Questions and Answers 2009-2014 (May/June)

What is ethics? [3]

Ethics is about what we ought and ought not to do, but it is also about setting priorities in human behaviour. Ethics is not always about what is absolutely right or wrong, acceptable or unacceptable, ideal or less ideal. It is also about what is the best decision in particular circumstances, what is the lesser of two evils, what is the balance between doing good and causing harm. Ethics is therefore about working out the principles on which we make these sorts of decisions.

What is the meaning of "legal ethics" [5]

"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? However, 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?"

What according to you is the relation between ethics and a code of conduct? [3]

Ethical considerations guide a professional in specific situations. They set the standard of conduct towards which all those in the profession should strive (eg "a practitioner must avoid all conduct which, if known, could damage his or her reputation as an honourable lawyer and honourable citizen").

Clients are the basis of the legal profession. There is a difference between advocates and attorneys where clients are concerned. Discuss the lawyer's relationship with clients and refer to:

1. **The acceptance of a mandate from clients**
2. **The referral rule and its rationale**
3. **The need for a trust banking account**
4. **The duty of confidentiality owed to a client**
5. **Recourse for clients who are not satisfied with a legal practitioner's work. [30]**

1. Although attorneys are considered to be officers of justice, they are not obliged to accept a client's brief. Before a mandate is accepted, the attorney should consider whether he or she has the ability and knowledge to do the work. Attorneys should consider any possible conflict of interests and whether the mandate involves any illegality or other impropriety. A conflict of interests would arise, for example, if the attorney were asked to represent both the claimant and the defendant. If there is a conflict of interests, the mandate should not be accepted. An attorney who has accepted a mandate has to see the matter through. An attorney may withdraw only with the client's consent, or with good reason, such as the client's improper or fraudulent behaviour. In this case, the attorney must withdraw timeously so that the client can make other arrangements. Advocates, on the other hand, are obliged to accept briefs if they are available and able to do the work. The fact that the advocate's political or religious beliefs conflict with those of the client does not justify refusal of a brief. Advocates generally may not accept briefs directly from clients, and must be briefed by an attorney. This is called the "referral rule".

2. Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. This is called the referral rule. Direct instruction is sometimes allowed, for example, from the Legal Aid Board. Attorneys take care of matters such as the investigation of facts, the issuing and service of process, and the discovery and inspection of documents (*Society of Advocates v De Freitas & Another* 1997 (4) SA 1134 NPD). Advocates are litigation specialists, and they prepare pleadings and present clients' cases in the courts. One of the reasons for the referral rule is that the attorney and advocate can apply their respective skills for the benefit of the client.

3. There is another more obvious reason why advocates should not perform the duties of attorneys: unlike attorneys, advocates are not required to open trust accounts for the keeping of clients' funds. 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. If advocates were permitted to handle clients' money, the danger of material prejudice to the client therefore exists. It is in the public interest for the courts to enforce the referral rule: advocates may not handle any money on behalf of clients as this is the task of the briefing attorney. A client who does not employ an attorney, but instructs an advocate directly, does not have the same protection, if any at all.

4. The contract between attorney and client 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. 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 confidential communications made for the purpose of giving or receiving legal advice or assistance, are considered to be “privileged information”. The privilege is the client’s, and not the practitioner’s. Privilege must be claimed in court, and does not arise automatically. The attorney, in claiming it, must not act in his or her own interest or behalf, but for the benefit of the client. An exception to this principle would be where the legislature expressly excludes this privilege, or where the client gave his or her consent. Communications by a client in furtherance of a criminal purpose are not protected. Communications made between friends (and not in their professional capacity as client and legal representative) are not protected.

5. When an attorney accepts a client’s mandate, the attorney should carry out his or her work with care, skill, and commitment that may reasonably be expected from the average attorney. This duty is a silent term of the contract that came about between the attorney and the client on the acceptance of the mandate. Apart from a claim for damages resulting from breach of contract, an aggrieved client may institute a claim for professional negligence against the attorney where, for example, he or she erred in judgement or lacked the necessary skills. An attorney may be found negligent if he or she did not exercise the necessary care in accepting a client and dealing with him or her.

Write notes on acceptance of briefs by an advocate. (or)

An attorney approaches you as an advocate to represent his client who is suspected of raping a 6 year old girl. Will you accept the brief or not? (or)

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

Advocates are expected to accept briefs if they are available and able to do the work. The fact that an advocate’s political or religious beliefs conflict with those of the client does not justify refusal of a brief. Advocates generally may not accept briefs directly from clients but must be briefed by an attorney. Direct instruction is sometimes allowed, for example, from the Legal Aid Board. Advocates may not “cross over” to the opposition after having obtained information related to the client’s case, or accept the opposition’s briefing for the appeal case, since this may lead to an abuse of confidential information.

Write notes on the challenge in *Rosemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA). [5]

The admission requirements for the legal profession were challenged 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 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 which 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.

Discuss the factors an advocate should consider in determining reasonable fees for services rendered. [5]

It is proper to consider the following:

1. The time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the case.
2. The customary charges by counsel of comparable standing for similar services.
3. In cases regarding money, the amount involved in the controversy and its importance to the client.

Advocates may not enter into partnerships with colleagues and may not share their professional fees with anybody else.

Discuss when and how a judge may be removed from office. [5]

A judge may be removed from office only if the Judicial Service Commission (JSC) finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members. The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed. The President, on the advice of the JSC, may suspend a judge who is the subject of a procedure regarding that judge's removal from office.

Discuss the duty owed by an advocate towards the court when he or she appears in an *ex parte* application. [5]

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Advocates and attorneys may not mislead the court, whether directly or indirectly, for example by making misrepresentations or false statements. In *ex parte* applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case. In motion court proceedings advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation for this. Advocates and attorneys should keep abreast of the law, including the newest authorities. Their sense of integrity should guide them to inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client's case. They may not abuse court procedures or use delay tactics.

Discuss the lawyer's relationship with the public. [5]

Practitioners are officials of justice and they should be available to render legal services to the public. The public put their trust and confidence in practitioners to carry on their profession with integrity and honour, and the courts must therefore see to it that practitioners are persons of dignity, honour, and integrity. The community should be shown that attorneys who depart from the high standards of professional behaviour required of them will not go unpunished. Misconduct (eg a fraudulent misrepresentation of facts) of such a serious nature that it shows defects in character and a lack of integrity renders the person unfit to practise.

Witnesses who are subpoenaed to appear in court are performing a public duty in coming to court and should be treated with respect. Offensive, unreasonable or intimidating cross-examination should be avoided. Improper examination detracts from the court procedure and creates an unfavourable image with the witnesses and general public. It is the duty of the presiding judicial officer to protect witnesses from such abuse.

Under what circumstance will resistance to the law (civil disobedience) be justified? [5]

It may be argued that resistance is justified when:

1. The laws are immoral;
2. It is based on the individual's religious beliefs;
3. Positive law is unjust, and not worthy of respect;
4. Utility so dictates (disobedience of the law brings about the greatest good for the greatest number).

Discuss the characteristics of an adversarial legal system. [5]

In the adversary system two parties face each other. The roles of legal representatives and judges are carefully separated. The judge acts as an impartial “referee” who listens to both sides of the case and who must see to it that the various legal representatives adhere to the procedural rules. The judge has to ascertain the true version of the facts, and has to apply the law objectively to these facts. Legal practitioners, on the other hand, focus on their clients’ interests. According to the adversary system, it is not the task of legal representatives to decide whether or not their clients are guilty or accountable (this is the task of the judge), but rather to act as a mouthpiece for their clients. They only listen to their clients’ versions of the case, and have to promote their clients’ interests fearlessly - regardless of the interests of other persons. Because everybody has the opportunity to present his or her case and because an independent judge renders the decision, it is assumed that the adversary system will result in justice and the equal protection of everybody’s rights.

Discuss the characteristics of a post-modern theory of ethics. (or) [5]

Explain how post-modern ethics differs from the traditional approach to legal ethics. [4]

Post-modernism is characterised by:

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

May you as a legal practitioner engage in civil disobedience? Explain. [5]

In certain circumstances, a lawyer may feel morally compelled to engage in acts of civil disobedience and defiance of the law. Lawyers are bound by the content of the law, and must uphold the law and be loyal to it. But you should also strive to make the law more just. Once you have exhausted all lawful means of bringing about the desired change in the law, the prospect of civil disobedience may be the only option, but should be given serious thought before being engaged in. You should, however, reflect very carefully before doing so. You should not advise a client to engage in civil disobedience, but may point out the consequences of such an action if asked about this.

Write notes on the need to maintain the dignity of the court and the legal process. [5]

Courts must be able to attend to the proper administration of justice and must be seen and accepted by the public to be doing so. Without public confidence in the administration of justice and in the integrity of judges, the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed. Such lack of confidence in, and even contempt for, courts will have the effect that people will be generally dissatisfied with all judicial decisions and will become unwilling to obey them. Whenever the allegiance to the laws is so fundamentally shaken, justice will be obstructed. The rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained. The authority and influence of the court exists in the interest of the public at large. The crime of scandalising the court is, therefore, concerned primarily with the publication of comments which reflect adversely on the *integrity* of the judicial process or its officers. The crime of contempt of court does not aim to protect the feelings or even the reputation of judges or to grant them any additional protection against defamation other than that available to other persons.

Write notes on the legal remedies which ensure that the dignity of the court is maintained. [5]

Safeguards have been in existence for many centuries in many countries to protect the judiciary against vilification and disparaging remarks calculated to bring the judicial process into disrepute. Contempt of court, which is a common law crime in South Africa, has been described in textbooks as the unlawful and intentional violation of the dignity, repute or authority of a judicial body, or interference in the administration of justice in a matter pending before it. The dignity and moral authority of the courts and the administration of justice are also protected by the Constitution.

Judges may be removed from office by a special impeachment procedure, if they are found to suffer from incapacity, be grossly incompetent, or guilty of gross misconduct. Until now, professional standards have been enforced informally through the Judge President of a particular court. A more formal mechanism is envisaged by section 180 of the Constitution, which provides that national legislation may provide for training programmes for judges and for procedures for dealing with complaints about judicial officers. No code of ethics for judges is currently in force. All complaints are referred to the Judicial Service Commission.

During a rape trial the defence advocate calls a witness a whore. The judge does not seem perturbed by this and the prosecutor looks on with no objection registered on his face. Discuss. [5]

Witnesses who are subpoenaed to appear in court are performing a public duty in coming to court and should be treated with respect. Offensive, unreasonable or intimidating cross-examination should be avoided. Improper examination detracts from the court

procedure and creates an unfavourable image with the witnesses and general public. It is the duty of the presiding judicial officer to protect witnesses from such abuse.

In terms of our Roman-Dutch common law, advocates and attorneys have a “qualified” privilege in conducting a case in court. This privilege, which gives them great latitude to put their client’s case, is based on public policy according to which they should not be hampered in their search for the truth and justice. They may not, however, abuse the legal process to slander the opposition or third parties maliciously. If this privilege is abused, for example by making false and slanderous statements wholly unconnected to the case, the privilege lapses and legal liability for the injury caused may ensue. Only if an advocate or attorney is able to prove reasonable grounds for making defamatory statements, and show that this promotes his or her client’s case, will he or she be able to rely on this privilege.

What according to you are the reasons for the loss of ethical direction within the legal profession? [5]

Unfortunately people who are financially successful, and not necessarily those who display high moral character, are honoured by our consumer society. The desire for wealth has eroded civic and community values, and being financially well off is unfortunately now the most important life goal of university students. Fierce competition and commercialisation have led to increased levels of wealth and income but unfortunately often also to unethical, even fraudulent, behaviour as not to be left behind in the wealth race.

In the current competitive environment, South African legal practitioners often see themselves as “business people” competing for business in a “dog eats dog” fashion instead of as professionals who serve the public. This “survival morality” in South Africa is brought about by increasing competition owing to growing numbers of law graduates and an accompanying growth in law firms. Competition in the marketplace has driven some legal practitioners to act in a manner which would have been unconscionable a decade ago. Many practitioners now think that as long as an act is not illegal, it is justified, even though it may violate the rules of ethical behaviour and decency. Apart from the competitive business environment, the present climate of lawlessness in South Africa is also contributing to the moral crisis experienced in the professional field. The climate of lawlessness has been attributed to the blunting of moral sensitivities during the apartheid years, and to the transition from a culture of authority to one with more relaxed political and moral ties.

What are the functions of a code of legal ethics? [5] (or)

What is the purpose of a code of conduct? [7]

A code of legal ethics generally seeks, among other things, to:

1. Protect the professional nature of legal services by stressing the obligation of professionals to serve justice and the public.
2. Correct the imbalance in the relationship between the professional and the client.
3. Maintain public confidence.
4. Protect the public against improper conduct or incompetence by prescribing and guaranteeing the standards of skill, learning, and conduct required.
5. Provide practitioners and newcomers with the broad parameters for making morally responsible choices in testing situations.
6. Ensure fair competition between legal practitioners.
7. Discipline unprofessional behaviour.

Law is practised as a profession and is not merely a job. What distinguishes a profession from other jobs, businesses, or trades? [8]

Professions are distinguished by virtue of the following characteristics:

1. Professionals are required to have specialised intellectual knowledge and skills before they will be granted access to their chosen profession. This knowledge puts the professional in a position of authority *vis-à-vis* the client, and the latter has to trust the professional and therefore be able to rely on the professional's integrity.
2. Professionals are expected to have a commitment to promoting the basic good of society.
3. Professionals are expected to have a commitment to serving the public.
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 profession.
6. Professionals share a sense of common identity.
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 standards of professional conduct are enforced by the profession itself or by the courts.

Discuss the lawyer's relationship with the courts. [10]

Attorneys and advocates are officials of the court and should always give the courts their due respect. They should not only conduct themselves in a dignified fashion, but maintain and promote the dignity of the court. They may not mislead the court, whether directly or indirectly,

for example by making misrepresentations or false statements. Lawyers may not conceal anything that the court requires for the administration of justice. The court should be able at all times to rely on their honesty and on the veracity of their statements. There can be no effective administration of justice without legal practitioners being scrupulously truthful in their dealings with one another and the courts.

If material facts are withheld from the court, this may lead to a decision that the attorney or advocate involved is not a fit and proper person to practise law. An attorney was removed from the roll because he misled the court in a divorce matter, which meant that the court would never be able to trust him again.

In *ex parte* applications, practitioners are obliged to act in the utmost good faith and to put all relevant facts to the court so that the court may have full knowledge of the circumstances of the case. In motion court proceedings advocates should bring to the attention of the court any deviations from the usual forms and offer an explanation for this.

Advocates and attorneys should keep abreast of the law, including the newest authorities. Their sense of integrity should guide them to inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client's case. They may not abuse court procedures or use delay tactics. They may not act in contempt of court by, for example, insulting a judge or magistrate. Matters should be settled by the courts, and not in the media. Legal practitioners may not therefore make statements to the media with regard to cases in which they are involved.

Legal practitioners' duty to the court is greater than their duty towards their clients, except as regards their duty not to disclose the confidences of the client to the courts. They must have impeccable court manners, even under the most provocative circumstances.

Discuss the lawyer's relationship with the clients. [10]

Lawyers of integrity should put the administration of justice and the interests of the client above their own interests and right to compensation for services rendered. They should seek to balance the interests of the client with the interests of the community.

Lawyers should endeavour to reach a solution by settling out of court, rather than initiating legal proceedings, if this is in the client's interests. They should not stir up unnecessary litigation. Lawyers should be honest in advising clients on the merits of their case, and should tell clients when they are wrong, even if this might mean that the client goes elsewhere for advice.

Attorneys are not obliged to accept a client's brief. Before a mandate is accepted, the attorney should consider whether he or she has the ability and knowledge to do the work. Advocates,

on the other hand, are obliged to accept briefs if they are available and able to do the work. The fact that the advocate's political or religious beliefs conflict with those of the client does not justify refusal of a brief. Advocates generally may not accept briefs directly from clients, and must be briefed by an attorney. This is called the "referral rule". Direct instruction is sometimes allowed, for example, from the Legal Aid Board. An attorney initiates the contract between an advocate and his or her client, negotiates about and receives fees from the client, instructs the advocate specifically in relation to each matter affecting the client's interest, oversees each step advised or taken by the advocate, keeps the client informed, and is present as far as reasonably possible during interaction between the client and the advocate. Attorneys take care of matters such as the investigation of the facts, the issuing and service of process, and the discovery and inspection of documents (*De Freitas v Society of Advocates of Natal*). Advocates, by contrast, are litigation specialists. They prepare pleadings and present clients' cases in the courts. An advocate does not report directly or account to the client and acts only in terms of the instructions given to him or her by the attorney in relation to matters which fall within the accepted skills and practices of his or her profession.

Attorneys should consider any possible conflict of interests and whether the mandate involves any illegality or other impropriety. A conflict of interests would arise, for example, if an attorney was asked to represent both the claimaint and the defendant, or where an advocate were to appear for two accused whose interests conflicted.

If the mandate is accepted, the attorney should carry our his or her work with the care, skill, and commitment that may resonably be expected from the average attorney. The duty to the client is satisfied when a lawyer of competent knowledge makes a diligent effort in the best interests of the client. This duty is a silent term of the contract that came about between the attorney and the client on the acceptance of the mandate.

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. 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 the 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". The privilege is the client's, and not the practitioner's. Communications made between friends (and not in their professional capacity as client and legal representative) are not protected.

An attorney who has accepted a mandate has to see the matter through. An attorney may withdraw only with the client's consent, or with good reason, such as the client's improper or

fraudulent behaviour. In such a case, the attorney must withdraw timeously so that the client can make other arrangements.

Despite lofty ideals and strong disciplinary prescriptions there is criticism from both the side of the profession and the public against legal codes of ethics. Discuss. [12]

<u>"Insider criticism"</u>

Practitioners are suspicious of codes of ethics and this suspicion concerns two different aspects: practical concerns, and theoretical concerns.

Practical concerns:
Professional codes are not always enforced by law societies and those who transgress them are not always dealt with effectively. Since many practitioners feel that codes are not properly enforced, they argue that the profession might as well abandon them, or replace them with codes of business ethics. Others are afraid of upholding ethical values and sticking to the rules when their colleagues are not. They fear that by trying to encourage their clients to do the right thing, these clients may go to somebody else who is willing to carry out their wishes.

Theoretical concerns:
The very idea that the practice of law is a profession counters the idea that legal ethics can be reduced to the "rules of 'professional conduct'". One justification for the self-regulation of the profession is that the practice of law requires complex professional judgements, the reasonableness of which can be judged only by fellow professionals. Self-regulation presumes that the conduct of a practitioner will not be judged against a code, but by colleagues who exhibit those virtues inherent in morally good practitioners. The formalistic idea that legal ethics is no more than the compliance with a legal code makes a mockery of this justification, reduces law to another business enterprise, and exposes the continued existence of the law and bar societies as no more than agencies created to protect vested interests.

<u>"Outsider" criticism</u>

Outsiders (the public) feel that they have no access to a simplified, easily understandable professional code, and hence do not know what conduct is regarded as unethical or dishonest. They are therefore not able to lay complaints which may be investigated by enforcing agencies (the various law societies or bar councils). Some ethical rules are seen as protecting members of the profession against the public, or as serving only the interests of the members of the legal profession themselves (eg, the rules which create barriers against competition from newcomers to the profession). Neither are the rules regarded as having universal or timeless value. Rules sometimes change as times change. For example, the rules that practitioners who write articles may not be identified in the press with reference to

their firms (which could be considered a form of touting) no longer applies. The public furthermore feels that since complaints are handled by colleagues of the accused in the legal profession, the latter will be protected against accusations from the public. Practitioners are also reluctant to report colleagues to the enforcing agencies and are often not willing to testify against them during hearings. If practitioners turn a blind eye to what their colleagues do, there is no way in which the profession may be disciplined. The legal profession is consequently sometimes regarded as a “conspiracy against the laity” or as an “unusually effective monopoly”.

Should one make a distinction between a legal practitioner’s private and professional life? [10]

Some aspects of strictly personal business dealings may spill over into a lawyer’s professional life, and vice versa. The fitness of a lawyer who has embezzled funds will be suspect, whereas his or her sexual indiscretions may not have such a negative effect. Professional codes tend to reflect this lack of precision and differ in their approach to the requirement of a good moral character in private life, as opposed to professional life. This shows their superfluous and pragmatic nature. The American Bar Association’s Model Code of Professional Responsibility (the 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. It further prohibits lawyers from engaging in illegal conduct involving “moral turpitude”. This concept has never been defined, and could probably include matters related to personal morality, such as adultery and promiscuity, which may not necessarily have any specific bearing on the lawyer’s fitness to practise law. However, the Model Rules do distinguish between private and professional life and state that “committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” amounts to professional misconduct on the part of the lawyer.

The issue of whether there should be a distinction between professional and personal conduct has not been settled in South Africa, and there seems to be a discrepancy in this respect between the application of the rules of the bar and the side-bar. For example, the purpose of ethical rules of professional conduct at the side-bar had been stated to “regulate an attorney’s conduct not only in his professional career but also in his personal life” while such a rule does not apply to members of the bar. This seems to be the reasoning of the court in relevant cases. 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 be brought into disrepute.

The role played by legal practitioners in court is not any different from the one played by actors on a stage. Discuss the role differentiated approach to legal ethics. [10]

Q&A by @yash0505

Role differentiated behaviour 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. The role of the lawyer requires one to ignore moral considerations that would otherwise be crucial in determining one's own actions. Lawyers are forced by the nature of their profession, it is said, to disregard their own views on whether their client has 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 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 play only a role, and that their aggressive and unethical conduct goes with their role as legal practitioner. When legal practitioners act in their professional capacity they do not act as ordinary people, but as occupants of a role. Their role insulates them from moral censure. Their conduct cannot be assessed by the standards of ordinary morality. The only questions are whether their appearance in court was good or bad, whether their arguments were clever, and whether their cross-examination was skilful. The question whether they abused other people or told lies is not relevant.

Markovits feels that the morally good 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. This results in a loss of integrity and an own life plan and ideals, and in an acceptance that immoral conduct has become 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 fulfilment 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.

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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 (toward their clients) and statesmanship (towards the community). Loyalty towards their clients involves that practitioners act selflessly and renounce themselves when promoting the interests of their clients. Statesmanship involves 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 that morally good practitioners find themselves in only if these arguments are accepted by the outside world, which is unlikely to happen.

Wasserstrom developed a critique of the ethics of the hired gun. He investigated the possible justifications for the hired gun approach:

- The legitimacy of role-differentiated behaviour can be sustained only if the adversarial criminal law system is itself legitimate. However, we have some cause for skepticism about the justice and effectiveness of the present legal system.
- Role-differentiated behaviour justifies a cut-throat, “winner takes all”, capitalist ethic, competitiveness (rather than cooperation), aggression (rather than accommodation), and ruthlessness (rather than compassion).
- Lawyers cannot adopt a purely role-differentiated perspective as easily as medical doctors can, because it is intrinsically good to cure a disease, but in no way can it 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.
- 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.

Write notes on the role played by legal practitioners and judges in the maintenance of the independence, impartiality, dignity, accessibility, and effectiveness of the courts. [10]

Legal practitioners should always give the courts their due respect. Not only should they conduct themselves in a dignified fashion, but maintain and promote the dignity of the court. The court should be able at all times to rely on their honesty and on the veracity of their

statements. There can be no effective administration of justice without legal practitioners being scrupulously truthful in their dealings. Their sense of integrity should guide them to inform the court of all the relevant case law of which they are aware, even if this may be to the detriment of their client's case. They may not act in contempt of court by, for example, insulting a judge or magistrate. Matters should be settled by the courts, and not in the media. Legal practitioners may not therefore make statements to the media with regard to the cases in which they are involved. Legal practitioners' duty to the court is greater than their duty toward their clients, except as regards their duty not to disclose the confidences of the client to the courts. Legal practitioners must have impeccable court manners, even under the most provocative circumstances.

The Constitutional Court held that no one expects judges to be infallible. What *is* expected from them is honesty, integrity and self-discipline, and that the process of resolution followed by them should be analytical, rational, and reasoned.

Is the traditional approach to legal ethics still acceptable today? Discuss. [10]

It would seem that (some) lawyers are not interested in moral philosophy or ethics but are, in accordance to their legalistic mindset, only interested in the prescriptions regulating their conduct as legal practitioners (eg no touting, charging prescribed fees, addressing the judge as "my lord", etc). This is the approach which has been adopted in the leading South African textbook on legal ethics. In this book, Lewis opens with the statement that ethical philosophy does not form part of his study, and that it is not necessary to plunge into the philosophy of ethics because the purpose of the book is to set out the rules of conduct which an attorney is required to obey. Furthermore, he 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. What is needed, according to Lewis, is an "entirely practical" approach to the professional conduct of legal practitioners.

Many ethical and legal philosophers have found very little of value in this way that lawyers approach ethics. Most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience but to sanction. It seeks mandate rather than insight. In contrast, it is argued by the authors of the study guide that both ethical and legal philosophies are of decisive importance in both the study of practical legal ethics and the application thereof. Coquillette makes two important points concerning the positivistic or rule approach (the traditional approach). Firstly, a lawyer with a formalistic and positivistic approach to law or legal philosophy will also tend to understand his or her ethical responsibilities as a question of complying strictly with a codified set of legal rules. These rules will then fully prescribe what he or she may or may not do in a given situation. This kind of lawyer will understand ethics as a question of complying with general rules. It may also be said that such a lawyer will adopt a rule-based approach to ethics. The point to be stressed is

that the legal philosophy of the lawyer will influence his or her understanding of his or her ethical responsibilities as a lawyer. Secondly, a formalistic approach to ethics will tend to focus on those minimum standards and rules which could be strictly enforced by law societies.

In conclusion, any discussion of “legal ethics” should begin by bringing to light the philosophy of law and ethics upon which it rests. When law and ethics are approached from this wider philosophical perspective, it soon becomes clear that the legalistic or rule-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, or even something completely different, to strict compliance with rules. A legalistic or rule-based mindset 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 mindset 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 judgement. Thus there are two alternatives to legal practice. One is the present lawyer-client model - the professional “realistic” approach. The other is to place our work in a truly moral context. The former leads to the present inhumane system that now prevails. The latter leads to an environment where on can be human; where one can reconcile being a good lawyer with being a moral or virtuous person.

Write an essay in which you discuss the critique against the traditional approach as it is put forward by writers as Wasserstrom. [10]

Wasserstrom 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 a model for lawyers in general. Lawyers should see themselves “less as subject to role-differentiated behaviour and more as subject to the demands of the moral point of view”. He 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”, capitalist 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 in no way can it 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 the 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 determines what kind of person one becomes.

Write notes in which you explain deontic ethics or the ethics of duty. [5]

Rule-governed ethics is based on the idea that in order to judge human conduct, it is necessary to establish first the ethical rule governing particular conduct. The ethical rule then takes precedence over everything else, such as the consequences of the conduct. The rule has two qualities. It prescribes what ought to be done in order to qualify as morally good, and the rule must be accepted as a duty. Once the rule is accepted as a duty then you have the obligation to obey it. The ethics of duty is also known as deontology. Rule-based ethics is haunted by the difficulty in explaining the origin of the moral sense of duty or respect for the law which it takes to be the key to ethical conduct. Critics of rule-based approaches to ethical conduct claim that this approach cannot prevent a merely legalistic or instrumental approach to the rules it holds dear.

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

Utilitarianism may be considered as one of a number of outcomes-oriented or teleological theories of ethics. The basic idea behind teleological theories of ethics is that, ultimately, the only thing that is relevant in determining whether or not an action is right or wrong is the purpose which the action is intended to achieve. Hence, teleological theories are often called consequentialist theories. Moral judgement in the case of utilitarianism boils down to the decision whether or not a given result is useful. A useful result is one that induces and promotes the greatest happiness of the greatest number in society.

Jeremy Bentham is a famous legal philosopher who argued that the whole of the legal system should be based on the utilitarian idea that all laws should aim to achieve the greatest good for the greatest number. The condition of "of the greatest number" is very important. For a lawyer to get someone accused of murder off the hook is not good ethically speaking because that will make only the two of them happy while the rest of the community will feel unhappy!

The problem with utilitarian ethics is on the one hand that there are no clear cut criteria for usefulness - to introduce the happiness of the greatest number is only to replace the problem, namely, criteria for happiness and the greatest number. On the other hand not everything that is useful is by necessity right. There are useful things that may be ethically wrong, for example the abuse of scientific and technological processes. Also, a person's objective may

not be realised; someone may jump into a river to save a drowning child and they may be too late, however this attempt is evaluated as morally good. The question arises whether any means may be used to achieve the happiness of the greatest number or in pursuit of a good purpose. To hold that the end justifies the means would mean, for example, that if a lawyer is convinced of the innocence of his or her client, he or she may lie in court, or even plot the murder of the judge in order to vindicate his or her client's innocence.

In the context of legal ethics, professional guidelines (formalism) as such could also be justified on utilitarian grounds. They 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 that utilitarianism is the final answer to legal-ethical worries. Our ethical concerns are not limited to results - motives are also important. Moreover, the application of any rule requires that the context be considered too. Ethical evaluation cannot be reduced to the mindless application of a number of rules formulated to result in a desired outcome.

Even when professionals go beyond the ethical minimum expected of them by the professional guidelines and aspire to be highly ethical, one could argue along utilitarian lines that the consequences of their action may be increased material reward and the esteem and respect of their community.

Discuss the core values in the make-up of a "good lawyer" with reference to honesty and trustworthiness, good judgement, and objectivity. [20]

Values are ideals which we strive to achieve. The idea of the good or virtuous lawyer is also an aspirational value. Three of the core values that good lawyers should have are honesty and trustworthiness, good judgement, and objectivity.

Apart from knowledge of the law, technical skill, and the ability to work hard, a fit and proper lawyer should have impeccable integrity. By integrity is meant 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**, 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 six months of the lease, when this was not the case. In *Swain v Society of Advocates, Natal**, Mr Swain had

demonstrated that he 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 practise as an advocate. In acting on behalf of the client, lawyers have the obligation to be honest to the client, to the court, to other lawyers, and to third parties and society in general. Arguments for allowing some leniency with reference to honesty to non-clients are questionable. These arguments, justifying dishonesty towards others on behalf of the interest of a client, is based on the ethical theory of utilitarianism and not on virtue ethics. It is also based on the role-differentiated approach. 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. To argue that since professionals lie not in their own interests but in the interests of their clients and this does not amount to dishonesty is problematic. To be an honest lawyer means to be ready and willing to make a full disclosure at all times. An exception to this is the obligation of protecting the privacy of a client. In order to be trustworthy and honest it is important for the legal practitioner to foresee and avoid a situation in which there is conflict of interests. 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.

In addition to the above, good lawyers should be able to exercise good judgement. They should possess the decision-making skills necessary to arrive at equitable results. 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 judgement whereas the latter case, the person showed poor or bad judgement. Good judgement is considered to be a virtue. Good or bad judgement 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 judgement, whether good or bad, involves a number of complex and interrelated elements, including deduction and intuition. Intuition is an indispensable element in forming a particular judgement. 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. However, to understand judgement as intuition can be discouraging in the sense that the non-reflective character of intuition means that you either have it or you don’t. Intuition is thus a disposition or “gift” or a talent. It cannot be acquired by some special effort. It is also misleading to understand judgement as being based on intuition only. The problem is that in everyday life people are required to give reasons for their judgement. In this case deductive reasoning assumes an important role. It is therefore misleading to understand judgement as intuition only. According to Kronman, judgement demands that we picture or imagine the situation in which we will be should we take a particular decision. We must ask ourselves 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. In the

words of Kronman, compassion or empathy is a crucial element when making a judgement. 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 person faced with the 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. 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 judgement we value are the men and women best able to meet these conflicting requirements and to endure the often considerable tension between them. To be able to live with yourself, to show “fellow-feeling” towards yourself through the choices you make is a mark of good judgement which leaves you pleased and satisfied to live by such a judgement. This is the core of integrity. But choosing what you cannot live with is the mark of bad judgement and leads to the destruction of your integrity and sorrow and remorse.

Objectivity is closely related to good judgement and also to honesty. It requires that no irrelevant considerations should be brought to bear upon your judgement 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, that is, consciously put out of play. This is where honesty, particularly to yourself, plays a role.

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 practise law or not. [25]

Initially, a character test was applied by our courts and the question was whether the political motive behind the criminal conduct reflected a corrupt character. With the rise of the apartheid state, however, more and more emphasis was placed on legal practitioners’ duty to obey the law as such.

One of the earliest cases in which the influence of a criminal conviction on professional membership was investigated was *Ex parte Krause**. Krause was a practising advocate. He was taken prisoner of war by the British troops and released on parole in England, where he obtained permission to practise law. While in England, he wrote a number of letters to a former colleague of his in Johannesburg in which he suggested that the author of a series of newspaper articles describing the Boer forces as outlaws should be killed. On the basis of these letters, Krause was subsequently convicted in England of attempting to incite murder. When he returned to South Africa after the war and the expiry of his sentence, he resumed

his practice as an advocate at the Cape Bar. He then applied to be admitted as an advocate of the newly constituted Transvaal Supreme Court, on the basis that he had been a member of the bar of the defeated ZAR. The Transvaal Bar Council took a resolution stating that it had no objection to his admission to the Transvaal Bar. The court decided in favour of Krause's admission to the Transvaal Bar. 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. However, in cases where the criminal offence was committed with a political motive and was not borne 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 was applied again fifty years later in the context of another political struggle. Nelson Mandela had participated in the Defence Campaign against the apartheid government in the early 1950s and as such violated a number of apartheid laws. In the court case that ensued (*Incorporated Law Society, Transvaal v Mandela**), the court examined the principles for the removal of a legal practitioner from the roll. The court confirmed that the fact that an attorney had been convicted of a crime is *prima facie* evidence of misconduct. However, the fact that you deliberately disobeyed the law does not necessarily disqualify you from practising law. In this case, Mandela was motivated by a political vision of a nonracial 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. Despite his questioning of the law and acting consistently with that questioning, Mandela was found to be a "fit and proper person" and was accordingly not struck off the roll.

*Matthews v Cape Law Society** is another case which resulted from the Defiance Campaign in which Mandela took part. However, this case brought about an important shift in the law. It brought an end to the investigation into 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 Cape Law Society refused to register Matthew's articles of clerkship because he had two previous convictions under the Suppression of Communism Act. In deciding against the applicant, 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.

In *Society of Advocates of SA (Witwatersrand Division) v Fischer** 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. Bram Fischer was a practising advocate and member of the South African Communist Party. He too decided to challenge what he considered to be the unjust laws of the land. It was in the course of this challenge that he was arrested in September 1964 and charged under the Suppression of Communism Act. He applied for bail, which was

granted, but did not return to stand trial. The court found that Fischer had deliberately misled the court when he applied for bail, that this contempt of court amounted to dishonest conduct, and that it reflected negatively on his character. The court stated categorically that an attorney is bound to the same duty as the court to uphold the laws of the land which had been duly enacted and promulgated. The Johannesburg Bar Council decided to institute proceedings in the Supreme Court to have Fischer removed from the roll of advocates because his “recent conduct [was] unbefitting” of an advocate. 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. Fischer was accordingly struck off the roll and was sentenced to life imprisonment.

The *Fischer* judgment set the tone for the future. *Incorporated Law Society, Natal v Hassim** involved an application to have Hassim struck off the roll of attorneys. He 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. During the trial, evidence was led on Hassim’s moral character, good name, and integrity as an attorney. Evidence was also led that he was personally opposed to violence and had assisted with the recruitment out of a sense of loyalty to the political movement to which he belonged. 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. Nothing was made of the fact that the offence was unrelated to Hassim’s professional work, that his good name, honesty, and integrity as an attorney was undisputed, and that the offences were borne 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** the character approach was also not followed. The applicant had previously been convicted of sabotage and sentenced to 10 years’ imprisonment. His conviction, like the convictions of *Mandela, Fischer,* and *Hassim*, had also arisen from the struggle against apartheid. 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**, 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.

Q&A by @yash0505

It seems as if the duty test and not the character test, is applied by the courts in the new South Africa. Illustrate this view by referring to case law where an applicant's belief has brought him into conflict with the law. [7] or [12]

The relevant case in question is *Prince v President, Cape Law Society**. After obtaining his BIuris and LLB degrees, Prince applied to the Cape Law society to have his articles registered. His application was refused on the basis that he had two previous convictions for the possession of cannabis, and he had made his intention clear to continue breaking the law. Prince took his decision on review to the Cape High Court and challenged his refusal on two grounds:

Firstly, he argued that the prohibition of the use and possession of dagga was unconstitutional in so far as it did not make provision for an exception for its *bona fide* religious use. 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 Supreme Court of Appeal. 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. There are however indications in the Constitutional Court judgment that the position taken by the Cape High Court and the Supreme Court of Appeal on this issue does not find universal support among South Africa's senior judges. Sachs J, for example, judges the defiance of the law by Prince against the politics of open democracy and of "reasonable accommodation of difference". According to his understanding of democratic politics Prince should not be forced by an inflexible application of the law to make the excruciating choice between his conscience and his career. Sachs has no problem to concede that, in spite of his open defiance of the dagga prohibition, Prince has shown himself to be "a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs". From this obiter one can infer that Sachs J is of the opinion that Prince's religious (but illegal) use of dagga does not render him an unfit or improper person for the legal profession.

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: *Incorporated Law Society, Transvaal v Mandela* and *Natal Law Society v Maqubela*. [20]

Q&A by @yash0505

Nelson Mandela had participated in the Defiance Campaign against the apartheid government in the early 1950s and as such violated a number of apartheid laws, including the Suppression of Communism Act, for which he was convicted. After a suspended sentence was imposed, the Incorporated Law Society of Transvaal approached the court to have Mandela removed from the roll of attorneys. In the court case that ensued, the court examined the principles for the removal of a legal practitioner from the roll. The court confirmed that the fact that an attorney has been convicted of a crime is *prima facie* evidence of misconduct. However, the fact that you deliberately disobeyed the law does not necessarily disqualify you from practising law. Usually, removal will follow where the offence is related to your professional capacity. However, you can also be removed from the roll for an offence that has nothing to do with your practice. This would be the case, for example, where the offence involves dishonesty and raises doubts about whether you can be trusted as an officer of the court. The final test in this regard is whether the offence indicates that you "are of such a character that you are not worthy to remain in the ranks of an honourable profession". In this case, Mandela was motivated by a political vision of a nonracial 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. The court concluded that Mandela's offence was not of a "personally disgraceful character", and that there was nothing in his conduct which rendered him unfit to be an attorney. Despite his questioning of the law and acting consistently with that questioning, Mandela was found to be a "fit and proper person" and was accordingly not struck off the roll.

In *Natal Law Society v Maqubela* the court focused on criminal conduct. 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 *Mandela* was not considered.

"The court has an inherent common law power to regulate the legal profession and therefore remains the final arbiter of what is appropriate in this regard" ***Professional Ethics Study Guide (LJU413J)*** **5. Refer to case law in your discussion of this statement as far as it relates to the power of the court to**

Admit prospective legal practitioners into the profession,

Strike errant legal practitioners off the roll, and

Reinstate legal practitioners who want to rejoin the profession after being struck from the roll. [30]

Q&A by @yash0505

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. The Attorneys Act states that a court may only enroll an applicant if “such a person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled”. The Act states that a practising 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”. A similar character test applies to membership of the advocates’ profession. In terms of the Admission 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 authorised”. The Act also 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 practise as an advocate”.

Whether somebody is a “fit and proper person” to practise law as an advocate or attorney is essentially a discretionary value-judgement on the part of the court. In South Africa the court’s judgement about who is “an appropriate person” has frequently been influenced by political considerations. When 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” to practise law. When 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. During the years of apartheid, the various Law Societies brought numerous court applications to have lawyers, who become 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*, 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. The end of apartheid, and the adoption on the declaration on human rights and the reinstatement of Bram Fischer on the roll of advocates (posthumously) did not signal an end to the abuse of the “fit and proper person” standard. 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.

Section 7 of the Admission of Advocates Act gives effect to the inherent power of the court to control and discipline the practitioners who practise within its jurisdiction. In exercising this power, courts take note of the rules of conduct of advocates, and strive to maintain these rules as far as possible. However, the courts are not bound to these rules and remain the final arbiters of ethical rules of conduct. Disciplinary proceedings are *sui generis* in nature, and are not subject to all the strict rules of the ordinary adversarial process. Evidence which would

have been inadmissible in ordinary civil proceedings may be considered. It is expected of the respondent in disciplinary proceedings to give his or her cooperation and to put the facts before the court. Broad denials and obstructionist tactics have no place in disciplinary proceedings. Courts take into consideration the cumulative effect of all the allegations, as well as the circumstances involved. They also consider the seriousness of disciplinary steps and the effect these may have on the advocate. They keep in mind that not only suspension from practice or striking off of an advocate, but also a mere investigation of conduct, may affect the whole future career of the person whose conduct is in question, whether the court makes an order against him or her or not. Proceedings may leave a stain on the person's name in the eyes of the public, or even do irreparable harm to the practitioner involved. Courts decide whether the alleged offending conduct has been established on a preponderance of probability, and if so, whether the person is a fit and proper person to practise as an advocate. It is in the court's discretion to either suspend or strike the practitioner off the roll.

In terms of the Attorneys 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. The penalties are aimed at the following: to discipline and punish errant attorneys, and to protect the public. 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 the roll, and that the probability is that if reinstated, he or she will in future conduct him or herself honestly and honourably.

Discuss the requirement of being a fit and proper person to practise as a lawyer in South Africa. (or)

Whether somebody is a "fit and proper person" to practise law is essentially a discretionary value judgement on the part of the court. Discuss this statement referring to relevant case law. [30]

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 once they have proven that they are indeed "fit and proper persons" for the legal profession.

Membership of the profession is subject to extensive character screening. The Attorneys Act states that a court may only enroll an application if "such person, in the discretion of the court,

is *a fit and proper person* to be so admitted and enrolled. The Act states that a practising 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 practise as an attorney". A similar character test applies to membership of the advocates' profession. In terms of 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 twenty-one years and are "*a fit and proper person* to be so admitted and authorized". 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".

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. The public is protected when lawyers are honest, diligent, and place both the rights of clients and the law above their own interests.

Whether somebody is a "fit and proper person" to practise law as an advocate or attorney is essentially a discretionary value-judgement on the part of the court. 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.

In South Africa the court's judgement about who is an "appropriate person" has frequently been influenced by political considerations. When 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" to practise law. When 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. 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, 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. The end of apartheid and the adoption of a declaration on human rights and the posthumous reinstatement of Bram Fischer on the roll of advocates did not signal an end to the abuse of the "fit and proper person" standard. 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 he stated his intention to do so in future.

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. From the cases of *Kleynhans* and *Machaka* it is clear that the constitutional challenge to the admission requirements currently applicable to the legal profession have 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.

The fit and proper test was constitutionally challenged on two occasions. Refer to case law and indicate the court’s verdict in both cases. [8]

The issue was first raised under the interim Constitution of 1993 in *Prokureursorde van Transvaal v Kleynhans**. 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. It was argued that this power violated section 26(1) of the interim Constitution (the right to free economic activity). The court rejected the argument. It 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 of the interim Constitution.

In *Law Society of the Transvaal v Machaka** 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 in *Kleynhans*. It was argued that the fit and proper person standard violated the right to human dignity, equality and freedom, the right not to be subjected to cruel, inhuman and degrading treatment, and the right to choose one’s trade, occupation or profession freely. 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 choose one’s profession from being abused by criminally minded attorneys.

It is important for the 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 the rules.

Q&A by @yash0505

Discuss the above statement. Your discussion should in addition make reference to the four other philosophical approaches to ethics. [25]

Many ethical and legal philosophers have found very little value in the traditional rule-based approach of lawyers towards ethics. In terms of this approach, most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience but to sanction. It seeks mandate rather than insight. A lawyer with this formalistic and positivistic approach to law or legal philosophy will tend to understand his or her ethical responsibilities as a question of complying strictly with a codified set of rules. These rules will then fully prescribe what he or she may or may not do in a given situation. This kind of lawyer will understand ethics as a question of complying with the general rules. It may also be said that such a lawyer will adopt a rule-based (Kantian) approach to ethics. A formalistic approach to ethics will tend to focus on those minimum standards and rules which could be strictly enforced by law societies. A lawyer adhering to a rule-based or formalistic approach to law would be adopting a “bad man” approach to the law, and this is highly problematical and one of the reasons for the ethical crisis in the profession. It leads to role-differentiated behaviour between lawyers and clients.

Utilitarianism may be considered as one of a number of outcomes based theories of ethics. The basic idea is that ultimately the only thing that is relevant in determining whether or not an action is right or wrong is the purpose which the action is intended to achieve. Hence the theory is also called consequentialism. Moral judgement in the case of utilitarianism boils down to the decision whether or not a given result is useful. A useful result is one that induces and promotes the greatest happiness of the greatest number in society. Jeremy Bentham is a famous legal philosopher who argued that the whole of the legal system should be based on the utilitarian idea that all laws should aim to achieve the greatest good for the greatest number. The condition of “the greatest number” is very important. For a lawyer to get someone accused of murder off the hook, is not good ethically speaking because it will make only the two of them happy while the rest of the community will feel unhappy! The problem with utilitarian ethics is on the one hand that there are no clear cut criteria for usefulness - to introduce the happiness of the greatest number is only to replace the problem namely, criteria for happiness and the greatest number. On the other hand not everything that is useful is by necessity right. There are useful things that may be ethically wrong, for example the abuse of scientific processes. The question arises whether any means may be used to achieve the happiness of the greatest number or in pursuit of a good purpose. To hold that the end justifies the means would mean, for example, that if a lawyer is convinced of the innocence of his or her client, he or she may lie in court or even plot the murder of the judge in order to vindicate his or her client’s innocence. In the context of legal ethics, professional guidelines as such could be justified on utilitarian grounds. They 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. 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. As indicated above our ethical concerns are not limited to results - motives are also important. Moreover, the application of any rule requires that the context be considered too. Ethical evaluation cannot be reduced to the mindless application of a number of rules formulated to result in a desired outcome. Even when professionals go beyond the ethical minimum expected of them by the professional guidelines and aspire to be highly ethical, one could argue along utilitarian lines that the consequences of their action may be increased material reward and the esteem and respect of their community.

In ancient Greek philosophy virtue was regarded as an excellence and accordingly, all ethics was virtue ethics. Aristotle did not base his ideas about ethics on rules that had to be obeyed, but on excellence of character. Aristotle described the kind of person you should strive to become, and which character traits were virtuous. When deciding how to act the question is not simply what the rules prescribe, nor what would be useful to achieve, but what a person of good moral character would do in the same circumstances. Such a person will seek to act with virtue in a moral crisis which Aristotle defines as the mean between two vices. Thus in the sphere of fear and confidence, rashness is the vice of excess, and cowardice is the vice of deficiency. Between the two vices lies the virtue of courage. Thus the moral demand: always to act in a courageous manner. According to Aristotle, some of the virtues essential to a perfect life can only be developed by participating in the public affairs of the state. A life spent in pursuit of private affairs would thus be a life deprived of an essential component of life. It is only by living the life of an active citizen that one may develop all the moral and intellectual virtues fully. He believed that a life devoted to public-political affairs was the highest level of life that could be attained.
Contemporary virtue ethics is, in part, a revival of Greek thought. It is focused on questions such as: what makes a particular human quality a virtue? What is the relation between being a virtuous person and doing the right thing? 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. The mode of conduct to adopt in a given situation is determined by the type of person you want to become, the excellence or virtue you want to embody, and not by what a rule prescribes or what results you want to achieve. Anthony Kronman is one philosopher who has adopted a virtue based approach to the ethical conduct of lawyers. He suggests that a life in the law is valuable not because of money or status but because of the unique type of person or character it allows the lawyer to become. The primary virtue of lawyers is the ability to make good, reflective judgements. In Aristotle's philosophy, man could strive to become more virtuous, and most virtue ethicists claim that virtue is inherent and consistent in all people and can indeed be developed. Some virtue ethicists maintain, however, that the possession or non-possession of specific virtues is a matter of a natural gift. It is a talent that you may or may not have. A talent is something that you cannot learn or acquire. You either have it or you don't. Therefore, virtue cannot be learnt. Now if

virtue cannot be learnt, it should follow that those who are not gifted with virtue cannot be expected to act ethically. Critics of virtue ethics thus conclude that virtue cannot be the foundation of ethics and morality, or that if virtue is the foundation of ethics and morality, only those who have the natural gift of specific virtues may be subjected to moral judgement.

A number of feminists writing about the law developed a distinctive version of virtue ethics. They argue that the influx of women into the legal profession might bring about significant changes in the practice of law. “Feminine” traits such as empathy, care, nurturing and social commitment may transform legal ethics and processes, as well as the image of the typical “legal profession”.

Postmodernism is a reaction by contemporary thinkers against the Western scientific model of rationality in 17th century Europe. One of the characteristics of postmodernity is the view that universal morality has come to an end. A single universal ethical code applicable to and binding on everyone at all times is not part of postmodern ethical thinking. Postmodernism is characterised by

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

In light of the above, the question arises whether it is possible to have law in postmodern times. From a rule-based perspective, law is underpinned by universal rules and principles which can be applied to all situations. Law constitutes and establishes a sole, definite and authoritative point of reference in terms of which human conduct must be judged. However, this is precisely what postmodern ethics denies and rejects. This is the reason why we end up without a substantive or moral or ethical code for the postmodern period. The uniqueness of the particular situation, or the difference involved in every other person, cannot be captured through general or universal rules. To be receptive to otherness and difference in a truly open, pluralistic and democratic world, practical norms cannot take the form of general rules or principles.

Cases

- Integrity/honesty
    - *Fine v Society of Advocates of South Africa*
    - *Swain v Society of Advocates, Natal*
- Political commitments versus fit and proper test
    - *Ex parte Krause*
    - *Incorporated Law Society, Transvaal v Mandela*
    - *Matthews v Cape Law Society* [this is the turning point, character -> duty]
    - *Society of Advocates of SA v Fischer*
    - *Incorporated Law Society, Natal v Hassim*
    - *Ex parte Moseneke*
    - *Natal Law Society v Maqubela*
- Religious belief versus fit and proper (character test)
    - *Prince v President, Cape Law Society*
- Constitutional challenge of fit and proper person test
    - *Prokureursorde van Transvaal v Kleynhans*
    - *Law Society of the Transvaal v Machaka*
- Historical abuse of fit and proper person test
    - Madeline Wookey
    - Mahatma Gandhi
    - Bram Fischer