of apartheid laws.

**Whilst disciplinary or ethical rules generally have a directional and prescriptive nature,** I believe that the rules of professional conduct are not cast in stone. They state the minimum level of conduct or of character requirements below which no lawyer can fall without being subject to disciplinary action.

These rules require group approval and a certain measure of consensus regarding the minimally ethical character which must be maintained throughout the legal practitioner’s professional career.
Similarly legal practitioners are guardians of the law and trained servants of a public legal order whose aim should be to further the administration of justice and the preservation of society. As officers of the court, lawyers are bound by -, and must uphold the law legal procedures diligently in accordance with the law and their professional codes or canons of ethics.

These canons are statements of axiomatic, unassailable norms which express in general terms the standards of professional conduct expected of lawyers, and from which ethical considerations and disciplinary rules are derived. Some of these universal and timeless values - whether seen from a Western or African perspective - are integrity, objectivity or fairness, power of judgment, dignity and respect.

Former acting Chief Justice of the - judge Oliver Wendell Holmes in “The path of the law” (published in ‘97 in the Harvard Law Review) suggested that lawyers wishing to know the law and the rules of professional conduct must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience.

In his August 1962 trial Nelson Mandela said... “I regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law and to justice for all mankind, to cry out against this discrimination, which is essentially unjust and opposed to the whole basis of the attitude towards justice which is part of the tradition of legal training in this country.
I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession.

**Whilst Holmes and Mandela’s axioms may be diverse** - their views in fact confirm that lawyers should strive to accomplish adherence to the law and a code of ethics whether as ‘good men’ finding reasons for conduct whether inside or outside it, in the vaguer sanctions of conscience or in upholding the dignity of an honourable profession.

**Core values in the make-up of “The Good Lawyer”:**

Values are rather ideals which we strive to achieve, i.e. a good we aspire to i.o.w aspirational values.

The idea of “the morally good” or virtuous lawyer is also in itself an aspirational value and due to the vast spectrum of what may or may not constitute a ‘good lawyer’ the combination and/or extend of core values may differ from person to person.

Three core values - honesty and trustworthiness, good judgment and objectivity are essential traits in the make-up of a ‘good lawyer’.

**Prof L M Du Plessis** in “The ideal legal practitioner” *from an academic angle* 1981 De Rebus states that 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. He then concludes that - for this reason any code of professional conduct must include both aspirational values and directional norms.
Therefore I believe that codes of ethics and of conduct should incorporate both respect for the law and the commitment to individualised though aspirational principles of justice, dignity and equality, care and concern for others. If not - lawyers should work to correct injustices or eliminate codes that stifle their efforts to achieve these ideals; to facilitate change, and then to act diligently in accordance with the new adapted and inclusive rules.

Eli Levine a prominent South African entrepreneur once said: “If the rules are wrong, improve and change them, but then act in accordance with the new rules... not to do so - is a flirtation with chaos”.

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Do you agree that other non-rule based approaches to professional conduct, like virtue ethics, should be more creatively explored when the reconstruction of the legal profession is debated?

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 and 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.
“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 the judgments that his professional tasks require” Kronman “Living in the law” 1087 University of Chicago Law Review Vol 54 at 861-2

According to Kronman, good judgment 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 judgment in the lives of different legal practitioners. Distinguish for example what good judgment entails if it is not based on logic or intuition?**

The idea of “the morally good” or virtuous lawyer is also in itself an aspirational value and due to the vast spectrum of what may or may not constitute a ‘good lawyer’ the combination and - or extend of core values may differ from person to person.

Three core values - honesty and trustworthiness, good judgment and objectivity are essential traits in the make-up of a ‘good lawyer’.

As a legal practitioner should have a sense of equity and fairness, be able to act impartially and to exercise good judgment. (Equity refers to the application of general law to the individual case in such a way that justice may prevail). You should be able to judge matters objectively, carefully and deliberately. You should possess the decision-making skills necessary to arrive at equitable results.

**Law is practised in a specific normative context** because the legal system in a particular country is the outcome of an accepted system of values and norms, formalized in codes of conduct or legislation which lawyers have to accept and adhere to.

Kronman argues that to practice law well requires not only formal knowledge of the law but certain **qualities** of mind and temperament as well.
“To be a lawyer is to be a person of a particular sort, a person with a distinctive set of character traits as well as an expertise”. By choosing the law as profession, one tends to become a certain kind of person. Within this normative context - legal practitioners are constantly faced with the need to deliberate upon situations and then decide upon what they consider to be an appropriate course of action.

Such decisions will reflect upon his good judgment if correctly judged or poor judgment, if not. According to Kronman - good judgment requires the qualities of objectivity, deductive reasoning, legal intuition, visualization of cause and effect, detachment from the latter and deliberation - from the astute law practitioner.

By choosing the one or the other, you are basically answering the question: “Can I live with it?” This is the core of integrity...

But choosing what you cannot live with is the mark of bad judgment and leads to the destruction of your integrity and sorrow and remorse.

Kronman’s argument in this connection is that to practice law well requires not only formal knowledge of the law but certain qualities of mind and temperament as well. “To be a lawyer is to be a person of a particular sort, a person with a distinctive set of character traits as well as an expertise”. By choosing the law as profession, one tends to become a certain kind of person.

Kronman states that good judgment dictates that no-one will choose any career if the choice were immoral or contrary to the moral convictions of your community. The trend that many people choose the legal profession for selfish ends “because it offers great opportunities for wealth and prestige” is inherently dangerous and legal practitioners run the risk of losing their identity or personality as a result.
He argues that the law should be seen as a means or instrument to promote and protect something outside and above yourself, namely the public good - which includes - a sense of public-spiritedness albeit through the law or politics.

Thus the lawyer “who views his career merely as a vehicle for justice or equality or some other public value bears a certain resemblance to the lawyer who regards his career as a means. ... Both find the point of their professional work in something that lies outside it, and both may be inclined to view their choice of career as an accommodation to external necessity”.

People are constantly faced with the need to deliberate upon situations and then decide upon what they consider to be an appropriate course of action. Sometimes a decision to act in a particular manner yields the desired result but at other times it does not. In the former instance, we can speak of the person acting on his or her good judgment whereas the latter case, the person showed poor judgment.

**Good judgment is considered to be a virtue.** Good or bad judgment is not the outcome of following or disregarding the correct and consistent use of a particular theory or drawing or, failing to draw, the only correct inference in specific circumstances.

Exercising your judgment, whether good or bad, involves a number of complex and interrelated elements, including deduction and intuition. It has already been stated that deductive reasoning is an indispensable element of forming a particular judgment. But it is not in itself sufficient since not all situations allow for a single conclusion or decision.

**Objectivity is closely related to good judgment and also to honesty.** It requires that no irrelevant considerations should be brought to bear upon your judgment which implies not only a keen logical sense but also good preparation so as to know what is needed.

Du Plessis maintains that subjective influences should be consciously neutralized to enable objectivity and above-all honesty to oneself.
**Intuition** is a gift or a disposition which is also an indispensable element in forming a particular judgment. By **intuition** Kronman understands “a form of direct insight or apprehension distinct from any species of understanding at which you are able to arrive by reasoning alone”. Hence – judgment encompasses a form of intuition.

According to Kronman judgment also requires an **ability of visualization** of the self into a projected situation comparable to reality, upon which courses of action- and interaction with people within a network of relationships are planned and decisions or judgments are made.

Kronman postulates that in this process: The person faced with a choice must give each alternative its due- **detach** himself from- and entertain all the possibilities whilst **withholding his commitment** to any within his process of **deliberation** which must culminates in the making of a specific choice.

The **core of integrity** is whether the person making the choice can in fact – ‘**live with his choice**’ – i.o.w whether it is morally justifiable and equitable to all. Kronman maintains that choosing what you cannot live with is the mark of bad judgment and leads to the destruction of your integrity and sorrow and remorse.

It is only when an advocate has acquired the character trait of good judgment that he can be confident in his ability to see the world of legal disputes as a judge would see it and hence to **distinguish wise arguments from merely clever ones**.

To be a good advocate, then, one must be in the habit of looking at one’s own case from a judicial point of view, and since a judge’s direct concern is with the community of law, an advocate who sees things from the judge’s perspective and attends to his concerns will be careful to frame his own arguments so as to emphasize the congruence between his client’s interests and the interests of the legal community as a whole.
In his August 1962 trial Nelson Mandela said... “I regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law and to justice for all mankind, to cry out against this discrimination, which is essentially unjust and opposed to the whole basis of the attitude towards justice which is part of the tradition of legal training in this country. I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession.

A judgment call which eventually raised this humble lawyer to the stature of a world leader... A man who owned the decisions he made...

It is important for aspirant legal practitioners and those already in practice to know the rules of the legal profession, but to be an ethical professional requires more than adherence to rules.

**Discuss the above statement. Your discussion should in addition make reference to the four other philosophical approaches to legal ethics.**

**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 and 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.
In the history of South Africa there have been legal practitioners whose political commitments brought them into conflict with their duty to uphold the law. Refer to case law and indicate the influence such political commitments had on them in being “fit-and-proper” to practice law or not? 

Considerations which affect the admission or disbarment of a lawyer or advocate into-or from the legal profession is inter alia broadly based on two approaches.

Firstly the virtue-ethical which emphasises the moral character of the legal practitioner and asks whether the offence discloses a dishonourable or disgraceful character – and – Secondly the rule-ethical approach which 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 South African context - more particularly during the struggle era courts showed a growing reluctance against the virtue-ethical approach – i.o.w to investigate the character of struggle lawyers as reflected in their political convictions.

The courts in most instances tended to focus on the rule-ethical approach which focused on seriousness of the crime involved and on apparently objective standards such as criminal conduct (divorced from its political context). However there were certain exceptions...

It held that as a general rule, persons with previous convictions would not be admitted to the legal profession. However, it was not the mere fact of a previous conviction that mattered, but the question whether the conviction reflected negatively upon the “personal honour” of the person involved. In most cases, the criminal conviction would expose the character of the person involved as dishonourable.
However, in cases where the criminal offence was committed with a political motive and was not born out of spite, or in an attempt to unlawfully further the private interests of the offender, the criminal offence would not reflect negatively on the moral character of the person involved. It was held that open defiance of the law and incitement of others to defy the law are serious breaches of a duty to uphold the law, irrespective of the good moral character which the political offender may exhibit.

Through all this - the pendulum swung between the political aims of the government on the one hand and the political convictions of those who opposed them - on the other. Accordingly, decisions regarding the “fit-and-proper” person standard were invariably influenced by the political convictions of ruling parties in the South African context.

- One of the first cases was that of *In re Gandhi* 1894 NLR 263 wherein *Mahatma Gandhi* applied to be admitted as an advocate of the High Court of Natal. His application was opposed by the Law Society of Natal because he was a person of Indian origin and as such not a “fit-and-proper-person”. Gandhi later became a prominent leader in the political struggle in South Africa - known by his philosophy of ‘passive resistance’ embodied in the *Satyagraha (the force of truth, love or non-violence)* movement. He was often arrested but never disbarred as an attorney in South Africa.

- *Ex parte Krause* 1905 TS 221 – *Adv. Krause* was convicted in England of an attempt to incite murder of a certain Lawyer Foster in South Africa who published flagrant untruths about the burghers of the ZAR in the Pall Mall Gazette. Adv. Krause who was in exile, and whose motivation was clearly political, was subsequently disbarred by the Benchers of his Inn. After his return to South Africa, the Transvaal Bar Council took a resolution stating that it had no objection to his reinstatement to the Transvaal Bar.
Nearly 50 years later the court examined the principles for the removal of a legal practitioner from the roll in *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) after Nelson Mandela received a suspended sentence i.r.o - Suppression of Communism Act 44 of 1950. The court confirmed that the fact that where an attorney has been convicted of a crime is prima facie evidence of misconduct. However, the fact that he deliberately disobeyed the law does not necessarily disqualify him from practising law.

The criteria applied by the court included that normally removal would follow where an offence - is related to professional capacity - or - involves dishonesty & raises doubts whether the person can be trusted as an officer of the court - or - indicates that the person “is of such a character that he is not worthy to remain in the ranks of an honourable profession”.

The court held that Mandela was motivated by a political vision of a non-racial South Africa and although the campaign of civil disobedience which he instigated was unlawful, his conduct was not of a dishonest, disgraceful or dishonourable kind.

*Matthews v Cape Law Society* 1956 (1) SA 807 (C) is another case which resulted from the Defiance Campaign in which Mandela took part. This case brought about an important shift in the law. It brought an end to the investigation of the character of politically motivated legal practitioners.

From then on, struggle lawyers would rely on the old character test, while the establishment would rely on the duty to obey the law. The court rejected the character approach adopted in Mandela and Krause because of its narrow scope.
The court now reasoned that the real question was not whether participation in the Defiance Campaign disclosed a lack of integrity, honesty and honour, but whether it could be reconciled with the duty of an attorney to uphold all the existing laws of the land. An officer of the court cannot himself or herself contravene the law or incite others to do so, even if the motive for doing so is political.

The new duty approach rested on the fact that every legal practitioner is required to swear an oath of allegiance to the state and the law.

* In *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T) the court referred briefly to the character approach of Mandela and to Bram Fischer’s character, but the duty approach of Matthews carried the day.

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.

Instead of appearing personally in court, Fischer’s letter cited here was read on his behalf: “I can no longer serve justice in the way I have attempted to do during the past thirty years. I can only do it in the way I have now chosen.”

The court held that:

- It is the duty of a lawyer to further the administration of justice in accordance with the laws of the country and not to frustrate it.
It is the court’s duty to uphold and enforce the laws of the country... 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. Fischer was accordingly struck off the roll and was sentenced to life imprisonment, but the Fischer judgment set the tone for the future.

The defendant in Incorporated Law Society, Natal v Hassim (also known as Essack) 1976 had had been convicted of assisting with the recruitment of persons in South Africa to undergo political and military training as part of the armed resistance to apartheid.

*The court tried to reconcile the character and rule approaches* by using the rhetoric of the character approach of Mandela and Krause, and by asking whether the offence in question was of a personally disgraceful nature. The court, however, found that any attempt to conspire with others to violently overthrow the government was disgraceful behaviour, and a reprehensible method of voicing protest. The court chose to ignore Hassim’s professional work, that his good name, honesty and integrity as an attorney were undisputed, and that the offences were born out of a desire to bring about democratic transformation in South Africa.

*The decision in Hassim regarded disobedience to the law out of political conviction as sufficient proof of bad character.*

*In Ex parte Moseneke 1979 (4) SA 884 (T), the character approach was also not followed.* At the age of 14, when in grade 10 at school, he had attended a number of meetings of the PAC as a member of ASUSA (the student wing of the liberation movement).
This was the only offence of which he had been convicted. He had never actually been involved in any act of violence, sabotage or rioting (the offence was that broadly defined). The court stated that the serious offence of which the applicant had been convicted would, at the time of its commission, have rendered him an unfit person for the legal profession. However, since the applicant had undergone a “complete and permanent reformation” his character had been reformed to such an extent that he was now a fit and proper person for the legal profession. His application was successful.

* In *Natal Law Society v Maqubela* 1986 (3) SA 51 (N), the court also focused on the criminal conduct as such. The court decided that “the inherent character of the offence, particularly a common law one, is not altered by virtue of the fact that the motive for its commission is proved to be political”.

The inherent nature of the offence was in itself “dishonourable and morally reprehensible”, regardless of Maqubela’s moral character or motivations, and this disqualified him from practising as an attorney. The political-offence exception recognised in *Krause* and *Mandela* was not considered.

* The *Truth and Reconciliation Commission* (TRC) rejected the argument that lawyers did not shirk their duty to obey the law when they served the administration of justice under apartheid and found that by participating in the legal system and by keeping it intact, lawyers:
  - legitimised the apartheid state and sustained its longevity
  - betrayed the ultimate purpose of law
  - subconsciously or unwittingly connived in the legislative and executive pursuit of injustice“
The TRC further held that the true purpose or point of a legal system (ie, the pursuit of justice) remained:

- inherent if hidden in the South African (common) law and provided a space for criticism of the positive law
- as the duty to hold the legal system accountable to its final objective or moral end, namely the pursuit of justice.

In conclusion:

Whilst the political playing field has substantially changed, politics by its very nature is a dynamic- though fickle- inexact and unpredictable modality of human endeavour. Whilst most politicians bestow upon themselves the guise of selflessness, their credibility has more than often been weighed and found to be wanting - leaving those who have elected them to their noble positions, greatly disillusioned or even threatened.

It is exactly such political incompetence and narcissism - that have resulted in financial and political chaos and social oppression throughout the developing world today - bar a few exceptions.

If challenged - after fifteen years of democracy - by the resurgence of oppression and the flagrant disregard for and oppression of the core values of democracy entrenched in the South African Constitution being - dignity, equality and freedom - the legal profession will have no choice but to uphold these values and will have to draw on the examples set by Mandela, Gandhi and others to oppose any threat of destruction of this young and respected democracy.
Do you think that the character test in *Krause* should be applied in cases where a practitioner purely because of religious convictions is compelled to defy the laws of the land? Why / why not?

* One can hardly equate the actions of Krause with that of defiance of the law due to the religious convictions of a practitioner of the law.

* Krause’s motivation was that of a man incensed by flagrant untruths published by the *Pall Mall Gazette*, written by a certain Foster whom acted as lawyer for the occupying British forces in the ZAR, and as stringer journalist for this publication, in which Foster painted the ‘burghers’ who fought against Britain during the second Anglo Boer War as outlaws, concluding that: "If this war is to be ended once and for all, all the Boers now in the field must be treated as robbers and bandits and not as belligerents."

* In response to this article - Krause wrote a former prosecutor and friend in the ZAR - Cornelis Broeksma - that: "It is your duty to inform our people of its contents [abovementioned article] so that they can deal with him in a lawful manner and either shoot him or otherwise make him harmless." On this he was convicted for incitement to murder and disbarred from practicing law in Britain by the Benchers of his Inn.

* Krause’s action can hardly be labelled politically motivated. To the contrary one can argue that he was acting in the interest of the truth about his people being conveyed in the British media.

* Whilst his choice of the words: “...either shoot him [Foster] or otherwise make him harmless” was clearly ill considered due to his dismay, one can understand that - within the post war context it would have been construed as an incitement to murder, whilst semantically it could have meant anything but murder...
Upon Krause’s return to South Africa 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. In *Ex parte Krause* 1905 TS 221 the court decided in favour of Krause’s admission to the Transvaal Bar – clearly following the character approach to the determination of his suitability to practice law.

I believe that Krause’s motivation was neither political nor religious and clearly the facts and finding of the Krause case cannot be applied in a matter pertaining to the transgression of the law due to religious convictions. Such matter should be heard on its own merits and in terms of rules governed by the Constitution and the law.

In comparison the application to have Mandela disbarred, failed as his political convictions were found to be in the interest of the common good and of justice, were not reprehensible, dishonest or dishonourable, had not affected his underlying ethical character and had not rendered him an unfit or improper person to practice law.

On the other hand in *Mathews* the court now reasoned that the real question was not whether participation in the Defiance Campaign disclosed a lack of integrity, honesty and honour, but whether it could be reconciled with the duty of an attorney to uphold all the existing laws of the land. An officer of the court cannot himself or herself contravene the law or incite others to do so, even if the motive for doing so is political.

In *Prince* 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
People who want to enter the legal profession as attorneys or advocates are subjected to extensive character screening. **What does this mean? Who is responsible for it? Give examples on how political considerations influenced character screening in the past?**

**What was the Constitutional Court’s view on the issue?**

**What does extensive character screening refer to?**

The question of who can be a legal practitioner in South Africa is strictly regulated by legislation and by the inherent common-law right of the court to regulate its own processes.

It is not sufficient to have a thorough knowledge of the law to become a legal practitioner. Even those with all the relevant legal qualifications and degrees will be admitted to the legal profession only once they have proven that they are indeed “fit and proper persons” for the legal profession. Membership is subject to extensive character screening.

**Who is responsible for character screening?**
Admission of Attorneys:

Section 15(1)(a) of the Attorneys Act 53 of 1979 states that a court may only enroll an applicant if “such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled”.

In terms of section 3 of the Admissions of Advocates Act 74 of 1964, if you wish to be admitted as an advocate you need to satisfy the court that you are “over the age of twenty-one years and is a fit and proper person to be so admitted and authorized”.

This means that only persons of a certain character are allowed to practise as lawyers. The requirement that you as an aspirant lawyer must prove to the satisfaction of the law society that you are “a fit and proper person” for the legal profession underlines the moral basis to the profession.

How political considerations influenced character screening in the past?

Decisions regarding the “fit-and-proper” person standard were invariably influenced by the political convictions of ruling parties in the South African context.

* One of the first cases was that of In re Gandhi 1894 NLR 263 wherein Mahatma Gandhi applied to be admitted as an advocate of the High Court of Natal. His application was opposed by the Law Society of Natal because he was a person of Indian origin and as such not a “fit-and-proper-person”. Gandhi later became a prominent leader in the political struggle in South Africa - known by his philosophy of ‘passive resistance’ embodied in the Satyagraha (the force of truth, love or non-violence) movement. He was often arrested but never disbarred as an attorney in South Africa.
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The criteria applied by the court included that normally removal would follow where an offence - is related to professional capacity - or - involves dishonesty & raises doubts whether the person can be trusted as an officer of the court - or - indicates that the person “is of such a character that he is not worthy to remain in the ranks of an honourable profession”.

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The decision in *Hassim* regarded disobedience to the law out of political conviction as sufficient proof of bad character.

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- legitimised the apartheid state and sustained its longevity
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The TRC further held that the true purpose or point of a legal system (i.e., the pursuit of justice) remained:

- inherent if hidden in the South African (common) law and provided a space for criticism of the positive law
- as the duty to hold the legal system accountable to its final objective or moral end, namely the pursuit of justice.

What is the Constitutional Court’s view on the issue of character screening?

The role of the Constitution:

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 religious ceremonies and stated his intention to do so in future (Prince v President, Cape Law Society 2000 (3) SA 845 (SCA)).

A denial of admission to practice law could have serious consequences for your career.
In this respect it must be kept in mind that the right to choose your trade, occupation or profession freely, although subject to regulation by law, is recognised in section 22 of the South African Constitution 1996. The right to follow a (legal) profession may not be limited without fulfilling the requirements set out in section 36 of the Constitution.

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 (850G–J).

In Law Society of the Transvaal v Machaka 1998 (4) SA 413 (T) the constitutionality of the power of the court to strike somebody off the roll was again challenged. However, the challenge was brought under the final Constitution of 1996 and was much broader in scope than that in Kleynhans. It was argued that the fit and proper person standard violated the right to dignity, equality and freedom (s 7(1)), the right not to be subjected to cruel, inhuman and degrading treatment (s 12(1)(e)), and the right to choose one’s trade, occupation or profession freely (s 22). Relying on the judgment in Kleynhans, 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 (416A–J).
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

*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.*

Clients form a constant feature in the professional lives of legal practitioners. The legal profession has put in place various systems and processes that are aimed at protecting clients. Bearing in mind the division of the legal profession into both attorneys and advocates, discuss the lawyers relationship with clients. In your discussion you should consider – amongst others:

(i) **Acceptance of a mandate from clients?**  
(ii) **The referral rule and its rationale?**
(iii) The need for a trust banking account?
(iv) The duty of confidentiality owed to the client?
(v) Recourse for clients who are not satisfied with a legal practitioner’s work?

4 x Repeat! [25]

(i) The acceptance of a mandate from clients:

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 or her 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 and refuse to co-operate or withdraw if dishonesty is required of the practitioner himself by the client or any party.
- 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.

  - 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.

(ii) The referral rule and its rationale?

Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. Hence - attorneys must facilitate access by the client to an advocate, should the client’s brief or circumstances so require.

This is also known as the referral rule - which includes to:

- initiate contract between advocate and client;
- negotiate and receive 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 rationale for the referral rule:
- The client is afforded the legal expertise required at the appropriate time of the litigation process.
- The advocate is not burdened by unnecessary detail, but only with what is essential to the matter at hand.
- It is in the public interest that advocates do not handle any money on behalf of clients as this is the task of the briefing attorney.

(iii) **The need for a trust banking account**

All attorneys must keep a **separate trust banking account**

- in which all money held or received by them on account of other persons must be deposited.
- No amount standing to the credit of such an account is to be regarded as forming part of the assets of the attorney.
- Any shortfall in the account may be recovered from the Fidelity Fund in proper circumstances.

The law society’s most fundamental rule is that the total amount in an attorney’s trust account must at all times be sufficient to cover the amounts owing to trust creditors (although it is no requirement for admission as an attorney that the applicant should satisfy the court of this ability).

An attorney receiving money from his client without having any trust account, would become involved in the financial affairs of his client and would therefore lose his professional independence and ability to act in the interest of his client and may – if abuse is proven be summarily struck off the roll.
(iv) The duty of confidentiality owed to the client?

The contract between attorney and client also brings about the duty of confidentiality.

- The attorney may not divulge confidences or communications made to him or her by the client in the course of their professional relationship.
- This applies whether the communication is oral or in writing, and even where the client admits that he or she has committed a crime.

Hence a relationship develops between an attorney and client wherein the attorney’s duty of confidentiality and the client’s corresponding right to confidentiality, continue even after the attorney-client relationship has come to an end, and only the client may waive this right.

Apart from this contractual obligation, it is also an established principle of South African law that 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, are considered to be “privileged information”.

- This means that privileged information may not be disclosed to a court or in quasi-judicial proceedings, or offered in evidence.
- It is an accepted legal principle that to divulge this kind of information would not promote the proper functioning of the litigation process or of the legal system in its entirety.

*S v Safatsa 1988* (1) SA 868 (A)

The privilege is the client’s, and not the practitioner’s
Privilege must be claimed in court, and does not arise automatically

(v) Recourse for clients who are not satisfied with a legal practitioner’s work?

Attorneys are bound by a strict professional code and clients inter alia have the right to professional, honest, equitable and unbiased conduct and advice at all times.

- Should an attorney act unprofessionally in any way a client will have the following options of recourse - being:
  - To communicate the cause of dissatisfaction with the attorney himself.
  - To insist upon a remedy - either personally or in writing by registered mail.
  - Should the attorney fail to take appropriate action the client will be entitled to lodging a complaint in writing with the Provincial Law Society in the client’s region.

The Provincial Law Society will thoroughly assess all matters once the required correspondence has been exchanged who will investigate the matter and take appropriate action against the attorney in question.

____________________________________________________________________________

The court has an inherent common law power to regulate the legal profession. Refer to case law in your discussion of the power of the court to:

(i) Admit prospective legal practitioners.

(ii) Strike errant legal professionals off the roll.

(iii) Reinstate legal professionals who have been struck off the roll.
(i) The inherent power of the courts to admit prospective legal practitioners

The court has an inherent common law power to regulate the legal professions and therefore remains the final arbiter of what is appropriate in this regard (see Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA 762 (TPD) 770G–784D).

In South African context the Attorneys Act 53 of 1979 or Advocates Act 74 of 1964 determines the criteria to be applied for the admission and enrolment or exclusion or expulsion from the profession on the basis of such candidate or practicing attorney or advocate being a fit and proper person. These acts afford inherent power to the courts to control and discipline the practitioners who practise within its jurisdiction.

Admission of Attorneys:

Section 15(1)(a) of the Attorneys Act 53 of 1979 states that a court may only enroll an applicant if “such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled”.

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 religious ceremonies and stated his intention to do so in future (Prince v President, Cape Law Society 2000 (3) SA 845 (SCA)).

Admission of Advocates:

In terms of section 3 of the Admissions of Advocates Act 74 of 1964, if you wish to be admitted as an advocate you need to satisfy the court that you are “over the age of twenty-one years and is a fit and proper person to be so admitted and authorized”.

The Supreme Court Act 59 of ‘59 contains rules pertaining to the admission of advocates, their authorisation to practise and their conduct.
In terms of section 11 of the **Admission of Advocates Act 74 of 1964**, the power to make rules includes the power to make rules in terms of the Supreme Court Act to give effect to the provisions of the Admission of Advocates Act. The Rules of the Code of Conduct of the various court divisions also govern the professional conduct of advocates.

**(ii) Strike errant legal professionals off the roll.**

Section 22(1)(d) of the **Attorneys Act 53 of 1979** states that a practicing attorney may be struck off the roll, if that attorney “in the discretion of the court, is not a *fit and proper person* to continue to practice as an attorney”.

**Striking-off** is usually reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with suspension from practice. If an attorney is struck from the roll, he or she will not be readmitted unless the court can be satisfied that the applicant has genuinely reformed, that a considerable period elapsed since he or she was struck off and that the probability is that, if reinstated, he or she will in future conduct him- or herself honestly and honourably (*Law Society of the Cape v C* 1986 (1) SA 616 (A)).

**Summerley v The Law Society of the Northern Provinces 2006** (5) SA 613 (SCA) was an appeal against a decision of the High Court of Pretoria. In the court *a quo* the Law Society of the Northern Provinces, in terms of section 22(1)(d) of the Attorneys Act 53 of 1979, had applied that Summerley be struck from the roll of attorneys. In terms of section 22(1)(d) of the Act an attorney may, at the instance of the law society concerned, be struck from the roll or suspended from practice by the court if he or she, in the discretion of the court, is not *a fit and proper person to continue to practise* as an attorney.
Section 7(1)(d) of the Admissions of Advocates Act 74 of 1964, likewise authorises a court to remove an advocate from the roll if the court “is satisfied that you are not a fit and proper person to continue to practice as an advocate.

**Bram Fischer** - The political abuse of the “fit and proper person” standard is well illustrated by the case of Bram Fischer, a brilliant, highly regarded, senior advocate attached for many years to the Witwatersrand Bar. *Fischer was struck off the roll of advocates in 1965 because of his opposition to apartheid (Soc of Advocates of SA (WWR Div) v Fischer 1966 (1) SA 133 (T)).*

(iii) **Reinstate legal professionals who have been struck off the roll.**

Striking-off is usually reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with suspension from practice. If an attorney is struck from the roll, he or she will not be readmitted unless the court can be satisfied that the applicant has genuinely reformed, that a considerable period elapsed since he or she was struck off and that the probability is that, if reinstated, he or she will in future conduct him- or herself honestly and honourably (*Law Society of the Cape v C* 1986 (1) SA 616 (A)).

In October 2003 Bram Fischer was posthumously re-instated on the roll of advocates in terms of the provisions of The Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002 (*Rice v Society of Advocates of SA (Witwatersrand Division)* 2004 (5) SA 537 (WLD)).

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Discuss the core values in the make-up of a “good lawyer” with reference to honesty and trustworthiness, good judgement and objectivity? (25)
Values are rather ideals which we strive to achieve, i.e. a good we aspire to i.o.w aspirational values. The idea of “the morally good” or virtuous lawyer is also in itself an aspirational value and due to the vast spectrum of what may or may not constitute a ‘good lawyer’ the combination and/or extend of core values may differ from person to person.

Three core values - honesty and trustworthiness, good judgment and objectivity are essential traits in the make-up of a ‘good lawyer’.

**Honesty and trustworthiness**

The onus to prove that a prospective lawyer is a “fit and proper” person to practice law rests on the person applying to be admitted to practice as an attorney or an advocate. Apart from your knowledge of the law, technical skill and the ability to work hard, a “fit and proper” lawyer should have impeccable integrity.

By “integrity” we understand reliability, honesty and the ability to withstand the temptation to do something irregular or dishonest for personal gain when conducting a client’s affairs.

In *Fine v Society of Advocates of South Africa (WD)* 1983 (4) SA 488 (A), it was held that Fine was not a fit and proper person, and that his name should be removed from the roll after he had acted fraudulently by signing a letter sent to a lessor of property, indicating that he held sufficient funds on behalf of a foreign lessee to cover rental for the first six months of the lease, when this was not the case.

In *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) the court found that the conduct of Mr Swain was a breach of the duty to act in good faith as required of
practitioners and aspirant practitioners. It was further held that in his evidence, Mr Swain had demonstrated that he was reckless in his assertions and had no sense of responsibility towards the truth. Consequently, it was found that he was not a fit and proper person to be admitted to practice as an advocate. Mr Swain appealed against this judgment but the appeal court upheld the judgment of the court of first instance.

Advocates have to maintain high standards of integrity and honesty and should avoid not only criminal conduct, but also misconduct and unprofessional conduct. They should be truthful and act with integrity of the highest degree since the proper administration of justice could not survive if they were not scrupulous of the truth.

In *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA), the court held that the fact that an attorney is a pillar of society and works for the poor without pay was no substitute for honesty, reliability and integrity. Vassen’s appeal against his removal from the roll was dismissed by the court. The court also held that it may strike off or suspend any attorney who is not a fit and proper person, including one who has not yet commenced practising, or who has ceased to practice. **In acting on behalf of the client, you have the obligation to be honest to the client, to the court, to other lawyers, and to 3rd parties & society in general.**

**Dishonesty:** The argument, justifying dishonesty towards others on behalf of or in the interest of a client, is based on the ethical theory of utilitarianism (good = good consequences) and not on virtue ethics (See Study Unit 6). It is also based on the role-differentiated approach which will be exposed as untenable later.
Disclosure: To be honest is to be ready and willing to disclose not some of, but all the truth you know about a particular situation. Withholding some information, even for “good reasons” does not measure up to the requirement of full disclosure. You can avoid lying by keeping silent, but in doing so, you fail to be candid. Consequently, you may not claim to have acted honestly where you deliberately avoided making a full disclosure.

Client Privilege: In our opinion, to be an honest lawyer means to be ready and willing to make a full disclosure at all times. An exception to this is your obligation of protecting the privacy of your client. The professional privilege of a client’s communications is a legal doctrine which provides that professionals cannot be required to reveal client confidences in a court of law. Underlying this doctrine is the notion that clients would not be able to trust professionals who violated the confidentiality of their communications.

Conflict of Interest: In order to be trustworthy and honest it is important for you as a legal practitioner to foresee and avoid a situation in which there is conflict of interests. This may arise, for example, where you have a financial interest in the subject matter of a case you are conducting. The point, though, is that you are in the first place, under no obligation to accept a client’s mandate. Therefore, it is your choice whether or not to abide by the demands of trustworthiness and honesty in specific situations.

Honesty & truthfulness: There is an essential connection between honesty and truthfulness. To be honest is at the same time to be truthful. The obligation to be
trustworthy and honest permeates all areas of your relationship with others. This includes your relationship with other practitioners, the courts and the public.

**Good judgment:**

As a legal practitioner should have a sense of equity and fairness, be able to act impartially and to exercise good judgment. (Equity refers to the application of general law to the individual case in such a way that justice may prevail). You should be able to judge matters objectively, carefully and deliberately. You should possess the decision-making skills necessary to arrive at equitable results. In his article, “Living in the law” 1987 *University of Chicago Law Review* 835, Kronman asks: “Why should anyone care about being or becoming a lawyer, or leading the life to which the choice of law as a career confines one?” SG pp 36

**Choice of the profession:** Kronman proposes that you would choose neither the law nor any other career if the choice were immoral or contrary to the moral convictions of your community - hence it must be assumed that the choice of a legal career is a morally permissible one. Kronman then focuses on why you would care to choose law as a career and not on what you ought to do once you are a lawyer. **Kronman’s findings:** He finds that many people enter the legal profession “because it offers great opportunities for wealth and prestige” as an instrument for the acquisition of wealth and honour. This position may be criticized for being outright selfish.

**Selfish motivation:** The core of this criticism is that such lawyer does not really care about the law in the first place. Rather his or her concern for the law is subordinate to
using the law as an instrument to acquire those things that he or she really cares for such as a good life or prestige. It should be remembered that lawyers who admit to choosing the legal profession on this basis are doing what is often done by many other people, whether or not they are in the legal profession. This makes such lawyers rather ordinary and less than interesting.

In fact, they are in danger of working so hard in the pursuit of wealth and honour that they do not find the time to live the kind of life they had envisaged. They often end up failing to achieve their original objective which was to use the legal profession as a means or instrument for achieving their specified goals.

**Loss of identity or personality:** Another reason why their using the legal profession for selfish ends is problematic, is that they run the risk of losing their identity or personality. They would go through the motions of being lawyers simply as required. In that case, their personality would begin to suffer because they would be acting out of step with their true identity or personality.

**What differentiates a lawyer?**

Kronman’s argument in this connection is that to practice law well requires not only formal knowledge of the law but certain **qualities** of mind and temperament as well. “To be a lawyer is to be a person of a particular sort, a person with a distinctive set of character traits as well as an expertise” (841). By choosing the law as profession, one tends to become a certain kind of person.
Public-spiritedness means that you choose the legal profession based on your commitment to the public good. Although you once again consider the law as a means or instrument, this time you intend to use the law for more than your own selfish ends or goals. On the contrary, the law is seen as a means or instrument to promote and protect something outside and above yourself, namely the public good. No doubt there are different meanings and views regarding the public good. It is important to understand that it is possible and plausible to subscribe to the “public good”.

Kronman makes the following three points in this regard: (844)

- If you do not have a sense of public-spiritedness you are to some extent a “professional failure”. You are a failure because you are unable to recognize and appreciate that with your status and profession should come the promotion and protection of the public good in a rather special way.

- Some of you may seek more than the general promotion of the public good. They may find fulfillment by becoming involved in politics, for example. This should not be contrary to the pursuit of the public good, but is rather a way of working for the public good by placing special emphasis on political engagement.

- If you choose the legal profession purely for reasons of public-spiritedness then you regard law as an instrument for the attainment of some public good. Law will thus remain an instrument even though it might not be used for selfish purposes. Thus the lawyer “who views his career merely as a vehicle for justice or equality or some other public value bears a certain resemblance to the lawyer who regards his career as a means. ... Both find the point of their professional work in something that lies outside
it, and both may be inclined to view their choice of career as an *accommodation to external necessity*.

People are constantly faced with the **need to deliberate upon situations and then decide** upon what they consider to be an appropriate course of action. Sometimes a decision to act in a particular manner yields the desired result but at other times it does not. In the former instance, we can speak of the person acting on his or her **good judgment** whereas the latter case, the person showed **poor judgment**.

**Good judgment is considered to be a virtue.** Good or bad judgment is not the outcome of following or disregarding the correct and consistent use of a particular theory or drawing or, failing to draw, the only correct inference in specific circumstances.

**Exercising your judgment, whether good or bad, involves a number of complex and interrelated elements, including deduction and intuition.** It has already been stated that **deductive reasoning** is an **indispensable element of forming a particular judgment**. But it is not in itself sufficient since not all situations allow for a single conclusion or decision.

**Intuition** is also an indispensable element in forming a particular judgment. SG pp 37

By **intuition** Kronman understands *“a form of direct insight or apprehension distinct from any species of understanding at which you are able to arrive by reasoning alone”*. Intuition does not involve reflection. To have an intuition is simply to see that something is the case, to apprehend its obviousness in the same direct way that you apprehend, for example, the physical shape of the room in which you are at present sitting (847–848).

However, to understand judgment as intuition can be discouraging in the sense that the non-reflective character of intuition means that you either have it or not. Intuition is thus a disposition or “gift” or a talent. It cannot be acquired by some special effort.
It is also misleading to understand judgment as being based on intuition only. The problem is that in everyday life people are required to give reasons for their judgment. In this case deductive reasoning assumes an important role. However, if intuition is used either to complement or replace deductive reasoning, it becomes difficult to attach the qualification “good” or “bad” to any judgment. It is therefore misleading to understand judgment as intuition only. Furthermore, if judgment is understood solely as intuition, then it becomes difficult to establish the connection between an individual’s character and intuition. The reasoning behind this is that since intuition is a gift, those without such a gift cannot develop a virtuous character through their own efforts. On what basis then may the legal profession, for example, demand specific character traits under the rubric of a “fit and proper person”? This question points to the need to modify and qualify the assertion that judgment is a form of intuition.

Visualization: This is what Kronman does next. According to him, judgment demands that we picture or imagine the situation in which we will be should we take a particular decision. The projected situation is a picture of a double relationship. In the first place, the projected situation involves our relationship with ourselves. In order to make the transition from an imaginary to a real relationship with ourselves we must answer the question: “Can I live with it?” The meaning of this question is incomplete until we understand that the “I” involves both the individual and those in his or her network of relationships. The other people involved in the imagined situation form the second arm of the double relationship. Thus “I” must take into consideration both his or her “feelings” about the projected new situation and the “feelings” of those with whom he or she will interact.
**Detachment:** To be able to deliberate with empathy for ourselves and others with whom we have a relationship, it is necessary to assume a separating distance. The “I” in the present situation must be separated or distanced from the future “I” existing only in the imagination. Similarly, the present network of existing relationships must be distanced from the future network of relationships. Kronman uses the word “detachment” to describe this situation. *“The person faced with a hard choice must give each alternative its due; he must entertain all the possibilities by feeling for himself what is most attractive in each. But he must do this while withholding his commitment to any”* (853).

**Deliberation:** On this basis, Kronman (853) proffers his definition of deliberation: Deliberation is neither deduction nor intuition. It is the compassionate survey of alternatives viewed simultaneously from a distance, and those who show excellence in deliberation and whose judgment we value are the men and women best able to meet these conflicting requirements and to endure the often considerable tension between them. As Kronman understands it, deliberation culminates in the making of a specific choice. This means, for e.g. that on the basis of deliberation you may choose either to remain in the present thereby rejecting an imaginary new situation of the future or, do the opposite, that is, reject the present and turn the imaginary new situation of the future into your actual reality.

*By choosing the one or the other, you are basically answering the question: “Can I live with it?”* The answer is very important because it may result either in the enrichment of personal integrity or personal disintegration and regret. To be able to live with yourself, to show “fellow-feeling” towards yourself through the choices you make is a mark of good judgment which leaves you pleased and satisfied to live by such a judgment.
This is the core of integrity. *But choosing what you cannot live with is the mark of bad judgment and leads to the destruction of your integrity and sorrow and remorse.* SG pp 38

The role of politics:

Kronman then proceeds to argue that the above elements of judgment also apply in the sphere of politics. *For our purposes the important point to note is that the legal career is situated and functions in the context of politics.* The professional lawyer should therefore possess the abovementioned qualities of good judgment. It is insufficient simply to know the law well enough to apply it as an instrument in the pursuit of selfish ends. *In the political context, justice – be it retributive or distributive & – is always an integral part of the public good.*

*It is in this sense that the standard of a “fit and proper person” enjoins the professional lawyer to pursue and preserve the public good in the name of justice. Accordingly, it is a mark of bad judgment to enter the legal profession solely in search of wealth and prestige at the expense of justice and the public good.*

One of the main responsibilities of a judge is to preserve the community of law, to discover and articulate the conditions under which political fraternity is possible. It is the judge’s direct responsibility to do this; he must attend to the community of law, to its construction and preservation, and cannot simply assume that it will come into existence as the indirect consequence of what he does by means of an invisible mechanism of coordination. ... *[T]o be a good advocate, then, one must be in the habit of looking at one’s own case from a judicial point of view, and since a judge’s direct concern is with the community of law, an advocate who sees things from the judge’s perspective and attends to his concerns will be careful to frame his own arguments so as to emphasize the*
congruence between his client’s interests and the interests of the legal community as a whole.

... It is only when an advocate has acquired the character trait of good judgment that he can be confident in his ability to see the world of legal disputes as a judge would see it and hence to distinguish wise arguments from merely clever ones. Advocates who do not possess this trait of character may be knowledgeable about the law and quick in argument, but their lack of judgment is a liability: it makes them less effective than they otherwise would be.

Objectivity

Objectivity is closely related to good judgment and also to honesty. It requires that no irrelevant considerations should be brought to bear upon your judgment which implies not only a keen logical sense but also good preparation so as to know what is needed.

In this regard your emotions should definitely be blocked out. You should not be influenced by emotions which come out in cases or interviews. According to Du Plessis absolute objectivity is probably not attainable, but you should at least recognise your own disposition, preconceptions and subjectivity, and should be able to distinguish facts from emotions. Subjective influences should be bracketed, i.e. consciously put out of play. This is where honesty, particularly to yourself, play a role.

Critically discuss the argument that legal ethics is no more than the compliance with a legal or professional code?
Ethics is the branch of philosophy that defines human behaviour and interaction pertaining to what is good for the individual and for society and establishes the nature of obligations, or duties, that people owe themselves and one another.

The word ethics is derived from the Greek word ethos, which means ‘character’ and from the Latin word mores, which means moral ‘customs.’ The need to control-regulate, and legislate ethical conduct at the individual, corporate, and government levels has ancient roots. Laws can be neutral on ethical issues, or they can be used to endorse ethics or as a code of ethics which is often developed by a professional society within a particular profession.

Though law often embodies ethical principles, law and ethics are far from co-extensive. Many acts that would be widely condemned as unethical are not prohibited by law - lying or betraying the confidence of a friend, for example. And the contrary is true as well. In much that the law does it is not simply codifying ethical norms.

Legal ethics should embody the principles of good character (ethos) and good moral behaviour (mores) as both establish the minimum standards of appropriate conduct within the legal profession. Thus legal ethics and can also refer to the study and observance of good collective morality including the study, internalisation and application of written codes governing the latter in a legal context.

Rule differentiated behaviour

Legal philosopher E 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.

Various critical minds however maintain 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 and to talk of ‘legal ethics’ as it is used traditionally, is in fact a contradiction in terms - as legal positivism entraps legal morality in slavish adherence to professional codes. The so-called rule based approach.

It would seem that (some) lawyers are indeed not interested in moral philosophy or ethics but are, in accordance to their legalistic mind-set, only interested in the prescriptions regulating their conduct as legal practitioners.

Daniel Coquilette in *Lawyers and Fundamental Moral Responsibility* argues that a lawyer with a formalistic and positivistic approach to law or legal philosophy - who understands law as a closed and coherent set of rules or principles - will also tend to understand his or her ethical responsibilities as a question of complying strictly with a codified set of legal rules.

Stan Ross adds his voice in *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* wherein he mentions that the technical application of ‘the law’ in interpreting ethical rules leads to a very narrow moral universe as it emphasises the use of logical or rational thought without giving proper concern for values.

Accordingly a legalistic or rule based mind-set leads to ’role-differentiated’ behaviour between lawyers and clients. 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.
Role differentiated behaviour

The concern of moral and legal philosophers about the way in which lawyers approach legal ethics is compounded by a slightly different but related problem, known as 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.

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 utmost skill, aggression & diligence the client’s objectives, as long as he or she does not violate the law.

Markovits in “Legal ethics from a lawyer’s point of view” 2003 Yale Journal of Law & The Humanities contends that in order to survive legal practitioners have to prefer their clients over others in a way that would otherwise be immoral.
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.

They claim that 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. SG pp 60

**Wasserstrom** in “*Lawyers as professionals: some moral issues*” published in *Davis & Elliston (ed’s) Ethics and the Legal Profession* argues that lawyers should see themselves “less as subject to role-differentiated behaviour and more as subject to the demands of the moral point of view”. He warns that 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.

**Morally good people** strive always to act honestly and justly, and to treat other people in a friendly and cordial manner. They 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.*
Conclusion: Clearly legal ethics is much more than the compliance with a legal or professional code - when law & ethics are approached from a wider philosophical perspective, it soon becomes clear that the legalistic or rule- or role-based approach to ethical responsibility frequently results in a 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.

“... an applicant who has stated and repeated in unequivocal terms that he 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 24 of the Attorneys Act. Conduct of that sort reflects adversely upon the 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 this statement – referring to case law? (25)

The comment relates to the various attempts of Gareth Prince, a devoted Rastafarian, to be admitted to the legal profession and to have the possession and use of cannabis legalized for Rastafarian religious purposes. (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.

- 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 a majority decision in the Constitutional Court in *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) the 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.
This position 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 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 cases and compare how the court understood the duty of a legal practitioner to obey the law? (25)

**Incorporated Law Society, Transvaal v Mandela 1954** (3) SA 102 (T)

**Natal Law Society v Maqubela 1986** (3) SA 51 (N),

Paving the way in 1905 for the decision in Mandela – nearly 50 years later - the court in *Ex parte Krause* set the tone that it was not the mere fact of a previous conviction of an attorney that mattered, but the question whether the conviction reflected negatively upon the “personal honour” of the person involved – citing that if a criminal offence was committed with political motive was not born out of spite, or in an attempt to unlawfully further the private interests of the offender, the criminal offence would not reflect negatively on the moral character of the person involved.

This principle resounded in *Incorporated Law Society, Transvaal v Mandela 1954* (3) SA 102 (T). At the time *Nelson Mandela* was a practicing attorney, and was convicted under the Suppression of Communism Act 44 of 1950. He received a suspended sentence for inter alia encouraging a scheme which aimed at bringing about certain social and political changes including the repeal of the pass laws, laws that enforce segregation of races and the laws that restrict non-european franchise, by unlawful means and instigating public disobedience. Consequently an application was brought for his removal from the roll of attorneys.

- The court held that the offence committed by Mandela had nothing to do with his practice as an attorney and that his conduct was not dishonest, disgraceful or dishonourable and hence the application was refused.
- The court referred to the crime of treason and to the oath of allegiance to the Union that attorneys had to take to have been admitted and aired the view that violation of such solemn oath and the commission of treachery would commonly and rightly be dishonourable and undoubtedly reflect on a lawyers’ fitness to remain in the profession. The court held that this was not the case in the matter at hand.
The court held that – while in certain circumstances an attorney may be expected to observe the law more strictly than others, the fact that an attorney has deliberately disobeyed the law does not necessarily disqualify him from practising his profession or justifies the court in removing his name from the roll.

In contrast the decision in *Natal Law Society v Maqubela* 1986 (3) SA 51 (N), application was brought for the removal of the respondent from the roll of attorneys i.t.o the Attorneys Act 53 of 1979, contending that Maqubela had been convicted and sentenced to 20 years imprisonment for high treason, due to his participation in a conspiracy which had resulted in various explosions which had caused damage to property and injuries to persons. The applicant cited that he was therefore unfit to practice as an attorney.

It was contended on behalf of the respondent that the offences were unrelated to his profession and that they were “political offences” having regards to the motive which lay behind their commission and that they accordingly called for special treatment and appraisement.

The court held that although certain statutory offences could be labelled “political offences”, the inherent character of an offence, especially a common law offence was not altered by virtue of the fact that it was politically motivated.

The court further held that the offences were not unrelated to the attorney’s fitness to practice, and that the inherent nature of the offence was in itself “dishonourable and morally reprehensible”.

The court held that regardless of Maqubela’s moral character or motivations, his dishonourable and reprehensible conduct, disqualified him from practising as an attorney and the court duly granted the application for his removal from the roll.
The political-offence exception recognised in *Krause* and *Mandela* was not considered.

**The contrast in the position of the courts is clear.** The criterion applied is whether an attorney should be disbarred – measured against his duty to uphold the law – is whether the conduct of the attorney:

- was morally reprehensible
- was not in the interest of the common good and of justice
- was dishonest or dishonourable and
- affected the underlying ethical character of a practitioner which rendered him an unfit or improper person to practice law.