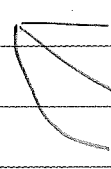




TRADITIONAL APPROACH



Rule-based Approach

Role-differentiation

Adversarial

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Rule-based approach

- Lewis = Not a philosophy but sets out rules of conduct which attorneys are required to obey.
 - = Tries to reduce ethics to a code of conduct, which lawyers must comply with.
 - Lawyers will obey rules even if it's against their spiritual/cultural values.

- Shaffer: - what most lawyers call ethics, aren't ethics at all, they are just rules of administration.
 - Don't appeal to persons conscience but to fear of punishment

"Justice Holmes" if you want to know what the law is, look at it as a bad man - who only cares about the consequences of his actions (fear of punishment) &

NOT at the good man - who looks at reasons for actions (conscience)

3 questions

- 1) What is ethics?
- 2) What is relation between ethics & code of conduct?
- 3) Why does legal profession use a narrow view of ethics?
(By asking these = Philosophy)

- Coquille - looks at lawyers attitude to legal rules
 - Rules governing profession
 - = lawyers have an NB moral responsibility.

- Formalism = if ethical responsibilities comply with codified set of rules.
 - = Rules can be strictly applied by law Society.

oo both philosophical and rule based.

Rule-based = unethical approach to legal ethics

Ethical-philosophy - Moral responsibility involves more than just complying with the rules.



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Role - differentiation

- Sometimes requires attorney to do things that an ordinary person need not do.
- Lawyer has duty to his client to make his expertise available IRRESPECTIVE OF THE MORALITY.
- Provided result client wants isn't illegal
- Lawyer is an amoral technician who's skills & knowledge are available to his client.
- "Role-differentiated" character of lawyer renders irrelevant what would have been relevant to him in some other instance.
E.g. X wants to make a will, disinheriting her child because she married a man from a different race.
Attorney isn't going to draft the will just because he thinks that it is wrong to disinherit your child for such a reason.
- A lawyer doesn't have to agree to represent a client but it's not wrong to represent a client whose aim is immoral
- Lawyers job is to provide his skill & not to have to approve of the character of his client or avenues provided by law.

Wasserstrom & Criticism of the ethics of the "hired gun"

- 1.) Legitimacy of role differentiated behaviour can only be sustained if the adversarial system in criminal law is legitimate (= if judge keeps his impartial, objective role)
 - 2.) This behaviour justifies "a winner takes all" aggressiveness rather than an approach of compassion and co-operation
 - 3.) Lawyers can't adopt role-differentiated approach as easily as a doctor, cos not always good to win every case at all costs.
 - 4.) Lawyers pay the price for their behaviour as it's hard to separate this type of thinking from their personal lives
- "The profession one chooses determines the type of person they will become"

Lawyers play a role & their unethical aggressive behaviour goes with that role, their conduct cannot be assessed against ordinary morals
They look at it as Was their appearance in Court good or bad.



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FIT AND PROPER PERSON

① - Good moral character

For lawyers, Good character is defined as: The professional must have virtues or traits such as:

- 1.) Truthfulness
- 2.) Dedication
- 3.) High levels of competence
- 4.) Loyalty to clients &
- 5.) Trustworthiness and courage to carry out his professional responsibilities

② A Client has to be able to trust the professional's competence & judgment & must tell them confidential information that might be abused by a dishonest professional

③ Good moral character is a requirement for admission to the profession

- The profession must weed out those who have acted unprofessionally and thereby damaged their clients or others.
- This should be based on an objective criteria and actual wrongful acts rather than subjective judgements and predictions.

④ Prince v President

- Applicant wanted to be admitted as an attorney & had fulfilled most requirement except for community service.
- Law Society declined to register his contract to perform community service because they said he wasn't a fit & proper person to be admitted as an attorney.
- he had 2 previous convictions of possession of dagga and made it clear that he intended to continue using it. He adhered to the Rastafarian religion - the use of dagga was used for spiritual, medicinal & ceremonial purposes.



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- Question of Prince's fitness to be admitted as an attorney decision made by law Society its Attorney's act.
- Its decision can only be set aside if
 - 1.) hadn't applied its mind to relevant issues of Attorney's act
 - 2.) acted mala fide
 - 3.) decision was unreasonable
- The court found no basis for existence of these grounds (1-3)
- Application dismissed - no order for costs.

Fit & proper requirement:

- S15 Attorneys Act: court only enrol person if its discretion fit & proper
- S22 Attorneys Act: Courts discretion if not fit & proper, strick off roll
- S3 Admission of Advocates Act: over 21 & fit and proper person.

Fit & proper person character = under lies moral basis of law. because: lawyers are entrusted with matters relating to

- 1.) Affairs
- 2.) Honor
- 3.) Property
- 4.) Money
- 5.) Confidential information
- 6.) Lives of their clients.

- Whether someone is a fit & proper person is essentially a DISCRETIONARY VALUE JUDGMENT

- Mahatma Gandhi applied to be admitted as an advocate opposed by law society because he was Indian & ∴ not fit & proper

- Madeline Woakey: law society refused to register her articles cos she was a woman ∴ not fit & proper. (Roman-Dutch law).



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Braam Fischer: struck off roll of advocates because he opposed apartheid - \therefore not fit & proper person.

Modern History of legal profession has been damaged by arbitrary exclusion of people belonging to certain groups (race, sex, religion).

Machaka - Challenged constitutionality of power of court to strike off roll
- argued fit & proper person requirement violated right to dignity, equality & freedom, right not to be subjected to cruel, inhuman & degrading treatment & right to choose one's trade & profession.
- Court held: screening process prevented the abuse from criminally minded attorneys

- American Bar Association doesn't distinguish between professional & personal conduct
a lawyer must at all times comply with rules

- SA matter isn't settled - Purpose of ethical rules are to regulate conduct in professional & personal life.

sexual indiscretions may not have such a negative effect compared with a lawyer who's embezzled funds.

- Rationale: do something in personal life brings professional into disrepute
- Past conduct/history, not an indication on whether they'll be a threat in future.
- Problem can be remedied after its occurred.

It's suggested that the requirements that lawyers must prove that they are fit and proper people for legal profession opens the door to a more ethical profession.



PHILOSOPHICAL APPROACH

- 1) Rule-Governed ethics
- 2) Utilitarianism
- 3) Virtue-Ethics
- 4) Feminism
- 5) Post Modern Ethics.

1) Rule-Governed approach

- based on idea that in order to judge human conduct, it must 1st be established what ethical rules govern the conduct.
- Rules are above everything
- Must be accepted as a duty > Deontic Ethics.
- Obligation to obey it

1) Categorical Imperative

being morally good is a duty

2) hypothetical imperative

trained to be morally good. (Air-hostess being kind.)

2. Utilitarianism

- Moral judgment = greatest happiness to the greatest number of people.
- Eg: 20 people held prisoner - one is told to kill one of the prisoners then the others go free.

kill the one for the benefit of the others

The fact that his morality is in jeopardy & murder of innocent person is wrong is of no consequence = people are a means to end



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3. Virtue - Ethics:

In ancient Greece : All ethics were virtue ethics

Aristotle :

- Idea of ethics, not rules that had to be obeyed but an excellence of character.
- The kind of person one should try to become and the character traits were virtuous.
- When deciding how to act - isn't just a question of what the rules prescribe, BUT what a person of good moral characteristic would do
- Such person acts with virtue in a moral crisis.

The virtue of lawyers is to make good judgments.

4) Feminism :

- Influx of woman into legal profession might bring about a change in the practice of law
 - "Feminine" traits such as empathy, care, nurturing & social commitment may transform legal ethics & processes as well as the image of the typical "legal profession"
- ^{propensity}
- of Woman like to "heal" or "reconcile" rather than to "win"

5) Post Modern Ethics :

- Characteristics :
- 1) end of universal morality
 - 2) Celebrate difference
 - 3) Reject absolutes & universals
 - 4) Accept uncertainty and indeterminacy

Single code has no part of post modern thinking.



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Do criminal Activities with a political motive reflect negatively on a lawyer's character?

(Shift from character (virtue) to rules (duties))

- In apartheid - more emphasis placed on practitioner's duty to obey the law, regardless of political motives

• 2 approaches (used in striking an attorney off the roll)

1.) Virtue - ethical = look at moral character & ask whether the offence discloses a dishonorable character

2.) Rule - ethics = Objective duty to obey all the laws of the land

Ex Parte Krause

At outbreak of war, Krause was a practicing advocate - he was taken as a prisoner of war by the British troops and released on parole in England, where he got permission to practice. While in England he wrote a number of letters to someone in Johannesburg in which he suggested that a writer of newspaper articles describing Boer forces, as outlaws should be killed.

On the basis of these letters = he was convicted in England of an attempt to incite murder.

When he came back to SA after the war & the expiry of his term, he resumed his practice as an advocate - he then applied to be admitted as an advocate under the new Transvaal

The court decided in favour of his admission. His application to be reinstated in England was denied.

In Tvl it was held as a general rule, person with previous convictions couldn't be admitted to the profession. However it wasn't the mere previous conviction that mattered but whether the conviction reflected negatively on his personal honour.

- In most cases a criminal conviction = dishonorable character

- BUT when a criminal offence was committed with a political motive - generally doesn't reflect negatively on the person's moral character.

CHARACTER TEST WAS USED.



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WERKOPDRAGSKRYFBLOK - ASSIGNMENT WRITING PAD
Skryf - Write

Dosent se Kommentaar
Tutorial Comments

Mandela

Pg 40 - 46 Ndes



pg 51 + 52
Notes

Values in the make-up of a "good lawyer"

- Honesty & Trustworthiness
- Good judgment
- Objectivity.

Honesty & Trustworthiness

① - A fit & proper person should have "integrity"

- Integrity =
- 1) Reliability
 - 2) Honesty
 - 3) Ability to withstand temptation

② - Advocate / Attorney wanting to be admitted has to prove they're fit & proper

③ - Professionals can be honest with clients & acting on clients behalf - dishonest with others. (oo don't violate their duty to their client)

Weaken clients trust in 2 ways

- 1) tainted by their dishonesty to others on the clients behalf.
- 2) Honesty isn't an easily divisible character trait.

④ ARGUMENT Justifying dishonesty = ROLE DIFFERENTIATED BEHAVIOUR.

⑤ To be an honest lawyer = full disclosure at all times (excl clients' privacy)

- clients privilege for privacy is done so can trust Lawyer.
- Honest & Trustworthy lawyer must avoid conflict of interest.

⑥ There is an essential connection between honesty and truthfulness

- to be honest is to be truthful & this includes yr relationship with other practitioners, the courts & the public.

⑦ Cases : Fine : held not a fit & proper person, name struck off roll, he acted fraudulently by signing a letter sent to lesser of property, indication he had sufficient funds on behalf of a foreign lessee to cover rental for 1st 6 months of lease, when this wasn't the case.



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Swain : No sense of responsibility towards the truth & so found not a fit & proper person to be admitted.

Vassen : Court held : The fact that an attorney is a pillar of society and works for the poor without pay was no substitute for honesty, reliability and integrity. (Was removed from Roll)

Merret : deliberately put his divorce case on the "unopposed roll" so deliberately misled court & was struck off roll

(1) In acting on behalf of the client, the lawyer must be honest to the client, the court and Society in general

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Notes

GOOD JUDGMENT

- (1) - Possession of Good judgment is a virtue
- (2) - To deliberate well :
 - 1.) Sympathy &
 - 2.) detachment
- (3) - To show good judgment, you must do more than simply apply the general rules
- (4) - Judgment requires a dilemma where the choice is btw conflicting interests.
- (5) - Someone who has good judgment regularly makes the right decision, its believed a person who deliberates well, makes sound choices.
- (6) - Someone who is faced with a difficult personal decision must look at all the concerns and possibilities, enter his imagination & look at what his life will be like after certain decisions are made (entertain his choices)
- (7) - To entertain a set of values isn't to make them your own but to look at them - its halfway btw acknowledging them & applying them
- (8) - In laws a lawyer must exercise good judgment in that he needs to look at the conflicting interests in a case with a sympathetic detachment, imagine the effects of the decision & try achieve a solution which benefits all as much as possible.



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9) Kranman claims:

- 1.) Law is an activity which can be performed, well, badly or adequately and to excel in the practice of law you must have good judgment
- 2.) The practice of law often promotes the development of good judgment

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54. 3)**OBJECTIVITY:**

- ① - Is closely related to Good judgment and also to Honesty
- ② - No irrelevant considerations should be brought to bear upon your judgment.
- ③ - Emotions should be blocked.
(Should not be influenced by emotions)
- ④ - Du Plessis: absolute objectivity is probably not attainable but at least recognise your own disposition, preconceptions and subjectivity & should be able to distinguish facts from emotions.
- ⑤ - Subjective influences should be bracketed, ie. consciously put out of play. This is where honesty, particularly to yourself, play a role.

based on yr
own ideas
or opinions