Define the term “legal ethics”

“Legal ethics” can be understood in a wide and a narrow sense. In the wide sense, it refers in general to the relationship between law and ethics (or morality). For example may the law be used to enforce moral views on abortion, homosexuality, prostitution or human cloning?

In the narrow sense, the term refers to the ethical standards of professional conduct applicable to the field of law. Legal ethics in the narrow sense thus deals with the “oughts” of providing legal services: “How ought a legal practitioner to behave in order to be a ‘good’, ‘decent’ and ‘proper’ legal practitioner?” In legal practice the term “legal ethics” is, understandably generally used in this narrow sense.

Explain how a profession differs from an ordinary job (10 marks).

The word “profession” is derived from the Latin professio which means “a public statement” or “promise”. From this may be inferred that a legal professional (whether an attorney, advocate, judge, magistrate, public prosecutor or legal adviser) should be worthy of public trust, and you should carry out your professional duties with public-spiritedness and the highest standards of ethical conduct.

1. Professionals are required to have specialised intellectual knowledge and skills before they will be granted access to their chosen profession. This knowledge, which is not easily accessible to the lay person, puts the professional in a position of authority vis-à-vis the client. The client has no other option but to trust the professional and should therefore be able to rely on the last mentioned’s integrity.
2. Professionals are expected to have a commitment to promoting the basic good of society. In the case of the legal profession, the basic good is justice.
3. Professionals are expected to have a commitment to serving the public in matters related to their particular field.
4. Professionals enjoy relative autonomy in the execution of their duties. They use their discretion in the execution of their duties and do not blindly accede to their clients or other authorities.
5. Professionals should have a willingness to accept personal responsibility for their actions and for maintaining public confidence in their particular profession.
6. Professionals share a sense of common identity and an established moral community.
7. Professionals are self-disciplined and abide by a code of legal ethics based upon what the best thinkers in their particular profession regard as proper conduct for a member of that profession.
8. The above standards of professional conduct are enforced by the profession itself or by the courts, taking into account the views of the controlling body of the particular profession.

Discuss the practising of law as a profession

According to Ackerman 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. Law is practised as a profession and is not merely a job. You must find it a calling. Most importantly, the law must call upon the highest exercise of your highest selves”

Formalistic and legalistic philosophy of law, focuses exclusively on rule-based approach to professional conduct has led to a very restrictive interpretation of three claims or assumptions traditionally made in the name of a lawyer:

- that he or she acts like a professional,
that he or she always remains morally a fit and proper person for the legal profession, and
that he or she has a duty to obey the law.

Explain the content and constitutionality of the standard of a “fit and proper person”

- **Section 15(1)(a) of the Attorneys Act 53** – 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 Attorneys Act 53** - 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”.
- **Section 3 of the Admissions of Advocates Act** - 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) Admissions of Advocates Act** - 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”.
- **Section 22 of the South African Constitution** - recognises the right to choose your trade, occupation or profession freely, although subject to regulation by law.
- **Section 36 of the Constitution – Limitation clause**
- **Section 26(1) of the interim Constitution – The right to free economic activity**

The “fit and proper person test”

A character test (“good moral character”) applies to membership of the advocates’ profession.

- **Section 3 of the Admissions of Advocates Act** - 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) Admissions of Advocates Act** - 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”.

This means that only persons of a certain character (“good moral character”) are allowed to practise as lawyers. 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.

Criticism: The standard of a “good moral character” 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. For example, women were considered too emotional, timid and delicate for legal practice. In the early years of the 20th century, Jews, blacks, Eastern European immigrants and other nonconformists (such as radicals, divorcees, religious fanatics) were subjected to such stringent character scrutiny that only a few gained entry to the profession. During the second half of the 20th century, applicants were excluded because of their perceived membership of the Communist Party, and Rhode (552) holds that this kind of prejudice does not augur well for a profession charged with defending minority groups on the fringes of society. She believes a broader range of values should be acknowledged, and
that more debate and discussion are needed. It is noteworthy that bar organisations consist mostly of mainstream practitioners who may wish to keep nonconformists out of legal practice.

**In South Africa** - individuals 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.

**The Apartheid South Africa** - Whether somebody is a “fit and proper person” to practise law as an advocate or attorney is essentially a discretionary value-judgment on the part of the court. In *Prokureursorde van Transvaal v Klynhans* 1995 (1) SA 839 (T) 853I–854C the court stated that although its judgment must be made on the totality of the facts before the court, judgment will in the end be based on the general impressions formed by the court and its own sense of appropriateness. 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 Africa the court’s judgment about who is an “appropriate person” has frequently been influenced by political considerations. During the years of apartheid, the various Law Societies brought numerous court applications to have lawyers, who became involved in the struggle against apartheid, removed from the roll. The political abuse of the “fit and proper person” standard is well illustrated by the case of Bram Fischer. **Fischer was struck off the roll of advocates in 1965 because of his opposition to apartheid** (Society of Advocates of SA (Witwatersrand Division) v Fischer 1966 (1) SA 133 (T)).

**Prince v President, Cape Law Society** - In a highly publicised recent case, 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)).

From Gandhi to Prince the modern history of the South African legal profession is marred by the arbitrary exclusion of persons belonging to marginalised or oppressed groups on account of their race, sex, political affiliation or religious convictions by having recourse to the “fit and proper person” standard. Given this history, it is not surprising that the character screening of lawyers has been the subject of a number of constitutional challenges during the first decade after apartheid. What is more surprising is how little impact these challenges have had on the traditional legal establishment.

**Constitutional Impact:**

Section 22 of the South African Constitution recognises the right to choose your trade, occupation or profession freely, although subject to regulation by law. The right to follow a (legal) profession may not be limited without fulfilling the requirements set out in Section 36 of the Constitution.

You may therefore assume that any qualification for admission to the profession (such as the criteria of character) must be clearly related to the public interest and your fitness or capacity to practise law. It could probably be argued that character traits or personal conduct that do not affect your professional performance or the public interest should not play a role in the
decision whether to admit you or no, however this argument was rejected subject to Section 36 of the Constitution.

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.

Case law: (Pahe 5-6)

- *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) - In this case the court was called upon to comment on the constitutionality of its statutory power to remove “unfit and improper” persons from the roll of attorneys.

- *Law Society of the Transvaal v Machaka* 1998 (4) SA 413 (T) - 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).

- *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

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Outline and discuss the conflict that may exist between lawyers’ duty to uphold the law and the state and their duty to seek justice above all (Pg 7)

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. Lawyers of bad character may fail to uphold their duty either to the courts or clients, or may abuse their position of trust. The public is protected when lawyers are honest, diligent and place both the rights of clients and the law above their own interests.

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. For example, some aspects of strictly personal business dealings may spill over into a lawyer’s professional life, and vice versa.

The issue of whether there should be a distinction between professional and personal conduct has not been settled in South Africa, and there seems to be a discrepancy in this respect between the application of the rules of the bar and the side-bar. 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.

**Fit and proper test (Page 4 – 7)**

However, the concept of a “good moral character” has also been criticised as an “unusually ambiguous”, fuzzy concept which creates the potential for arbitrary and discriminatory application and which of necessity reflects the subjective views and prejudices of the person applying the criterion. It has been shown that in the United States, the standard of a “good moral character” 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.

Case law:
- *In re Gandhi* 1894 NLR 263 – Because he was of Indian origin
- *Incorporated Law Society v Wookey* 1912 AD 623 – Madeline Wookey was a woman
- *Witwatersrand Division v Fischer* 1966 (1) SA 133 (T) - became involved in the struggle against apartheid
- *Prince v President, Cape Law Society* 2000 (3) SA 845 (SCA) – Using dagga (which is illegal) during religious ceremonies and stated his intention to do so in future.

Write down ‘good’ arguments either in favour or against the ‘fit and proper person’ requirement.1.3.4 Form of regulation (pg 7)

**Note:**

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

1. that he or she acts like a professional,
2. that he or she always remains morally a fit and proper person for the legal profession, and
3. that he or she has a duty to obey the law.

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. “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.

**ACTIVITIES**
1) Do you think that one should distinguish between the professional and the private life of a legal practitioner? Substantiate your view.
2) What are the objections against character judgment before admitting someone to the legal profession?
3) Do you think that character screening as a prerequisite for admission to the legal profession can be constitutionally justified? If your response is “yes”, how could the past abuse of the standard be prevented in the future?

**FEEDBACK**
Before you answer the questions go back to the Introductory Study Unit! Remind yourself once again of how to reason in an ethically correct manner.
(1) Say YES/NO and give reasons for your choice (10 marks).
(2) Refer to the fact that the applicant bears the burden of proof, that it is a subjective way to look at people’s abilities and it can lead to a violation of privacy (10 marks).
(3) Refer to the Kleynhans and Machaka cases (15 marks).

**Discuss the shift from the character test to the duty test.**