


**Previous Exam Questions & Answers '09 – '14**
**15 pointer Questions & Answers**

**Write notes on: The referral rule by referring to the case of Society of Advocates v De Freitas & another 1997** <sup>(4) SA 1134 NPD.</sup> **(15)**

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

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

- initiate contract between advocate and client;
- negotiate and receive fees from the client;
- instruct the advocate specifically in relation to each matter affecting client's interest;
- oversees each step advised or taken by the advocate;
- keeps the client informed, and is present as far as possible during interactions between the client and the advocate.

**The rationale for the referral rule:**

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

As shown in *De Freitas v Society of Advocates of Natal 2001* attorneys are responsible to take care of matters such as the **investigation of the facts**, the **issuing and service of process**, and the **discovery and inspection of documents**.

The referral rule does not however mean that advocates may not under any circumstances accept instructions directly from clients. There are exceptions under which advocates may be instructed directly by the Legal Aid Board.

*De Freitas* also showed that different Bars approach this matter differently. For instance, advocates in the Western Cape may, for example, take direct instructions for opinions, from a restricted list of clients, which members of other Bars may not do.

With reference to the keeping of a separate trust banking account by attorneys it was reiterated that funds held on behalf of clients for payments to advocates referred by attorneys acting on behalf of clients - should be deposited for safekeeping in those accounts.

In *de Freitas* it was also shown that an advocate can in actual fact practice independently and need not take up chambers at a specific Bar after having done his pupillage. Membership of a bar is voluntary. If you do not want to you could practice from your own chambers or as a member of the Independent Association of Advocates of South Africa ("IAASA"). The IAASA functions side by side and, in a sense, in competition with the constituent Bars of the General Council of the Bar of South Africa ("the GCB"). *De Freitas and Another v Society of Advocates and Another* [2001] ZASCA 9 par 2).

The constituent Bars of the General Council of the Bar of South Africa have their own rules that regulate the professional conduct of its members. The IAASA on the other hand was founded during 1994 by a group of advocates who were mainly opposed to some of the rules of the GCB and its members are therefore not bound by the rules of the GCB.

Having said this, “the Courts have inherent disciplinary powers over practitioners in cases of misconduct or unprofessional conduct” as was shown in *De Freitas and Another v Society of Advocates and Another* 2001

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**Discuss the role of rules, consequences and virtue as approaches to assessing ethical conduct? 3x (15)**

As we said above, **legal ethics involves the philosophical study of the moral experience of the good lawyer.** The question is how the legal profession’s self-understanding or ideal of the good lawyer may best be described or captured.

The professional ideal of the good lawyer may be **approached from different ethical perspectives.** For example... from a...:

- » rule-based perspective the good lawyer is recognised by his or her sense of duty;
- » virtue-based perspective the good lawyer is recognised by the virtues or type of character he or she has;
- » consequentialist (utilitarian) perspective by the types of consequences he or she effects;
- » postmodern ethics of difference perspective by his or her sense of absolute responsibility to “the other”, beyond the limits defined by established rules, desired consequences or existing character.

### **Rule-governed ethics (duty)**

As already mentioned 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**.

**The ethics of duty is also known as deontological ethics** based on ethical theories that place special emphasis on the relationship between duty and the morality of human actions.

Deontology (Greek *deon*, “duty,” and *logos*, “science”) consequently focuses on logic and ethics, postulating that once the rule is generally accepted as a duty then you have the obligation to obey it.

**Deontological ethics - Immanuel Kant (1724–1804)**



**Immanuel Kant (1724–1804) is one of the most famous exponents of the ethics of duty.** According to Kant, the first principle is that in any ethical situation you should act in the same way you would have others act in a similar situation. You always have to treat others with respect, and may never regard a person as a mere means to an end. You should treat others in such a manner that you can always justify your conduct towards them.

This implies **universalising** your action or conduct because for Kant actions are morally good if they ought to be the action of everyone else.

**Universalising a morally good action imposes the duty on all** to do the same for no other reason than it is your duty. But freedom of decision (which exists next to causality) is always a pre-condition.

Since moral goodness is the reason for the duty, it is necessary for everyone to accept and obey it. Obedience is necessary because moral goodness is desired by everyone.

Kant calls this first principle of deontic ethics the **categorical imperative**.

However, Kant is also aware that at times people do act contrary to the categorical imperative. In such situations people either put the ethical rule completely aside, or they downgrade it. When a rule is secondary, the moral goodness of an act is weakened in the sense that it is no longer the decisive criterion. They are then acting according to what Kant calls the **hypothetical imperative**.

For example, if you consider that it is morally good to be kind to others then you must be kind to others at all times for the reasons that kindness is **morally good and therefore a duty**. This conduct is in accordance with the categorical imperative.

But it is possible, for example, that the air hostess who is full of smiles and exudes kindness in the aircraft does so not because she holds kindness to be morally good but because she has been trained to be kind for the sake of the airline as well as her own job. Being kind – in **keeping up appearances** - not for what is morally good - then is conduct arising from the **hypothetical imperative**: if I am not kind it is likely that our airline will lose customers and the loss of customers will be a threat to my own job.

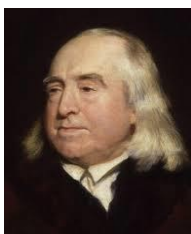
**Practitioners** are members of a profession and are governed by professional rules. They are obliged to comply with these rules and to fulfill minimum ethical obligations, whether they like it or not. They have a **“morality of duty”** and **failure to abide** by the rules brings about sanction. The conduct of lawyers who merely meet these minimum standards has been described above as formalistic, positivistic and legalistic. Such conduct would, in terms of Kant’s philosophy, fall in the **hypothetical imperative** category.

They do not act ethically because they hold this to be morally good but because they have been trained in this manner, and because it will be good for their practice and for the profession as a whole.

However, according to the **categorical imperative**, lawyers should expect more from themselves and from colleagues than merely abiding by professional rules out of prudence or fear of punishment (as opposed to a sense of duty). In short, formalists cannot rationalise that they follow Kant because for Kant moral discussions are very important; every such discussion is a free decision for humanity as a whole.

**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.

What sustains the motivation to obey the law out of a sense of duty? 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 (like the approach of Holmes's bad man). Kant is an example of taking the rule deeper by building his duty ethics on a fully worked out moral theory and the theory about the nature of the human being.



### **Utilitarianism (Consequentialism) - Jeremy Bentham (1748 – 1832)**

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

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

Hence, teleological ethical theories are often called **consequentialist**. **Moral judgment** in the case of utilitarianism **boils down to** the decision **whether** or not a given **result is useful**. A useful result is one that induces and promotes the greatest happiness of the greatest number in society.

**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**.

**Usefulness is the criterion of moral judgment** here, not a sense of duty and respect of legal rules as in Kantian or rule-based ethics. The condition 'of the greatest number' is very important. For a lawyer to get someone accused of murder off the hook, is not good ethically speaking because that will make only the two of them happy while the rest of the community will feel unhappy!

**The problem with utilitarian ethics** is on the one hand that there are **no clear cut criteria for usefulness** - to introduce the happiness of the greatest number is only to replace the problem namely, criteria for happiness and the greatest number. On the other hand **not everything that is useful is by necessity right**. There are useful things that may be ethically wrong, for example the abuse of scientific and technological processes. Also, a person's objective may not be realised, someone may jump into a river to save a drowning child and he may be too late, however, his attempt is evaluated as morally good.

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

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

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



**Daniel Markovits** (225–241) critical of the philosophy of **utilitarianism**

raises an example stating that with this philosophy: The murder of one prisoner to save the lives of 19 inmates would be ethically justifiable as it

establishes the greatest good for the greatest number – **something Kant would not have approved of.**

**In the context of legal ethics, professional guidelines 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 utilitarianism is the final answer to legal-ethical worries.

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### Virtue ethics:



In ancient Greek philosophy, **virtue** was regarded as an **excellence** (**arete**). Accordingly, from the perspective of ancient Greek philosophy, 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**.

**Virtue allows the virtuous person to flourish**, because a person's ethics and his or her personal success are intertwined.

**Markovits** contends that "Ethics is about forming and satisfying appropriate ambitions and desires"

**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 a vice of excess, and cowardice a 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 (work and family) would thus be a life deprived of an essential component of the good life. It is only by living the life of an **active citizen** that one may develop all the **moral and intellectual virtues** fully. Aristotle described man as a *zoon politicon* - a **political animal** - to whom participation in public life and debate was only natural. He believed that the *bios politikos* - **a life devoted to public-political affairs of the polis** - was the highest level of life that could be attained.

To take part in public life demanded courage. The courage to stand up for your beliefs therefore became virtue par excellence. The public realm was permeated by a fiercely competitive spirit, where individuality and human excellence could be demonstrated by being courageous.

**The citizen who lived his life in the public realm lived the truly “good life”** which was far better and more virtuous than an ordinary life. (According to Aristotle, only Greek men were destined by nature to the life of an active citizen. Women, slaves and workers were excluded from public life).

**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 judgments.

**In Aristotle's philosophy,** man could strive to become more virtuous.

Most virtue ethicists however 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 have by chance. It is thus 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 judgment.

## **Feminist ethics**

### ***Recommended reading***

Prof. Carrie J. Menkel-Meadow "Portia *redux*: another look at gender, feminism, and legal ethics" in *Legal Ethics and Legal Practice: Contemporary Issues* (ed Parker & Sampford) (1995:25–56)



A number of feminists writing about the law developed a distinctive version of virtue ethics. **They argued 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 professional”. Reflect on how the feminisation of the legal profession (and the propensity of women to “heal” or “reconcile” rather than to “win”) may influence legal ethics, for example as regards the relationship between lawyer and client, or the relationship between the lawyer and the court.

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

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

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

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

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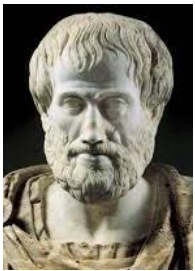
**(1) The obligation to be honest is achievable only if one has been born inherently honest, or if one has been taught to be honest from very early childhood. Discuss this thesis on the basis of any one of the above cases, and from the perspective of virtue ethics? (10)**



**John Locke**, (1632–1704) characterized a new-born child's mind as a blank sheet of paper, a clean slate, a **tabula rasa**. For Locke, there are no natural obstructions that would block development of children's native potential for acting freely and rationally. He argues that some possess more agile intellects or stronger wills than others; but all are innately equipped to become persons capable of freely following their own reason's pronouncements i.e. become autonomous beings.



This **egalitarianism** is one of the aspects of the modern view of human nature, so different from the **Plato's** ranking of human souls in the **Phaedrus** wherein he reflects on the inborn inequalities of man



fundamental to all nature, but also in **Aristotle's** notion that the capacity to act on reason rather than on instinct - distinguishes human beings from animals, or in **God-ordained hierarchies** in society, church, and state – averred by **medieval philosophers**.

Sometimes called the **Scala Natura** (scales of nature), this view saw all of creation existing within a universal hierarchy that stretched from God (or immutable perfection) at its highest point to inanimate matter at its lowest.

Somewhere between **Locke's egalitarianism** founded upon the tabula rasa of a new-born child's mind and incorporating the agility of intellects or wills that differentiate men, **Plato's** ranking of human souls in the **Phaedrus** wherein he reflects on the inborn inequalities, and **Aristotle's** notion of the capacity to act on reason, lies the answer.

**Virtue Ethics** is an ethical system which emphasizes character. The right thing to do in a given situation is what a virtuous person would do in the circumstances.

**Honesty** is the **virtue of refusing to fake the facts of reality** towards oneself or others, and refers to a facet of moral character and connotes positive and virtuous attributes such as integrity, truthfulness, and straightforwardness, including straightforwardness of conduct, along with the absence of lying, cheating, theft, etc. Furthermore, honesty means being trustworthy, loyal, fair, and sincere. These values are universal and supersede cultural diversity.

**Aristotle** did not base his ideas about ethics on rules that had to be obeyed, but on excellence of character. He argued that it is only by living the life of an **active citizen** that one may develop all the **moral and intellectual virtues** fully. He described man as a *zoon politicon* - a political animal - to whom participation in public life and debate was only natural.

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.

Some virtue ethicists maintain, 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 have by chance. It is thus something that you cannot learn or acquire. You either have it or you don't. Therefore, virtue cannot be learnt.

**I beg to differ** and submit that **no man is born inherently honest or virtuous** - in fact - man is born as a clean slate, free of virtue or depravity... bar genetic anomaly or predisposition or intellectual impediment.

I believe that freedom and rational ability to decide for oneself within a structured, nurturing and virtuous environment affords man the capacity to be taught to internalise the virtue of honesty.

The absence or dysfunctionality of structure and nurture in a degenerate environment limits or depraves man of the inherent capacity to internalise virtue of any kind.