The requirement of ‘fit and proper’ for the legal profession:

A South African perspective

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Declaration

I, Martie Bloem, declare that the thesis that I herewith submit for the doctoral degree, Doctor of Philosophy, at the University of the Free State, is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

I also declare that no work of other scholars has been used without the means of proper citation and that all sources I have used or quoted have been indicated and acknowledged by means of complete reference.

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Dedication

To Hester Lefera, for all your help and for your example.

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I am thankful and extremely grateful to have had the privilege to complete this study with the guidance and support of my dear friend and colleague, Prof Karin van Marle. Her humility and caring nature are even more inspiring than her remarkable wisdom and knowledge of the law. She embodies the academic legal professional *becoming fit and proper* in her continuous reconsideration of the law and what it is supposed to be. Her passion and dedication are exemplary and I consider myself fortunate to have had the opportunity to work with her so closely during the last few years.

When reflecting on my work, particularly now at the completion of this study, it is impossible to imagine it as my own without recognising the countless intellectuals and their work that have contributed to my thinking and understanding. In the words attributed to Sir Isaac Newton, I acknowledge that if I have seen further than others, it was by standing on the shoulders of giants.

According to an African proverb, it takes a village to raise a child. After completing this PhD, I now bear testimony that the same is true of postgraduate studies: It takes a village. I sincerely thank my village, my family, friends and colleagues, for your patience, support and confidence in me. I am because you are and for that I am indebted to you.

Abstract

The research problem of this study is that our understanding and interpretation of the 'fit and proper' requirement for admission to legal practice is too superficial and one-dimensional to allow for a more diverse, broader and critical thinking needed to enable transformation of the legal profession. The question that originates from the research problem and guides this study is what the meaning, reason, purpose and importance of the current 'fit and proper' requirement is, and what it rather should be.

The purpose of this research is to indicate that the requirement of 'fit and proper' for a person to be admitted to legal practice is closely related to the role of the legal professional in society and should therefore be directly linked to objectives such as public interest, access to justice and social justice if we are serious about transformation of the legal culture of South Africa. My proposal is that 'fit and proper' should be a continuous responsibility of all legal professionals instead of a prerequisite only required from legal practitioners for admission to legal practice. Furthermore, that the meaning of the concept should be informed by variable values and principles in line with the *Constitution* and not mere compliance with fixed rules of conduct or a specific test.

Every chapter of this study indicates that changing the legal culture will necessarily entail an honest reconsideration and admission of the role and responsibility of legal professionals in their contribution to the current vision of the law and the manner in which law is practiced. What would be needed for this change is that at least the majority of legal professionals understand their responsibility in changing the traditional approach to the law in order for it to respond to the needs of a multicultural society. In my opinion, the role of legal professionals in this process is twofold: in their capacity of being professionals and therefore having an obligation to serve the public interest; and in their capacity as members of the community, having a responsibility of being self-conscious and aware of their complicity.

The suggestion is that we should discontinue the practice of finding that a person is 'fit and proper' to be admitted to legal practice and rather expect of all legal professionals to continuously reconsider the role they play in society. Reimagining our

understanding of ‘fit and proper’ requires an endless contribution to the collective effort of thoughtful thinking about the law in an attempt to imagine justice into reality and thereby becoming ‘fit and proper’.

A shift in focus of legal education may be the starting point or even the solution to the research problem that our thinking about the law, the role of the legal practitioner and interpretation of ‘fit and proper’ is too superficial to allow for transformation. The recommendation is that the focus of legal education must be adapted to enable law graduates to be critical of both the law and the political state in order to serve the law and the aims of justice and not only on delivering practically skilled law graduates.

Table of contents

List of abbreviations and acronyms

ADP	Acting Deputy President
AJ	Acting Judge
AJA	Acting Appeal Judge
AJP	Acting Judge President
ALS	Association of Law Societies
ANC	African National Congress
BA	Bachelor of Arts
BCL	Bachelor of Civil Law
B.Iuris	Baccalaureus Iuris
CC	Constitutional Court
CHE	Council for Higher Education
CJ	Constitutional Judge
GCB	General Council of the Bar
J	Judge
JA	Appeal Judge
JJ	Judges
JJA	Judges of Appeal
JP	Judge President
LLB	Bachelor of Laws
LPA	Legal Practice Act 28/2014
LPC	Legal Practice Council
SCA	Supreme Court of Appeal
SC	Senior Advocate
TRC	Truth and Reconciliation Commission
Unisa	University of South Africa

Chapter 1
Introduction

1.1 Research problem

What is the meaning, reason, purpose and importance of the current 'fit and proper' requirement for admission to legal practice, and what should it rather be? This is the question guiding this study and originates from the research problem that our understanding and interpretation of the 'fit and proper' requirement is too superficial and one-dimensional to allow for a more diverse, broader and critical thinking needed to enable transformation of the legal profession. My contention is that our perpetuating conservative legal culture not only obstructs the transformation of the legal profession but also transformation of the law and transformation of society through law. A brief historical consideration of the understanding and implication of the 'fit and proper' requirement shows that the interpretation of this concept has been problematic even before 1994 and that reassessment thereof has been imminent and necessary, now probably more so in light of the constitutional objectives and new regulative guidelines for the legal profession.

The purpose of this study is to indicate that the requirement of 'fit and proper' for a person to be admitted to legal practice is closely related to the role of the legal professional[1] in society and should therefore be directly linked to objectives such as public interest, access to justice and social justice if we are serious about transformation of the legal culture of South Africa. My tentative suggestion is that 'fit and proper' should be a continuous responsibility of all legal professionals instead of a prerequisite only required from legal practitioners for admission to legal practice. Furthermore, that the meaning of the concept should be informed by variable values and principles in line with the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) and not mere compliance with fixed rules of conduct or a specific test. A different interpretation of 'fit and proper' will necessarily have an impact on our understanding of the role of the legal professional in society as well as the

[1] Reference to *legal practitioner* in this study means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the *Legal Practice Act* 28/2014 (LPA), while *legal professional* is an all-encompassing term that includes, but are not limited to, legal practitioners, legal advisors, prosecutors, magistrates, judges, academics and law teachers.

meaning of the perceived knowledge, competencies and values that have traditionally been required in determining a professional's fitness and propriety for legal practice.

The *Legal Practice Act*[2] stipulates that the High Court must admit to practise and authorise to be enrolled as a legal practitioner, a person who, upon application, satisfies the court that he or she is duly qualified and is a *'fit and proper person'* to be so admitted.[3] The requirement of 'fit and proper' was also contained in the predecessor of the LPA, the *Attorneys Act*,[4] which stipulated that unless cause to the contrary was shown, the court had to admit and enrol any person as an attorney if the court could be satisfied, upon application, that such person was 'fit and proper' to be so admitted and enrolled.[5] It was even stated in the *Attorneys, Notaries and Conveyancers Admission Act*[6] that every person who intended to serve his articles of clerkship under an attorney had to produce proof to the satisfaction of the secretary of the law society concerned, that he is a 'fit and proper' person, and has passed the matriculation examination or an approved degree.[7]

It is therefore assumed that all legal practitioners are 'fit and proper', or must at least at some point have been, to be in that position in the first place.[8] In this thesis, I question the validity of this assumption by showing that the requirement of 'fit and proper' cannot be objectively determined upon admission to legal practice, that attainment thereof is a continuous process throughout a legal professional's career and that setting it as a requirement creates a false warranty to the public.[9]

Although the intention of this requirement seems to have been aimed at adding a value component to the knowledge and competence required of a legal practitioner, the question arises as to whether it ever had a specific or determinable meaning; and, even if so, whether the content, meaning and interpretation of this requirement should not have changed after 1994 to align with the objectives of the *Constitution*. If it is

2 Act 28/2014 (hereafter referred to as 'the LPA').
3 Act 28/2014: sec. 24(1).
4 Attorneys Act 53/1979.
5 *Attorneys Act* 53/1979: sec. 15(1)(a). See also the *Admission of Advocates Act* 74/1964 with a similar stipulation, as well as section 174(1) of the *Constitution*, which provides that any suitably qualified person who is 'fit and proper' may be appointed as a judicial officer.
6 *Attorneys, Notaries and Conveyancers Admission Act* 23/1934.
7 Act 23/1934 only makes provision for male persons being admitted as attorneys, notaries and conveyancers and therefore refers to 'he/him' in its provisions.
8 See Chapter 4.3.1.
9 See Chapter 3.5 and Chapter 4.2.1.

accepted that the law and the legal professional should grow together, then whoever is responsible for teaching lawyers, also have the responsibility for growing the law.[10] Teaching the law, studying law and growing the law, in my understanding, should be an ongoing and revolving process for the law becoming just and the legal professional becoming 'fit and proper'.[11] Although the continuance of this process would be the legal professional's responsibility, it is my provisional position that law faculties should play a leading role and that legal education in South Africa should be directed at obtaining this requirement as a starting point.[12]

1.2 Motivation and background

I registered my articles of clerkship in 2002 with the Free State Law Society. Included in my application for registration, and in accordance with the requirements, I submitted two letters from university lecturers who respectively stated that they were of the opinion that I was a 'fit and proper' person to be enrolled as a candidate attorney. In 2004, upon my admission as an attorney, the court found that I was a 'fit and proper' person to be so admitted and I made the following oath on the day in the motion court of the Free State Division of the High Court of South Africa with Malherbe JP as the presiding judge: 'I, Martie Bloem, do hereby swear and declare that I will truly and honestly demean myself in the practice of attorneys according to the best of my knowledge and ability, and further, that I will be faithful to the Republic of South Africa. So help me God.'[13]

Although I felt proud to be admitted to an elite profession which placed a high premium on the ethical values of its members, I have always wondered what it really meant to be 'fit and proper' and what it required of me to be faithful to the Republic of South Africa. Over the years in practice as an attorney, I became more sinical of this idea of an 'elite profession with high ethical values' and all its members being 'fit and proper'. I realised that not only are law firms nothing more than businesses being managed in a manner that would be most profitable, but that legal services are extremely

10 See Chapter 2.2.
11 See Chapter 4.2.3.
12 See Chapter 5.2.
13 It is noteworthy that this prescribed Oath of Office has not changed after 1996 and is still the prescribed oath in terms of the *Uniform Rules of the Supreme Courts* of the *Supreme Court Act* 59/1959. See also Chapter 4.2.1.

expensive and unaffordable for the majority of the public.[14] Because attorneys are only serving a small minority of the public, it increases the competition for work between them, which often results in a variety of transgressions of the professional Code of Conduct, ranging from minor to major transgressions. The most common transgressions relate to sharing of fees and touting of services and the most serious to misappropriation of trust funds, fraud and money laundering.[15]

I was confronted with more questions about this 'fit and proper' requirement and the application thereof when I exchanged my career in practice for one in academe. The Legal Practice Council (LPC) requires two written character references by persons in a position of authority as proof that such a person is 'fit and proper' to serve as a candidate attorney under a practical vocational training contract.[16] A lecturer is accepted to be a 'person of authority' and, because students who have just graduated may not know any other person of authority in legal practice, lecturers are inundated with requests to issue such letters. Apart from the fact that it is very difficult to establish whether a person is indeed 'fit and proper', it is almost impossible for a lecturer to do so when lecturing classes in excess of five hundred students. However, refusing to issue such a letter could potentially be very detrimental to students who may not be able to register their practical vocational training contract without such a letter. I therefore issue such letters upon request simply based on such students' study records, provided that there is no indication of any transgressions related to dishonesty or plagiarism during their years of study at the university. The LPC appears to be satisfied that such a candidate then complies with the requirement of being 'fit and proper'.

My experience, both as a practitioner and an academic, is that the meaning and content of the legislative 'fit and proper' requirement are not clear and cannot be determined upon admission of a person to legal practice. From judgments in applications for the removal or suspension of practitioners from the roll, it seems to be easier to establish when a person is no longer 'fit and proper' for practice.[17] The uncritical adherence to this requirement, regardless of the obvious practical challenges

14 See Chapter 4.4.
15 See Chapter 4.4.
16 See Chapter 3.2.
17 See Chapter 3.4 and 3.5.

and inconsistent application thereof continues to motivate my interest in the topic and informs the hypothesis of my study.

1.3 Assumptions and hypothesis

There seems to be a disconnect between the method applied by the LPC and the courts to determine whether a person is 'fit and proper' and the moral content attached to the concept in theory. Understandably so, because it would be impossible for a court to determine, at the commencement of a person's career in law, whether the person is an honest person with integrity and ethical values. Even if such values could be objectively described, the determination of the existence or extent to which it is possessed would not be possible. The courts are therefore left with the objectively observable conduct of a person in order to establish the values of such person. If no conduct can be found in terms of which the person could be rendered 'unethical', then the person would be considered suitable for practice until such time they engage in conduct which indicates the contrary. It can therefore rightly be asked whether the current moral connotation to the concept of 'fit and proper' and the labelling of a person as such, does not create a false warranty to the public that such a person will act ethically.[18] In my opinion, we may have been fooling ourselves, as well as the public, by attaching a moral connotation to the 'fit and proper' requirement and, by finding a person 'fit and proper', implicating that the existence of ethical values could and have been established.

From a consideration of judgments related to the 'fit and proper' requirement, it appears that the courts have traditionally accepted that persons are 'fit and proper' if they know the laws and adhere thereto or, would no longer be 'fit and proper' if they transgressed such laws. This interpretation necessarily had to be reviewed with the transition from parliamentary sovereignty to constitutional supremacy. The extent to which our view of the law and the role of the legal professional has indeed changed is questioned. My hypothesis is that our views of legislative requirements are still uncritical and narrow due to our embedded formalist and positivist legal culture which has not responded to calls for transformation.[19]

[18] See Chapter 3.5.
[19] See Chapter 2.7.

1.4 Research questions

I consider each of the following questions in the respective chapters in an attempt to address and propose a possible solution for the research problem stated above:

- How did the legal profession develop in relation to the public good or public interest and how does it differ from who the legal practitioner is today and the role the person plays in society?
- Is what is regarded as 'fit and proper' today still in line with where it developed from? And should it be?
- In South Africa, with its diverse, multicultural society, is it possible that the legal practitioner has a particularly different role to play and that conceptions about the legal profession need be reconsidered or reimagined?
- If we know what 'fit and proper' means or should mean, how can our legal education be directed at developing such legal practitioners?

1.5 Summary of chapters

I consider the history of the legal profession in Chapter 2, how it developed in relation to its original public interest objective and whether the current purpose of the legal profession and the role of legal practitioners in South Africa are still aligned with this objective. I commence with a broad view of the history of universities, the tradition of teaching law and development of the legal profession in a global context, after which I consider the South African history that influenced the development of the law, the legal culture and the role of the legal practitioner in our own context. I begin my study with this historical analysis as the foundational point of departure in search for the meaning, reason, purpose and importance of the current 'fit and proper' requirement for admission to legal practice, and what it should be instead.

I conduct this research from the premise that the law and our understanding of it, the legal profession, the legal culture, the role of the legal practitioner, legal practice and legal education are all interrelated concepts, each of which plays a role in my investigation of what is to be conceived as 'fit and proper' as a legislative requirement for admission to legal practice. The South African law and legal profession, as developed from a Dutch and British origin in the seventeenth century, have retained their dominantly Western European character to this day. It is therefore necessary to

understand the global history of universities, the tradition of teaching law and the development of professions before considering the South African history and our context-specific circumstances that influenced the law and the legal profession. The detrimental impact of Afrikaner Nationalism and apartheid on legal certainty and the trust in the legal system by the public is emphasised in Chapter 2. I also consider whether and to what extent our understanding of the law under parliamentary sovereignty has changed with the advent of constitutional sovereignty.

The objective in Chapter 3 is to establish the traditional and current meaning, interpretation and application of the 'fit and proper' concept. In my opinion, the 'fit and proper' requirement must be directly linked to the role of the legal professional in our society. It is therefore necessary to establish what constitutes being 'fit and proper', whether the meaning of the requirement has changed with the transition to a constitutional democracy and if it is aligned with what is expected from legal professionals in our current context. My investigation of these questions in this chapter entails a reflection on the role and purpose of the LPC before considering the legal opinion, interpretation and application of the 'fit and proper' requirement by legal scholars and the judiciary.

I attempt to reveal that the notion of 'fit and proper' as an ethical requirement for admission to the legal profession has never had a determined meaning, nor served an apparent purpose that could be linked to the public interest, as understood in the democratic constitutional purpose of the phrase. This is demonstrated with reference to the role of politics in the legal interpretation of the 'fit and proper' concept in a range of judgments that influenced legal opinion over time. I also consider how the law, our thinking of and about the law, the legal culture, legal opinion and the role and purpose of the legal professional are intrinsically related. A crucial aspect of this relatedness is not only how we think about the law, but also our ability to think with a self-awareness of our responsibility and the consequences of our deeds. To this extent, I rely on the importance of Sanders' conception of complicity in as far as he makes an intrinsic, existential link between complicity and responsibility.[20] I reflect on these notions with a specific focus on the responsibility of the legal professional in society, their competency to think with self-awareness and the meaning and consequence of

[20] See Chapter 2.7.

complicity from this perspective. This reflection also ties to my contention in Chapter 2 that the development and transformation of an existing formalist legal culture as a result of modernity, would entail an increased consideration of the consciousness as well as conscience of the law and an appreciation of morality, ethics and meaning.[21]

If it is accepted that the 'fit and proper' requirement has always been closely linked to the public interest, as considered in Chapter 2, it is important to note that the profession's reputation is first reliant on the reputation of its individual members, but arguably just as significant, on the public perception of the profession, including the judiciary. It is my opinion that, if the legal profession of South Africa is dedicated to the service of the public, its reputation and that of its individual members should be aligned with constitutional imperatives and guarantees such as social justice, access to justice, equity and equality. These constitutional aspirations should be understood as serving the diverse South African community to its fullest possible extent. Because the individual members of the legal profession are the legal policymakers of the community, the process of transformative constitutionalism relies on them. The legal profession, its professional bodies and universities should be seen and perceived by the public as being in the forefront, as advocates for change and defenders of the *Constitution*. If, however, the profession is perceived as an elitist group for the sake of their own purpose and reputation only, we may expect a stagnant legal culture with no inclination to change or transformation for the 'greater good'.

While I consider the history and background of the legal profession in South Africa in Chapter 2 and attempt to establish the current meaning and interpretation of 'fit and proper' in Chapter 3, the focus of Chapter 4 is on reimagining the 'fit and proper' legal professional in a South African context. My proposal in Chapter 4 is that 'fit and proper' is a continuous responsibility of all legal professionals, rather than a prerequisite, and that the meaning of 'fit and proper' should be informed by variable values and principles and not mere compliance with fixed rules of conduct or a specific test. This interpretation will necessarily have an impact on our understanding of the role of the legal professional in society, as well as the meaning and content of the knowledge, competencies and values that have traditionally been required in determining a professional's fitness and propriety for legal practice.

21 See Chapter 2.2 and 2.7.

The question I consider in Chapter 4 is whether a legal professional in South Africa today has to play a different role than what was traditionally required in our diverse, multicultural society and whether certain conceptions, but particularly the 'fit and proper' requirement for admission to the profession, should be reconsidered. It is my tentative opinion that its reconsideration will necessarily have to be continuous and that the current practice of ascertainment of 'fit and proper' upon admission to legal practice should be replaced by a process of reimagining 'fit and proper' throughout the career of a legal professional, in whichever capacity. In reimagining the 'fit and proper' legal professional, I consider the current conundrum created by the concept as a legislative requirement. This entails a critique of applying 'fit and proper' as a legal rule. The different points of critique lead me to a consideration of what it would mean to become 'fit and proper' by aligning current principles with a utopian objective that is continuously reimagined. In this consideration, I reflect on the interpretation of the current principles of 'fit and proper', the effect of the moral aspect thereof, 'fit and proper' as a utopian concept and the meaning of knowledge, competencies and values necessary in becoming a 'fit and proper' legal professional. I finally consider how the interpretive change from being 'fit and proper' to always becoming 'fit and proper' could potentially impact on the understanding of professional responsibilities of the legal professional, the role of the legal professional, the legal culture and understanding of the law.

It cannot be denied that the current legal culture in South Africa is still very much embedded in the formalist, traditionalist and positivist European culture from where it developed, and that transformation thereof is necessary in an attempt to truly realise the objectives of the *Constitution*. In Chapter 4, I attempt to show why a legitimate protest against the current legal culture would inevitably have to entail self-consciousness instead of self-interest and reflect respect for the continuous responsibility to think about, interpret and apply the law in line with the values of the *Constitution* as a point of departure.[22] My analysis in Chapter 2 informs my opinion that it is necessary for the legal practitioner practicing law in a multicultural society with a transformative constitutionalist objective in South Africa, to replace their current restrictive view of the law with a broader approach thereto. This suggestion entails a more general jurisprudence with an understanding of the African value of *ubuntu* and

[22] See Chapter 4.4.

compliance with the demand of constant rethinking of what the ethical and politico-ideological require. It would need to entail the incorporation of the conceptions of African law into the duties of lawyers, which does not imply adding specifications to the Code of Conduct, but rather a foundational understanding of the meaning of these values and principles, the fluidity thereof and constant reconsideration of the ethical.[23] The suggested more general jurisprudential approach must be understood in same context explained by Douzinas and Geary and is further throughout the study referred to as a 'critical approach'.[24] I also return to the ideas from Chapter 2 in my reflection on the meaning of 'public interest' and practical implication of providing an unbiased service aimed at the public good in an attempt to gain a better understanding of how it relates to being 'fit and proper'.

The question in Chapter 4 relating to whether a legal professional has a different role to play in our society today, partly arises from my opinion in Chapter 2 that there must be a clear distinction between the law and laws and that law must be taught and understood in a broader context and in relation to other disciplines. The ultimate objective is for legal professionals to become better equipped and able of developing law that is capable of responding to the changing needs of a multicultural society.[25] The responsibility for this development will entail a renewed thinking about the law and what it calls upon us to do in order to transform the existing formalist legal culture to one that considers the consciousness as well as the conscience of the law with an increasing appreciation of morality, ethics and meaning.[26]

The research question guiding Chapter 5 is how legal education should contribute to an understanding of the concept and process of becoming a 'fit and proper' legal professional. The overall argument of this chapter that I also emphasise in the other chapters, is that the law and lawyers must grow together and that the responsibility for training legal professionals necessarily involves the responsibility for continuous transformation of the law.[27] Law faculties should accept responsibility for the role they

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23 See Chapter 2.7 and Chapter 5.4.

24 Douzinas & Gearey 2005:10. With reference to the appeal of Douzinas and Gearey that we return to a general jurisprudence, which returns to the classical concerns of legal philosophy and adopts a much wider concept of legality. See Chapter 2.2.

25 Douzinas & Gearey 2005:10. See Chapter 2.2.

26 Douzinas & Gearey 2005:3,15. See Chapter 2.2. See also Chapter 5.5, with reference to White's statement that in becoming to know the law, it is important to know who you are in reading it and in writing it and what it calls upon you to do and to be (2002:1429).

27 Pound 1941:204. See Chapter 2.2 and Chapter 4.2.

play in shaping the legal profession and the practise of law. I expand in this chapter on the argument in Chapter 2 that legal education should do more to develop critical thinking and invoke Pound's argument that we should not regard the law as merely laws.[28]

Subsequent to considering or 'reimagining' the principles that could inform becoming 'fit and proper' and the objective thereof in Chapter 4, my proposal in Chapter 5 is that a shift in focus of legal education is necessary to challenge and transform the current legal culture. This conclusion is also drawn from the statement that new possibilities and dreams of a truly different future cannot be realised if legal positivism is left unchallenged.[29] The reconceptualisation of legal education in light of the imperatives of transformative constitutionalism therefore necessarily implies that the content, design, methodologies and outcomes of legal education have to be reconsidered.[30]

The purpose of Chapter 5 is limited to reconsidering the broad guidelines of legal education in South Africa in order for it to align with what is considered necessary in *becoming* a 'fit and proper' legal professional. The outcome of this chapter therefore directly relates to the main research problem of the study and is not intended to be a complete overview or consideration of the entire Bachelor of Laws (LLB) curriculum. In my proposal for transforming the perceptions of becoming 'fit and proper' through legal education, I reflect on the traditional formalist approaches to the law and legal education in South Africa, the calls for transformation by legal scholars, the current state of legal education and the meaning of critical pedagogy with the aim of achieving critical citizenship as a potential direction for legal education.

Every chapter of this study indicates that changing the legal culture will necessarily entail an honest reconsideration and admission of the role and responsibility of legal professionals in their contribution to the current vision of the law and the manner in which law is practiced.

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28 Pound 1941:191. See Chapter 2.2. and Chapter 4.2.
29 Cornell 1990:267. See Chapter 4.
30 Quinot & Greenbaum 2015:60. See Chapter 4.2 and 5.2.

Chapter 2
History of the legal profession in South Africa

2.1 Introduction

This chapter considers the history of the legal profession, how it has developed in relation to its original objective of being in the public interest and whether the current purpose of the legal profession and role of legal practitioners in South Africa are still aligned with this objective. This chapter commences with a broad view of the history of universities, the tradition of teaching law, and development of the legal profession in a global context, after which it considers the South African history that influenced the development of the law, the legal culture and the role of the legal practitioner in our own context. I begin the study with this historical analysis as the foundational point of departure in my search for the meaning, reason, purpose and importance of the current 'fit and proper' requirement for admission to the practice of law, and what it should be instead.

While the focus of a study by Van der Walt is on the links between legal history, legal tradition and legal culture and the position of legal history in a period of transformation, the focus of this study is specifically on the position of the legal professional within these dynamics.[1] The overarching purpose of this study focusses on the position and role of the legal professional and whether it is suited to respond to a diverse, multicultural and democratic South Africa.

I conduct this study from the premise that the law and our understanding thereof, the legal profession, the legal culture, the role of the legal practitioner, legal practice and legal education are all interrelated concepts that each play a role in my investigation of what is to be conceived as 'fit and proper' as a legislative requirement for admission to legal practice. The South African law and legal profession, as developed from a Dutch and British origin in the seventeenth century, have retained their predominantly Western European character to this day. It is therefore necessary to understand the history of universities, the tradition of teaching law, the development of professions, and specifically the legal profession, from this perspective before considering the

[1] Van der Walt 2006:47.

South African history and our context-specific circumstances that influenced the law and the legal profession. This chapter further emphasises the detrimental impact of Afrikaner nationalism and apartheid on legal certainty and trust in the legal system by the public. It also considers whether and to what extent our understanding of the law under parliamentary sovereignty has changed with the advent of constitutional sovereignty and the role and impact of African tradition and values in this process of transformation.

This study ultimately intends to establish who the South African legal professional is, or should be, and the role they are supposed to play in a democratic constitutional society. It is therefore imperative to consider the history of the legal system and legal culture. While lawyers in the common law world generally agree that law is a defence against the arbitrary power of the state that limits power and confines its exercise, one of the recognised flaws of the South African legal system is that it has not done what it could have to defend citizens against the state. Instead of limiting and controlling power, the working of law in South Africa was rather used as a way of creating, extending and exercising power.[2] It is this apparent conflict between legalism and political power, on the one hand, and justice, on the other, that raises the question of where the current legal culture in South Africa has developed from and where it is heading, with a specific focus on *legal professionals*[3] as the main role players and perceived guardians or gatekeepers of constitutional democracy in South Africa.

When writing history in a transformative or changing situation, one cannot pretend that the concern is only with the past. According to Chanock, strategies and agenda for the future are an important part of writing South African legal history because such a project is an attempt to reshape perceptions of legality in South Africa.[4] It can be said that the opposite is also true and that any investigation of current legal culture and an attempt to contribute to the transformation thereof, will necessarily also concern a study of the past. In conducting such a study, as Chanock pertinently points out, care

2 Chanock 1989:267.

3 *Legal professionals* refer to legal practitioners as well as academics in law, legal advisors and legal policymakers as persons trained in law who contributes to the legislature, the judiciary and the national executive.

4 Chanock 1989:265.

should be taken not to replace or obscure the agenda of the past with that of the present.[5]

It is my tentative position that the role and purpose of the legal professional, the teaching of law, and the understanding and practice of law should necessarily have changed with the transition to a democratic dispensation based on the values of the *Constitution*. The extent to which this has indeed changed remains in question.

2.2 History of universities and the tradition of teaching law

When considering the history of the universities and the tradition of teaching law, one notices the gradual shift from law as a taught tradition with a broader jurisprudential approach to law taught as laws or a legal science. The argument explored is that this shift necessarily resulted in the moral impoverishment of legal study and jurisprudence.[6] This has also been evident from a South African context and a study of the history in this subsection informs the conclusions drawn in Chapter 5 relating to the transformation of legal education.

Western origin of universities and law as a taught tradition

Van Scoyoc, in her study of the 'Origin and development of the University', explains that the ancient Greeks and the Romans did not have universities as we know them today but that they had great teachers.[7] Some of these teachers, such as Socrates and Aristotle, are still well-known for their teachings. Their instruction was mainly in philosophy, rhetoric and law but it was not formally organised and they gave no certificates or degrees.[8] However law, as we understand it in the modern world, has been a taught tradition.

Pound explains that this traditional teaching of the schools of jurists in the earlier Roman empire resulted in regular successions of jurisconsults handing down the traditions of successive great lawyers who were at the same time great teachers of law and great writers upon law.[9] In his consideration of 'The universities and the law', Pound explains how the system of law through teaching was an integrated theory of

5 Chanock 1989:265.
6 Douzinas & Gearey 2005:4.
7 Van Scoyoc 1962:323.
8 Van Scoyoc 1962:323.
9 Pound 1941:194.

principles and ideas and how the balance was preserved between the teacher and the practitioner:[10]

> Thus, a tradition of organization of the law through principles and doctrines arises and makes for certainty of application, taking care of the need for stability, as the professional and judicial application to concrete cases makes for a continual unsettling of the details of the teacher's logical organization and for overhauling of the doctrines and so *takes care of the need for change*. As the two correct each other, a system of law grows up and achieves and maintains a balance between the general security, which calls for stability, and the individual life, which calls for change. So long as the *balance between the teacher and the practitioner* is preserved, the taught system, into which legislation and new institutions and adaptations from without and novel adjudications are carefully fitted, becomes a powerful instrument for making a body of legal precepts effective for its purposes.

Pound remarks that Modestinus was the last of the great Roman jurisconsults and that, when he died in 225, juristic writing as a creative force in the development of the law came to an end in the ancient world.[11] This marked the beginning of an era of legislation and codification and the growing point of the law shifted to legislation.[12]

Separation of the study of law from rhetoric and arts – law as a science

Irnerius is associated with a period in the history of medieval law and education. He was centred at Bologna, which was considered the first school or *studia* for law. According to Van Scoyoc, the *Irnerian* period marked the beginning of the systematic study of the whole *Corpus Iuris Civilis* as a regular part of legal education and this revival of legal science separated the study of law from rhetoric and the liberal arts.[13]

Pound describes the period between the sixth and twelfth centuries as a great gap in the development of law and in legal education until the rise of a new teaching of Roman law in the twelfth century, with Justinian legislating the curriculum of the two law schools of his empire.[14] This marked the beginning of the era of university-trained lawyers that persisted in continental Europe and countries that have since derived their law from continental Europe.[15] Universal scholarship was promoted by universities to which students from all countries resorted to study law, theology, philosophy, and medicine as universal subjects. Latin was the universal language of official instruction and there were universal ethical principles and ethical customs of

10 Pound 1941:195 (footnotes omitted; emphasis added).
11 Pound 1941:195.
12 Pound 1941:195.
13 Van Scoyoc 1962:325.
14 Pound 1941:196.
15 Pound 1941:196.

chivalry so that knights could pass freely between countries; they were considered as Christians rather than subjects of some particular political authority.[16]

There was a necessity for growth late in the thirteenth century when university teaching outgrew the repetition of the first stages of legal development.[17] According to Pound, this was a period of strict law, a time dominated by authority and when any consciously creative juristic activity would have been inconceivable.[18] Academic teachers, or commentators, responded to the need for development by adjusting the law books of Justinian to the actual necessities of the administration of justice in Europe of the later Middle Ages. Their method was meant to be essentially practical and, as men thought in an age of authority, it required a mechanical method and the appearance of an exact process of developing authoritative propositions. Their method responded so well to this requirement that the doctrinal writing and legal science up to and including the period of the Humanists of the sixteenth century were almost wholly based on it, with the result that the Roman law of the universities spread from there throughout Europe and became the common law of half of the world today.[19]

Pound significantly states the following about the Roman law of universities:[20]

> Philosophy replaced formal logic and set up reason above authority in the development of the modern Roman law in the universities of the seventeenth and eighteenth centuries. In the nineteenth century history replaced philosophy. In the twentieth century it has looked as if economics or psychology or both might replace history. *But whatever has been the dominant mode of thought in any century, the modern Roman or the civil law as we call it in the English-speaking world has kept the stamp which it got in the eastern Roman empire of the fifth century.* It is a law of the universities. Its oracles are teachers. Its law books are codes and commentaries on codes. Its mode of growth is legislation and juristic exposition of legislation. Its method is one of logical development and logical exposition of supposedly universal enacted propositions. Its tradition is one of the logical handling of written texts.

Difference between Roman law and English common law taught by way of apprentice training

Pound draws a distinction between the English common law, which characteristically became the law of the courts, and the modern Roman law, which was considered the law of the universities. The lawyers in the king's courts were students under practitioners in those courts who associated themselves with societies that grew into

16 Pound 1941:197.
17 Pound 1941:197.
18 Pound 1941:198.
19 Pound 1941:197-198.
20 Pound 1941:198 (footnotes omitted; emphasis added).

institutions. This was the model of the colleges in the English universities and, according to Pound, did for English law what the universities did for law on the continent. However, they did so as professional schools, learning from the lawyers and the courts, not as universities teaching the lawyers and advising the courts.[21]

It is important to note that Pound writes from an American perspective as he explains why the English model of apprentice training could not suffice for developing American law as it had to be developed to meet the needs of the economic order in a country expanding in area, wealth and institutions. He states that apprentice trained lawyers, brought up on the traditional technique of the common law, as the practitioners had learned it in the courts, were not equal to the demands of the time. There was also an urgent demand for law books as these have always been a measure and product of law teaching. He states that, after having inherited the English model with British colonisation, everything pointed to the law school as a needed American institution.[22]

Importance of the history of legal education and Pound's work from a South African perspective

The importance of Pound's work, also from a South African perspective, is his insistence that the law must be distinguished from laws. He writes that it was a mischievous idea of the nineteenth century analytical jurisprudence that the law was no more than a collection of laws and that a law was a rule of the type of a penal statute, attaching a definite detailed legal consequence to a definite detailed state of fact.[23] Pound remarks the following about laws, which seems to have also been true in South African history:[24]

> They are the whole of the beginnings of social control by a politically organized society. But a body of detailed rules of this sort, emerging from an undifferentiated social control in which the internal discipline of kin groups and the discipline of a religious organization play the chief roles, does not suffice for a developed social and economic order. If for no other reason, it is impossible to have a rule for every detailed situation of fact which can give rise to controversy and come before tribunals for determination … *Not the least striking phenomenon in legal history is the popularity of narrow, illiberal, ultra-technical systems of strict law and the tenacity with which men have clung to them and rejected broader, more liberal, less artificial systems through suspicion that they subjected the free individual to the arbitrary action of the judge.*

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21 Pound 1941:199.
22 Pound 1941:201-202.
23 Pound 1941:191.
24 Pound 1941:191 (references omitted, emphasis added). See 2.6 below, which discusses the influence of Afrikaner Nationalism, the influence of religion (particularly Afrikaner Calvinism) and parliamentary sovereignty on the development and understanding of the law and the role of the legal practitioner.

Pound states that laws do not require lawyers and that there have even been times of a great amount of laws in societies without lawyers.[25] It is important to note that, without seeking to prescribe a rule for every possible case, lawyers are taught to find principles informing the rules from which they can construe decisions. More significantly, lawyers must be taught to construct ideals of the social order and what the legal order, legal institutions, legal doctrines and principles ought to be, and then to choose analogies, and develop such principles and interpret rules in light of those ideals. Pound claims that,[26]

> When we have not merely rules, but along with them principles, conceptions, and standards, with a technique of developing and applying them and a body of received ideals in the light of which to employ the technique, then laws have grown into law and we have arrived at the legal order characteristic of a matured politically organised society.

As far back as 1941, Pound voices his concern about the uncritical manner in which the law was being taught as laws. Almost 60 years later, Douzinas and Gearey remark that modern legal theory has led to the cognitive as well as moral impoverishment of legal study and jurisprudence.[27] They explain that legal education took the form of vocational skills training that resulted in legal scholarship becoming an entomology of rules, a guidebook of technocratic legalism, a science of what legally exists and a legitimation of policies.[28] The humanistic engagement in legal text was replaced with rationalism and positivism, doctrine and dogma. Douzinas and Gearey describe this as the movement in the history of jurisprudence from a general to restricted interest that diminished the scope of thinking about law with a technical and professional approach.[29] Positivism supposes legitimacy of the law on formal reason and its strict distinction between fact and value resulted in the minimised influence of moral values and principles in law.[30] This impact of positivism as a consequence of modernity is also evident in the development and interpretation of law in a South African context, which is further uncovered in Chapter 3.

Pound describes the ideal of a lawyer as a person, 'trained, filled with the scientific spirit, independent of particular interests, seeing questions as a whole in their setting not merely of the law of the state but in the life and law of the common-law world,

25 Pound 1941:192.
26 Pound 1941:192.
27 Douzinas & Gearey 2005:4.
28 Douzinas & Gearey 2005:4.
29 Douzinas & Gearey 2005:4-6.
30 Douzinas & Gearey 2005:6.

working upon them continuously, unhampered by limitations of jurisdiction or parties or venue'.[31] For Pound, it is imperative that the law and lawyers grow together and that the responsibility for training of lawyers necessarily involves the responsibility for growth of the law. He states that it is necessary for courts and bar associations and universities to work together in assuming these responsibilities as pathfinders of the law for the future.[32] This notion of Pound and the role of legal education in South Africa are further considered in Chapter 5.

2.3 Development of professions in the public good or public interest

Four great professions associated with medieval universities

By the eighteenth and nineteenth centuries, scholars considered the fields of theology, law, medicine and education to be the four great traditional professions, and these were the ones associated with medieval universities.[33] The later emergence of the Industrial Revolution and scientific developments led to a number of new occupations that would claim professional status.[34] For the purpose of this study, only the sociological considerations and theory relevant to the legal profession are investigated in order to indicate the relation between the legal profession and the public good or public interest and its development. The sociological classification of the different professions, method of classification or purpose of classification fall outside the scope of this study; however, selective parts of these studies are used to specifically indicate the relevance of certain factors and concepts to the legal profession.

Distinguishing feature of a profession: an unbiased service aimed at public good

According to Western *et al*., occupations generally referred to as *the professions* had their origins in the medieval guilds and the church, but it was not until the 1940s that the first serious attempt was made by social scientists to analyse the nature thereof.[35] Different distinguishing features were identified in different studies, but the provision of an unbiased service aimed at the public good, independent of any concern for

31 Pound 1941:206.
32 Pound 1941:204.
33 Western *et al* 2001:22. See 2.2 above.
34 Western *et al* 2001:22.
35 Western *et al* 2001:21.

personal gain, were found to be one of the main distinguishing features of professional practice.[36]

Western *et al* summarise a few persistent themes that transpire when considering the nature of the professions. According to them, the professions are characterised by a service orientation based on skills, knowledge and values that were acquired over an extended period of time and considerable autonomy in setting conditions and standards of service in their work.[37] They further agree that the notion of *service delivery* should be understood in terms of 'the culture of a profession', and summarise this opinion as follows: [38]

> The attribute that distinguishes professions from other occupations is their professional culture. This culture comprises of values, beliefs, attitudes, skills, knowledge and behaviours. The culture is transmitted during training and reinforced during social interaction with other professionals following the completion of training. The social values of the professional group are the unquestioned premises upon which its existence rests. Foremost among these values is a belief in the essential worth of the service that the professional group extends to the community. The profession considers that the service is a social good and that community welfare would be impaired by its absence.

Professions are known to assert their views about recruitment and training and to make an effort to protect their members from outside bureaucratic interference in the carrying out of their tasks.[39] The success of the profession to maintain autonomy, exclusive competence and the right to monopolistic control of a field of endeavour mainly depends on wide social acceptance thereof. At publication of their article in 2001, Western *et al.* claimed that this acceptance was less widespread than a decade before and had further declined.[40] It would be fair to assume that public acceptance of the autonomy and exclusive competence of certain professions have declined even further and is, in fact, quite questionable another two decades later.[41]

In a study by Klegon on the sociology of professions, he considers the taxonomic approach to distinguish professions from non-professions and cites some of the lists of attributes of professions proposed by different sociologists.[42] One of the common

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36 Western *et al* 2001:21.
37 Western *et al* 2001:27.
38 Western *et al* 2001:25.
39 Western *et al* 2001:28.
40 Western *et al* 2001:28.
41 See Chapter 4.4, for a discussion of the criticism of Johnson who proposes a deconsecrating of the sacred cow that the law has become by making itself indispensable to modern society by means of its monopoly on the machinery and jargon of the law.
42 Klegon 1978:260.

factors found in almost all the lists considered by Klegon is that all of the professions apparently consist of an attribute of being to service or interest to the public. This attribute of the professions is described by different sociologists as 'having an ethical code regulating relations with clients and colleagues', 'primary orientation to community interest' and consisting of a 'system of rewards that are ends in themselves and not means to some end of individual self-interest'.[43] Klegon further suggested that the most dominant factor is trust and that 'the job of the professional is such that the client or society could be harmed by unethical or incompetent work by the practitioner'.[44]

Decline in public belief in professional goodwill

It is important to note that, while this taxonomic approach may originally have worked well in the past to distinguish the professions from the non-professions, Klegon is of the opinion that it becomes more complex with the development and differentiation of occupations of which the technical aspects of knowledge cannot be treated in isolation. He insists that one should rather focus on the wider social forces affecting the claim of exclusive expertise.[45] Others have suggested that the expansion of education, technological changes, changes in the division of labour within occupations and the rise of consumerism have resulted in a weakening of the knowledge monopoly and a decline in public belief in professional goodwill. Klegon is in agreement with this opinion and predicts that basic structural and cultural changes can result in a period of increasing de-rationalisation, de-bureaucratisation, and de-professionalisation. However, without such changes, only minor variations in professional control are likely to occur, such as a more mediative system with either state or corporate mediation in the consumer – service provider relationship.[46] Since this prediction by Klegon in 1978, we have already experienced increased control (and proposed control) in legislation and regulations of professions, particularly in the health, finance and legal sectors in South Africa, especially with the rise of client dissatisfaction with services, resulting in a higher demand for quality of professional services.[47]

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43 Klegon 1978:260-262.
44 Klegon 1978:261.
45 Klegon 1978:279.
46 Klegon 1978:281.
47 Refer to different regulative measures and legislation in the health, legal and financial services sectors: *Consumer Protection Act* 68/2008, *Health Professions Act* 56/1974, *Health Professions Amendment Act* 29/2007, *Legal Practice Act* 28/2014, *Financial Sector Regulation Act* 9/2017.

From these selective parts of Klegon's work, it is clear that the public good or public interest is considered as one of the indicating factors that distinguishes a profession from non-professions. My understanding of Klegon is that it may ironically also be social forces and a change in structure and culture that question professionalism, which would lead to a decline of public belief in professional goodwill and ultimately result in deprofessionalisation.[48] This conclusion is also in line with the assertions of Western *et al.* referred to earlier.[49]

In a 2002 Tabor lecture presented by Shepard, Chief Justice of the Indiana Supreme Court, he states that there is continuing public complaint about the work of lawyers as well as recurring dissatisfaction among lawyers themselves about their participation in the profession.[50] He notes that, in contrast to the increasing number of persons who want to be part of the profession, the number of lawyers and judges who question the value of their career choice is growing. He considers this contrast in light of four issues that, even though specifically based on an American context, can also be useful from a South African perspective where we experience similar challenges:[51]

- The state of public attitude about lawyers' work.
- How lawyers have reacted to public criticism.
- The state of lawyer satisfaction with the career choices they have made.
- What lawyers can do to improve their own sense of well-being about being lawyers.

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48 See Chapter 4.4. McKay, in a public lecture with the focus on law, lawyers and the public interest, notes that 'the practice of law is a profession – *if we can keep it*' (1986:353).

49 Western *et al* 2001:28.

50 Shepard 2002:161-162. See also Kronman (1993:2) in this regard. In his consideration of the failing ideals of the legal profession, Kronman identifies the crisis of the American legal profession as a crisis of morale. According to him, it is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. He states that, 'disguised by the material well-being of lawyers, it is the spiritual crisis that strikes at the heart of their professional pride.' According to Kronman, the crisis has been brought about by the demise of an older set of values that played a vital role in defining the aspirations of American lawyers. At the center of these values, he says, was the belief that the lawyer is not simply an accomplished technician but a person of prudence and practical wisdom as well. Although it would be rewarding to become technically proficient in the law, the highest goal was considered to be the attainment of wisdom about human beings and their tangled affairs. This wisdom was understood to be a trait of character that one acquires only by becoming a person of good judgment and not just an expert in the law. *The Lost Lawyer – Failing Ideals of the Legal Profession* by Anthony Kronman has provided much food for thought and inspiration for this study. Although he writes exclusively from an American perspective and the influence of their particular history, there seem to be many similarities in the failing ideals of the South African legal profession.

51 Shepard 2002:162.

According to Shepard, the public's confidence in law firms have declined substantially since the early 1970s. He notes that Americans who had previously believed in the honesty and integrity of lawyers in general, have now very little trust in the profession's ethical standards.[52] In his experience, members of the profession would brush off these criticisms by saying that the public did not understand what they do but that, upon closer investigation, it would appear that the greater exposure people have to the legal profession, the lower regard they have for it and that their attitude cannot simply be attributed to public ignorance.[53]

Shepard further states that one of the biggest causes of discontent of the public with the legal profession is that the course of the law or legal action is very slow and very costly and that compensation paid to victims in tort litigation is often less than the cost of attorneys' fees and expenses.[54] He agrees with the sentiments that a need for change exists and that there should be a stronger focus on training of law students in the skills and values that make for good lawyering in the hope that such training would result in an increased quality and speed of service delivery while reducing the cost of services to the public.[55]

From the above it would appear that the historic themes of the legal profession, which includes public trust or confidence, quality of service delivery, cost of service delivery and improved training and regulation of specialised knowledge, skills and values, remain current issues in a global context.[56]

Professional responsibility entails a consciousness and conscience of the law

Shepard interestingly connects professional satisfaction with law reform and submits that the successful implementation thereof 'makes all of us feel that we are part of a clan that performs well in making life better for the people whom we serve' and states that the many reforms undertaken by the profession contribute to that end.[57] It is this notion of Shepard that the concepts of *well-trained and equipped legal professionals*, *service delivery*, *law reform*, *public interest* and *professional satisfaction* are all

52 Shepard 2002:163.
53 Shepard 2002:163-164.
54 Shepard 2002:164-165. See also Chapter 4.5, which considers the impact of the cost of legal services on constitutional concepts such as 'access to justice', 'public interest' and 'social justice' in a South African context.
55 Shepard 2002:165.
56 See 2.5 below.
57 Shepard 2002:169.

interconnected, that specifically relates to the purpose of this study and is further considered in the following chapters.

It has been suggested above that training of the professional or legal scholar, should not only entail education in knowledge and skills but also values and adaptation to legal culture with a focus on public service. In their paper, 'The law school experience and student orientations to public interest concerns', Erlanger and Klegon investigate the assumption that, while students are undergoing training in a professional school, they are assumed to experience attitude change, internalising the norms of their future profession.[58] They state that value transmission is especially important for the professions, since part of the justification for their special prerogatives is a presumed commitment to *higher ideals* such as public service and that socialisation[59] to professional attitudes is therefore thought to have an important influence on their subsequent careers.[60]

Although the traditional professions have always had the *public interest* or *service to the public* as one of their distinguishing attributes, Erlanger and Klegon note that both the medical and law professions are in a 'community era' that emphasises social responsibility and the delivery of services to those previously disadvantaged. Consequently, there has been an increased professional and sociological interest in the role of professional education in the promotion or furthering of the public interest.[61] From a South African perspective, this opinion is even more applicable here and now, more than four decades after this article was published as part of a research programme in legal education of the American Bar Foundation. The findings of the study, even though conducted from an American perspective, are still relatable and useful for the limited extent and purpose of this study. Their opinions on what is considered to be *public interest*, the actual impact of legal education on the social

58 Erlanger & Klegon 1978:11.

59 Little describes socialisation as the process through which people are taught to be proficient members of society. It describes the ways that people come to understand societal norms and expectations, accept society's beliefs, and be aware of societal values. Socialisation is not the same as socialising (interacting with others, like family, friends, and co-workers); to be precise, it is a sociological process that occurs through socialising. 2016, *Introduction to sociology,* https://opentextbc.ca/introductiontosociology/chapter/chapter5-socialization/ (accessed on 22 January 2021).

60 Erlanger & Klegon 1978:11.

61 Erlanger & Klegon 1978:12.

conscience of scholars and how legal culture and work in the public interest are affected by existing orientations are further considered in the following chapters.

However, it is important to note here that the meaning of the concept *public interest* is not entirely clear and could even be controversial. Erlanger and Klegon point out that it would be incorrect to assume that all those presently underrepresented have the same interest, or that their interest is identical with that of the broader public.[62] It could even be said that lawyers who conscientiously represents the interests of their clients are operating in the public interest.[63] From a South African perspective, the meaning of this concept may be even more problematic and is considered in more detail in Chapter 4.

In the 2020 Blackstone Lecture by the retired Hon Sir Ernest Ryder, he emphasises in his first few opening sentences that the COVID-19 pandemic has widened existing social divides and created new ones.[64] He points out that, as far as it comes to our health, our livelihoods, our education and our age, we are not all in this together. This may ring even more true for people living in South Africa where the social divide is even more pronounced than in the United Kingdom. The primary question that Ryder addresses in his lecture, is whether the rule of law is effective in as well as after a crisis and states that this question does not only pertain to the content of the law or judicial behaviours but also justice and its systems. He argues that it is about the dignity of people in the communities and how the common good should be pursued by the State so that the trust, respect and confidence of the rule of law is maintained. In his opinion, it is the duty of legal practitioners to ensure that justice is done and seen to be done and that this means that they have the important function of involving the information, communication, education and dialogue with the people they serve. He also calls for the scrutiny of the justice system and states that as legal practitioners, we ought to identify the legal rules that would create the best system. This would entail value judgments about moral and political considerations as well as an analysis of

62 Erlanger & Klegon 1978:12.
63 Erlanger & Klegon 1978:12.
64 Ryder, Blackstone Lecture 2020, https://www.ialsnet.org/wp-content/uploads/2021/01/blackstone_script-Sir-Ernest-Ryder-blackstone-Lecture-012121.pdf (accessed on 22 January 2020).

what the law is and what its outcomes are.[65] In his lecture, Ryder again considers the statement that a rule can only be valid if the legal system of which the rule is a component is effective as a whole and then comes to the conclusion that it all relates to the common good. He significantly states that the impact of the law upon different communities with different values should not be underestimated in any attempt to safeguard the rule of law if we are to enhance trust, respect and confidence in it.[66]

Even though Ryder's paper is based on a different legal system with a different character and context, he seems to raise a universally applicable argument. In a South African context, his argument speaks directly to our challenges relating to social justice, access to justice, the legal system's responsiveness to changing circumstances and fluidity to provide justice in differentiated environments. This again raises the question of whether the current legal culture and social consciousness of legal practitioners are directed at achieving this purpose to serve the common good in the interest of the public.

Douzinas and Gearey draw a link between jurisprudence and its relation to the legal culture, social consciousness and the public interest.[67] They explain that, even before the creation of various disciplines, thinkers turned to law when they contemplated the organisation of society or the relationship between authority and the citizen.[68] According to them, jurisprudence is consciousness and conscience of the law, and juristic issues have always been central to philosophical concerns in history. They state that works of philosophers such as Plato, Aristotle and Hegel were all attempts to study the legal aspects of the social bond and to discover and support a type of legality that connects and keeps together the body and the soul and links them to the broader community.[69] Jurisprudence, as the wisdom of the law, therefore brings together what is and what ought to be; the law and justice. Consequently, the consciousness of the law and the conscience of the law cannot be separated.[70] If how

65 Ryder, Blackstone Lecture 2020, https://www.ialsnet.org/wp-content/uploads/2021/01/blackstone_script-Sir-Ernest-Ryder-blackstone-Lecture-012121.pdf (accessed on 22 January 2020).
66 Ryder, Blackstone Lecture 2020, https://www.ialsnet.org/wp-content/uploads/2021/01/blackstone_script-Sir-Ernest-Ryder-blackstone-Lecture-012121.pdf (accessed on 22 January 2020).
67 Douzinas & Geary 2005:3.
68 Douzinas & Geary 2005:3.
69 Douzinas & Geary 2005:3.
70 Douzinas & Geary 2005:4.

we think about the law is replaced with a technical or professional approach, it will lead to an impoverishment of legal study and jurisprudence. Instead, a continuous reconsideration is required by also adopting external theories that would not only prevent the excessive formalism of jurisprudence but also provide a background and methodology for research that explores the economic and social effects of legal operations and domination.[71] To this extent, it is argued that a more general instead of restricted jurisprudence will assist in changing an existing formalist legal culture to one with more appreciation of morality, ethics and meaning.[72]

2.4 Overview of the general history and origins of the law and legal profession

The overview of the general history and origins of the law and the legal profession in this subsection is closely related to the history of universities and development of the professions. It is specifically intended to indicate how the law and the lawyer grew together over time, while being influenced by different political and religious contexts. The shift from general to restricted jurisprudence is as evident from the history of law as from the history of teaching of law. It is also clear from this account of history that the turn to rule formalism and positivism of law in Europe directly impacted the development and understanding of the law since the early development thereof in South Africa.

2.4.1 Greek origins

Although lawyers do not originate from Greece, the roots of the modern institutions are to be found in ancient Greece. The translated word for *law* in Greek means ethical custom, religious practices, law in general and a rule of law and social control.[73] In the Greek tribal society, the accepted way of dealing with a transaction or decision was through a priestly cast that provided advice on how to deal with a matter in a traditional way.[74] These men were called interpreters and considered to be the forebearers of the lawyer's function.[75] The Greek speech-writer was another example of such an

71 Douzinas & Gearey 2005:4-5.
72 Douzinas & Gearey 2005:15. See also Chapter 5.4, which discusses *ubuntu* as an ethical as well as politico-ideological concept, which always entails a social bond that must be understood as one that is fluid and being continuously shaped and reshaped by the heavy ethical demands it places on all its participants. Understood in this manner, it appears to be a perfect example of general jurisprudence.
73 Ledbetter 1966:381.
74 Ledbetter 1966:381.
75 Ledbetter 1966:381.

interpreter. He would draw a fee for writing speeches that could be delivered by litigants before a tribunal. The Romans, who argued for the people against the government, are said to have copied this particular type of oratory from the Greeks.[76]

2.4.2 Roman origins

It was only during the last two centuries of the Roman Republic that the legal profession is believed to have started to develop.[77] Wildenboer states that the main reasons therefore had been the demise of the monopoly of the college of popes over the interpretation of the law, provision of legal advice and the replacement of the ancient procedural system of *legis actiones* with the formulary system.[78] Whereas litigants had to appear on their own behalf according to the *legis actiones*, the implementation of the new formulary system and later *cognitio* procedure, gave disputing parties the option of acquiring a representative to act on their behalf.[79] This initiated the practice of appointing an agent for purposes of litigation and litigants seeking legal advice from jurists and appointing an orator to argue cases on their behalf.[80] It is important to note that the attorney's profession as it exists today did not exist in Roman times.[81] Representatives were regarded as agents appointed by mandate and this could be done by way of a formal or informal process.[82] The formal agent was known as a *cognitor* while the informal agent was a *procurator*.[83] Apart from the difference in the process of appointment, Wildenboer points out that the *cognitor* was originally appointed by aged and sick people to represent them in a specific case and that a *procurator* was a general agent appointed to look after the estates of his clients.[84] She also lists a third type of agent, a *defensor*, which was a procurator appointed to represent a defendant.[85]

Van Zyl explains that the inconvenience and formality necessary for the appointment of a *cognitor*, led to the gradual demise of the *cognitor* position and the continuance

76 Ledbetter 1966:381.
77 Wildenboer 2010:202.
78 Wildenboer 2010:202.
79 Wildenboer 2010:203.
80 Wildenboer 2010:203.
81 Wildenboer 2010:203.
82 Van Zyl 1912:261; Ledbetter 1966:382.
83 Ledbetter 1966:382; Van Zyl 1912:261.
84 Wildenboer 2010:203.
85 Wildenboer 2010:203.

of the term and office of *procurator*.[86] Although a *procurator* could be appointed in terms of mandates of all kinds with varied purposes, it was the only term employed by Justinian, albeit several classes of *procurators* could be distinguished.[87]

Although there was no profession of attorneys, or *procurators*, they were required to have certain qualifications and persons increasingly started to act as such.[88] According to Ledbetter, serious abuses of the courts increased during the time that this body of agents was unorganised and not subjected to professional discipline. The influence of a person of stature who assisted a litigant with advice or with his presence, became discernible during this period.[89]

In the fifth and sixth centuries, considerable development of this early profession occurred and the writing of law became a legal science.[90] The profession became more regulated and law could be studied at law schools in the chief cities of the Roman Empire.[91] Fees on a fixed scale was recognised and professional discipline developed. As the patron system declined, motives for becoming an advocate changed and men came to practice law as a means of livelihood and were no longer necessarily men of wealthy houses indifferent to remuneration for work performed for clients.[92]

According to Wildenboer, it is worth noting that the distinction between the two main branches of the legal profession was not prominent during Roman times and although historians refer to separate law professions, they do not refer to advocates and attorneys.[93] Ledbetter describes the three main functions of the lawyer as consummate with the functions of an agent, an advocate, and that of a teacher and writer. This function was well developed by the sixth century.[94]

2.4.3 Early Middle Ages

According to Ledbetter, the courts of the church in the early Middle Ages assumed a dominant role over that of civil courts, and the canon law consequently provides a better source for examining the development of the legal profession than the history

86 Van Zyl 1912:262.
87 Van Zyl 1912:262.
88 Ledbetter 1966:382.
89 Ledbetter 1966:382. See also Wildenboer 2010:204.
90 Ledbetter 1966:382-383.
91 Ledbetter 1966:382; Wildenboer 2010:205.
92 Ledbetter 1966:382-383.
93 Wildenboer 2010:204-205.
94 Ledbetter 1966:383.

of the so-called *civil courts* at the time.[95] One of the consequences of this was that German law at the time lagged behind in development because it was not yet recognised as an academic field of stand, coupled with the fact that no organs of legislation (legislature) existed yet.[96] The result was that the legal procedure of the Germanic kingdoms during the Early Middle Ages, differed significantly from that of Roman law.[97] The judges of the Germanic courts, in contradiction to the judges of the later Roman Empire who received legal training, were royal officials who were appointed on the basis of social standing and virtue and were not required to have any legal training or expertise.[98] In Germanic law, the trial was not an investigation of the facts but rather an arbitrary device expected to reveal and to show the judgment of God.[99] The outcomes of cases were difficult to predict because it was not determined by the interpretation of law. It resulted in legal uncertainty and parties consequently preferred to resolve disputes through arbitration rather than through formal legal processes.[100]

The Early Middle Ages are often referred to as a period of 'law without lawyers' as the legal profession as it is now known, did not exist during that time.[101] Institutions which offered advanced schooling mostly trained church officials. The result was that the legal professionals or persons performing such duties at the time were predominantly clerics.[102] As the law gradually developed, so did the lawyers as distinct profession until the stage that they prominently featured in the courts by the twelfth century. By the thirteenth century, clerics were forbidden to practice in courts.[103]

2.4.4 Roman–Dutch origins

In the early Roman–Dutch law, as in the ancient Roman law, no representation was allowed in court; litigants had to act in person.[104] The court would, however, in matters where it would be difficult for a person to conduct his own case, appoint men titled

95 Ledbetter 1966:383.
96 Ledbetter 1966:383.
97 Wildenboer 2010:205.
98 Wildenboer 2010:205.
99 Ledbetter 1966:386.
100 Wildenboer 2010:206.
101 Wildenboer 2010:207.
102 Wildenboer 2010:207.
103 Ledbetter 1966:383.
104 Van Zyl 1912:263.

taalmannen (teachers or interpreters of languages) or *woordhouders* (keepers of the word) to attend to the pleadings and speak on behalf of their principals.[105]

On 30 June 1450, the Court of Holland decreed that no person would henceforth be able to appear personally or be represented by anyone other than an attorney.[106] Several regulations by the Court of Holland and the legislature followed this decree, which regulated qualifications, requirements as to moral character, general education, the conduct exhibited towards judges, duties towards clients, duties in court, instructions to advocates, expeditious transaction of work and responsibilities.[107] This represented the establishment of the appointment of *procureurs* (attorneys) in Holland. The word *procureur* is derived from the Latin word *procurator*.

Roman–Dutch law embraced the practice of a divided legal profession. Wildenboer explains that an advocate was the only person allowed to address the court on behalf of a litigant. An attorney, on the other hand, had to ensure that the required formalities in the litigation process were met and that the case was sufficiently prepared to enable the advocate to argue it in court. Both advocates and attorneys had to take an oath of good faith at the start of their careers and then renew it on an annual basis.[108]

Van Zyl quotes the following from the 1551 Plakaat of Charles V; it is important to also note it here as the principles seem to have been of similar importance in a later South African context:[109]

> No one shall in future be admitted as an advocate or an attorney to practice daily in court unless he has the necessary qualification and has obtained permission from the court to practise there and has also taken the oaths that he will show due honour, reverence, and dignity, at all places, to the president and the court; that he will not act in any case which he knows to be unjust, whether it appears to him so at the beginning or later on; and he will honestly and faithfully serve his client; that he will be satisfied with the taxation (of his costs) by the court; that he will not cause unnecessary or improper delay; that he will make no agreement to share in the results of the actions; and generally that he will conduct himself as a good and faithful advocate or attorney.

2.4.5 English law

The English common law developed independently of and separately from canon law and Roman law that was taught at English universities.[110] Common law lawyers

105 Van Zyl 1912:263.
106 Van Zyl 1912:263.
107 Van Zyl 1912:263.
108 Wildenboer 2010:207-210.
109 Van Zyl 1912:264.
110 Wildenboer 2010:210.

received training from their peers and, as a result, the English (common law) legal profession developed independently and separately.[111]

Van Zyl explains that the word *attorney* is derived from the French word *tourner*, which in turn was derived from the Latin word *ad-tournare,* which means to turn over or to commit the business to another. According to Van Zyl, this meant any substitution or agent appointed to act in the place of another, or to manage or conduct another's affairs or law proceedings.[112] An attorney or solicitor could in principle act as an agent for another in any type of matter, while specific reference to 'attorneys or solicitors *at law'* would refer to a substitute *de jure* instead of a substitute *de facto*.[113]

Although the exact period is not known, the vocation of an attorney had existed in England from very early times. Van Zyl refers to a statute of Edward I which required 'judges to select as attorneys, persons who were good and virtuous and learned and of good fame'.[114] Unlike the position in Rome and Holland, attorneys (or solicitors)[115] had been allowed to practice in England long before barristers (or advocates).[116] In the seventeenth century there was a clear division between barristers and attorneys. While barristers were organised and characterised by fine professional tradition and discipline, the same could not be said of attorneys, particularly from the fifteenth to the nineteenth centuries.[117] Barristers were controlled by the Inn to which they were admitted to study and practice, while solicitors were regulated by parliament and judges.[118]

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111 Wildenboer 2010:210. According to Wildenboer, the history of a divided legal profession in the English common law goes back many centuries. Wildenboer refers to Hahlo and Kahn who describes this complex divided system and separate branches of legal professionals receiving different types of training and having right of appearance in different English courts. For the purpose of this study, it is unnecessary to conduct a more detailed discussion of this divided English system. See also Hahlo & Khan's *The South African legal system and its background* (1968).

112 Van Zyl 1912:265.

113 See discussion by Van Zyl 1912:265.

114 Van Zyl 1912:265.

115 Van Zyl 1912:266. Interestingly, according to Van Zyl, the term *solicitor* is not as old as that of *attorney*. Attorneys allegedly preferred to be called *solicitors* because constant abuse and ridicule were heaped upon them by writers and others. The English Judicature Act of 1873 eventually determined that 'all persons admitted as solicitors, attorneys, or proctors in any court … shall be called 'Solicitors of the Supreme Court', after which the word *attorney* became obsolete in English practice.

116 Van Zyl 1912:265.

117 Ledbetter 1966:387.

118 Ledbetter 1966:387-388.

When the oral pleadings of the courts were replaced with more complex written pleadings, it also affected the role and education of attorneys and barristers, respectively. Attorneys had to learn to use the forms of procedure and the practical processes of obtaining legal results and barristers learned draftsmanship to be able to advise on the pleadings, but they dealt mainly in theory.[119] The attorneys handled and dealt with the practical preparation of the materials with which the barristers were to work. Barristers ceased to deal with clients directly and attorneys would retain a barrister for their clients since 1750.[120]

Interestingly, the question of fees also arose in England and could probably be ascribed to the Roman influence. A law was enacted in 1629 that an attorney could sue for his fees but not a barrister because the fee paid to a barrister was considered to be a gift. Barristers, as a result, continued to consider themselves to be on a professionally higher plane.[121]

2.5 Development of the legal profession in South Africa

Van Zyl claims that any existing legal system is intricately linked with the history and development of its true origins and that South African law is no exception to this rule in that it consists of a system of legal principles which can mostly be traced directly to an ancient source.[122]

It can be accepted that, when the Cape Colony passed over to Great Britain in 1806, the vocation of an attorney and his qualifications would have coincided with the practice in Holland at the time.[123] During the period of Batavian rule (1652–1795 and 1803–1806), according to Wildenboer, the Roman–Dutch law position regarding the divided legal profession was adhered to in the Cape Colony and both advocates and attorneys could appear before the *Raad van Justitie*.[124] The legal profession consisted of three branches, namely advocates, attorneys and notaries. Advocates were required to be in possession of a doctoral degree in law obtained at one of the

119 Ledbetter 1966:388.
120 Ledbetter 1966:388.
121 Ledbetter 1966:388.
122 Van Zyl 1977:9.
123 Van Zyl 1912:266.
124 Wildenboer 2010:214.

universities in Holland, while this was not a requirement for the other branches and the fees of all branches were regulated.[125]

For a few years after 1806, due to a lack of an attorney-general or any prescribed examination or apprenticeship, attorneys were simply admitted by the favour of the governor on advice of the public prosecutor.[126] It was only with the publication of the first *Charter of Justice, the Cape Rule of Court*, on 4 September 1829 that a person could be admitted and enrolled as an attorney after serving as an article clerk for a period of five years to any barrister, advocate, attorney, solicitor or proctor.[127] Van Zyl draws attention to the fact that those who served their articles in the Cape Colony could only be enrolled as an attorney but that those who came from abroad and were admitted under foreign titles, would retain those titles, even though the terms *attorney* and *solicitor* practically had the same meaning.[128]

Whereas the number of attorneys that could be admitted was previously limited, it became unlimited with the provision that time of service had to be spent. While there was no such requirement in Holland at the time, it was implemented in South Africa in accordance with the English law. In both England and Holland, and therefore also in South Africa, it was required of candidates to undergo an examination in order to obtain their professional qualification, and all three countries regulated the profession by legislative acts and rules of the court.[129] According to Van Zyl, no other profession was so strictly surrounded by *safeguards in the interest of the public*.[130] He states that attorneys have always been subject to the jurisdiction and discretion of the court in matters concerning their professional conduct and that fees are fixed and do not have to be paid until it has been taxed by an officer of the court.[131]

Although the regulative measures affecting attorneys and advocates may have differed slightly, in England as well as in Holland, the two professions have always insisted on a high standard of conduct. South Africa followed this custom and expected

125 Wildenboer 2010:215.
126 Van Zyl 1912:266.
127 Van Zyl 1912:267.
128 Van Zyl 1912:267.
129 Van Zyl 1912:268.
130 Van Zyl 1912. Emphasis on public interest, which was historically and continues to be a revolving theme of the legal profession as a distinguishing attribute of all professions. See 2.3 above. See also Chapter 4.5.
131 Van Zyl 1912:268.

attorneys, in addition to a university qualification and law examinations, to pass practical examinations and continuously observed the same high standard of conduct as their counterparts in England and Holland.[132] The practical examination eventually replaced the mere serving of articles in 1883 and the establishment of the Incorporated Law Society in the same year resulted in even closer regulation of the legal profession.[133]

Three general principles with reference to the duties and professional conduct of attorneys and solicitors deriving from Roman–Dutch law remained useful and relevant:[134]

- A procurator, whether acting as an agent in the general management of business on behalf of his principal or in bringing or defending actions, *is bound to account for everything in good faith*.
- Expenses incurred in good faith and of necessity must be repaid in the action of mandate even if the agent was unable to complete the business.
- If the principal is defeated in the instituted cause or sustains damage *due to fraud or negligence* of the attorney and which may have been avoided by a more diligent attorney, the attorney must be ordered to repair the whole loss.

From the English law reports of the last two centuries it is clear that, without openly adopting the Roman law or Roman-Dutch law on the subject of duties and professional conduct of attorneys and solicitors, the principles laid down from time to time by the English courts have been in conformity with those laws. Van Zyl is therefore of the opinion that these decisions of the English courts have been of importance in a South African context and provided valuable examples of the practical effect of the Roman and Roman-Dutch laws on the topic.[135]

All provinces in South Africa (with the exception of Natal) adhered to the practice of a divided legal provision after 1910. The admission of attorneys, notaries and conveyancers were regulated uniformly and apart from the admission of advocates. Professionals from both disciplines were, however, required to obtain the necessary

132 Van Zyl 1912:268.
133 Wildenboer 2010:217.
134 Van Zyl 1912:270. Van Zyl refers to commentaries from the *Justinian Code* and the *Commentaries* of Voet on the Roman–Dutch law.
135 Van Zyl 1912:269.

qualification, undergo a form of apprenticeship, pass the practical examinations and had to be considered 'fit and proper' to be so admitted.[136]

The study of Wildenboer mainly focusses on the origins of the division of the legal profession in South Africa and the desirability of a fusion or dual profession as proposed by the *Legal Practice Bill* of 2000. However, the division between attorneys and advocates remained in the new LPA and the arguments against and in favour of such fusion by Wildenboer is therefore not relevant for the purpose of this study. My focus is rather directed at indicating that certain traits of legal professionals (whether it be attorneys, conveyancers, notaries, advocates, prosecutors or academics) are or should be the same in the interest of the profession and the public it aims to serve. In this regard, the following conclusion from Wildenboer remains relevant:[137]

> Although South Africa's transition to a constitutional democracy and a human-rights culture is a recent historical event, its legal system is far from underdeveloped or simple. It is, in fact, complex and, in addition, legal pluralism prevails. As a result, the legal order is faced with the constant challenge of harmonising a wide range of divergent influences and components. Apart from this, on a daily basis, the law has to meet the demand for specialised legal solutions in various fields of interest, both old and newly established. The law has to keep up with the demands of a fast-changing society: it cannot afford to lag behind the needs of society as this could lead to the risk of illegitimacy of the legal system. To meet these demands, *skilled*, *well-trained* and *knowledgeable* lawyers are needed. Specialisation in the different functions performed by legal professionals as well as in specific areas of law is not only preferred, but also crucial. It is submitted that for these reasons, a divided legal profession is far more appropriate in the South African legal context, than a dual practising legal profession. Nevertheless, a specialised legal system is *worthless if it meets only the demands of a small segment of the population*. Ideally, the legal system should be accessible to everyone.

2.6 Afrikaner nationalism and its impact on the legal profession: complacency and blind adherence

The story of blind adherence to a misplaced ideology

The resistance against the British influence and the rise of the *Afrikanerdom* entailed an ideal of racial segregation with the determination that white South Africans retain all political power to prevent competition from black Africans, which inevitably resulted in their oppression. Moodie states that wherever physical contact occurred between the races, the subordination of black to white was clearly defined by law and custom.[138] Moodie further postulates that the favourite justification for pragmatic protectionism

136 Wildenboer 2010:221-222. See also the *Admission of Advocates Act* 74/1964 and *Attorneys Act* 53/1979.
137 Wildenboer 2010:224-225 (references omitted, emphasis added).
138 Moodie 1975:260.

was the unquestioned superiority of white civilisation and the belief that the gap between black and white in terms of culture was so great that there had to be separation between them until the former could develop to the level of the latter.[139]

The rise of Afrikaner[140] nationalism is a story of loyalty to a misplaced ideology of a minority group of white people, who found themselves in a part of Africa that had historically only been inhabited by black communities, and who desperately needed to find an identity in an 'own' language, land and culture. It was a battle against the supremacy of the British Union and black majority which grouped together this diverse white community, with very little else in common, at the turn of the nineteenth century into the twentieth.[141]

Afrikaners seemed to nurture the belief that they were a chosen nation of God. Not even the eventual loss of the Anglo-Boer War of 1899–1902 could undermine the Afrikaner conviction that they were a chosen people. If anything, this belief was intensified. Afrikaners believed that, like the suffering of the Israelites in Egypt, their suffering revealed their uniqueness.[142]

This notion of a *chosen nation* is also depicted by a statement made in 1948 by DF Malan, a minister of the Dutch Reformed Church and former Prime Minister of South Africa:[143]

> Our history is the greatest masterpiece of the centuries. We hold this nationhood as our due for it was given us by the Architect of the universe. [His] aim was the formation of a new nation among the nations of the world … The last hundred years have witnessed a miracle behind which must lie a divine plan. Indeed, the history of the Afrikaner reveals a will and a determination which makes one feel that Afrikanerdom is not the work of men but the creation of God.

This deep-rooted belief of being chosen by God explains the strong union between the church, culture and politics during the rise of Afrikaner nationalism. Religion, especially neo-Calvinism (Afrikaner Calvinism), played an instrumental role in the development of Afrikaner nationalism and consequently in the apartheid ideology. Prominent Afrikaner theologians of the reformed churches used the Bible as foundation and

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139 Moodie 1975:260-261.

140 It is interesting to note that the word *Afrikaner* did not originally refer to white Afrikaans-speaking citizens, but that was initially used in the 1700s to refer to slaves born in Africa. The first written reference to *Afrikaners* was made in 1830 in a Dutch newspaper, *De Zuid-Afrikaan*, in which the editor noted that everyone who live in the country and make a living from it are *Afrikaners* (Giliomee 2012:220).

141 Giliomee 2012:219-221.

142 Lave 1994:493.

143 Lave 1994:483.

justification for the ideology of apartheid.[144] This justification would then understandably lead to acceptance without question or resistance (blind adherence) by the nation (*volk*) who considered themselves to be loyal Afrikaner Christian Nationalists.

Illustrations of Afrikaner complacency

In the Truth and Reconciliation Commission (TRC) Report, it was found that:[145]

> The failure by religious communities to give adequate expression to the ethical teaching of their respective traditions, all of which stand in direct contradiction to apartheid, contributed to a climate within which apartheid was able to survive. Religious communities need to accept moral and religious culpability for their failure as institutions to resist the impact of apartheid on the nation with sufficient rigour. The failure of the churches in this regard contributed not only to the survival of apartheid but also to the perpetuation of the myth, prevalent in certain circles, that apartheid was both a moral and Christian initiative in a hostile and ungodly world.

Nothing illustrates this conflict between the loyalty to Afrikanerdom and the church and the need for resistance or opposition against it better than the autobiography of Beyers Naudé, *My Land van Hoop* (My Land of Hope).[146] He ironically commences his narrative with a quotation of General GF Beyers, a rebellion leader after whom he was named: 'Laat ons zorgen dat wij aan den kant van het rech zijn, al kost het ons leven.'[147] He tells the story of his traditional Afrikaner childhood in the early 1920s, with his father as a minister of the Dutch Reformed Church and one of the founders of the Afrikaner Broederbond, his own inevitable theological schooling and eventual critical realisation of the injustices of apartheid. He vividly explains his emotions on the day of Steve Biko's memorial service, standing next to his grave: 'What are we doing with these insane measures, not only to others but also to ourselves? At that moment, the strongest conviction was in my mind: Steve Biko's body will perish, but his spirit, his message, his testimony will live!'[148]

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144 Hofmeyr 2012:443-447. See also Lubbe 2002:19.

145 South Africa, Truth and Reconciliation Commission Report (hereafter TRC Report), Volume 4, Chapter 3, 1998:91.

146 Naudé 1995. *My land van hoop – Die lewe van Beyers Naudé*. Human & Rousseau.

147 Naudé 1995:11. Own translation: Let us make sure that we remain on the right side, even if it costs us our lives.

148 Naudé 1995:107-108. In contradiction to Louw who chose to be an apologist, Naudé became an accuser. Naudé's dissent is a perfect example of an intellectual who was associated with belonging to a group and who became uncomfortable with such tie to the point of disapproval and accusation. Sanders (1998:5-12) explains this 'folded togetherness' of complicity as a basic trait of connectedness shaded into complicity which troubles conscience.

The insane measures that Naudé refers to is unquestionably the apartheid laws of the National Party that came into power on 26 May 1948. The National Party government was determined to save the Afrikaners from the unfortunate circumstances created, according to them, by the unholy alliance between the English, blacks, Indians and coloured people under the leadership of the pro-British, Afrikaner leader, General Jan Smuts.[149]

How profound the influence of this previous order was, is reflected on by Froneman in his book review of *A man of principle: The life and legacy of JC de Wet*.[150] He notes that, when the National Party came into power in 1948, they held that power with little outward sign of moral doubt of its justifiability. For them, their power was an 'apparent moral certainty'.[151] Froneman states that Afrikaners of his generation lived in a kind of complacency or indifference through the apartheid era without challenging it and with very few of them joining the forefront of the struggle against it. In fact, he says, the greatest of Afrikaans jurists never publicly spoke out against the legal iniquities of apartheid.[152] By doing so, Froneman raises an important aspect of professional ethics: unethical behaviour, *not by doing something but by not doing something* – a failure to speak up, not protesting, mere compliance.

In 1939, when Afrikaner nationalism was gaining momentum, NP van Wyk Louw wrote: 'Rebellion is just as necessary in a nation as loyalty. It is not even dangerous for a rebellion to fail; *what is dangerous is that an entire generation will pass without protest*.'[153]

Although Louw's concept of loyal opposition was a construct mobilised in the name of Afrikaner nationalism, it is rather ironic that almost an entire generation thereafter passed without protest against the ideals of separate development and apartheid. The complacency with which these notions of the Afrikaner nationalists were accepted looks rather like complicity, a charge against the Afrikaners as a collective for the atrocities and gross human rights violations that took place in their name. My reading

149 Scher 2012:325.
150 Froneman, 2014. Book review. *A man of principle: The life and legacy of JC de Wet,* edited by Du Plessis and Lubbe, 2013.
151 Froneman 2014:474.
152 Froneman 2014:474.
153 Translated from Louw 1939, *Lojale Verset*: 'Opstand is net so noodsaaklik in 'n volk as getrouheid. Dit is nie eens gevaarlik dat 'n rebellie misluk nie; wat gevaarlik is, is dat 'n hele geslag sonder protes sal verbygaan.'

of Louw is that he warned against mere loyalty instead of the ability to be critical of resistance and that, although he called on Afrikaners to resist British influence, it would necessarily have to be a continuous process.

Complacency as a form of complicity: Sanders' notion of complicity

In the introduction to his study, *Complicities: On the intellectual*, Sanders explains that:[154]

> The word 'complicity' carries an enormous pejorative charge. It is a word used to accuse someone of partnership in crime. Do we want to rid it of its powerful negative valence? In the general sense, by contrast, the Derridean theme of 'complicity,' which plays so crucial a role in *Of Spirit* and other works, is banal: a folded-togetherness: the folded-togetherness of being human, perhaps. Just as following Gramsci and Sartre, we can say that all human beings are intellectuals by virtue of pensive conscience, we can say that to be human is to be complicit: to be folded into connection, yet at the same time to be divided. 'Complicity' is about constitutive human duality, and indeed multiplicity. Just as belonging to a group is an instance of such complicity, so too is the impulse to dissociate, since belonging is partial, one of many possible folds.
>
> How do we get from this basic, neutral, ontological condition to the morally hypercharged notion of 'complicity?' There is no direct way. To answer this question, we are compelled to look at various responses to belonging: identifications and disidentifications. Complicity, if in the general sense banal, is never neutral in the narrower senses.

In his work, Sanders shows that being complicit is not static but occurs on a range between well-being and aversion where aversion could be the turn which makes us aware of complicity.[155] He explains that for an intellectual who is associated with belonging to a group and who is uncomfortable with such tie, even to the point of disapproval and accusation, complicity as a basic trait of connectedness shades into complicity which troubles conscience.[156] He goes further to say that all human beings are complicit in the banal sense of being folded together in connection and that it is unlikely for such connections to exist, which would trouble no conscience. Through the examples of the intellectuals he examines, a sense of complicity comes out of their attempts to dissociate from what he considers thoughtful conscience. Sanders significantly notes that this awareness intensifies the experience that being an

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154 Sanders 1998:9-10.

155 Sanders 1998:10.

156 In Sanders' consideration of who he regards as 'an intellectual' for the purpose of his study, he refers to different opinions and distinctions involving the intellectual. He comes to the conclusion that, 'If we do generalize, the sense in which I am using the term is neither of social function, nor simply of basic pensive humanity, but of responsibility. Indeed, as we find in all major accounts of the "intellectual," the imperatives of the intellect and duties of one's profession are continually transgressed or conscripted by this other demand' (1998:8-9). In this study, I am referring to the legal professional as an intellectual based on its assumed professional responsibility and relying on this interpretation by Sanders.

intellectual involves not only commitment to truth but also an assumption of ethical responsibility. He states that when knowledge and thought become political activities, the question of what to think leads to the question of what one ought to do and the intellectual then, aware or unaware of the politics of knowledge, confronts the question of ethical responsibility.[157]

Sanders' investigation into complicity and the intellectual leads him to Louw's advocacy of *lojale verset* (loyal opposition), which became the convention and institution that channeled and restricted Afrikaner dissent during the apartheid era.[158] He indicates how Louw found in his own career that it could become a matter of choosing between being an accuser or an apologist and that he (Louw) seemed to have chosen the latter by publicly defending apartheid, locally and abroad. Sanders points out that the post-apartheid or post-colonial intellectual could similarly face a conflict between loyalty to the resistance movement and the impulse to criticise its leaders when it threatens to repeat the worst elements of what was fought against.[159]

Moodie, in similar vein, remarks that as follows:[160]

> However cruel apartheid was in its effects and however blind its adherents were to the suffering it caused, many Afrikaners (especially Afrikaner intellectuals) saw the policy as tackling a moral dilemma rooted in their own experience of colonial domination. Indeed, some of the very ruthlessness of apartheid's implementations may be attributed to internal resistance to the moral predicament it evoked. Much of it, of course, was simply self-interested blindness or unwillingness to see.

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157 Sanders 1998:5-12. Sanders' entire work entails a much broader consideration of the 'folded-togetherness' insinuated by complicity which falls outside the scope of this study. His themes related to complicity, thoughtful conscience, commitment to truth and ethical responsibility coincides with similar themes in this study and enriched my own thinking about the ethical responsibility of legal professionals.

158 Sanders 1998:14.

159 Sanders 1998:14.

160 Moodie 2009:180. Moodie's reference to self-interested blindless or unwillingness to see reminds of Arendt's notion of 'banality of evil'. In her *Report on the banality of evil: Eichmann in Jerusalem*, Arendt considers Eichmann's apparent lack of insight in his wrongdoing, even though being charged with playing a key role in the 'final solution' by managing the mass deportation of Jews to ghettos and killing centres. He insisted on being innocent throughout the trial and although he was considered as one of the greatest criminals of all time, Arendt describes him as far from being evil or a villain. She states that, apart from his exceptional diligence in looking out for his personal advancement, he had no other motives and that he merely never realised what he was doing. It was not stupidity but rather his thoughtlessness and blind compliance with the law that predisposed him to become known as one of the greatest criminals of that period (1963:287-288). Arendt makes the important remark that we must admit to the fact that 'superior orders', even when their unlawfulness is 'manifest', can severely disturb the normal working of a man's conscience (1963:294). The full extent of Arendt's work falls outside the scope of this study, but there is a definite resemblance between the lack of self-consciousness of Nazi role players like Eichmann that she identifies and that of apartheid role players, but specifically the legal professionals and law enforcement officers, which is the focus of the study.

This blindness and concern about self-complacency is also evident in Froneman's review on the life and legacy of JC de Wet when he states that 'his failure to publicly question the injustice of apartheid is perhaps the single most interesting question for his and my generation of critical but 'quiescent' Afrikaners'.[161]

Froneman names a few 'prophets' who were marginalised from the mainstream of Afrikaner society who were prepared to speak out against the injustices of the time.[162] Although Froneman, from a consideration of the life and work of De Wet, is convinced that he was a critical scholar who contributed immensely to the legal profession, the question remains why he did not publicly question the injustice of apartheid. He states that open dissent was the exception during that time. This lack of critical investigation by De Wet and other prominent legal scholars at the time, meant that little or no contribution to the development of the moral content of law and its institutions were made. Law students, lawyers, judges and academics were schooled to be uncritical and passive when it came to critically questioning the moral content of the law and its development.[163] A 'difficult question' identified by Froneman, is what the consequences of the general acceptance of De Wet's methodology were for the role and application of law in the apartheid system and whether it contributed to students, lawyers, judges and academics critically questioning the moral content of the law.[164]

2.7 Role of apartheid in our current view of the law and the legal culture

Apartheid: the misplaced political ideology and the blind adherence of Afrikaner Nationalists

The newly elected National Party government in 1948, in collaboration with the Afrikaner Party, campaigned for what the author Alan Paton called a 'new heaven and earth' that would one day command admiration from the whole world.[165]

In contrast, in a 1961 edition of the *Yale Law Journal*, Landis writes that,[166]

> Throughout the world the integration of repressed and segregated racial and religious groups into the community is being fostered by modern legal theory and political philosophy – throughout the world, that is, except the Republic of South Africa. There this almost universal trend has not

161 Froneman 2014:478.
162 Froneman 2014:474.
163 Froneman 2014:478.
164 Froneman 2014:478.
165 Scher 2012:325.
166 Landis 1961:1.

> merely been rejected, but a counter-philosophy has been developed and implemented with singular doggedness and devotion. This counter-philosophy is known as apartheid.

The system of racial segregation in South Africa known as 'apartheid' was implemented and enforced by legislation. This legislation served to institutionalise racial discrimination and the preservation of white privilege. While the bulk of this legislation was enacted after the election of the National Party government in 1948, it was preceded by discriminatory legislation enacted under earlier British and Afrikaner governments. Apartheid in South Africa is distinguished from segregation in other countries by the systematic way in which it was formalised in law.[167]

The complacent and/or complicit role of the legal profession

Burdzik and Van Wyk attempt to illustrate the extent to which the concept of apartheid and the law was integrated:[168]

> As far as the law is concerned, it can safely be stated that at some stage every recognised source of South African law would also have been a source of apartheid in law. Even the courts, at times, have sanctioned apartheid, albeit by upholding the principle of separate but equal. Especially in the area of legislation, apartheid became an all-pervasive phenomenon. Acts of Parliament, proclamations of the State President, regulations by ministers, provincial ordinances, municipal by-laws, have all contained, and in some cases still contain, elements of apartheid.

Attainment of this all-pervasive phenomenon would only be possible with an extensive collaboration between politicians and the majority of lawmakers, legal policy creators, law enforcers, the prosecuting authority, the judiciary and legal practitioners. Sachs reflects on the contribution of the judiciary (and legal practitioners) in his article, 'Honouring the truth in post-apartheid South Africa':[169]

> Businesses were asked, "What were you doing other than making money?" The press was asked, "What were you reporting?" The judges smiled until they were asked, "Where were you?" They were asked, "How is it possible, in a learned country with an active judiciary, that these terrible tortures could take place? How is so much violence possible? How is it possible that even the laws against apartheid were broken?" …The courts had failed to protest against the massive injustices imposed by the law. We also had failed to interpret the law in such a way as to make it more difficult, rather than easier, for the security police to commit their brutal acts against humanity.

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167 Burdzik & Van Wyk 1987:119.

168 Burdzik & Van Wyk 1987:120.

169 Sachs 2001:804-805. See also Sachs, 2009, *The Strange Alchemy of Life and Law*, in which he rejects purely formal notions of the judicial role and shows how both reason and passion are required to work in the service of justice.

Similarly, Le Roux and Davis remark that it was as if white South Africa was engulfed in a state of moral paralysis during the 1970s and 1980s.[170] Allegations made afterwards by the National Party (FW de Klerk) and broader (white) public that they did not know of the abuse of power, torture and maltreatment of those held in custody without trial or countless human rights violations by the security police, cannot be believed or defended. Le Roux and Davis strikingly remark that 'people could have found out if they cared'.[171]

According to Sachs, there is a distinction between knowledge and acknowledgement and that there is a conversion required from the one to the other in a process of reconciliation. He states that knowledge is having the information and the statistics, for example, knowing that there were torture and assassination of detainees. Acknowledgement, on the other hand, is establishing a connection with that information which means that a personal, intimate and emotional acceptance of a degree of responsibility is required.[172]

Sachs's argument reminds of Sanders who states that 'between privilege and its denial, temptations to complicity and none, lies a continuum'.[173]

A failure of acknowledgement is very well illustrated by the National Party's consistent position, even at the TRC hearings, that they were not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the National Party was not aware and which it never would have condoned.[174]

The practice of detention without trial in terms of section 17 of the *General Law Amendment Act*[175] (90-day clause) serves as another illustration. This section authorised any police officer to arrest and detain in custody for up to 90 days any person whom the officer suspected of having committed or being about to commit certain offences or being in possession of certain information. This practice was employed for almost 30 years during which time about 80 000 people were detained under these terms. At the TRC hearings it was testified that about 22 000 detainees

170 Le Roux & Davis 2019:126.
171 Le Roux & Davis 2019:126.
172 Sachs 2001:806.
173 Sanders 1998:5.
174 Le Roux & Davis 2019:120.
175 *General Law Amendment Act* 37/1963.

during this time had been tortured or physically assaulted and 73 detainees died while in detention.[176] The TRC reported that:[177]

> More distressing is the fact that many judges and magistrates continued to accept the testimony of detainees, despite the fact that most of them knew that the testimony had been obtained under interrogation and torture whilst in detention. In this way, the judiciary and the magistracy indirectly sanctioned this practice and, together with the leadership of the former apartheid state, must be held accountable for its action.

It would, however, appear that there were very few members of the judiciary, magistracy and leadership who were prepared to accept accountability. On 27 October 1999, the South African Press Association reported that former President FW de Klerk said that he found TRC chairman Archbishop Desmond Tutu's reported rejection of his sincere efforts to continue to work for reconciliation in South Africa and other divided society 'strange and disappointing', *'especially so coming from a man of cloth'*. De Klerk stated that: 'I offered to meet him to try to resolve our differences in a spirit of *Christian reconciliation*. I wrote that I sometimes gained the impression that he resented any statement which sought to place *in perspective the very complex history of our recent past*.'[178] In February 2020, in an interview with the national broadcaster, De Klerk said that he was 'not fully agreeing' with the presenter who asked him to confirm that apartheid was a crime against humanity. De Klerk, although he was prepared to acknowledge that it was a crime and to apologise for his role in it, insisted that apartheid was responsible for *relatively few deaths* and that it had not to be placed in the same category of genocide or crimes against humanity. Two weeks after this statement, and after a furious backlash had commenced, he apologised for any 'confusion, anger, and hurt' that his remarks may have caused although he did not retract the statement. He also did not issue a statement in which he acknowledged that apartheid had been a crime against humanity. His own charitable foundation issued a statement in which it explained why it believed that he was right to insist that apartheid was not a crime against humanity. In an interview with the British Broadcasting Corporation a few weeks later, De Klerk said that his comment was in line with the position of the United Nations Security Council at the time. The reality is that although the United Nations General Assembly declared that apartheid was a

176 Le Roux & Davis 2019:120-126.
177 Le Roux & Davis 2019:127.
178 South African Press Association, 27 October 1999, *Tutu's rejection of his efforts disappointing, says FW,* https://www.justice.gov.za/trc/media/1999/9905/p990524b.htm (accessed on 20 December 2021) (emphasis added).

crime against humanity, the United States and the United Kingdom voted against this description. Apartheid is also included as a crime against humanity in the Rome Statute of the International Criminal Court.[179]

Within hours after De Klerk died on 11 November 2021 at the age of 85, the FW de Klerk Foundation released a video on their website wherein he, 'without qualification, apologise[d] for the pain and hurt and the indignity and the damage that apartheid has done to black, brown and Indians in South Africa'. He states that he did so in his capacity as the former leader of the National Party and also as an individual. In this video he further states that he changed his views in the early eighties and that he realised that apartheid was wrong and that they had arrived at a place which was morally unjustifiable.[180] It should be noted that, although he apologises without qualification for the damage caused by apartheid, he remained silent on the issue and therefore persisted with his view that it had not been a crime against humanity.

Instances of resistance – different sides of the struggle

From the annals of history, it would appear that very few Afrikaners cared to the extent that they were prepared to acknowledge, speak up, to resist or to protest. Froneman remarks that they lived through apartheid with very few of them in the forefront of the struggle against it. He states that we owe much to the Afrikaners who were marginalised from the mainstream of society during their time because they were prepared to publicly speak out against the legal iniquities of apartheid. These included Beyers Naudé, Van Zyl Slabbert and lawyers like Bram Fischer, Laurie Ackerman, Jeremy Gauntlett, Edwin Cameron, Barend van Niekerk, and John Dugard.[181]

The legal professionals referred to above were white Afrikaners whose resistance should be distinguished from their black counterparts like Nelson Mandela, Robert

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179 British Broadcasting Corporation, 18 February 2020, FW de Klerk and the South African row over apartheid and crimes against humanity, https://www.bbc.com/news/world-africa-51532829 (accessed on 20 December 2021). See also Rome Statute of the International Criminal Court: art. 7; News24, 11 November 2021; Christi van der Westhuizen, FW de Klerk: A defender of his roots until the end, https://www.news24.com/news24/obituaries/christi-van-der-westhuizen-fw-de-klerk-a-defender-of-his-roots-until-the-end-20211111 (accessed on 26 July 2022).

180 The full video is available on the website of the FW de Klerk Foundation, https://fwdeklerk.org/ with a link to YouTube: https://youtu.be/HlW0UQFW0Gg (accessed on 26 July 2022).

181 Froneman 2014:476. There are many other lawyers who have contributed to the struggle and who have gone through great lengths to represent suppressed clients during apartheid South Africa against the oppressive National Party government. I am mentioning a few names for the sake of the example and by no way intend it to be a list of any kind.

Sobukwe, Oliver Thambo, Dullah Omar, Zak Yacoob and Dikgang Moseneke.[182] The struggle against apartheid was theirs and, as Steve Biko pointed out, the white men could never be a part of it. The whites were not oppressed, and they did not need to 'save' the black population from it. They were needed to speak up against it and to acknowledge it.[183]

The difference between these two groups of lawyers (white versus black) is that the black lawyers were actively fighting white supremacy and oppression by a racist government, while the white lawyers acknowledged the injustice and accepted a degree of responsibility to the extent that they were prepared to speak up against it, regardless the potential negative impact it may have had on their own careers. It cannot be said that they were in the same boat. It cannot even be said that they were on the same side. However, reflecting back on their respective contributions at the time, acting and reacting critically against injustice, it would be fair to say that they were all morally and ethically aligned, acting out of the conviction of their beliefs.

Although Froneman seems critical of De Wet's failure to explicitly speak out against the injustices of apartheid, he remarks that De Wet at least seemed to know that 'the law depended on those who "do" law and that the changes did not simply fall from the legal heaven'.[184] He appeals to the members of the legal profession to be critical of content, to morally engage and to speak out against injustices, to ensure that the law reflects the reality of the society we live in – changing the legal culture in South Africa.

The far-reaching impact of complacency

Without exception, the greatest risk created by a complacent culture, is the possibility of injustice. This appears to be a general truth that was confirmed globally in other instances of injustice long before apartheid.

In 1867, John Stuart Mill made the following profound remark in his inaugural address delivered at the University of St Andrews:[185]

> Let not any one pacify his conscience by the delusion that he can do no harm if he takes no part, and forms no opinion. Bad men need nothing more to compass their ends, than that good men should look on and do nothing. *He is not a good man who, without a protest, allows wrong to be*

182 Again, not intended to be an exhaustive list or a list of any kind other than a few names to illustrate the example.
183 Naudé 1995:107. See also Biko 2017:52,*The definition of black consciousness*.
184 Froneman 2014:480.
185 Mill 1867:36 (emphasis added).

> *committed in his name, and with the means which he helps to supply, because he will not trouble himself to use his mind on the subject*. It depends on the habit of attending to and looking into public transactions, and on the degree of information and solid judgement respecting them that exists in the community, whether the conduct of the nation as a nation, both within itself and towards others, shall be selfish, corrupt, and tyrannical, or rational and enlightened, just and noble.

In 1999, Elie Wiesel, a survivor of the Holocaust, gave a speech on 'The perils of indifference' to the members of Congress of the United States during which he said the following:[186]

> In a way, to be indifferent to that suffering is what makes the human being inhuman. Indifference, after all, is more dangerous than anger and hatred. Anger can at times be creative. One writes a great poem, a great symphony. One does something special for the sake of humanity because one is angry at the injustice that one witnesses. But indifference is never creative. Even hatred at times may elicit a response. You fight it. You denounce it. You disarm it. Indifference elicits no response. Indifference is not a response. Indifference is not a beginning; it is an end. And, therefore, indifference is always the friend of the enemy, for it benefits the aggressor – never his victim.

In these two speeches, Mill and Wiesel, in different concepts and timeframes, integrate some of the concepts considered above: public interest, the importance of protest or resistance, the consequence of failure to speak out against injustice and 'moral paralyses'. Particular emphasis is placed on Mill's statement that 'he is not a good man who, without protest, allows a wrong to be committed in his name, … because he will not trouble himself to use his mind on the subject'. A universal truth over centuries, that complacency, mere compliance, is not and has never been equivalent to ethical conduct.

This multi-layered description of ethical conduct points an accusatory finger to the Afrikaner community in general, the business and the press that Sachs refers to, but more so to the judiciary, lawmakers and law enforcers at the time. Where were you? is the question asked to the judges and legal community by the TRC. Sachs states that 'the courts had failed to protest against the massive injustices imposed by the law and that they had failed to interpret the law in such a way as to make it more difficult, rather than easier, for the security police to commit their brutal acts against humanity'.[187] De Klerk said they did not know,[188] Le Roux and Davis say that the

186 Wiesel 1999, 'The perils of indifference'. https://www.americanrhetoric.com/speeches/ewieselperilsofindifference.html (accessed on 16 December 2021).
187 Sachs 2001:804-805.
188 Le Roux & Davis 2019:120.

knowledge was available, they could have found out if they cared.[189] With regard to the National Party, if Sachs's argument is followed, this would translate into a failure to reconciliate because there had been no conversion from knowledge to acknowledgement.[190]

The accusatory finger pointing at the legal community: TRC

In its report on the institutional hearing of the legal community (legal hearing), the TRC states that the purpose of the exercise was to draw lessons of the past so that the legal process could be transformed in the future in an attempt to avoid the tragic injustice of apartheid-at-law.[191] The TRC found that 'part of the reason for the longevity of apartheid was the superficial adherence to "rule by law" by the National Party, whose leaders craved the aura of legitimacy that "the law" bestowed on their harsh injustice'.[192] Law teachers are criticised for concentrating on 'safe' areas of law or that they taught in such a way that no critical ability was imparted to the students. It was also found that students were blinded by the glamour and material returns of the conventional mainstream of the profession, while neglecting their potential role as fighters of justice for all in South Africa.[193] The TRC points out that the judiciary unthinkingly allowed judicial policy to be influenced by executive dictate and white male prejudice.[194] In addition, a finger is pointed at the organised profession who took no effective initiatives to make the administration of justice more accessible to those who could not afford it as well as their complacency in the face of challenges brought about by government injustice.[195] With relation to the lawyers who fought for justice, the TRC remarks that a question that was ever-present during the hearings, at times furiously debated and goes to the heart of much of the jurisprudential controversy was the fundamental issue of what the law is and how it relates to justice.[196] The TRC

189 Le Roux & Davis 2019:126.
190 Sachs 2001:806.
191 TRC Report, Volume 4, Chapter 4, Institutional Hearing: The legal community, 1998:101 (hereafter TRC Report, Volume 4, Chapter 4), 1998:101.
192 TRC Report, Volume 4, Chapter 4, 1998:101.
193 TRC Report, Volume 4, Chapter 4, 1998:102-103. See Chapter 5 for a detailed discussion of the role and purpose of legal education in South Africa.
194 The TRC's remarks about the superficial adherence to laws, the uncritical manner of teaching law, complacency and unthinking allowance of influence of legal policy reminds of Arendt's notion of the 'strange interdependence of thoughtlessness and evil' (1963:288).
195 TRC Report, Volume 4, Chapter 4, 1998:103. See Chapter 4 for a detailed discussion on the meaning of public interest and the role of the legal practitioner.
196 TRC Report, Volume 4, Chapter 4, 1998:105. See Chapter 4, which links to the issue of the relation between law and justice and the role of the legal practitioner.

significantly states that it is not enough for South African lawyers to parade the sovereignty of parliament as if that alone explained and excused their conduct. The social contract which has for so long been the foundation for such sovereignty in the United Kingdom was absent in South Africa, therefore requiring something more by way of response *and responsibility* from the judiciary and the legal profession. The point is that judges had a choice and that it was feasible for them to have increased their alertness as to government's abuse of powers in the power vacuum created by the partially representative legislature and the absence of basic fairness in the citizen–state relationship.[197]

In his commentary on the legal hearing of the TRC, *Judging the judges, judges ourselves – Truth, reconciliation and the apartheid legal order,* Dyzenhaus reminds us that the law was not self-executing under apartheid.[198] It required administration, application and interpretation by judges, magistrates, prosecutors, officials of the Department of Justice and Law and Order, and lawyers, both in the academy and the legal profession.[199] Dyzenhaus further emphasises that the majority of lawyers at the time had a legal education that did not incorporate apartheid and its law into the curriculum and therefore did not provide students with the necessary critical tools to understand their society. Dyzenhaus importantly summarises the following related questions around which the legal hearing of the TRC revolved:[200]

> How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces? And to those whose skills could have been used to resist – if only by criticising – apartheid law, the question was put of why they stood passively by or actively supported the regime.

In his foreword on Dyzenhaus' book, Kader Asmal states that public confidence remains the key challenge. Public confidence in a judiciary, according to him, reflects far-reaching sentiments of belonging, identity and ultimately, justice for all. He concludes that these fragile sentiments were totally destroyed in the apartheid history

197 TRC Report, Volume 4, Chapter 4, 1998:105. Only a few abstracts from the report are highlighted because it specifically relates to this study, but the report and findings of the TRC must be considered in its entirety for a true reflection on the legal profession's transformation now, almost 25 years after the release thereof.

198 Dyzenhaus 1998:27.

199 Dyzenhaus 1998:27.

200 Dyzenhaus 1998:27.

of South Africa and that it remains to be seen whether and to which extent it could be repaired.[201]

The extent to which the legal profession has become more critical in how we view the law, its relation to justice and the role and responsibility of the legal professional in a constitutional democracy must continuously be evaluated and reconsidered. This is what Van der Walt calls for when he emphasises the importance of taking note of our 'possible pasts'.[202]

In her article on the multiplicity of transition, Van Marle thoughtfully reflects on our 'possible pasts' as part of a project that considers issues of transition, transformation, memory, truth and justice.[203] She uses the TRC and the responses to it as an example of the South African process of remembering, forgetting and imagining.[204] According to Van Marle, the understanding of legal interpretation as recollective imagination can be translated into the context of transition in the sense that we need to be future-orientated and to rely on the past. She states that we cannot choose one single framework as the only version of the past because the past is always offered to us within competing frameworks. The past can therefore only be given meaning within a framework that is future-orientated and meanings will always be tentative and conditional due to the continuous possibility of reinterpretation.[205] Our possible pasts, which Van der Walt refers to, relates very closely to the notion of recollective imagination, and as Van Marle insists, is very important when addressing a society's past legal traditions in order not to perceive these traditions as fixed and unchangeable. She concludes that the relationship between the past and the future, between memory and the imagination, should not be a linear one and that we should make use of the concept of *recollective imagination* when engaging with our pasts and futures.[206]

In contradiction with the emphasis on the importance of memory in the process of transformation, Dyzenhaus points to the struggle of certain parts of the South African legal community to come to terms with their role in the apartheid legal order.[207] In his

201 Dyzenhaus 1998:x (foreword by Kader Asmal).
202 Van der Walt 2006:47. See 2.1 above.
203 Van Marle 2002b:65.
204 Van Marle 2002b:68.
205 Van Marle 2002b:68.
206 Van Marle 2002b:76.
207 Dyzenhaus 1998:91.

chapter, 'Memory's struggle', he shows how many of the lawyers who made written and oral submissions to the legal hearing of the TRC fell prey to the temptation to try to manage public memory in their own self-interest.[208] In their attempt to forget what is uncomfortable and to persuade others to forget, this management of memory was evident by the presentations of many lawyers at the hearing.[209] The application for the removal of Mandela from the roll of attorneys serves as an example.[210] The Association of Law Societies could not bring itself in 1997 to say that the law was indeed unjust or that the moral imperative in the matter was in fact justifiable. The Association of Law Societies attempted to indicate that it was merely following the law of the land in bringing the application for his removal. It was pointed out during the hearing that it was not necessarily their 'slavish' to apartheid law that was cumbersome, but rather the fact that without any legal duty at stake they initiated their own campaign of harassing opponents of apartheid.[211]

Prevailing culture inherited from the apartheid dispensation

If it is accepted that the 'values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place',[212] constitutes the legal culture, then the prevailing legal culture that was inherited from the previous dispensation, can rightly be questioned. Marshall even goes a step further when she emphasises that the characteristics of non-ruling communities, identities, legal consciousness, and practices toward law and in law through their own voices need to be studied.[213] She states that communal legal culture is not only about social being and legal consciousness, but also about the ways in which collective identities of non-ruling communities are expressed in law and toward law.[214] Even though Marshall writes from a Palestinian perspective in Israel, her views

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208 Dyzenhaus 1998:91. Dyzenhaus relies on the phenomenon described by Theodor Adorno in his 1959 essay, *What does coming to terms with the past mean?* He quotes the following passage from this essay by Adorno: 'The effacement of memory is more the achievement of an all-too-wakeful consciousness than it is the result of its weakness in the face of the superiority of unconscious processes. In this forgetting of what is scarcely past, one senses the fury of the one who has to talk himself out of what everyone knows, before he can talk them out of it.'

209 Dyzenhaus 1998:92. The troubling memory in the submissions regarding Bram Fischer by the General Council of the Bar is considered in Chapter 3.4.9.

210 See Chapter 3.4.6.

211 Dyzenhaus 1998:113.

212 Davis & Klare 2010:406.

213 Marshall 2006:234.

214 Marshall 2006:234.

on legal culture and legitimacy of the law for marginalised communities are equally applicable in a South African context.

My conclusion from the discussion in this subsection is that the legal culture in South Africa was historically shaped by politics and religion that have led to a traditionalist, formalist and exclusionary perspective by most members of the legal profession. It would definitely be easier to complacently accept and adhere to the apartheid laws than to dissent. Acknowledgement of this knowledge could have contributed to reconciliation with the new constitutional dispensation but there seemed to have been a struggle with the memory against forgetting. Either that, or the temptation to try to manage public memory in their own self-interest by attempting to forget what is uncomfortable and to persuade others to forget. A continued formalist and positivist approach to the law which does not critically engage with the concept of recollective imagination or the different frameworks as the versions of our past, would keep us on the same track than we found ourselves in five decades ago. Transformation of the legal culture would necessarily entail a consciousness of our complicity, critical engagement with the memory of our possible pasts and a conversion of this knowledge to acknowledgement. Such a transformation of the legal culture would then only impact and have a continuous impact on our understanding of the law if the process of reconsideration and reimagination remains continuous in a democratic and multicultural society.

It would appear that a formalist and positivist approach to the law provided a convenient retreat to both legal practice and legal education during the era of apartheid when any moral influence or more critical engagement would necessarily have resulted in opposition. It is probably not so much loyalty to the apartheid project itself, than the self-interestedness and lack of self-consciousness that ensured the complacency of the legal profession. This corresponds with the notion of Douzinas and Gearey that positivism, as a result of modernity, diminished the broader scope and thinking about the law to a restricted interest with a minimised influence of moral values and principles in law.[215]

If positivism supposes legitimacy of the law on formal reason and a strict distinction between fact and value, it raises the question of how the ostensible ethical requirement

[215] Douzinas & Gearey 2005:4-6. See 2.2 above.

of ‘fit and proper’ for admission to the legal profession was traditionally interpreted and what it entails, or rather should entail in our current constitutional dispensation.[216] The meaning and legal interpretation of this concept is analysed in Chapter 3, with reference to the legal opinion of academic writers and judgments in a series of case law.

2.8 Conclusion

This chapter focusses on the origin and the history of legal profession from a global as well as a South African perspective in an attempt to gain a better understanding of the position and purpose of the legal professional within the dynamics of the legal history, legal tradition and current legal culture. My objective was to establish the current role and purpose of the legal professional and ultimately what it should be in order to respond to a diverse, multicultural and democratic South Africa.

My sense is that the legislative requirement that a person should be ‘fit and proper’ in order to be admitted to legal practice could have been a recognition of the necessity to include a value component in the education and competency of a legal practitioner. The extent to which this has realised in a formalist and positivist legal culture with a limited scope and thinking about the law is questioned. A more detailed analysis of the current meaning and interpretation of this requirement is conducted in Chapter 3, but the outcomes of the legal hearing of the TRC considered in this chapter are indicative of the legal culture and the values inherited from the previous dispensation.[217] The allegation against the legal profession is that they could have done more. The judges, the advocates, the attorneys and the academics were all in a position to provide more resistance against apartheid legislation, which was not self-executing. Nevertheless, their complacency and lack of self-consciousness during this time were well-noted and their failure to remember, to turn knowledge into acknowledgement when asked to do so in an effort to reconcile, left us without true reconciliation.[218]

From the reflection on the global history of universities, the development of the professions and origins of the law and the legal profession, it is evident that the legal profession in South Africa has retained its strong traditional Western character,

216 See 2.2.
217 See 2.7.
218 See 2.7.

specifically influenced by Roman, Roman–Dutch, Dutch and English principles.[219] Our reality is that we teach and practice law in a multicultural society that necessitates the law being influenced and transformed by African traditional principles if we are serious about serving the public, or even just upholding constitutional imperatives.

We would arguably do well to remember that the law has always been a taught tradition and that the law is not laws;[220] that positivism, which supposes legitimacy of the law on formal reason, results in a minimised influence of moral values and principles in law;[221] that the true value of a profession is that the service it renders is a social good and that community welfare would be impaired by its absence;[222] that all human beings are complicit in the banal sense of being folded together in connection and that it is unlikely for such connections to exist, which would trouble no conscience;[223] bad persons need nothing more to compass their ends than that good persons should look on and do nothing;[224] that the past can only be given meaning within a framework that is future-orientated and meanings will always be tentative and conditional due to the continuous possibility of reinterpretation.[225]

The nature and extent of this ongoing process is evident from the analysis of case law in Chapter 3.

219 See 2.2, 2.4 and 2.5.
220 See 2.2.
221 See 2.2 and 2.6.
222 See 2.3.
223 See 2.7.
224 See 2.6 and 2.7.
225 See 2.7.

Chapter 3
'Fit and proper' concept as a current legislative requirement

3.1 Introduction

In search for the meaning, purpose and importance of the current 'fit and proper' requirement for admission to legal practice, and what it rather should be, I commenced my study in Chapter 2 with a historical analysis of the legal profession. Since 'fit and proper' has been a legislative requirement over almost the last century, it has to be understood from a historical South African perspective in order to establish the meaning or possible meaning and value thereof for our current context.

In this chapter I consider the traditional and current meaning, interpretation and application of this concept. This is important in the context of the overarching purpose of the study which aims at establishing the role and purpose of the legal professional in order to ultimately determine what it should be in order to respond to a diverse, multicultural and democratic South Africa. In my opinion, the 'fit and proper' requirement must be directly linked to the role of the legal professional in our society. It is therefore necessary to establish what constitutes being 'fit and proper', whether the meaning of the requirement has changed with the transition to a constitutional democracy and if it is aligned with what is expected from legal professionals in our current context. My investigation of these questions in this chapter entails a reflection on the role and purpose of the LPC before considering the legal opinion, interpretation and application of the 'fit and proper' requirement by legal scholars and the judiciary.

The legal profession, once only reserved for the aristocracy in the Western world, is a profession that has always set a particular standard of conduct to its members. The minimum requirements for admission to the profession related to knowledge and competencies have varied over time and have developed globally to become highly regulated and administered by national regulating bodies of the profession.[1] Although these regulations vary in detail in different countries and jurisdictions, it is generally accepted that only persons who are suitably qualified and display an ethical character, are allowed to become members of this elite profession. In practical terms, these

[1] See Chapter 2.3 and 2.4.

requirements usually entail that a person must obtain a law degree (LLB), undergo practical vocational training, pass competency examinations and that there must be no objection against their ethical values.[2] In South Africa, the latter requirement for admission to the legal profession was formulated to stipulate that 'a person must satisfy the court that he/she is 'fit and proper' to be so admitted'. This has been a legislative requirement since 1934 in a range of consecutive pieces of legislation for the admission of attorneys and advocates to the profession and was recently again confirmed as a requirement with its inclusion in the LPA.[3]

When considering the role and responsibility of legal professionals, it is expected that the regulating body of the profession not only prescribes specific ethical standards but then also provides substantive content to the settled phrase and requirement of fitness and propriety. Compliance with the prescribed Code of Conduct, linked to the 'fit and proper' requirement for admission to the legal profession in South Africa, has always been considered to achieve the purpose of ensuring the required standard of ethical and professional conduct of legal practitioners.[4] The extent to which it has indeed achieved this purpose since its inception in 1934, is considered in this chapter.

I attempt to reveal in this chapter that the notion of 'fit and proper' as an ethical requirement for admission to the legal profession has never had a determined meaning, nor served an apparent purpose that could be linked to the public interest, as understood in the democratic constitutional purpose of the phrase. This is demonstrated with reference to the role of politics in the legal interpretation of the 'fit and proper' concept in a range of judgments which influenced legal opinion over time. I also consider how the law, our thinking of and about the law, the legal culture, legal opinion and the role and purpose of the legal professional are intrinsically related. A crucial aspect of this relatedness is not only how we think about the law but also our ability to think with a self-awareness of our responsibility and the consequence of our deeds. To this extent I again rely on the importance of Sanders' conception of complicity in as far as he makes an intrinsic, existential link between complicity and

2 See Chapter 2.5.

3 *Attorneys, Notaries and Conveyancers Admission Act* 23/1934; *Admission of Advocates Act* 74/1964; *Attorneys Act* 53/1979; *Legal Practice Act* 28/2014: sec. 24.

4 See also Chapter 4.2 for criticism of equating compliance with the Code of Conduct with being 'fit and proper'.

responsibility.[5] I reflect on these notions with a specific focus on the responsibility of the legal professional in society, their competency to think with self-awareness and the meaning and consequence of complicity from this perspective. This reflection also ties to my contention in Chapter 2 that the development and transformation of an existing formalist legal culture as a result of modernity, would entail an increased consideration of the consciousness as well as conscience of the law and an appreciation of morality, ethics and meaning.[6]

If it is accepted that the 'fit and proper' requirement has always been closely linked to the public interest, as considered in Chapter 2. It is important to note that the profession's reputation is first reliant on the reputation of its individual members, but arguably just as significant, on the public perception of the profession. If the legal profession in South Africa is dedicated to serving the public, its reputation and that of its individual members should be aligned with constitutional imperatives and guarantees such as social justice, access to justice, equity and equality. These constitutional aspirations should be understood as serving the diverse South African community to its fullest possible extent. Because the individual members of the legal profession are the legal policymakers of the community, the process of transformative constitutionalism relies on them. The legal profession, its professional bodies and universities, must be seen and perceived by the public as in the forefront, as advocates for change and defenders of the *Constitution*. If, however, the profession is perceived as an elitist group for the sake of their own purpose and reputation only, we may expect a stagnant legal culture with no inclination to change or transformation for the 'greater good'.

In understanding legal culture, Marshall's identification of the primary actors who exert or influence legal culture is helpful: 'beyond the courtroom, legal culture consists of the way that legal actors, such as police, lawyers, court clerks, and jurors deploy the law in the performance of their duties'.[7] She notes that recent studies of 'legal consciousness' have shown that legal culture extends to everyday life in that law and legal concepts shape the way ordinary people understand their experiences. According to her, this is just one of many interconnected systems of meaning and that

5 See Chapter 2.7.
6 See Chapter 2.4 and 2.7.
7 Marshall 2006:230.

legal culture emerges from a society's social, cultural, political, and economic arrangements.[8]

The purpose of my consideration of the origin of the professions, the legal profession and historical role and purpose of legal practitioners in South Africa in the previous chapter was an attempt to understand and define the position and purpose of the legal professional within the dynamics of the legal history, legal tradition and current legal culture. I also considered how the history of South Africa, the politics, religion and the law have always been very closely related and therefore, in my opinion, informed the concept of the 'fit and proper legal practitioner'. It remains important to understand the legal professional's role in this interrelated historical context in order to gain better insight regarding our contemporary legal culture and why there is an outcry for change.[9] It is now more than ten years since Davis and Klare warned that the South African legal culture may hold back efforts to realise the free, open and democratic aspirations of the *Constitution*.[10] As early as 1998, Klare identified a 'disconnect' between the *Constitution*'s transformative aspirations and the conservative character of South African legal culture. He claimed that the participants within a legal culture are, to some extent, influenced and constrained by it and that this inevitably has a constraining effect on legal outcomes.[11] The extent to which Klare's opinion is still true and prevalent is considered below in the analysis of the judiciary's interpretation of the 'fit and proper' requirement, as well as the legal practice's complacent and unreflective adherence to this requirement by merely equating compliance with laws to ethical values.

3.2 Current 'fit and proper' legislative requirement conundrum

Section 24(2)(c) of the LPA stipulates that 'the High Court must admit to practice and authorise to be enrolled as a legal practitioner, conveyancer or notary, any person who, upon application, satisfies the court that he or she is a 'fit and proper' person to be so admitted'. Slabbert notes that:[12]

> Membership to the profession is thus subjected to character screening, yet what exactly a 'fit and proper' person is, is not defined or described in legislation or regulations. It is commonly accepted that in order to be 'fit and proper' a person must show *integrity, reliability and honesty*, as these

8 Marshall 2006:230.
9 Davis & Klare 2010:405.
10 Davis & Klare 2010:406.
11 Klare 1998:151.
12 Slabbert 2011:212 (references omitted, emphasis added).

> are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public.
>
> Although the burden of proof is on the applicant to prove that he or she is a 'fit and proper' person to enter the legal profession, the decision remains essentially a *discretionary value-judgement* on the part of seniors or the court.

In terms of the LPA, applicants have a duty to prove that they are 'fit and proper' and have a right to expect admission when they have satisfied this burden of proof. Conversely, the High Court has a right to expect that applicants prove that they are 'fit and proper' and has a duty to admit such a person to the profession upon satisfaction of this burden of proof.[13] Nothing is further stated about this rule and no discretion is created or conferred upon the Court in the interpretation of the rule by the LPA. The assumption is that the rule is clear and what is considered to be 'fit and proper' is determined and can be proven.

In reaching its decision when determining whether a person is indeed fit and proper for legal practice, the Court almost solely relies on the report by the LPC in all applications for the admission of legal practitioners. Closer consideration of the LPC's process of application for the registration of practical vocational training contracts, screening of prospective candidate attorneys and admission of legal practitioners is therefore necessary.

The LPC determines that, in application for registration as a candidate legal practitioner, a candidate must submit two character references, not older than six months, by persons in a position of authority, which will serve as proof to the satisfaction of the Council that they are a fit and proper person. Any criminal charges

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13 It is worth noting that, upon admission of an attorney or advocate, the court will expect of such a person to take the following Oath of Office: "I, ... do hereby swear/solemnly and sincerely affirm and declare/that I will truly and honestly demean myself in the practice of advocate/attorney according to the best of my knowledge and ability, and further, that I will be faithful to the Republic of South Africa." This is the oath prescribed by Rule 3A of the Uniform Rules of Court (GoN R1157, G. 43856), which relates specifically to the Admission of Advocates. This oath is not prescribed in the LPA and Rule 3A does not pertain to the admission of attorneys. This is the same oath that was taken before 1996 and has not been reviewed with the overhaul of the LPC. In their commentary on the LPA, Ellis *et al.* note that, in a country now regulated by the *Constitution*, practitioners should rather be expected to take an oath to be faithful to and uphold the values of the *Constitution* (Ellis *et al.* 2021: Chapter 7.2). Schedule 2(6) of the *Constitution* determines the following oath for judges: "I …, swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the *Constitution* and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the *Constitution* and the law." It is expected and recommended that the Oath of Office of both the attorneys and advocates be reviewed.

or convictions or disciplinary inquiries against the candidate must also be disclosed with full detail thereof. A particular provincial office of the LPC may also conduct an interview with the candidate but this is not the standard practice. Although the practice of requiring and relying on character references by two persons in authority about students who have just completed their undergraduate studies, is highly problematic, it is sufficient for the purpose of this study to note the practical difficulty, if not impossibility, to establish a person's character upon initial admission to the legal profession.[14]

The application for admission and enrolment as a legal practitioner upon completion of a candidate's practical vocational training is governed by Rule 17 of the Rules of the LPC. With regards to the fit and proper requirement, the applicant is expected to confirm in the founding affidavit that he or she is a fit and proper person to be so admitted and this statement must include submissions regarding any previous criminal conviction and disciplinary proceedings by the LPC, the employer or the university, as well as confirmation that the estate of the applicant has not been sequestrated.[15] It is further required that the applicant shall attach a supporting affidavit by his or her principle which confirms that the applicant is, in his or her view, a fit and proper person to be admitted and enrolled as an attorney.[16]

In my analysis of the current interpretation of the 'fit and proper' requirement by the judiciary below, it appears that what is considered 'fit and proper' (or not), has traditionally been very closely related to a practitioner's conduct and compliance with the law at the time of this consideration.[17] This is also confirmed by the consideration above of the Rules of the LPC and the practical application thereof.

This legislative requirement and practice of finding that a person is 'fit and proper' for admission to the legal profession has never been questioned, apparently because it is deemed necessary for protection of the image, the prevention of liability of the

14 Refer to Legal Practice Council 2020, https://lpc.org.za/legal-practitioners/enrolment-of-legal-practitioners/ (accessed on 4 January 2022).
15 Rule 17.2.14 of the Rules of the South African Legal Practice Council.
16 Rule 17.4.5 of the Rules of the South African Legal Practice Council.
17 See 3.5 below, for a historical analysis through case law on the interpretation of the 'fit and proper' requirement.

profession and the public interest. But it may also be the remaining trait of the traditional legal culture: blind adherence to laws and complacency.[18]

Slabbert, however, questions at least the practice of labelling of a person as being 'fit and proper' and whether it does not create a false warranty to the public that such a person will act ethically while it is known that professionals who have once been described as 'fit and proper' do not always act in such manner.[19]

Slabbert's critique of this practice emphasises the conundrum created by a finding upon admission of a person to the profession that they have attained the necessary knowledge, competencies and values which render them 'fit and proper' for practice and then a later finding that it is no longer the case. It raises the question of whether a person can possess certain values at a time and then later prove to have lost it, or whether it could simply never be determined with certainty in the first place. This conundrum, in my view, has been created mainly by the uncritical understanding, acceptance and application of this 'fit and proper' requirement for admission to the profession.[20]

3.3 Role of the LPC, regulation of the profession and the 'fit and proper' requirement

Role of the LPC

In a journal article by Maloka, in which he investigates the protection of the 'foundation and magnificent edifice of the legal profession', he states that one of the overriding considerations behind the overhaul of the legal practice was the perceived ineffective regulation of legal practitioners by different constituent bodies at the expense of the public interest.[21] A result of this overhaul was that the LPC replaced the Law Society as the new regulating body for the legal profession in South Africa, and the *Legal Practice Act* (LPA) repealed the previous *Admission of Advocates Act*[22] and *Attorneys Act*.[23]

18 See Chapter 2.6 – Afrikaner Nationalism, complacency and blind adherence to laws.
19 Slabbert 2011:209 (references omitted, emphasis added).
20 See Chapter 3, par. 3.4.
21 Maloka 2015:2645.
22 Act 28/2014.
23 Act 53/1979. See Act 28/2014: sec. 119 and the schedule thereto for a complete list of repealed laws.

The LPC is a national, statutory body established in terms of section 4 of the LPA, which stipulates that it is a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners (attorneys and advocates) as well as candidate legal practitioners.

The objectives of the LPC are listed as follows:[24]

(a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;

(b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;

(c) promote and protect the public interest;

(d) regulate all legal practitioners and all candidate legal practitioners;

(e) preserve and uphold the independence of the legal profession;

(f) enhance and maintain the integrity and status of the legal profession;

(g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;

(h) promote high standards of legal education and training, and compulsory post-qualification professional development;

(i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;

(j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;

(k) uphold and advance the rule of law, the administration of justice, and the *Constitution* of the Republic; and

(l) give effect to the provisions of this Act in order to achieve the purpose of this Act.

According to the last recorded statistics on the (previous) Law Society's website, there were 27 200 practicing attorneys in South Africa in January 2019, with approximately 7 000 registered candidate attorneys at the time.[25]

In a newsletter of the LPC dated June 2021, the chairperson, Ms Matolo-Dlepu, remarks that there are about 36 000 practicing legal professionals in South Africa and that it is not sufficient to service a population of over 55 million people.[26] She further states that it is critical that the LPC addresses the transformation of the legal

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24 Act 28/2014: sec. 5.

25 Law Society of South Africa, Statistics for the attorneys' profession, https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/ (accessed on 4 January 2022).

26 LPC newsletter, 1st edition, https://lpc.org.za/1st-edition-newsletter/ (accessed on 4 January 2022).

profession at all levels, starting with the barriers that exist in legal education and the fact that many law graduates struggle to access work opportunities when they graduate. According to her, this is a fundamental challenge because they are key to increasing access to justice in the country. She confirms that it is important to the LPC as a regulator, which has a mandate to protect and promote the public interest, to have a profession that is effective, efficient and transparent. In doing their work, she says, they wanted to ensure that the Act provides to all those affected by it and they realised that there was a need to amend it, as well as their rules and Code of Conduct.[27]

In the same newsletter, the LPC executive officer attempts to explain the challenges they have been faced with since their transition and establishment. One of the challenges identified by her is that they have received over 21 000 complaints against legal practitioners in its nine provincial offices during this period.[28]

The problem seems to exacerbate because in the following newsletter of the LPC the chairperson commences her column by stating that *'professionalism, ethical conduct, and integrity are all fundamentals of any profession, and the legal profession is no different*.'[29] She then states that,[30]

> *I have to say that as a Council we have been dismayed by the number of reports that we have received about the conduct of some legal practitioners, especially during court proceedings, clearly indicating a lack of adherence to the Code of Conduct*. The Council is in the process of engaging with all Judge Presidents on a variety of issues including that of professional conduct during court proceedings. It must be acknowledged that the reputation of any profession is tainted by those few who fail to uphold its integrity. *The actions of the few legal practitioners who have acted contrary to the values to which we should all aspire are indeed unfortunate*. I am of the view that it is the duty of all of us to work together to maintain and enhance the prestige, status, and dignity of the legal profession and we can only do so if we are honest and open with each other.

According to the list available on the website of the LPC, approximately 152 legal practitioners were suspended or struck from the roll in 2021.[31] The list is not fully updated and does not include matters still under investigation but nevertheless

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27 LPC newsletter, 1st edition, https://lpc.org.za/1st-edition-newsletter/ (accessed on 4 January 2022).

28 LPC newsletter, 1st edition, https://lpc.org.za/1st-edition-newsletter/ (accessed on 4 January 2022) (emphasis added).

29 LPC newsletter, 2nd edition, https://lpc.org.za/2nd-edition-newsletter/ (accessed on 4 January 2022).

30 LPC newsletter, 2nd edition, https://lpc.org.za/2nd-edition-newsletter/ (accessed on 4 January 2022) (emphasis added).

31 LPC, https://lpc.org.za/members-of-the-public/list-of-struck-off-lps/ (accessed on 4 January 2022).

illustrates the problems faced by the LPC and the concern expressed by the chairperson of the LPC.

The LPC has a very noble mission and plays an important role in its attempts to promote access to justice in the interest of the public, the removal of barriers to improve transformation of the legal profession, and improved regulation of the profession by way of an updated Code of Conduct. What is interesting, however, is that no one seems to be concerned about the fact that it happens every year that so many practitioners who were considered 'fit and proper' upon admission to the profession, no longer are or, may in fact never have been 'fit and proper'. The LPC has expressed its concern by stating that they 'have been dismayed by the number of reports that [they] have received about the conduct of some legal practitioners, especially during court proceedings, clearly indicating a lack of adherence to the Code of Conduct'.[32] The question arises whether the problem is purely a lack of adherence to the profession's Code of Conduct or whether it is possibly more fundamental. If it is a legislative requirement that only 'fit and proper' persons can be admitted to practice as legal professionals, then it should be accepted that there are currently 36 000 'fit and proper' legal practitioners practicing law in South Africa. If being 'fit and proper' means that a legal practitioner maintains both high professional standards as well as ethical values, then non-compliance with the profession's Code of Conduct or unethical behaviour should not be a cause for concern, let alone a cause of dismay. Unless it is argued that a person could have been 'fit and proper' at the time of admission to the profession and later became unfit by displaying unprofessional or unethical conduct.

In my opinion, it would be closer to the truth to acknowledge that it is almost impossible to truly establish a person's professional and ethical values upon their admission to the legal profession to the extent that it is required by legislation. It is further possible that persons do not later become unfit but rather prove, through their conduct, that they were probably never 'fit and proper'. I am of the opinion that professional and ethical values can at most be strived towards upon admission to the profession and

[32] LPC newsletter, 2nd edition, https://lpc.org.za/2nd-edition-newsletter/ (accessed on 4 January 2022).

will then be cultivated and reinforced over time, similar to the knowledge and skills required from a legal professional.

The argument pursued in Chapter 4 is that how we view the concept of 'fit and proper' should be revised to rather signify an objective that is strived towards and gradually attained rather than a requirement that can be assessed and achieved already upon admission to the profession. The notion of continuous evaluation and reconsideration of what ethics demand, is consistent with the African concept *ubuntu,* considered in Chapter 5 below.[33] Douzinas and Gearey render a very similar view in their argument that we are only to the extent that others are, and that our becoming is always in relation to others and our encounters with others, which compel us to continue reinterpreting what the world is for us and who we are in the world.[34] The idea of a journey of becoming in the context of the 'fit and proper' legal practitioner is further explored in Chapter 4.

Current regulation of the profession and the 'fit and proper' requirement

In South Africa, the law governing legal practitioners are mainly contained in the LPA and the LPC's *Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities*, Notice 198 of 2019.[35]

An analysis of the preamble of the LPA and the Code of Conduct of the LPC shows that the historic themes of the legal profession, which includes public trust and confidence, quality of service delivery, cost of service delivery, improved training and the regulation of specialised knowledge, skills (or competencies) and values, remain current issues in a global context.[36] While sociologists suggest that the expansion of education, technological changes, changes in the division of labour within occupations and the rise of consumerism have resulted in a weakening of the knowledge monopoly and a decline in public belief in professional goodwill, Klegon insists that the focus should be shifted to the wider social forces that affect the claim of exclusive expertise.[37] He predicts that basic structural and cultural changes can result in a period of increasing de-rationalisation, de-bureaucratisation, and de-professionalisation but

33 See Chapter 5.4.
34 Douzinas & Gearey 2005:16.
35 LPC, Code of Conduct, https://lpc.org.za/legal-practitioners/code-of-conduct/ (accessed on 4 January 2022).
36 See Chapter 2.
37 Klegon 1978:279. See Chapter 2, par. 2.3.

that, without such changes only minor variations in professional control are likely to occur.[38] Since this prediction by Klegon in 1978, we have already experienced increased control (and proposed control) in legislation and regulations of professions, particularly in the health, finance and legal sectors in South Africa, especially with the rise of client dissatisfaction of services resulting in higher demands for equality in services.[39]

The general rules stated above, which govern the conduct of legal practitioners in South Africa, are therefore not necessarily questioned. The reason, the purpose and the importance of rules governing the profession must be understood in light of the international trends related to client service and the higher demand for quality in services. What is questioned, is the notion that legal ethics and values can be reduced to a set of rules which need to be complied with in order to be 'fit and proper'.[40]

My contention is that the LPC may prescribe rules of conduct for legal practitioners in an attempt to ensure that quality services are rendered to the public but that there should be a clear distinction between conduct in compliance with the Code of Conduct and ethical values. Even though there will certainly be a commonality or obvious overlap, a codification of legal ethics and values is not only injudicious but, if correctly understood, impossible due to the consistent reconsideration and therefore the illusive nature thereof. Legal practitioners could be expected to comply with a code of conduct, but the legal culture should be of such nature that a practitioner could also be able to be critical of the rules on the basis of ethical values. This implies that the conduct of a legal practitioner in the compliance of rules should be regarded as a distinctly different concept than the ethical values of such legal practitioner and that the profession's Code of Conduct should not be considered as the embodiment of the ethical values expected by its members.

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38 Klegon 1978:281. See Chapter 2, par. 2.3.

39 Chapter 2, par. 2.3. Refer to different regulative measures and legislation in the health, legal and financial services sectors: *Consumer Protection Act* 68/2008, *Health Professions Act* 56/1974, *Health Professions Amendment Act* 29/2007, *Legal Practice Act* 28/2014, *Financial Sector Regulation Act* 9/2017.

40 See Robertson and Kruuse for a detailed discussion on the apparent acceptance that the professional rules of lawyering constitute a complete resource to enable a lawyer to practice ethically. Robertson & Kruuse 2016:351-362.

Uncritical acceptance of rules and codes of conduct will perpetuate an uncritical formalist legal culture against which Froneman, Davis, Klare and others have been arguing since the inception of democracy in South Africa.

It must also be acknowledged that a professional code of conduct serves a different purpose than ethical values in this interpretation. A code of conduct, containing fixed and determined rules, regulates the profession and the accountability of professionals, protects them from liability and constitute grounds for disciplinary action.[41] Legal ethics and values are broad concepts that are susceptible to multiple interpretations and allows transformation of the law, legal concepts and standards with the values of the *Constitution* as a starting point of reference. A code of conduct insists on compliance while the notion of legal ethics allows for differentiated approaches in professional judgment guided only by the constitutional values and just outcomes in specific circumstances. The limit of the law is very clear in this comparison, and it must be recognised in the interpretation of these concepts and their ability to contribute to changing of the legal culture as well as their contribution to the understanding of the 'fit and proper' person.

Wessels, in his consideration of the history, liability and regulation of the legal profession in South Africa, explains that there are multiple ethical theories which could determine a person's decision and conduct, depending on which they subscribe to.[42] With reference to Herring, he identifies the three most important ethical frameworks as the rule-based approach, the outcome-orientated perspective and the character-driven outlook.[43] Wessels explains these three ethical frameworks as follows:

- *The rule-based approach* to ethics entails the determination of the applicable rules that should be followed in a particular scenario. For legal practitioners who follow this approach, it would imply that the ethical thing to do in any given situation would be to follow the applicable rules. According to Wessels, the question that arises with this approach is which ethical rules will apply and who decides what those rules are.

41 Wessels 2021:419.
42 Wessels 2021:402.
43 Wessels 2021:402.

In a South African context, it would appear that the profession has traditionally subscribed to this approach and that the rules were quite clearly and consistently prescribed by the (then) Law Society and legislation by parliament.[44]

- *The outcome-orientated approach* is determined by the consequences to which it will give rise. Legal practitioners who follow this approach will make their ethical decisions based on what would produce the best outcome. The basis of this approach therefore wholly depends on whether it produces good or bad consequences. Wessels questions the framework in accordance with which these decisions will be made and how it would be determined whether the consequences are to be regarded as good as bad.

  In my opinion, the outcome-orientated approach would be ideal if the values embodied by the *Constitution* are used as a starting point to determine the outcome of decisions. It is interesting that this approach is not further investigated by Wessels but that he appears to favour a rule-based approach with a transition towards or influence by the character-driven outlook.[45]

- *The character-driven approach* places virtues at the centre of ethical decision-making. It implies that ethics is about displaying specific virtues such as honesty or integrity and claims that a good character is essential to ethical decision-making. Wessels aptly points out that this approach leaves the question of what these virtues would be and how it should be determined. The study found this approach to be dangerously subjective and inclined to superficial inquiry due to the impossibility of personal values being determined.[46]

Wessels comes to the following conclusion:[47]

> Different approaches may be adopted to legal ethics, which may be understood in narrow or broad terms. The approach that one adopts to legal ethics will undoubtedly influence what you expect of an ethical legal practitioner. This chapter supports the position *that more attention should be paid to the virtue–ethical approach.* While legal practitioners must generally give effect to the laws of the country, a formalistic, rule-bound approach to legal ethics cannot be supported. There are other ethical values, which may not necessarily be captured or expressed in the Code of Conduct, which will be equally important. For instance, Bosielo JA remarked that legal practitioners must "understand the Constitution and the future role they will have to play. [They]

44 Wessels 2021:403.
45 Wessels 2021:403.
46 Wessels 2021:403.
47 Wessels 2021:412-413 (references omitted, emphasis added).

> should have the spirit of *ubuntu* and be willing to sacrifice, instead of being selfish; they should be socially conscious and develop the ethos of 'batho pele' [people first]; and they must be prepared to serve the community." Apart from *ubuntu* and *batho pele*, other key virtues and values include respect, honesty, integrity, trustworthiness, loyalty, good faith, courage, respect for the rule of law, a commitment to the rule of law as well as the Constitution, which include the rights set out therein and the values and norms that underlies it.

This conclusion of Wessels reminds of Froneman's argument of the prevailing formal vision of the law in South Africa.[48] If what he lists as 'other ethical values that will be equally important' than the ethical values listed in the Code of Conduct, then the question can be asked: Which ethical values are listed in the Code of Conduct and why were these not listed?

In his concluding remarks on the importance of legal ethics for the future, Wessels states that:[49]

- a legal ethical framework provides legal practitioners with a firm indication as to what is expected from them when providing legal services;
- that it provides valuable guidance to law students and new entrants to the legal profession;
- that it serves to protect the professional nature of legal service itself;
- that it protects the public against professional misconduct and instils trust and public confidence in the profession; and
- that it holds legal practitioners answerable to a set of legal ethical standards that strengthens the notion of accountability and provides a basis for instituting disciplinary procedures against practitioners who are guilty of misconduct.

Although Wessels makes a valuable contribution to the understanding of the regulation and liability of the legal profession in South Africa, I do not agree with his notion of equating legal ethics and values with the Code of Conduct for legal practitioners. His description above of the importance of legal ethics is, in my view, rather an indication of the importance of a code of conduct in addition to the broader legal ethics that is also expected of legal practitioners. While compliance with a code of conduct may ensure conformity and reduce legal liability, legal ethics are, or are supposed to be, directed at a more critical view of legal rules and conformation in favour of transformation in line with the *Constitution* and the 'other values' not contained in the

48 Froneman 2005:3-4.
49 Wessels 2021:418-419.

formal rules. There is, or there should be, a distinct difference between the LPC's interpretation of compliance of the Code of Conduct and transformative legal ethics in the practice of law. It could be expected from legal practitioners to comply with the profession's Code of Conduct, but compliance therewith should not render them 'fit and proper'.

Before returning to the question of what should render a person 'fit and proper', the current interpretation of the concept by legal scholars and the courts are considered in the following subsections.[50]

3.4 Legal opinion of 'fit and proper' by legal scholars

The law reports are replete with cases involving applications for admission, and enrolment on the roll of attorneys, removal from the roll, counter-applications, challenged striking-off, and for readmission and re-enrolment. In each of these cases the question had to be considered whether the legal practitioner involved was 'fit and proper' to be admitted to, or remain a member of the profession.[51] These reports have attracted the attention of legal scholars, a few of whose opinions are explored below. It is important to note that the 'fit and proper' concept has not regularly been the topic of academic research, arguably due to it being a fixed legislative requirement. Although the scholars' work considered below contributed significantly to my own thinking about the 'fit and proper' concept, it has not yet been questioned as a requirement for admission to legal practice. The critique is mainly directed at the problematic elusive nature and interpretation thereof which has provided the foundation for my argument that the concept as a legislative requirement should be reconsidered.

Maloka: 'Fit and proper' is a notoriously elusive proposition

Maloka aptly remarks that what constitutes a 'fit and proper' person for the legal profession is a notoriously elusive proposition.[52] He believes that it is clear that the requirement is considered as a gatekeeping standard in the legal profession and that it casts a brooding omnipresence over a legal practitioner's career.[53] He is further of

50 A reimagination of what 'fit and proper' could mean in a transformative constitutionalist context is considered in Chapter 4 below.
51 Maloka 2015:2643.
52 Maloka 2015:2646.
53 Maloka 2015:2645.

the opinion that any unethical behaviour, even unconnected with practice, could result in a person no longer being suitable for practice in order to safeguard the good name of the profession and the public interest.[54]

With regard to the determination of such cases, Maloka considers it to be a question of fact although he admits that it involves a value judgment and that factors such as absolute personal integrity, reliability and scrupulous honesty plays a central role.[55] These qualities of honesty and integrity, according to Maloka, must continue to be displayed throughout a legal practitioner's career and a practitioner who lacks these qualities cannot be expected to uphold the high standard of professional ethics.[56] Maloka seems to be of the opinion that a person's capacity of being 'fit and proper' is reliant on inherent values or character traits.

Maloka suggests that the privilege to practice law may be regained in such circumstances but only if compelling evidence of sincere and permanent rehabilitation is presented. According to Maloka, the legal profession has a special responsibility to recognise true cases of rehabilitation but that the admission or readmission of a legal practitioner should never be damaging to the integrity and standing of the profession, the judicial system, the administration of justice or be contrary to the public interest.[57] In his opinion, independent corroborating evidence should be required to determine such rehabilitation and thereby again appears to link the rehabilitation of values to the conduct of the practitioner, which should at least be objectively observable, unlike personal ethical values.

The questions that arise from Maloka's opinion are whether a person could have fully attained such values upon admission to the profession and, if so, how a person then loses such inherent values? How can values that were lost be regained for the purpose of readmission to the profession once a person was found to have conducted themselves dishonestly or without integrity? These questions are considered in more depth in my inquiry in Chapter 4 that relates to reconsidering of the 'fit and proper' concept.

54 Maloka 2015:2645.
55 Maloka 2015:2646.
56 Maloka 2015:2646.
57 Maloka 2015:2663.

Maloka expresses his concern when he considers the importance of constitutional democracy and the impact of a person who lacks the values to uphold a high standard of professional ethics:[58]

> Like a dormant volcano, the simmering questions of fitness to hold judicial office is bursting beneath the rarefied surface of the South African bench against the backdrop of allegations of incapacity, incompetence and impeachable conduct. This is apparent from the unfolding conundrum facing the judiciary in the aftermath of grave allegations made against the Judge President of the Western Cape. In lodging a complaint of gross misconduct against Hlope JP for violating the judicial authority of the apex court with the Judicial Service Commission, and the latter's counter-complaint against the Constitutional Court justices, the 'Langa Court' unwittingly opened a proverbial can of worms.

Judicial officers have the same requirement as legal practitioners of having to be 'fit and proper' to remain on the bench. This requirement is crucial in a constitutional democracy considering the role of the judiciary in controlling the exercise of power and upholding the Bill of Rights.[59]

From Maloka's argument, I draw the conclusion that legal practitioners, as officers of the court, should play a similar role that would be of equal importance to constitutional democracy and that the values they are expected to display must similarly be aligned with the values and objectives of the *Constitution*.

Slabbert: 'Fit and proper' is a discretionary value-judgment that can be politically influenced, vary from person to person and change over time

In a similar vein as Maloka, Slabbert states that, even though the meaning of a 'fit and proper' person is not defined or described by legislation, it is commonly accepted to mean that such a person must show integrity, liability and honesty.[60] She is further of the opinion that, although the applicant bears the onus to proof that they are 'fit and proper' to be admitted as a legal practitioner, the decision effectively remains a discretionary value-judgment and that these judgments can be politically influenced, vary from person to person and change over time.[61]

The varied interpretation and application of principles, over time and from case to case, is also evident from the series of case law discussed below.

58 Maloka 2015:2646-2647.
59 Maloka 2015:2647.
60 Slabbert 2011:212.
61 Slabbert 2011:212-213.

As stated in subsection 3.2, Slabbert also questions the practice of labelling of a person as being 'fit and proper' and whether it does not create a false warranty to the public that such a person will act ethically while it is known that professionals who have once been described as 'fit and proper' do not always act in such manner.[62]

Another aspect raised by Slabbert in her investigation of the requirement of 'fit and proper' for the South African legal profession, is whether lawyers should still be seen as professionals or whether they have simply become ordinary business people.[63] This question relates to the fundamental importance of 'public interest' for the professional which is not necessarily the same for 'ordinary business people'.

Slabbert is very critical of the 'fit and proper' concept and she admits that allowing "only real 'fit and proper' lawyers into the profession remains aspirational".[64] She however stops short from arguing that the practice should be discontinued but rather recommends that it be used as a means of screening prospective lawyers and enhanced by further training on ethical behaviour or morality within the legal profession.[65]

Geldenhuys and Stoop: Continuous ethical realignment

The critique of Geldenhuys and Stoop relates very closely to both Slabbert and Maloka's reasoning in their consideration of the problems in the South African legal system which contribute to its ineffectiveness. Geldenhuys and Stoop are of the opinion that continuous ethical realignment is necessary to ensure that the legal virtues that make a person 'fit and proper' are maintained throughout a practitioner's career.[66] They further suggest several ways in which the legal profession are failing their clients – the public – by not adhering to their fiduciary duty to perform their professional obligations with due diligence and care at the standard that is expected from members of the legal profession.[67] Practitioners who take what was held by courts out of context, do not adhere to the rules of natural justice, cause unnecessary delays, and the unprofessional drafting of pleadings and heads of argument that are

62 Slabbert 2011:209 (references omitted, emphasis added).
63 Slabbert 2011:209.
64 Slabbert 2011:226.
65 Slabbert 2011:226.
66 Geldenhuys & Stoop 2017:463.
67 Geldenhuys & Stoop 2017:467.

substandard, causes the public to lose faith in the ability to access justice. This ultimately results in the legitimacy of the legal system being drawn into question.[68]

From their argument, it is evident that a certain set of knowledge, competencies and values are expected of all legal professionals to enable them to be perceived as 'fit and proper'.[69] Traditionally and until now, the knowledge and skills required has been relatively easy to establish and to assess, and it was often the values that were challenging to define. As pointed out above, these *values* are often linked to the virtues of honesty and integrity. In terms of the current interpretation of ethical values, a lack thereof is mostly easily identifiable because they are akin to formal rules of conduct. In many cases where legal practitioners were found to be no longer 'fit and proper' for practice, it was because they were dishonest in their conduct. It can be said that they had deviated from the ethical standards expected from a legal professional, but the transgressions of overcharging a client or misappropriating trust funds are also contrary to the formal rules of conduct formulated by legislation and regulation. It is therefore relatively easy for a court to find that such a person is no longer 'fit and proper' without investigating such a person's foundational ethical and moral standards or so-called 'conscience' or 'moral compass'.

Van Zyl and Visser: The metaphorical moral compass

According to Van Zyl and Visser, being fit and proper is the cornerstone upon which entry to the legal practice rests. They state that, since there is no legislative or regulatory framework that describe what it is to be fit and proper, the professional codes of conduct could be an external source to determine the meaning of the concept. Apart from these external sources, they emphasise the importance of a person's own moral compass as an internal source to determine fitness and propriety.[70]

This metaphorical moral compass is described by Van Zyl and Visser as the ability of lawyers or law students to judge or decide what is right and wrong and then to act according to their judgment or decision, knowing that they should be able to defend it.[71] This notion implicates that legal practitioners are not only required to *conduct*

68 Geldenhuys & Stoop 2017:470.
69 See Chapter 4.3.4, about the reimagining of the necessary knowledge, competencies, and values of a legal professional.
70 Van Zyl & Visser 2016:8.
71 Van Zyl & Visser 2016:2.

themselves in accordance with the formal rules but also expected to be able to distinguish between right and wrong in the circumstances and act out of the courage of this conviction guided by their moral compass. They further explain that 'virtues aid a person in deciding between right and wrong and that it is imperative that one should *develop* virtues, as they will contribute to rendering one a fit and proper person'.[72] The virtues they identify as 'cardinal' are wisdom, fortitude, temperance and justice and they trace the importance of these virtues back to the writers of the classical period.[73]

Although these virtues can be described as objective because they can be identified and are shared, it has a subjective component because personal experience and own worldviews eventually inform a person's moral compass and personal virtues can only be assessed with reference thereto.[74]

Van Zyl and Visser recommend that the moral compass should not be seen as an idealistic ambition but rather as a useful tool for law students and lecturers who are faced with the reality of 'an increasing lack of moral fibre in the legal profession and society at large'.[75] They concede, however, that students from diverse backgrounds will have different worldviews which will necessarily impact on their virtues and therefore their moral compasses. They suggest that, in light of this diversity of beliefs, the lecturer might be prudent to facilitate discussions and debates that would expose students to the diversity of beliefs and an opportunity to cultivate respect for other persons' opinions.

Even though Van Zyl and Visser make a proper contribution to the argument that the 'fit and proper' concept is not determined but rather determinable with reference to specific circumstances and due respect for different beliefs and values, they fall short by insisting that the moral compass is not aspirational.

The moral compass and complicity

It can be concluded from the opinions of the different legal scholars above that 'fit and proper' is more than mere knowledge of laws and compliance therewith. In order to be

72 Van Zyl & Visser 2016:8 (emphasis added to quotation).
73 Van Zyl & Visser 2016:9.
74 Van Zyl & Visser 2016:9, 14.
75 Van Zyl & Visser 2016:14.

guided by a person's moral compass, thoughtfulness, self-consciousness and a sense of personal responsibility are required.

Sanders' notion of complicity considered in Chapter 2 reminds of a type of moral compass, understood to be guided by thoughtfulness, self-consciousness and a sense of responsibility.[76] Sanders notes that:[77]

> Whether stemming from the awareness of the "technician of practical knowledge" or from a mindfulness of the ambiguities of oppositional political commitment, or from a sense of what barriers need to be overcome simply to enter intellectual life, twentieth-century thinking finds complicity at the heart of what it is to be an intellectual. *Complicity breeds a watchfulness*. When the intellectual realizes that thinking and knowing demand not only a fidelity to truth, but also a consideration of social consequences, there is a sharpening of ethical responsibility. A resultant tendency in reflection about intellectuals has been to set the intellectual against the very faculty which defines him or her as an intellectual. According to the standard account, being a figure of ethico-political responsibility, the intellectual is a public actor, an agent of the will. In order to assume responsibility, the intellectual must eschew any intellectualism. When disinterest conceals undeclared interest, this may be a necessary avoidance. Yet, if the work of the intellect is what defines the intellectual, it can also be a betrayal.

This quotation from Sanders on complicity is exactly applicable to the legal professional where the awareness would mainly stem from the 'technician of practical knowledge'. In a South African context where legal professionals either benefitted from or were marginalised due to segregation and discrimination practices, the awareness could also originate from a mindfulness of the ambiguities of oppositional political commitment and the impulse to dissociate from established privilege or from a sense of what barriers need to be overcome to enter intellectual life.

Whereas Van Zyl and Visser regard the moral compass as a synonym for conscience, which is a person's moral sense of right and wrong, or at least the ability to distinguish between right and wrong, act in accordance and defend such judgment, the notion of complicity still adds to this.[78] The reimagining of 'fit and proper' and what a moral compass or professional responsibility should entail is further reflected on in Chapter 4.

Conclusionary note on the opinions of legal scholars considered

The different opinions of legal scholars considered above can be summarised as follows: The 'fit and proper' requirement for admission to the legal profession entails

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76 Sanders 1998:5-12. See Chapter 2.7.
77 Sanders 1998:21 (references omitted, emphasis added).
78 Van Zyl & Visser 2016:8.

honesty and personal integrity; this is an important requirement and serves to protect the public interest; the interpretation of this requirement has changed over time and is now aligned with the values and objectives of the *Constitution*; the legitimacy of the legal system is dependent on the commitment of legal professionals to uphold such values. Although these viewpoints cannot be faulted, it is proposed that the understanding of the content and meaning of knowledge, skills and values that constitutes 'fit and proper' is very superficial and is still being interpreted by the courts in a formalist and positivist manner as result of a mainly unchanged formalist legal culture. This point is illustrated by the discussion of some of the later judgments (after 1994) in the subsection below. The question remains how these ethical values or rehabilitation thereof, even if interpreted in line with the *Constitution*, can be established and if an accurate inference can always be made of persons' values by assessing their conduct and/or compliance with the rules of conduct.

In my opinion, a more foundational understanding is required of the content and meaning of the knowledge, competencies and values expected of a legal professional that would inform the standard of 'fit and proper'. This is considered in Chapter 4, which attempts to illustrate the importance of reimagining the 'fit and proper' person.

3.5 Interpretation of 'fit and proper' by South African courts

Background to the analysis of case law

The different judgments considered in this subsection were deliberately selected from many judgments related to the inquiry into whether a person is 'fit and proper' to be admitted to, readmitted or continue practice as a legal practitioner. The selection of judgments ranges over the period from 1900 until 2022 and includes matters relating to both advocates and attorneys. The different grounds for the applications for their removal from the roll or opposition against admission thereto also vary significantly and ranges from matters related to dishonesty, theft and incompetence to non-adherence to laws for political reasons.

My intention with the consideration of different judgments over this period is to determine whether the meaning of 'fit and proper' is or has ever been clear or determinable and consistently applied in different circumstances and over time. This

also links to the notion in Chapter 2.2 that the law and the lawyer grow together over time, while being influenced by different political and religious contexts.

The only clear guideline that I establish below is that the courts are generally, and have always been, consistent in finding that a person is not or is no longer suited for legal practice in matters where dishonesty, fraud or theft have led to the detriment of a client. What is in the public interest is described and defined by the courts in more certain terms in matters where there had been a monetary loss than in any of the other transgressions considered. Misappropriation of trust funds, overcharging of clients, defrauding clients and not managing client's funds appropriately also constitute transgressions of the professional Code of Conduct. It seems as if the courts are generally more comfortable with removing or suspending a person from the roll for such transgressions that also constitute a contravention of the professional Code of Conduct.

An inquiry that is not made by the courts and apparent from the discussion of cases below, is how it happens that someone who was considered 'fit and proper' upon admission to legal practice, can later be found to no longer being 'fit and proper'. This relates to the question raised in subsection 3.2 above that, if 'fit and proper' means that a person maintains both high professional standards and ethical values upon admission to the practice, such values are expected to become even more embedded over time. Therefore, non-compliance with the professional Code of Conduct should not be a concern, unless it is argued that a person could have high professional standards and ethical values and during their time in practice somehow lose these qualities.[79]

The argument can be made that it is probably be more accurate to accept that it is not actually possible to ascertain whether a person is inherently ethical and likely to maintain high professional standards and ethical values as a legal practitioner upon admission to legal practice. It is my contention that the question is further complicated by the fact that ethical values of a person do not necessarily equate to their conduct or compliance with a professional Code of Conduct. The argument that I pursue further

[79] See 3.2 above, relating to the conundrum created by the current legislative requirement. Slabbert (2011:209) questions the practice of labelling a person as being 'fit and proper' and whether it does not rather create a false warranty to the public that such a person will act ethically, while it is known that professionals who have once been described as 'fit and proper' do not always act in such manner.

in Chapter 4 is that a person, upon admission, would only have attained foundational knowledge, competencies and values necessary for legal practice and that these will gradually develop over time.

Another conclusion from the discussion below is that there are very little matters of opposition against the application for admission to practice in relation to the applications for the removal or suspension from the roll. This relates closely to the argument above that it is very difficult, if not impossible to actually establish whether a person is 'fit and proper' and therefore possess the necessary ethical values for legal practice. Not only because there is no clear measure for establishing a person's personal and professional ethics but also because, as stated above, it is a gradual process of attainment which requires dedication and continuous reflection and reconsideration. This conclusion is also in line with the opinion of Geldenhuys and Stoop referred to in subsection 3.3 that continuous ethical realignment is necessary to ensure that the legal virtues that make a person 'fit and proper' are maintained throughout a practitioner's career. They importantly remark that there are different ways in which the legal professional is failing the public and that their fiduciary duty to perform their professional obligations involves more than ethical handling of trust funds.[80]

One of my conclusions from the case law considered, which is further elaborated on in Chapter 4 below, is that what is considered 'fit and proper' should relate to a person's knowledge, skills and values because these concepts are not separate but integrated and integral to a professional's capacity to serve the public with care. If this is not the understanding of what it entails to be 'fit and proper', it would result in paradoxical judgments such as *Jiba and another v General Council of the Bar of SA, as well as Mrwebi v General Council of the Bar of SA*[81] discussed in subsection 3.4.12. In its majority judgment, the Supreme Court of Appeal found that, notwithstanding misconduct by the practitioner, he did not personally gain anything from his actions and therefore his misconduct could rather be attributed to his incompetence or naivety than his honesty and lack thereof. The court stated that the principle and main consideration was the protection of the public and not to punish the particular

80 Geldenhuys & Stoop 2017:467. See par. 3.3.

81 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA).

individual.[82] In my opinion, this is illogical since incompetence could potentially lead to as much harm to the public than a practitioner's dishonesty.

I am opposed to the idea that only dishonesty that results in personal gain would render a person unsuitable for practice. I insist that the public has a much broader interest in the manner of practice by legal professionals. Legal professionals' thinking and interpretation of the law, the development of the law, transformation of the law, competent representation, social justice and access to justice are what the legal profession is entrusted with. Being honest and acting in the client's interest instead of their own, only constitutes the bare minimum of what is required. Being or becoming 'fit and proper' entails or should entail much more than not making oneself guilty of a crime related to dishonesty.

A final conclusion drawn from the consideration of the judgments below is that the courts have consistently failed to draw a distinction between conduct which constitutes non-compliance with a law or the professional Code of Conduct and ethical values in its consideration of what constitutes 'fit and proper'. My critique of applying 'fit and proper' as a legal rule or standard is considered more carefully in Chapter 4, but my inference from the consideration of case law is that the definite distinction made by the courts between the facts and legal interpretation indicates the formalist and positivist manner in which the concept of 'fit and proper' has traditionally been dealt with.

The selected judgments considered below follow the chronological timeline consistent with the historical theme in Chapter 2 and the notion that the law and lawyer grow together over time.

3.5.1 *Incorporated Law Society v Vermooten* 1900 17 SC 312

The respondent, an attorney and notary public, had been found guilty on a charge of high treason and sentenced to four years' imprisonment. The Law Society applied to the court for the respondent's suspension because, on his admission he took the oath of allegiance, and he violated that oath with his conviction of high treason. The Law Society argued that he could not plead ignorance or inexperience, as he was a man who had studied the law and passed examinations in law. It was not a case of a

[82] *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):634.

presumed knowledge of the law, but one of actual knowledge. The court found that, '[a]s an attorney he took the oath of allegiance to Her Majesty the Queen, yet *in spite of his knowledge of the law, and in spite of his oath of allegiance*, taken in open Court, to be a loyal subject of Her Majesty, he violated his solemn obligation'.[83] Buchanan J ordered that the respondent be suspended from practice as an attorney and notary public until a further order, and the respondent had to hand up his certificate of admission to the Registrar of the Supreme Court.[84]

3.5.2 *Zeiler v Incorporated Law Society* 1902 TS 24

In this matter the applicant had on two separate occasions been struck from the roll by the High Court for embezzlement and professional misconduct. The court held that it was not bound to uphold a previous decision for him to be reinstated and that it was entitled, in terms of the Administration of Justice Proclamation, to exercise its own discretion on whether the applicant was 'fit and proper' to be so admitted.[85]

Innes J found that he was 'quite unable to come to the conclusion that this Court would be properly exercising the discretion vested in it if it allowed the applicant to be admitted to practise before it. So far as I am aware, it is an unprecedented case that an attorney should have his name struck off on two separate occasions for gross professional misconduct. And I think that a man who has thus been dealt with should not be placed on the roll of practitioners of this Court *whether we consider the interests of the public*, or the *feelings and status of those who would be his fellow-practitioners*.'[86]

Solomon J concurred with the decision by Innes J and said that the question was whether the applicant was a 'fit and proper' person to be a member of an honourable profession. He stated that, 'while having no desire to be unduly severe on a delinquent, *they had to protect the public, the suitors of the Court, and the members of the profession*'. Under the circumstances, he did not think they would be justified in coming

83 *Incorporated Law Society v Vermooten* 1900 17 SC 312:313 (emphasis added).
84 *Incorporated Law Society v Vermooten* 1900 17 SC 312:313. Maasdorp and Solomon JJ concurred.
85 *Zeiler v Incorporated Law Society* 1902 TS 24:27.
86 *Zeiler v Incorporated Law Society* 1902 TS 24:29-30 (footnotes omitted; emphasis added).

to the conclusion that the applicant was a 'fit and proper' person to be placed on the roll of attorneys.[87]

3.5.3 *Ex parte Krause* 1905 TS 221

In this matter, Krause, an English barrister and advocate of the Supreme Court of the Cape Colony and of the High Court, was convicted in England for an attempt to solicit to commit a crime of murder in respect of a person resident in the Transvaal. At the time of the conviction, Krause was a citizen of South Africa on parole in England and the person whose murder was contemplated, a British subject in the Transvaal. This conviction resulted in Krause being disbarred by the Benchers of his Inn in England. After expiration of this sentence, he returned to South Africa and resumed practice as an advocate in the Cape Colony. In this application he applied for admission as an advocate of the Supreme Court of the Transvaal on the ground that he was a practicing advocate of the High Court as well as the Supreme Court of the Cape Colony and that he has never been disbarred in either of the courts.[88]

Interestingly, this application was heard by the same judges as in the matter of *Zeiler v Incorporated Law Society,*[89] namely Innes, Solomon and Mason JJ.

The court granted the applicant's application based on the reasons that a criminal conviction does not *ipso facto* disqualify a person from admission to the Bar or the Side-Bar and, that the offence was of a political nature and was not committed with the intention of personal gain or revenge.[90]

Attention is drawn to the final part of Mason J's judgment which interestingly reads as follows:[91]

> But is a single act of that kind sufficient to justify the Court in saying that an individual who has been guilty of such an act is of such personal unfitness that he cannot be trusted, that he cannot be expected to act honourably? To do that would be acting contrary to what we know of human nature and what we have seen exemplified in the past. In this case there is no question of personal profit, no question of private ends; the whole intention of the applicant's act was for the benefit of his country and for what he thought was a right, proper and honourable purpose. Under these circumstances, having regard to the fact that so far as the applicant is concerned outside this circumstance every testimony is favourable to him, it would be wrong of the Court to say that we believe his character to be so untrustworthy that he could not be admitted as a member of its

87 *Zeiler v Incorporated Law Society* 1902 TS 24:30 (footnotes omitted; emphasis added).
88 *Ex parte Krause* 1905 TS 221:221.
89 *Zeiler v Incorporated Law Society* 1902 TS 24.
90 *Ex parte Krause* 1905 TS 221:221.
91 *Ex parte Krause* 1905 TS 221:234.

> Bar. So far as his personal fitness is concerned, there is nothing to show that he is not a fit and proper member of the honourable profession to which he has belonged in England before, to which he belongs at present in Cape Colony, and to which he is admitted on the Continent. I say on the ground of his personal fitness there seems to be absolutely no reason why he should not be admitted; the responsibility for admitting him must rest upon us, and I am prepared to take my share of this responsibility.

All three judges agreed that conspiring to commit a murder did not necessarily render him unsuitable for admission to the Bar. The fact that he had not committed the offence in self-interest, seemed to be of crucial importance in reaching their final decision. The applicant, even though still on parole at the time of his application, was admitted by the court as a member of the Bar of the High Court of Transvaal.

3.5.4 *Incorporated Law Society v Vrolik* 1918 TPD 366

This was an application by the Incorporated Law Society to have the respondent's name removed from the roll of attorneys, notaries, conveyancers and sworn translators on the ground that he had been convicted of a contravention of an ordinance by selling liquor to 'a native'. He had been sentenced to six months' imprisonment with hard labour and was serving his sentence at the time of the application. The notice of application had been served on him but there was no appearance on his behalf.[92] One can only wonder whether it was actually possible for him to arrange appearance or to appear in person while being incarcerated at the time. Bristow J made the following judgment, with Curlewis and Gregorowski JJ concurring:[93]

> *The fact that a person has been convicted of a crime is not necessarily conclusive that the Court should strike him off the roll of attorneys*. The question the Court has to consider is *whether the respondent is a proper person to be an attorney*. This *crime is of a very disgraceful character* and is one, a conviction for which must certainly show prima facie that he is not entitled to be on the roll of attorneys. The respondent has been served with notice, but he does not appear, and we must assume therefore that there is nothing to be said in his favour. He also, in addition to being an attorney, is a notary public and conveyancer, and a sworn translator. In all these offices he is admitted by the Court, and I think the Law Society is quite justified in bringing his conduct as regards all these capacities to the notice of this Court. An order will therefore be made striking the respondent off the roll of attorneys and also off the roll of notaries and conveyancers and sworn translators, with costs.

It is interesting to note that, even though the court found that a crime is not necessarily conclusive that the court would strike him off the role and that the question must be

92 *Incorporated Law Society v Vrolik* 1918 TPD 366:366.
93 *Incorporated Law Society v Vrolik* 1918 TPD 366:366 (footnotes omitted; emphasis added).

considered whether he is a proper person to be an attorney, the court does not then actually consider this question. The court found that the crime of selling liquor to 'a native' was disgraceful and *prima facie* proof that the person was not entitled to be on the roll, without setting out its reasons for the finding. It would appear that, even though it had been established by then that non-compliance with legislation, which constituted a crime, would not necessarily result in a removal from the roll, the court only noted it without actually considering why this crime would render the person unsuitable to remain on the roll. It also appears unusual for the court to grant costs in favour of the applicant when there was no opposition or appearance by the respondent.

3.5.5 *Lambert v Incorporated Law Society* 1910 TS 77

This was an application for reinstatement as an attorney. He had been struck off the roll after being convicted on two charges of fraudulent dealing with trust money. Innes J found that, even though he felt a certain amount of sympathy for him, he was not prepared to find that they would be doing their duty to the profession and the public by restoring him to the roll. He was not prepared to say that there could not be real reform but, in his opinion, a long period of time had to lapse before they could consider such requests.[94]

3.5.6 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T)

In 1954, the Incorporated Law Society brought an application to the Transvaal Provincial Division of the High Court of South Africa for a removal of the name of the respondent from the roll of attorneys of that court. The application was based on two grounds: That the respondent had committed acts which constituted a contravention of the *Suppression of Communism Act*,[95] as a result of which he had been convicted and sentenced to imprisonment with hard labour for nine months (suspended for two years) and; that he, at a meeting held on 25 May 1952, had uttered words with the intent to promote a feeling of hostility between natives and Europeans and therefore committed an offence in terms of the *Black Administration Act*.[96] The applicant later abandoned the second ground.[97]

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94 *Lambert v Incorporated Law Society* 1910 TS 77:79-81. Mason and Curlewis JJ concurred.
95 *Suppression of Communism Act 44/1950.*
96 *Black Administration Act* 38/1927.
97 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):174-175.

The offence of which the respondent had been convicted was that of contravening the *Suppression of Communism Act*,[98] sec. 11(b), which provided that 'any person who advocates, advises, defends or encourages the achievement of any such object (i.e., one of the objects of communism) or any act or omission which is calculated to further the achievement of any such object' shall be guilty of an offence.[99]

In his judgment, Ramsbottom J pointed out that the respondent was not alleged to have committed any act calculated to assist in the propagation of communism or communist doctrine as generally understood, but that he was charged with encouraging a scheme which aimed at bringing about certain social and political changes such as the repeal of the pass laws, the laws which enforced the segregation of the races, and the laws which restricted non-European franchise, by the unlawful means of disobedience to certain laws. That was the offence of which he had been convicted.[100]

The evidence that was placed before the court as to what the respondent had done in committing the offence was as follows: In July 1951, a joint conference was held of the National Executives of the African National Congress, the South African Indian Congress, and representatives of the Franchise Action Council (Cape). The conference resolved:[101]

(1) To declare war on Pass Laws and Stock Limitation, the Group Areas Act, and the Voters' Representation Act, the Suppression of Communism Act, and the Bantu Authorities Act.

(2) to embark upon an immediate mass campaign for the repeal of these oppressive laws.

(3) to establish a Joint Planning Council to co-ordinate the efforts of the National Organisations of the African, Indian and Coloured peoples in this mass campaign.

A planning council had been appointed in November 1951 and this council issued a report and recommended a 'plan of action' by which the resolutions of the conference had to be carried into effect. The planning council recommended that 'the forms of struggle for obtaining the repeal of unjust laws which had to be considered were (a) defiance of unjust laws and (b) industrial action'.[102]

98 *Suppression of Communism Act* 44/1950.
99 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):175.
100 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):176.
101 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):176.
102 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):176.

The planning council expressed the opinion that 'lawful industrial action' was not to be resorted to until a later stage and confined its recommendations to a plan for the 'defiance of unjust laws'. The purpose of the plan and the plan of action recommended were set out in the following extracts from the report:[103]

> 7. In dealing with the two forms of struggle mentioned in paragraph six, we feel it necessary to reiterate the following fundamental principle which is the kernel of our struggle for freedom.
>
> We believe that without its realisation race hatred and bitterness cannot be eliminated and the overwhelming majority of the people cannot find a firm foundation for progress and happiness.
>
> It is to be noted, however, that the present campaign of defiance of unjust laws is only directed for the purposes of securing the repeal of those unjust laws mentioned in the resolution of the Joint Conference.
>
> > All people irrespective of the National groups they may belong to, and irrespective of the colour of their skin, who have made South Africa their home, and who believe in the principles of democracy and the equality of man are South Africans. All South Africans are entitled to live a full and free life on the basis of the fullest equality. Full democratic rights with a direct say in the affairs of the Government are the inalienable right of every South African – a right which must be realised in the lifetime of the present generation if South Africa is to be saved from social chaos and tyranny and from the evils arising out of the existing denial of franchise to vast masses of the population on the grounds of race and colour. The struggle which the National organisations of the non-European people are conducting is not directed against any race or National group. It is against the unjust laws which keep in perpetual subjection and misery vast sections of the population. It is for the transformation of conditions which will restore human dignity, equality and freedom to every South African.
>
> 8. Plan of Action. We recommend that the form of struggle for securing the repeal of unjust laws (should be) by Defiance of Unjust Laws based on Non-cooperation. Defiance of unjust laws should take the form of committing breaches of certain selected laws and regulations which are undemocratic, unjust, racially discriminatory and repugnant to the natural rights of man. Rather than submit to the unjust laws we should defy them deliberately and in an organised manner and be prepared to bear the penalties thereof.
>
> The struggle of the Defiance of Unjust Laws should be planned into three stages—although the timing would to a large extent depend on the progress, development and the outcome of the previous stage.

It was not suggested during the trial that the respondent had been a member of this planning council, but it was alleged that he had been present at the conference of the African National Congress (ANC) when the report was presented and adopted and that he took an active part in giving effect to the recommendations afterwards. The respondent did not deny this allegation.[104]

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103 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):176.

104 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):177-178.

It was argued on behalf of the Law Society (the applicant) that the respondent's contravention had been deliberate and with full knowledge of what Parliament had forbidden. It was further argued that respect for the law was required from attorneys and that his deliberate disobedience of the law was an indication that he was unfit to be allowed to practice as an attorney of that Court.[105]

Ramsbottom J referred to the principle applied in *Ex parte Krause*[106] and stated that, while he thought that an attorney may be expected to observe the laws more strictly than other persons, the fact that an attorney had deliberately disobeyed the law, did not necessarily disqualify him from practising his profession or justified the Court in removing his name from the roll. It had to be understood that the purpose of striking off the roll or suspending an attorney who had been convicted of a crime was not to punish him for the offence for which he had already been sentenced. It was found that the sole question that the court had to decide was whether the facts which had been put before them and on which the respondent had been convicted, showed him to be of such character that he was not worthy to remain in the ranks of an honourable profession. The judge stated that:[107]

> To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But his offence was not of a "personally disgraceful character", and there is nothing in his conduct which, in my judgment, renders him unfit to be an attorney.

Upon the applicant's contention that the test whether the court had to take disciplinary action against the respondent was whether the conduct was a 'matter of indifference to the court', the court found that it was not the test and that the respondent's conduct had already been punished by the court and therefore was not a matter of indifference.[108]

105 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):178.
106 *Ex parte Krause* 1905 TS 221.
107 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):178-179.
108 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):179

Ramsbottom J made it clear throughout his judgment that, although the respondent's transgression had been wrong and was considered to be a serious offence, the current hearing was not about the offence but rather the impact it had on his ability and suitability to remain a member of the profession. He therefore denied the validity of the applicant's arguments that the court had to take disciplinary action due to the respondent's failure to express regret for what he had done or to order the respondent to pay costs of the application in order to mark its disapproval. He consequently dismissed the application with no order as to costs, and Roper J concurred.[109]

This judgment is significant because the court was not willing to accept that even deliberate transgression of the laws at the time constituted sufficient reason to find that a person was no longer fit for the legal profession. The judge acknowledged, albeit not expressly, that even though the respondent's conduct might have been unlawful, it had not been unethical when he stated that the offence was not of a 'personally disgraceful character', and there was nothing in his conduct which rendered him unfit to be an attorney.[110]

Mandela eventually practiced until 1961, when he informed the Law Society that he would no longer practice as an attorney.[111] According to the records of the Incorporated Law Society of the Transvaal, Mandela was admitted as an attorney in March 1951. When he commenced with his articles in 1946, there were only eighteen qualified African lawyers in South Africa.[112] In 1952, Mandela informed the Law Society that he started to practice for his own account and by the time that he advised them that he was in partnership with Oliver Tambo in 1953, it was the first black law partnership firm in South Africa, called Mandela and Tambo Attorneys. Even though he completed his LLB degree through Unisa while incarcerated on Robben Island, he never practiced law again after 1961.[113]

In the legal hearing of the TRC, the Association of Law Societies (ALS) tried to suggest that it was merely following the law of the land in bringing the application for Mandela's

109 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):179-180.
110 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):179.
111 Gerber, 'Mandela the lawyer', https://www.lawyer.co.za/Mandela.html#mandela (accessed on 18 December 2021).
112 Gerber, 'Mandela the lawyer', https://www.lawyer.co.za/Mandela.html#mandela (accessed on 18 December 2021).
113 Gerber, 'Mandela the lawyer', https://www.lawyer.co.za/Mandela.html#mandela (accessed on 18 December 2021).

removal.[114] In their submission to the TRC, the ALS stated that the lesson they had learnt from the court's judgment was that members were not bound to slavishly follow the laws of parliament and that a breach of a law did not necessarily constitute a violation of the sworn allegiance to the profession. They also quoted from an English judgment in their submission on how the conflict between the law of the land and the moral imperative should be approached and came to the conclusion that Mandela, in disobeying a law that he believed to be unjust, may have demonstrated one of the few instances where a moral imperative is truly just and justifiable.[115] Dyzenhaus, in his commentary on the legal hearing of the TRC and in consideration of the struggle of memory, notes that even in 1997 the ALS could not bring itself to admit that the law was indeed unjust. During the hearing the legal officer, Hanif Vally, pertinently indicated that the problem was not so much the attorneys' slavish following of the apartheid law but rather the fact that, without any legal duty at stake, the ALS initiated their own campaign in harassing components of apartheid.[116]

Nelson Rolihlahla Mandela passed away on 5 December 2013 at the age of 95. The following day the Law Society of South Africa ironically issued the following statement:[117]

> To the world he was an icon, to his family and our nation, a father, but to the attorneys' profession he was the embodiment of the principles that all in the profession aspire to; reconciliation, social justice and respect for the values enshrined in the Bill of Rights.
>
> As a profession we are honoured that Mr Mandela chose to serve in our ranks. He, along with Oliver Tambo, opened the first black attorneys' firm in the country, providing hope and dignity to a people given to despair, leading the way for our current generation of attorneys.

A clear sign that they had lost the struggle of the memory they continued to forget.

3.5.7 *Matthews v Cape Law Society* 1956 2 All SA 138 (C)

The applicant in this matter was the son of Professor ZK Matthews. He had obtained a Bachelor of Arts (BA) degree and requested to obtain a certificate of character from the Law Society of Cape Town in order for him to register his articles of clerkship with Spilken, an attorney from Port Elizabeth.[118] The Cape Law Society, the respondent in

114 Dyzenhaus 1998:113.
115 Dyzenhaus 1998:113.
116 Dyzenhaus 1998:113.
117 Gerber, 'Mandela the lawyer', https://www.lawyer.co.za/Mandela.html#mandela (accessed on 18 December 2021).
118 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):139.

this matter, advised his employer that they were not satisfied that he was 'fit and proper' to enter into articles of clerkship. The applicant's father had been the president and executive member of the ANC and he had been a member of the ANC Youth League and National Secretary until he was banned from office and membership of the ANC and the Youth League by the Minister of Justice in 1953. Prior to this, he was convicted for contravening the provisions of the *Suppression of Communism Act*,[119] alongside Nelson Mandela and thirteen others. They admitted to carrying out the scheme of defiance as was outlined in the report of the Joint Planning Council. The applicant was found guilty and sentenced to nine months compulsory labour which was suspended for three years.[120]

The applicant required the court to compel the respondent to register his articles of clerkship. His application relied almost solely upon the case of *Incorporated Law Society, Transvaal v Mandela*[121] in which the Law Society's application for the removal of Mandela from the roll of attorneys, based on exactly the same offence, had not been successful. The applicant submitted that the offence for which he had been convicted was not of a disgraceful character and maintained that his conduct had neither been unworthy nor unprofessional and that it had therefore not to be regarded as rendering him unfit for eventual admission as an attorney of the Court.[122]

JJ Theron, president of the Law Society, stated in his affidavit that they had considered all the circumstances and came to the conclusion that:[123]

> (a)
> Applicant desires to be articled with a view to becoming an attorney, i.e., an officer of this Honourable Court.
>
> (b)
> It is the duty of officers of the Court to assist in the administration of justice and particularly to respect and submit to such laws as are enacted by the Legislature until they are changed by constitutional means.
>
> (c)
> While the Council readily concedes that the commission by an attorney of some criminal offences does not call for disciplinary action, the gravamen of the charges upon which applicant was convicted was that *he, a well-educated man, took an active part in a campaign which urged a generally uneducated and unenlightened section of the population to defy certain established laws of the country.*

119 *Suppression of Communism Act* 44/1950.
120 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):139-140.
121 *Incorporated Law Society, Transvaal v Mandela* 1954 (3) S.A. 102 (T). See 3.4.6.
122 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):141.
123 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):141 (footnotes omitted; emphasis added).

(d)
The Council considers that there is a most substantial difference as far as an attorney is concerned in himself breaking a law and in his actively encouraging others to do so. It respectfully submits that the latter conduct is a direct negation of an attorney's duties as set out in clause (b) above, particularly because if obedience to the law or otherwise is to be regarded as a matter of personal discretion vested in the citizen, then the creation of chaos would be inevitable.

The court then found that the main issue in the application was whether the court took the same view as that expressed by Ramsbottom J, with the concurrence of Roper J and after full consideration of the facts and findings of that case, came to the conclusion that they were unable to share his views.[124]

The court found that the essence of the matter in so far as it related to a practising attorney was that, if he wished to remain on the roll he had to always be mindful of his obligations as an officer of the court. He further needed to conduct himself in a manner that there could be no question of his abusing the privileges accorded to him upon his admission to the ranks of his profession by either himself deliberately contravening existing laws, and even more so by inciting *others less enlightened than himself* to do likewise. The court then came to the conclusion that a too narrow criteria had been applied in the Mandela case.[125]

After having found that it did not agree with the court's judgment in the Mandela case and that he, in essence, believed that Mandela should have been found not fit to continue practice, De Villiers JP considered the particular circumstances of the applicant which were very similar but not exactly the same as Mandela's.[126] Although the applicant had been found guilty and convicted of the same offence, he found that, while Mandela had already been an attorney when he committed these offences, the applicant entered the legal profession 'long after he had indulged in the unlawful acts'.[127] He had been banned from the office of the national president of the Youth League and from attending gatherings by April 1953, and therefore ceased all active political work when he entered his employer's practice to serve his articles of clerkship in June 1953.[128] De Villiers JP stated that he did not think that the Court should assume

124 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):143.
125 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):144.
126 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):145.
127 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):145.
128 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):145.

against the applicant that he would repeat that sort of conduct in the future and reached the following bizarre conclusion with which Ogilvie Thompson J concurred:[129]

> While this Court cannot but deplore applicant's conduct in having participated in a campaign of calculated defiance of the law, we must at the same time give due weight to the circumstances that in the instant case we are dealing with conduct committed against a political background prior to applicant having any connection whatever with the profession of an attorney.
>
> As regards costs, although the applicant has succeeded, this Court has upheld the main contention advanced by respondent Society in regard to the decision in *Mandela's* case, *supra.* In the circumstances there will be no order as to costs.

In this judgment the court condemned the applicant's conduct as it came to the conclusion that the Transvaal Provincial Division had erred when finding that the same conduct did not have an impact on Mandela's suitability to remain a member of the legal profession. The court nevertheless made the finding that, because he had at that time been banned from office and gatherings of the ANC, it could not find that he would likely commit the same offence again and was therefore willing to accept that he was 'fit and proper' to be registered as an article clerk. What is curious about this finding is that the court seemed to be of the opinion that a person who was previously not 'fit and proper' due to his membership of an organisation which had orchestrated deliberate defiance of legislation which they deemed unfair, could later be 'fit and proper' when he was banned from membership and gatherings of such organisation.

Unlike Ramsbottom J, De Villiers J did not attempt to describe ethical behaviour that was intended with the 'fit and proper' requirement, but was satisfied that an attorney who deliberately defied existing laws and incited others to do so, was not to be allowed to remain on the roll of attorneys. De Villiers J also criticised the decision of Ramsbottom J that the illegal act of which Mandela had been found guilty, did not reflect on his personal honour.[130] It is strange that he seems to argue that the illegal conduct of which Mandela and Matthews had been found guilty indeed reflected upon their personal honour,[131] but was of the opinion that, if the behaviour ceased, at least Matthews' honour would be restored to the extent that he could then be admitted to the legal profession. According to this argument, ethics, or personal honour, of a person is therefore not inherent to a person, but fluctuating, and can be determined by assessment of the person's conduct, particularly the person's compliance (or

129 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):146.
130 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):144.
131 *Matthews v Cape Law Society* 1956 2 All SA 138 (C):144.

expected compliance) with laws. This argument is in direct conflict with the assessment of Ramsbottom J that unlawful conduct does not necessarily constitute unethical conduct.[132] I am of the opinion that Ramsbottom's judgment cannot be faulted in this regard. Whereas it is ideal that compliance with laws be aligned with what is considered ethical, this is not always the case. The proposal is that ethical conduct rather entails a continued personal commitment to build personal and individual morality wherein the notions of thinking and self-reflection, and of choice and personal responsibility becomes a reality. Thoughtless compliance with laws is as likely to result in evil than justice and can therefore not be equated to ethical conduct.[133]

In his foreword of the book by Ben Maclennan, *Apartheid, the lighter side*, Athol Fugard writes:[134]

> Because surely, nowhere in the world today – and I am sure that it is equally true of the past – has there ever been a society where the dominant political philosophy, aided and abetted by the dominant Christian theology, has led seemingly rational men and women into mind-boggling and logic-defying lunacies – and what makes it even more astounding is the all-pervasive nature of this madness. There is not an area of our lives from the most private to the most public, that has not been affected by it.

From the above it would appear that the courts have not escaped it either.

3.5.8 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T)

This was an application by the Pretoria Bar Council for the removal of Beyers, the respondent, from the roll of advocates due to his non-compliance of the Bar Council's rules of conduct.[135]

The Bar Council's rules of conduct stipulated that an advocate could not undertake any litigation without the intervention of an attorney and were not entitled to conduct interviews with members of the public without the intervention of an attorney, except in exceptional cases, which was not the case here. This contravention included the manner in which security had been claimed and taken, which in the Court's opinion, was extremely indecent. In addition, it seemed that the fee set was excessive, even

132 *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T):179.
133 See also Chapter 2.6.
134 Maclennan 1990:6 (foreword by Athol Fugard).
135 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):272.

taking into account that the respondent claimed that it had been expected to be a lengthy and complicated case.[136]

The second complaint against the respondent was that he had his own office used as the address where documents for the client could be served. De Wet JP stated that it was extremely inappropriate for an advocate to use his office for such purposes and that, in addition, it was also an interference with the function of an advocate.[137]

The third complaint stemmed from certain newspaper reports, which showed that the respondent had acted as legal adviser to a certain miners' action committee. He had addressed large numbers of miners in public and he allowed photos to be taken of himself with members of this committee. These photos even included one that was taken on the occasion of a meeting in his own home. The photos had appeared in various newspapers and the main complaint was that in this regard he sought publicity for himself, which was inappropriate for an advocate. In addition, De Wet JP said that it seemed to him that the respondent's entire behaviour, by associating himself in public with certain disgruntled miners, was degrading to the status of an advocate.[138]

From a statement by a lady that had worked in his office, it was clear that he had attempted to thwart the investigation by the Bar Council and by the Court.[139]

De Wet JP found that, based on the advocate's failure to comply with the Bar Council's rules of conduct and his attempt to frustrate the investigation by the Bar Council and the Court, he was evidently not a 'fit and proper' person to be allowed further membership to the Bar Council. It was ordered that his name be removed from the roll of advocates and that he had to pay the cost of the application, which included both councils who appeared on behalf of the applicant. Claassen J and Hill J concurred.[140]

This is an example of many similar cases in which the court did not conduct any investigation into the meaning of 'fit and proper' and whether the advocate's transgression of the rules actually constituted unethical behaviour. It was probably not deemed necessary because at that time, and to a certain degree still today, the advocate had made himself guilty of misconduct that could not be reconciled with the

136 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):274.
137 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):274.
138 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):274.
139 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):275.
140 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):275. Claassen J and Hill J concurred.

practice of an advocate. Although the position has now changed with the enactment of the LPA, it was at the time considered improper to take instructions directly from a client without involvement by an instructing attorney. There had also been allegations of dishonest behaviour in that he had charged an exorbitant fee and attempted to mislead the Bar Council by referencing a fictitious attorney's firm on his paperwork.[141]

It was a fairly easy task for the court to find that an advocate who had transgressed the rules of conduct of the Bar Council, dishonestly and in his own interest, would no longer be 'fit and proper' to be associated with the profession.

Although there are other such cases that could serve as an example of how the court established 'fit and proper' under these circumstances, this particular case was selected because it had been referred to in the matter of Fischer.[142]

3.5.9 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T)

In this matter, the Society of Advocates of SA (Witwatersrand Division) applied to the court to have the name of Bram Fischer, a senior advocate of the court, removed from the roll of advocates on the ground that he had estreated bail in another matter. This case was before a regional magistrate's court. Fischer was charged with alleged contraventions of the *Suppression of Communism Act*[143] in that he had been an office bearer or member of an unlawful organisation (the South African Communist Party), had taken part in the unlawful activities of the unlawful organisation and had taken part in actions to further the achievement of the objectives of communism. Fischer was granted bail by the magistrate in order for him to attend a sitting of the Privy Council for which he had been briefed. The attorney who had briefed him, an old and respected member of the legal profession, had given evidence to the effect that he had known the respondent personally and professionally for over 20 years, that he had absolute faith in his integrity. He testified that he would take his word for anything and would accept any undertaking given by him unhesitatingly. Fischer then went overseas to

141 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T):275.

142 The cases referred to in the matter of *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T) were Incorporated *Law Society v Vermooten* 1900 17 SC 312, *Ex parte Krause* 1905 TS 221 and *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T), but was distinguished from *Incorporated Law Society, Transvaal v Mandela* 1954 3 All SA 173 (T).

143 *Suppression of Communism Act* 44/1950.

attend the sitting and returned to South Africa to stand trial.[144] By the time that the State's evidence was completed, Fischer had a very strong case to meet. He failed to attend the hearing on 25 January 1965, and his representative read a letter from him to the court:[145]

> By the time this reaches you I shall be a long way from Johannesburg and shall absent myself from the remainder of the trial. But I shall still be in the country to which I said I would return when I was granted bail. I wish you to inform the Court that my absence, though deliberate, is not intended in any way to be disrespectful. Nor is it prompted by any fear of the punishment which might be inflicted on me. Indeed, I realise fully that my eventual punishment may be increased by my present conduct … My decision was made only because I believe that it is the duty of every true opponent of this Government to remain in this country and to oppose its monstrous policy of apartheid with every means in its power. That is what I shall do for as long as I can …
>
> There are already over 2,500 political prisoners in our prisons. These men and women are not criminals but the staunchest opponents of apartheid …
>
> If by my fight I can encourage even some people to think about, to understand and to abandon the policies they *now so blindly follow*, I shall not regret any punishment I may incur.
>
> I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way I have now chosen.

On 4 February, he wrote another letter to the Johannesburg Bar Council in which he stated:[146]

> I have been following the Press and have seen the reports of a decision in terms of which it is said that the Johannesburg Bar Council intends applying to Court in order to have my name struck off the roll of advocates.
>
> I assume that the sole reason for the decision is that I deliberately absented myself from my trial and estreated my bail.
>
> *The principle upon which I rely is a simple one, firmly established in South African legal tradition. Since the days of the South African war, if not since the Jameson Raid, it has been recognised that political offences, committed because of a belief in the overriding moral validity of a political principle, do not in themselves justify the disbarring of a person from practising the profession of the law. Presumably this is because it is assumed that the commission of such offences has no bearing on the professional integrity of the person concerned.*
>
> When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes to benefit personally by any 'offence' he may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.
>
> Though there have always been persons who have been prepared, by way of protest, to accept such punishment in respect of political crimes as might be imposed by an independent Judiciary,

144 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):347.

145 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):347-348 (emphasis added).

146 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):348-349 (emphasis added).

> this is not what we face in South Africa to-day. However independent and fair the Bench in my case, I was facing, if convicted, an 'indeterminate' sentence which would be imposed at the sole and unfettered discretion of the Minister of Justice. We have already seen how this type of sentence has been imposed upon Mr. Sobukwe and we have already seen how European public opinion in this country, to its lasting disgrace has failed to register any protest against this arbitrary, indefinite incarceration and has complacently accepted this total abolition of the rule of law.
>
> I do not pretend that I was unaware of these factors when I applied for bail. What I do say is that during the trial these and other factors caused me to change my mind as to the effectiveness of the protest upon which I had decided and compelled me to the view that any really effective protest would have to be made in a much sharper form—in an open defiance, whatever the personal consequences might be, of a process of law which has become a travesty of all civilised tradition: A political belief is outlawed, then torture is applied to gather evidence and finally the Executive decides whether you serve a life sentence or not.

It was contended on the respondent's behalf that his breach of faith in estreating his bail did not relate to his profession as an advocate and had not to be stigmatised as dishonourable conduct. The council for the respondent relied considerably on the decision of the court in the matters of *Incorporated Law Society, Transvaal v Mandela*,[147] *Ex parte Krause*,[148] and *Incorporated Law Society v Vermooten*.[149] The court, however, found these cases to be distinguishable from the respondent's case and stated that *Pretoria Bar Council v Beyers*[150] was rather of relevance to the current matter.[151]

The court found that the letters of the respondent, together with his absconding from his trial, had clearly led to the inference that he was not only guilty of subversive conduct in the past but that he intended continuing such activity and was probably at that time still engaged in such activity. The court stated that, in his letters, the respondent in effect admitted that his political beliefs were such that he was not prepared to conform to the laws of his country. The court found that it would be inconsistent with its duty to allow an advocate to remain on the roll when he was defying those laws and instigating others to defy the laws.[152]

147 *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T).
148 *Ex parte Krause* 1905 TS 221.
149 *Incorporated Law Society v Vermooten* 17 SC 312.
150 *Pretoria Balieraad v Beyers* 1966 1 All SA 271 (T).
151 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):350-351.
152 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):350.

De Wet JP ordered that the name of the respondent be removed from the roll of advocates and that he paid the costs of the applicant.[153]

Fischer had been the main council in the Rivonia trial which took place between 9 October 1963 and 12 June 1964, over which De Wet JP had presided. Fischer was also a senior council in the same division of which De Wet was the judge president. He was therefore fully cognisant of Fischer's reputation as a senior council and his competence. There is nothing in the judgment of De Wet JP that indicates any consideration of Fischer's actual character and standing in the legal profession, both in South Africa and abroad. He unceremoniously struck him from the roll of advocates without any consideration of the meaning of 'fit and proper' or what other legal practitioners had stated about Fischer's character.

In 1998, chief justice Ismail Mahomed said of Fischer:[154]

> Just occasionally in the life of people, history produces a citizen the impact of whose life continues long beyond his physical demise to stimulate profound reflections on the complexity and the potential grandeur of our species and its unique need and capacity to formulate and to develop for itself a moral basis to regulate the interaction of its members *inter se* and between those members and the evolving environment which it inherits and generates. Such a rare man was Bram Fischer.

Ellmann, in an abstract of his article 'To live outside the law you must be honest: Bram Fischer and the meaning of integrity', states that Fischer had followed a moral path that eventually brought his ethical duty as a lawyer and his moral duty to end apartheid into conflict. In the end, Ellmann says, Fischer chose to breach his duties as a lawyer in order to meet his responsibility as a human being.[155] He is also of the opinion that a lawyer who systematically acts on the principle that the rules of legal ethics are not binding, can hardly continue to act as a lawyer.[156] Ellmann reaches the conclusion that even though he does not think that Fischer's choices were necessarily the best ones, they were the morally justified choices of a remarkable man.[157] Several questions arise from Ellmann's opinion. I fail to understand why he accepts that a person's ethical duty as a lawyer and moral duty as a human being is not necessarily the same thing and that a choice for Fischer was unavoidable. Ellmann also refers to rules of legal ethics

153 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 All SA 346 (T):351. Hill J and Boshoff J concurred.
154 Le Roux & Davis 2019:73.
155 Ellmann 2001:451.
156 Ellmann 2001:473 (fn 150).
157 Ellmann 2001:474.

as if it is certain or established. The mere concept of 'rules of legal ethics' appear to be contradictory since what is considered 'ethical' can surely not be 'rules' if it is always to be established with reference to the circumstances. These problematic and seemingly contradictory concepts are investigated in more detail in Chapter 4.

Fischer's life and struggle appears to be a perfect illustration of Sanders' contention that being complicit is not static but occurs on a range between well-being and aversion, where aversion could be the turn which makes us aware of complicity. He explains that, for an intellectual who is associated with belonging to a group and who is uncomfortable with such tie, even to the point of disapproval and accusation, complicity as a basic trait of connectedness shades into complicity which troubles conscience. Fischer's sense of complicity, as an Afrikaner, comes out of his attempt to dissociate from his thoughtful conscience. It seems to have been this awareness which intensified his experience that being an intellectual (and a lawyer) involved not only commitment to truth but also an assumption of ethical responsibility. Sanders argues that, when knowledge and thought become 'political' activities, the question of *what to think* leads to the question of what one *ought to do* and the intellectual then, aware or unaware of the politics of knowledge, confronts the question of ethical responsibility.[158]

Fischer was eventually arrested and sentenced to life imprisonment. He died nine years later at the age of 67, succumbing to cancer on 8 May 1975, and after suffering considerable humiliation, inhumane treatment and medical neglect at Pretoria Central Prison where he was held. After he died in his brother's house, legally still a prisoner, his ashes were claimed by the Department of Prisons.[159]

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158 Sanders 1998:5-12. See also Chapter 2.7 above. Sanders' reasoning in this regard seems very closely related to Arendt's notion of the interrelatedness between a person's inability to think and lack of self-consciousness and their capacity of doing evil. In her consideration of *Responsibility and judgment* (2003:188-189), Arendt comes to the conclusion that, 'When everybody is swept away unthinkingly by what everybody else does and believes in, those who think are drawn out of hiding because their refusal to join is conspicuous and thereby becomes a kind of action.' She further contends that although the faculties of thinking and judging are different, they are interrelated in a similar way than consciousness and conscience. She explains that, 'If thinking, the two-in-one of the soundless dialogue, actualizes the difference within our identity as given in consciousness and thereby results in conscience as its by-product, then judging, the by-product of the liberating effect of thinking, realizes thinking, makes it manifest in the world of appearances.'

159 Ellmann 2001:459.

In 1970, a friend of Fischer who remained anonymous, contributed an essay on the virtues of Fischer to the United Nations Centre of Apartheid. This essay is concluded with the statement: 'The challenge is an old and fundamental one: when the good man is in jail, what can be said of the men who remain free?'[160]

Krog writes, 'He was so much braver than the rest of us, he paid so much more, he did so much more, his life seems to have touched the lives of so many people – even after his death.'[161]

At the TRC hearings on the legal profession, the General Council of the Bar (GCB) submitted that a 'grave injustice' was done to Fischer when his name was taken off the role of advocates, and apologised to his family.[162] Dyzenhaus notes that the GCB, similar to the ALS, seemed to have also lost the struggle against the tendency to forget what is uncomfortable by making itself complicit in a further unreflective act of legitimation in their submissions and testimony at the TRC.[163] The GCB emphasised in its submission that the fact that 'Fischer was facing charges of a political character' formed no part of the basis for the application for striking off. However, Dyzenhaus points out that the minutes of the Bar Council meetings on the subject of the application to remove Fischer, reproduced in Volume 3 of the GCB's submission, reveals a process of communication with the Minister of Justice on this topic, which suggests a negotiation about how best to play down the politics of the application.[164]

Although it is true that, technically speaking, the application for striking off referred only to Fischer's decision to break the conditions of his bail, Dyzenhaus insists that the GCB's narrowing of the issue to one about the personal integrity of an advocate, entirely abstracted from the political context of South Africa, was a deeply political act. He states that it was a way of refusing to confront the wider political and rule of law implications of Fischer's decision, implications which were intimately connected to the charges he was facing and the legal process of a political trial.[165] It can only be

160 United Nations Centre Against Apartheid, 1970, 'Bram Fischer: An Afrikaner against apartheid in jail for his convictions', http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.nuun1970_18_final.pdf (accessed on 20 December 2021).
161 Krog 1998:203.
162 Ellmann 2001:473 (fn 150). See also Dyzenhaus 1998:99.
163 Dyzenhaus 1998:109.
164 Dyzenhaus 1998:101.
165 Dyzenhaus 1998:101.

concluded, according to Dyzenhaus, that when one of the GCB's members tried to force them to see over the apartheid divide, they reacted by sacrificing him in order to avoid the view. How the GCB was at risk of losing memory's struggle was even more apparent in its oral submission relating to Fischer in the legal hearing.[166]

In his conclusion of the consideration of the GCB submission to the TRC, Dyzenhaus states that it is significant to note that its members did not attempt any apology for the fact that they either actively supported apartheid or did not in any way oppose it and that their oral presentations revealed some deeply problematic features in their sense of role.[167]

With regard to Fischer's story, Dyzenhaus considers it to be central to any account of the choices South African lawyers faced during apartheid.[168] He states that Fischer did not just ask lawyers to confront their role in sustaining the injustice of the law but that he also attempted to get them to see that there was more wrong with the law than that it was used in the cause of unjust policies. Fischer's argument was that any lawyer who wanted to maintain respect for the rule of law had to question whether the ideal of the rule of law would not be better served by violating, or then defying, the letter of apartheid law.[169]

In his speech from the dock in March 1966, before he was sentenced to life imprisonment, Fischer refused to enter a plea to the charges and stated that:[170]

> My conscience, my Lord, does not permit me to afford these laws such recognition as even a plea of guilty would involve. Hence, though I shall be convicted by this Court, I cannot plead guilty. I believe that the future may well say that I acted correctly.

Dyzenhaus remarks that we can think of a morally tragic situation as one in which a choice cannot be made without ignoring 'the legitimate pull of important moral considerations'.[171] He states, however, that we will still have to choose in such situations and that we have to try to make the best choice without the comfort that the

166 Dyzenhaus 1998:101.
167 Dyzenhaus 1998:110-111.
168 Dyzenhaus 1998:130.
169 Dyzenhaus 1998:130.
170 Dyzenhaus 1998:132.
171 Dyzenhaus 1998:133.

ignored considerations will cease to be legitimate, whatever the outcome of the choice.[172] He significantly states that:[173]

> Even when one seems vindicated in retrospect, all one can say is that one did the best one could and that one is *deeply sorry about one's complicity in the moral wrongs that resulted from one's choice.*

Similar to Naudé, but contrary to Louw who chose to be an apologist, Fischer also chose to become an accuser.[174] His dissent serves as another example of what Sanders describes as an intellectual who was associated with belonging to a group and who became uncomfortable with such tie to the point of disapproval and accusation.[175] It was Fischer's awareness of practical knowledge, but particularly his mindfulness of the ambiguities of oppositional political commitment, that led him to acknowledge his complicity.[176] According to Sanders, complicity breeds a watchfulness and as a result, a sharpening of ethical responsibility that follows upon the realisation that thinking and knowing demand fidelity to truth as well as a consideration of social consequences.[177] This particular mindfulness could be regarded as a type of moral compass that guides people by informing their decisions on what is right or wrong but with a sharpened ethical responsibility.[178]

This ability to convert knowledge to acknowledgement described by Sanders, reminds of Sachs's opinion of what is necessary in the process of reconciliation. According to Sachs there is a distinction between knowledge and acknowledgement and that there is a conversion required from the one to the other in a process of reconciliation. Acknowledgement, on the other hand, is establishing a connection with that information which means that a personal, intimate and emotional acceptance of a degree of responsibility is required.[179]

Acknowledgement of one's complicity could therefore enable true reconciliation due to the ability to emotionally accept the degree of responsibility that is required. To this extent it is significant to again take note of Dyzenhaus's remark that the GCB, similar to the ALS, seemed to have also lost the struggle against the tendency to forget what

172 Dyzenhaus 1998:133-134.
173 Dyzenhaus 1998:134 (emphasis added).
174 Sanders 1995:14. See Chapter 2.6.
175 Sanders 1995:11.
176 Sanders 1995:21.
177 Sanders 1995:21.
178 See 3.3 above.
179 Sachs 2001:806.

is uncomfortable by making itself complicit in a further unreflective act of legitimation in their submissions and testimony at the TRC.[180]

3.5.10 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O)

The Law Society of the (then) Orange Free State brought an application to have the respondent, Schoeman, removed from the roll in his capacities as attorney, notary public and conveyancer.[181]

What is interesting about this matter is that the judge went through great lengths to consider the profession and role of an attorney, and the importance of complying with the profession's Code of Conduct. The court considers the difference between a mere occupation and a profession and states the six characteristics that professions have in common with one another. Two of these characteristics identified by Steyn J are that the practitioners of the profession had to be organised in a representative body or institute for the testing, protection and development of competencies, standards and conduct, and that such body had to lay down and enforce a code of conduct of practice and ethics.[182] The judge stated that, with the development of Western expertise in the industrial, technological and business fields, the lawyer became more and more involved in business life and that it was increasingly expected and later required of him to provide proper accounting and handling of funds, especially of trust money.[183]

Steyn J used the image of a spider web to explain the complexity of the profession. According to him, the increasingly complex web of rights is a maze for the ordinary lay citizen and that the attorney in his particular field, such as the advocate on his own, provides the *Ariadnian* thread with which the layman is guided. If the wire broke or was laid incorrectly, the client would be lost, as he would be if he did not follow the wire due to lack of confidence.[184] In similar vein, he quoted Kotze AJ, who found that:[185]

> A lay client, … is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying

180 Dyzenhaus 1998:109.
181 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):434.
182 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):435.
183 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):437.
184 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):437-438.
185 *Webster and Another v Santam Insurance Co. Ltd.* 1977 2 S.A. 874 (A):883.

> out professional duties, but that is not usual, and a *fortiori* to the lay client it would be a most unusual and unexpected occurrence.

With regard to the duty of attorneys, Steyn J finally remarked that every practicing attorney had to be aware of this and be familiar with the established codes of conduct and practice guidelines. Ignorance of this was no excuse and would rather be considered as aggravating than mitigating. An attorney who did not take the trouble to become acquainted with his obligations as contained therein, and consequently got lost, did not deserve much sympathy at discipline and even less if he knowingly disregarded the regulations of his society.[186]

The respondent had, contrary to clear rules in terms of the *Attorneys, Notaries and Conveyancers Admission Act*,[187] failed to keep a separate trust bank account for his trust creditors, not ensured proper bookkeeping of the practice's transactions, withdrew amounts that resulted in a trust deficit and he presented classes at the technical college without permission of the Law Society.[188]

After consideration of all the factors, including mitigation, Steyn J eventually reached the conclusion that the circumstances justified an order in terms of which the applicant's name was removed from the roll.[189] Brink J concurred.

This was a relatively uncomplicated matter but important to note that Steyn J emphasised that the legal profession is regulated in the interest of its clients and that, when an attorney enters the profession, he accepts the responsibility of being honest and honourable, and to exercise his duties with the necessary skill, knowledge and diligence. Incidental to this responsibility is the obligation to know and to continuously study the law, the rules and practice guidelines that regulates the profession, and to adhere thereto, in the interest of the Law Society, the members of the profession and the public. And to be ethical. The court's reasoning appears to be sound in that it found the practitioner guilty of unprofessional behaviour due to his negligence in the administration of trust funds and ignorance of the rules of the profession and reckless management of his practice. The court stated that the attorney's attitude could not be tolerated by members of the profession because it constituted a material risk to clients

186 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):438.
187 *Attorneys, Notaries and Conveyancers Admission Act* 23/1934.
188 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):438-439.
189 *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* 1977 4 All SA 433 (O):448.

and the good name of the profession. The court ordered removal of the name of the attorney from the roll of attorneys based on his unprofessional conduct without reference to his ethical values. There had not been an attack on his ethics, which had not been the case before the court. This, in my opinion, was correctly argued and decided. Unprofessional behaviour, if linked to a person's non-compliance with rules or code of conduct, could lead to a person no longer being fit for practice without it necessarily meaning that he acted unethically. It would make sense for a person who acted unprofessionally to change his ways, to reconsider his way of practice, rehabilitate and approach the court for readmission to the profession. But once a court has found that a person is no longer fit for practice because of unethical misconduct, this is an indication of immoral values, characteristic to a person and not typically susceptible to change. A finding that a person's conduct was unethical is therefore more fundamental than mere non-compliance to rules or a code of conduct.

I am therefore of the opinion that the understanding of the concept of 'fit and proper', as an ethical requirement for admission to and membership of the legal profession, should be reconsidered. A distinction should be made between a person's conduct, which transgresses laws or the code of practice, and therefore renders the person no longer fit for practice, and professional ethics or ethical conduct. The first mentioned can be a prerequisite for membership because it is clear and determinable, while the latter requires a continuous commitment to thinking about the law and the capacity of self-reflection. While the contravention of laws or a code of conduct could be an indication that a person lacks ethical values, it cannot necessarily lead to such conclusion.

I am further of the opinion that it is far easier to find that a person has conducted himself in a manner that is unethical and therefore no longer fit for membership of the profession than to establish that he is ethical in order to allow admission to the profession. I will even venture to say that it is impossible to actually establish whether a person is ethical and therefore 'fit and proper' to be admitted to the legal profession and that the profession has been deceiving itself by pretending to do so. This argument is further pursued in Chapter 4.

3.5.11 *Ex Parte Moseneke* 1979 4 All SA 891 (T)

This was an application to the Transvaal Provincial Division of the High Court for the admission as an attorney. The applicant had complied with all the educational requirements and had served his articles of clerkship.[190] In terms of section 4 of the *Attorneys, Notaries and Conveyancers Admission Act,*[191] any 'fit and proper' person who was duly qualified could apply to the Court to be admitted and enrolled as an attorney. In this application, the Court questioned whether the applicant was indeed 'fit and proper' to be so admitted. It must be noted that the Law Society did not oppose the application and had actually filed an affidavit in support thereof.[192]

The court considered the application to be complicated based on the facts that a) the applicant had been found guilty of a contravention of section 21 of the *General Law Amendment Act*[193] when he was fifteen years old and had served a sentence of ten years on Robben Island and; b) the applicant ceased to be a citizen of South Africa and became a citizen of Bophuthatswana in 1977 in terms of section 6(1) of the *Status of Bophuthatswana Act,*[194] which stipulated that South African citizens who spoke a language used by members of any tribe that forms part of the population of Bophuthatswana, shall cease to be citizens of South Africa and become citizens of Bophuthatswana.[195]

The applicant was born in Pretoria and had lived his entire life in Atteridgeville in Pretoria where he had also attended school until he was sixteen years old. In 1963 he, together with about 300 other schoolfellows, were charged and convicted of sabotage in terms of section 21 of the *General Law Amendment Act*.[196] They were members of the Pan-Africanist Congress and had attended meetings where the policies, aims, views and strategies of this organisation were discussed. They had been considered to concur with the views discussed and were therefore parties to the conspiracy to implement these views. The applicant was never found to be involved in any actual acts of violence, sabotage or rioting and no dangerous objects were found in his possession. He served his ten years imprisonment sentence on Robben Island

190 *Ex Parte Moseneke* 1979 4 All SA 891 (T):891.
191 *Attorneys, Notaries and Conveyancers Admission Act* 23/1934.
192 *Ex Parte Moseneke* 1979 4 All SA 891 (T):892-893.
193 *General Law Amendment Act* 76/1962. Commonly known as the Sabotage Act.
194 *Status of Bophuthatswana Act* 89/1977.
195 *Ex Parte Moseneke* 1979 4 All SA 891 (T):891.
196 *General Law Amendment Act* 76/1962.

where he completed his Matric, his BA degree, B Iuris as well as an LLB degree through Unisa.[197]

The secretary of the Law Society of Transvaal had filed an affidavit in support of the applicant's application in which he explained the lengths they went through to establish that the applicant was indeed a 'fit and proper' person. The Law Society did not oppose the application but resolved to brief council to assist the court in consideration of the application.[198]

Boshoff AJP found that the offence of which the applicant had been convicted was of a very serious nature and that it could be regarded as the equivalent of high treason.[199] He stated that, at the time when the offence had been committed, the applicant would, generally speaking, not have been a 'fit and proper' person to be admitted as an attorney.[200] According to the judge, the authorities were, however, 'reasonably clear' that a person who was at a time not a 'fit and proper' person to practice as an attorney, could, after a complete and permanent reformation, become such a 'fit and proper' person, but that the onus was on the applicant to establish this on a balance of probabilities. Boshoff AJP then found that he was satisfied that the applicant had shown that there had been permanent reformation and that he was indeed a 'fit and proper' person to be admitted as an attorney.[201]

With regard to the problem of citizenship, it was established that the applicant was a South African citizen by birth and had permanent residence in the Republic. The applicant was born in Pretoria and had lived there his entire life, apart from his time on Robben Island. He ceased to be a South African citizen and became a citizen of Bophuthatswana solely based on the fact that he spoke Tswana.[202] The court found that, even though he ceased to be a South African citizen, by reason of the provisions of section 6 (1) of the *Status of Bophuthatswana Act*,[203] he did not forfeit any existing rights, privileges or benefits, except citizenship. In this way he retained his right of

197 *Ex Parte Moseneke* 1979 4 All SA 891 (T):892.
198 *Ex Parte Moseneke* 1979 4 All SA 891 (T):892-894.
199 *Ex Parte Moseneke* 1979 4 All SA 891 (T):894.
200 *Ex Parte Moseneke* 1979 4 All SA 891 (T):894.
201 *Ex Parte Moseneke* 1979 4 All SA 891 (T):894.
202 *Status of Bophuthatswana Act* 89/1977: sec. 6(1), Schedule B(d).
203 *Status of Bophuthatswana Act* 89/1977.

permanent residence. Because he was normally resident in the Republic, he therefore qualified for admission as attorney.[204]

Botha AJP admitted the applicant as an attorney and ordered the registrar to enrol his name on the list of attorneys of the court.[205]

Moseneke practiced as an attorney until he was called to the Bar in 1983. He practiced as an advocate in Johannesburg and Pretoria and was elevated to the status of senior council in 1993. Moseneke was appointed as a Judge of the High Court in Pretoria in 2001 until his appointment as Justice of the Constitutional Court in November 2002. He was appointed Deputy Chief Justice of the Republic of South Africa in 2005 in which capacity he served the country until his retirement in May 2016.[206]

In his judicial memoir, *All Rise*, Moseneke fittingly states that the human condition rarely permits people the luxury of an easy passage and that testing journeys are to be the measure. He quotes Ismailia as a reminder: 'Struggle is the meaning of life; defeat or victory is in the hands of God. But struggle itself is man's duty (and – I add – woman's duty) and should be his (or her) joy.'[207]

Moseneke explains that our past was founded on inequality, not only of race and gender but also of class and many other facets of life and that this inequality was the cornerstone of the political and social arrangement. Additionally, the law was employed to maintain order, which could be interpreted as state tyranny, and only secured the vital economic interest of the ruling class (the white minority). He aptly remarks that it was a system of rule by law and not rule of law and, in this way, the law was harnessed to produce an unequal and unjust social order.[208]

Moseneke captures the prevailing legal culture during the apartheid time as follows:[209]

> Courts enforced patently unjust laws made by parliament. Their jurisprudence was inspired by positivism – a theory of law that teaches that law is valid because parliament says so and it is always binding on the courts; courts are obliged not to second-guess or remake the law, but only to interpret and apply the law. In that way apartheid judges – not unlike Pontius Pilate … – washed their hands of the unfairness of the outcomes they ordered.

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204 *Ex Parte Moseneke* 1979 4 All SA 891 (T):897.
205 *Ex Parte Moseneke* 1979 4 All SA 891 (T):897. Moll J concurred.
206 Constitutional Court of South Africa, Deputy Chief Justice Dikgang Moseneke, https://www.concourt.org.za/index.php/judges/former-judges/11-former-judges/70-deputy-chief-justice-dikgang-moseneke (accessed on 21 December 2021).
207 Moseneke 2020:4-5.
208 Moseneke 2020:62.
209 Moseneke 2020:63.

His first encounter with the law and the court at the age of 16 years is testimony to this statement. Even from the judgment in his application for admission as an attorney it is evident that the law, however bizarre it might have been, was not to be questioned and only applied by judges.

In the closing remarks of his memoir, Moseneke appeals to his colleagues:[210]

> Fidelity to our oath of office is important, not because we are important but because without it, it is not us but our people who will suffer. By our people, I mean the full diversity, poor and rich, white and black, female and male, urban and rural, the marginalised and the powerful, all deserve our unwavering protection, which our Constitution demands of us to provide. After all, you are the ultimate guardians of our Constitution for and on behalf of our people.

It is clear from his memoir that, like Fischer, Moseneke was respectful of the law and rule of law but frustrated with the inequality that the apartheid state intended to maintain with unjust laws and policies that were blindly followed. Unlike Fischer, however, Moseneke chose to continue to serve justice in the way he knew best and continued to uphold the values of his belief, which proved to be of tremendous value to the new constitutional democracy.

Edwin Cameron, in his foreword of Moseneke's memoir, states that Moseneke led the forces in the court who sought fair-minded development of the common law, generous-spirited application of constitutional principles, and unflinching insistence on constitutional observance by the legislature and the executive. According to Cameron, Moseneke was a persistently generous, warm-hearted, forward-looking and richly-giving spirit and one who continued in everything he did to point the country forward to its destination of justice under law.[211]

This seems to be an appropriate description of a so-called 'fit and proper' person.

3.5.12 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA); *General Council of The Bar of SA v Jiba and others* 2019 (8) BCLR 919 (CC)

The GCB, a voluntary association with legal personality in terms of its constitution, brought an application in terms of section 7(1)(d) of the *Admission of Advocates Act*[212]

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210 Moseneke 2020:305.

211 Moseneke 2020:ix-xii (foreword by Edwin Cameron).

212 *Admission of Advocates Act* 74/1964: sec. 7(1)(d) - 'Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates if the court is satisfied that he is not a 'fit and proper' person to continue to practise as an advocate.'

to strike from the roll of advocates, alternatively to suspend officials of the National Prosecuting Authority.

This matter was an appeal against the order of the Gauteng Division, Pretoria, striking from the roll of advocates, the names of Jiba and Mrwebi with costs, including the costs of two counsel, the one paying the other to be absolved. The application against Mzinyathi was dismissed with costs. The three applications were dealt with in one hearing and were heard together due to the factual and legal backgrounds being similar.[213] The officials were Ms Nomgcobo Jiba, who held the position of deputy national director of Public Prosecutions; Mr Lawrence Sithembiso Mrwebi, who held the position of special director of Public Prosecutions and head of the Specialised Commercial Crime Unit, and Sibongile Mzinyathi who held the position of director of Public Prosecutions in North Gauteng.[214]

The application for removal from the role of the names of the respective advocates in the matter arose from complaints in their handling of the criminal matter against lieutenant-general Richard Mdluli, the head of Crime Intelligence within the South African Police Service who had been charged with fraud, corruption and related charges as well as murder and attempted murder.[215]

For the purpose of this study, only the respective judges' opinions of the meaning of 'fit and proper' will be considered without reference to the full facts of the matter.

Shongwe ADP stated that the principles that applied in striking off an attorney from the roll would also apply in matters concerning advocates and referred to the guidelines that was set out in *Jasat v Natal Law Society*:[216]

a) The court had to decide whether the alleged offending conduct had been established on a balance of probabilities, which was a factual inquiry;
b) It had to consider whether the person concerned, in the discretion of the Court, was a 'fit and proper' person to continue to practise. This involved a weighing

213 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):625.
214 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):625.
215 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):626.
216 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):626. See also Jasat v Natal Law Society 2000 (3) SA 44 (SCA):51.

up of the conduct complained of against the conduct expected of an attorney and, to this extent, was a value judgment; and

c) The court had to inquire whether, in light of all the circumstances, the person in question was to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.

It was found that, even though some form of incompetence could be inferred with regard to Jiba's duties, which may be a ground to remove her from being the National Director of Public Prosecutions, it was not sufficient enough to justify her removal from the roll of advocates. Shongw ADP stated that there was no need in the circumstances of the case to deal with a value judgment to determine whether Jiba was a 'fit and proper' person to remain on the roll of advocates and therefore the sanction of striking her name from the roll did not arise.[217]

The main complaint against Mrwebi was that he sought to mislead the court on the extent of the consultation between himself and Mzinyathi, as well as not providing a proper record of all the documents and relevant facts.[218] It was found that it was highly possible that Mrwebi really did not comprehend what the concept 'in consultation' meant; however, the concessions he made under cross-examination by counsel for the GCB indicated that he was at most confused. Shongwe ADP stated that he could not classify his explanations as dishonest, but that he was prepared to find that the GCB had succeeded in establishing the alleged offending conduct on a balance of probabilities. However, he found that, because there had been no personal gain from Mrwebi's conduct, he did not think that the sanction to remove him from the roll was justified and explained that the purpose of these proceedings was to uphold the rules regulating the profession and not to punish the wrongdoer.[219] Shongwe ADP stated that, in his opinion, the court *a quo* had treated Mrwebi too harshly because, notwithstanding his misconduct, he did not personally gain anything from his actions. His misconduct could rather be attributed to his incompetence or naivety than his honesty or a lack thereof. Shongwe ADP confirmed the principle that the main

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217 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):631.

218 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):631.

219 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of* SA 2018 3 All SA 622 (SCA):632. See also Society of *Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T):357.

consideration was the protection of the public and not to punish the particular individual.[220]

Shongwe ADP then reaches the following conclusion:[221]

> In conclusion, as regards Jiba, the evidence presented by the GCB juxtaposed with the explanation proffered by her failed to establish the alleged offending conduct on a preponderance of probabilities. On that ground the appeal must succeed. It becomes unnecessary to consider the discretion of the court on the question whether or not she is a fit and proper person to remain on the roll of advocates. As regard Mrwebi, I am satisfied that the alleged offending misconduct has been established and also concur that the court a quo exercised its discretion judicially when it concluded that he is not a fit and proper person to practise as an advocate, however, misdirected itself regarding the appropriate sanction to be imposed. Based on the reason given above, this is a case where the court a quo should have suspended Mrwebi, more especially, *that he did not personally benefit from his misconduct nor did he prejudice any client*. *All that the court a quo was dissatisfied with was that "[b]y their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute* by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him". Surely this is irrelevant and cannot be a good reason singularly or cumulatively to remove an advocate from the roll.
>
> *We have had cases in this court against advocates who had admitted to unlawfully enriching themselves of millions of rands, who in the result have been either suspended or ordered to repay the spoils* … In the case of Mzinyathi on costs, no cogent and justifiable grounds have been placed before this court to interfere with the discretion of the court a quo, save to underscore the tradition of the GCB being insulated against a costs order regardless. The appeal in this regard must also fail.

In his minority judgment, Van der Merwe JA, with Leach JA concurring, disagreed with the majority judgment above.[222] Van der Merwe stated that the matters extended beyond mere incompetence or unsuitability for the position of Deputy National Director of Public Prosecutions. In his opinion, they demonstrated a serious lack of appreciation or disregard of the duty of an advocate to be of assistance to the court and to uphold the administration of justice. The fact that Jiba had been a litigant in official capacity in these matters was even more reason for her to conduct the litigation with the utmost trustworthiness and integrity.[223]

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220 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):634.

221 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):634-635 (footnotes omitted; emphasis added). Seriti and Mocumie JJA concurred.

222 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):635.

223 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):640.

According to Van der Merwe JA, the importance of legal practitioners being scrupulously honest in their dealing with the court had been stressed numerously in South African case law. He stated that, in our system of justice, the courts had to be able to rely absolutely on the word of practitioners, and for that reason there was a serious objection to allowing a practitioner who was untruthful, and deceived or attempted to deceive a court, to continue with practice. What was also relevant, but not taken into account by the court *a quo*, was that Jiba had persisted throughout these proceedings with a denial under oath of misconduct on her part. This showed a lack of insight into what she had done wrong. This in itself was an important factor which reflected adversely on her character.[224]

With regard to Mrwebi, Van der Merwe JA found that he had lied about certain events and abused his position. According to Van der Merwe JA, Mrwebi had not only shown himself to seriously lack integrity but had also failed to take the court into his confidence and to fully explain his actions. All of this hallmarked him as a person unfit to practice as an advocate. Van der Merwe JA had no hesitation to endorse the order of the court *a quo* that Mrwebi had to be struck from the roll of advocates.

This judgment is significant due to the stark contrast between the majority and minority judgments. It is interesting to note that three of the five judges agreed that the misconduct related to ignorance or incompetence rather than dishonesty and were therefore excusable to some extent. They were also of the view that the public interest was not affected by their alleged misconduct because they did not personally benefit from it and had not been to the detriment of a particular client. The court seemed to be of the opinion that the misconduct in this particular matter had not been as serious when compared to other cases against advocates who had admitted to unlawfully enriching themselves with millions of rands, and which resulted in them either being suspended or ordered to repay the spoils.

By the time that this matter was heard, the extent of state capture was not yet fully realised or investigated. Whilst the court a quo was dissatisfied with the conduct of Jiba, Mzinyatha and Mrwebi's and their failure to prosecute Mdluli, the SCA found this to be irrelevant insufficient reason to singularly or cumulatively remove an advocate

224 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):640-641.

from the roll.[225] This was later proven not to have been irrelevant and in fact, rather significant, particularly also because it illustrates the extent to which different members of the legal profession were also involved in what would later be known as 'state capture'.

In his minority judgment, Van der Merwe JA referred to the Zuma matter in which Navsa ADP were puzzled by Jiba's indifference:[226]

> The essential issue in the *Zuma* matter was whether the record of decision that had been submitted by Ms Jiba should have included certain tapes or transcripts, alleged by Mr Zuma to be confidential, and internal memoranda of the office of the NDPP relating to the tapes and transcripts. Navsa ADP said that in her answering affidavit Ms Jiba failed to adopt a position in respect of the former and resorted to "a metaphorical shrugging of the shoulders". He said that this displayed a baffling lack of interest in being of assistance to the court. In respect of the internal memoranda, Navsa ADP stated that "Ms Jiba provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms". Navsa ADP added that the generalisation resorted to by Ms Jiba was, "to say the least, disingenuous". Thus, this court held in the *Zuma* matter that Ms Jiba had acted in a singularly unhelpful manner and had been less than truthful.

This comment seems to have been an early indication of the far-reaching impact and role played by different legal practitioners in different spheres of government as well as private practice in the national crippling phenomenon, state capture.[227]

On appeal to the Constitutional Court, Jafta J wrote the unanimous judgment with which Mogoeng CJ, Cameron, Froneman, Khampepe, Madlanga, Mhlantla, Theron JJ, Nicholls and Ledwaba AJJ concurred.[228] Jafta J commenced the judgment with an introduction in which he stated that:[229]

> The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.

The court found that, for leave to appeal to be granted the applicant had to prove that the matter fell within the jurisdiction of the Constitutional Court and that the interests

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225 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):634-635. See complete quotation from the judgment cited above.

226 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):637.

227 Public Protector of South Africa, *State of Capture*, Report 6 of 2016/17, http://www.saflii.org/images/329756472-State-of-Capture.pdf (accessed on 31 July 2022). The final reports of the Zondo Commission of Inquiry into State Capture were released on 24 June 2022, https://www.statecapture.org.za/ (accessed on 31 July 2022).

228 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC).

229 *General Council of The Bar of South Africa v Jiba and others 2*019 (8) BCLR 919 (CC): par. 1.

of justice warranted the granting of leave. This meant that the matter had to either raise a constitutional issue or an arguable point of law of general public importance that ought to be heard by the Court.[230] For a constitutional issue to arise, it was stated that the claim advanced had to require the consideration and application of some constitutional rule or principle in the process of deciding the matter.[231]

According to Jafta J, a careful reading of the GCB's pleadings revealed that its claim was solely based on section 7(1)(d) of the of *Admission of Advocates Act*[232] in that the GCB sought an order for the removal of the respondents' names from the roll of advocates on the ground that they were no longer 'fit and proper' persons to continue practice as advocates. The claim was based on allegations that the respondents had made false statements under oath and that they suppressed information in order to mislead a court and abused powers of the office they held.[233] The court found that these matters did not raise any constitutional issues. The interpretation and application of section 7 of the *Admission of Advocates Act*[234] in itself did not raise a constitutional issue, unless the section implicated a right in the Bill of Rights which required that it be construed in terms of section 39(2) of the *Constitution*, which was not the case.[235]

The court makes an interesting, and in my opinion, contradictory statement in its finding that:[236]

> Here the GCB did not seek to protect a constitutional right. All that it sought to do was to enforce the Admission Act so as *to protect the public and preserve the proper functioning of the administration of justice*. While these are important objectives they do not, in this case, give rise to a constitutional issue.

The purpose of this study is precisely to indicate how the 'fit and proper' requirement for the admission of legal practitioners is directly linked to concepts such as 'public interest', 'access to justice', 'social justice' and 'just administration' and that the interpretation thereof must necessarily be in terms of the *Constitution* if we are serious about transformation of the legal culture of South Africa.[237] It is proposed that 'fit and proper' should rather be a continuous responsibility of all legal professionals than a

230 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 35.
231 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 38.
232 Act 28/2014.
233 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 43.
234 *Admission of Advocates Act* 74/1964.
235 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 44.
236 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 48 (emphasis added).
237 See also Swanepoel 2020:22.

prerequisite for admission and that it has to be pursued as a professional as well as a constitutional value rather than mere compliance with fixed rules of conduct or a specific test.[238]

The Constitutional Court found that the apparently incorrect determination of the facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also did not raise a constitutional issue.[239] It was stated that the standard was well established and that the determination of facts, whether right or wrong, therefore did not amount to a constitutional issue.[240]

This definite distinction by the court between the facts and legal interpretation confirms the formalist, positivistic manner in which the concept of 'fit and proper' has traditionally been dealt with and again raises the question of whether the contents thereof are clear or determinable, particularly to the extent that the question of fact and law can be separated. My contention is that the content and meaning of what 'fit and proper' entail is not as clear as is purported by the court in this judgment and that the manner in which it has traditionally been interpreted needs to be reconsidered. A more critical approach with due consideration of moral and ethical values, instead of a restricted formalist approach, is proposed. Transformative constitutionalism therefore does not only influence the way we think about the law but also how we think about the role of legal professionals and their responsibility in the transformation process.

3.5.13 *Disciplinary hearing: Legal Practice Council v Dali Mpofu*[241]

On 23 March 2021, day 366 of the Commission of Inquiry into State Capture (the Zondo Commission), Dali Mpofu SC represented Mr Tom Moyane in the cross-examination of Mr Pravin Gordhan, Minister of Public Enterprises, represented by Michelle Le Roux SC. Towards the end of Le Roux's re-examination of Gordhan, Mpofu made an objection. The chairperson (now Chief Justice Raymond Zondo) allowed him to explain his objection, but Le Roux then interrupted to say that she

238 This proposal entails a reimagining of the 'fit and proper' person, which is considered in more detail in Chapter 4.

239 Reference to the test formulated in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) as described above.

240 *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC): par. 49.

241 At the time of conducting this study, the written report of the LPC has not yet been published. Facts of this hearing were gathered from the transcripts of the Commission of Inquiry into State Capture (Zondo Commission) and news reports on statements released by the GCB and the LPC.

should first explain the reason for her question. Mpofu would not allow her to speak even after Zondo said that he would listen to her explanation first. Mpofu told Le Roux to shut up and when Gordhan made an utterance in disbelief, Mpofu told him to shut up too. Zondo intervened by stating that he was in charge and ordered Mpofu to sit down, but he continued to object, after which Zondo warned him. At the adjournment of the session, Mpofu placed on record that it could not be that Moyane and his legal representatives were treated like that in the Commission. He said that he would not be interrupted by junior counsel and that he thought that the uneven treatment of the parties was completely unfair.[242]

On 25 March 2022, Zondo announced at the commencement of the day's hearing that he will make a public statement at 14:00 that day about the events that occurred during the evening session on 23 March 2022.[243] In his statement, Zondo explains the important purpose of the Commission, the role played by the legal practitioners who assists the Commission with its task and commends them for their cooperation and the respect they have shown to the Commission and one another. He then refers to Mpofu who told counsel for the witness to shut up and states that he had never had any lawyer in any court proceedings or in any commission or forum tell another lawyer or witness to shut up. He expresses his extreme concern for the disrespect that was shown, not only to some persons in the hearing but also to the Commission and him as the chairperson. He makes the important remark that, as legal practitioners, they have a duty to the public and to democracy to ensure that they instil public confidence in processes such as those followed at the Commission and that they maintain the minimum standards of conduct and decorum expected of them. Zondo states that besides the chairperson, no legal practitioner, including Mpofu, has a right to tell any person at the Commission to shut up and that even the chairperson would not use the words 'shut up'. He further confirms that this conduct is unacceptable and that it is

242 Commission of Inquiry into State Capture Transcription, 23 March 2021, Day 366: pp. 358-362. https://www.statecapture.org.za/site/files/transcript/380/Day_366_-_2021-03-23.pdf (accessed on 29 July 2022).

243 Commission of Inquiry into State Capture Transcription, 25 March 2021, Day 368: p. 4. https://www.statecapture.org.za/site/files/transcript/382/Day_368_-_2021-03-25.pdf (accessed on 29 July 2022).

important for the public and other legal practitioners to know that it is unacceptable in the Commission.[244]

On 26 March 2021, the chairperson of the GCB, Craig Watt-Pringle, was quoted stating that despite advocates being able to exercise an acceptable level of independence, they are still required to maintain their duty to the court. In his statement to SABC News, Watt-Pringle said that because counsel has an overriding duty to the court, there are limits to their independence and that it is unacceptable to put yourself in a position of conflict of interest between the interest of your client and duty to the court.[245]

On 15 December 2021, it was reported that the LPC has found that Mpofu's conduct at the Commission was unwarranted and that he had to be charged for unprofessional conduct. The investigating committee of the LPC dismissed complaints by Mpofu that Le Roux's attitude against him was perceived as racist. The committee was also not convinced by Mpofu's complaint against the chairperson of the GCB for allegedly siding with Le Roux in his media interviews about the incident.[246]

On 15 March 2022, the Johannesburg Society of Advocates found Mpofu guilty of violating Rule 4.12 of the GCB's Uniform Rules of Ethics which stipulates that:[247]

> **Ill-feeling and Personalities between Counsel**
> Clients, not counsel, are the litigants. Whatever may be the ill-feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanour towards each other or towards suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is improper to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

It is reported that the Johannesburg Society of Advocates sent a letter to Mpofu stating that 'it was indisputable that he used intemperate language *vis-à-vis* Le Roux SC by

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244 Commission of Inquiry into State Capture Transcription, 25 March 2021, Day 368: pp. 75-82. https://www.statecapture.org.za/site/files/transcript/382/Day_368_-_2021-03-25.pdf (accessed on 29 July 2022).

245 Maduray, 'Advocates required to maintain duty to court, General Council of the Bar on Mpofu's outburst', *SABC News*, https://www.sabcnews.com/sabcnews/advocates-required-to-maintain-their-duty-to-the-court-general-council-of-the-bar-on-mpofus-outburst/ (accessed on 29 July 2022).

246 Lekabe, Citizen Reporter, 'Legal Practice Council wants Mpofu to be charged for telling Pravin to 'shut up'', *The Citizen*, https://www.citizen.co.za/news/2944468/legal-body-recommends-mpofu-must-be-charged-for-shut-up-outburst-15-december-2021/ (accessed on 29 July 2022).

247 General Council of the Bar of South Africa, *Uniform rules of professional ethics*, 2017. https://www.johannesburgbar.co.za/wp-content/uploads/05-GCB-Uniform-Rules-of-Ethics-updated-2017-AGM.pdf (accessed on 29 July 2022).

telling her to shut up, whether directly or indirectly'. He was further asked to 'provide written submissions in respect of an appropriate sanction'.[248]

The LPC eventually released a statement confirming that Mpofu has been found not guilty of contravening the GCB's Code of Conduct in a hearing that was held on 2 June 2022.[249]

It is reported that, as part of his defence, Mpofu indicated that:[250]

> Le Roux was his junior and he had felt insulted by her reference to his cross-examination as 'political grandstanding';
>
> He was disrespected during a televised sitting when Le Roux allegedly interrupted him;
>
> Le Roux's behaviour was condescending, and he perceived her attitude to be racist;
>
> Le Roux made disparaging remarks that were hurtful; and
>
> Le Roux broke accepted protocols regarding how and when to respond to objections, and also disregarded issues of seniority.

According to the statement released by the LPC, the majority of three members of the disciplinary committee concluded that Mpofu was not guilty of the charges raised against him. They found that his utterance of the words 'shut up' could not conclusively be interpreted as rude or discourteous on an objective test and based on the ordinary grammatical meaning of those words as used by other members of his rural village. Mpofu told the committee that English was his second language and that, if he had been allowed to use his mother tongue, isiXhosa, he would have said *thula* (shut up) or *vala umlomo* (close mouth), both of which are acceptable expressions to ask another person to keep quiet.[251]

It is reported that Naidoo, for the LPC disciplinary committee's majority, found Mpofu's account of the altercation 'credible and he appeared to be acting in good faith and that his conduct by international standards was reasonable'. In the view of the majority, the momentary and uncharacteristic lapse of self-control and tone by insisting on holding

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248 Citizen Reporter, 'Mpofu found guilty for telling advocate to shut up during Zondo commission – report', *The Citizen*, https://www.citizen.co.za/news/south-africa/3050118/mpofu-found-guilty-for-telling-advocate-to-shut-up-during-zondo-commission-report/ (accessed on 29 July 2022).

249 Fengu, 'Dali Mpofu cleared of misconduct during Zondo Commission', *City Press*, https://www.news24.com/citypress/news/dali-mpofu-cleared-of-misconduct-during-zondo-commission-20220618 (accessed on 29 July 2022).

250 Fengu, 'Dali Mpofu cleared of misconduct during Zondo Commission', *City Press*, https://www.news24.com/citypress/news/dali-mpofu-cleared-of-misconduct-during-zondo-commission-20220618 (accessed on 29 July 2022).

251 Maughan, ''Shut up' in isiXhosa not rude, LPC finds as it clears Dali Mpofu of misconduct', *News24*, https://www.news24.com/news24/southafrica/news/shut-up-in-isixhosa-not-rude-lpc-finds-as-it-clears-dali-mpofu-of-misconduct-20220707 (accessed 29 July 2022).

the floor by virtue of a convention of advocacy and in part because of his seniority, was not sufficiently serious to cross the line to constitute professional misconduct.[252]

It is evident from the above that what is perceived as ethical behaviour is not clear or established, regardless the rules or code of ethics of the profession. In my opinion, it is not the fact that the rules are open for interpretation, but rather the manner in which discretion is applied which is problematic. It is established that this inquiry is a value-based judgment which requires discretion.[253] The uncritical manner in which Mpofu's argument was accepted raises a question. There seems to be no consideration for the fact that he insisted respect from Le Roux whom he regarded as a junior while the fact is that, although she may be his junior in age, she is on exactly the same professional level of seniority. The mere fact that respect is expected and considered to be due on this ground is problematic and archaic.

Although Zondo explained how the requirement of respect for one another as well as for the process is an important element in the legitimacy of the law and the public interest and trust in the system, it does not appear to have been considered in the outcome. Mpofu's argument that the words were not considered to be disrespectful in the village where he comes from, in comparison with his actual conduct during the hearing, also does not seem to be in line. He did not merely tell Le Roux and Gordhan to shut up, but he refused to abide by Zondo's instruction and had to be warned more than once. His disrespect, in my opinion, was evident from his conduct and manner, more than the mere utterance of the words he chose to further express his irritation. In essence, Mpofu's argument seems to be based on a high regard for himself, his seniority and rights based upon his own interest and not that of his client or the broader public. The potential harm in the approval of this approach lies in the perpetuation of a legal culture aimed at protecting its members' standing and reputation in individual interest instead of a critical evaluation of ethical conduct in line with the values of the *Constitution* in the interest of the public.

An opposing view that could have been considered in favour of Mpofu is Le Roux's behaviour during the same session and the fact that she also disregarded specific

252 Maughan, ''Shut up' in isiXhosa not rude, LPC finds as it clears Dali Mpofu of misconduct', *News24*, https://www.news24.com/news24/southafrica/news/shut-up-in-isixhosa-not-rude-lpc-finds-as-it-clears-dali-mpofu-of-misconduct-20220707 (accessed 29 July 2022).

253 See 3.4 above – Legal opinion of 'fit and proper' by legal scholars.

rules of conduct during the proceedings.[254] Mpofu labelled her attitude towards him as disrespectful and racist. In his public statement, Zondo commenced by saying that many things may have happened during the proceedings in the evening section that perhaps should not have happened and that there may be certain statements that should also not have been made, but that he will only deal with those that he regarded as the most serious.[255] It is clear on the recording as well as the transcription that she would not allow Mpofu to state his objection and insisted to speak before allowing him to continue with his objection, even after it was acknowledged by the chairperson. The chairperson's statement seems to confirm that her behaviour was probably also not in line with what is expected of legal practitioners, but he chose to concentrate on Mpofu's reaction to this because it was perceived to cross the line.

If the LPC found Le Roux's behaviour as provocative and dissimilar to the way that she had argued against other practitioners during the hearings of the commission, it would probably have constituted a better justification for their outcome than to find that 'shut up' was not disrespectful. If this view was critically analysed and accepted by the disciplinary committee of the LPC, the outcome would have been the same in the sense that Mpofu would be cleared on all charges of misconduct. It would also have been in the profession's interest to reprimand both practitioners for their disrespectful conduct during the proceedings and remind others of the important role they play in the legitimacy of the legal processes and their responsibility to promote and instil confidence in the law and its systems. But honesty and transparency in these processes are essential and again underscores the importance of avoiding the perpetuation of a legal culture aimed at protecting its members' standing and reputation in individual interest instead of a critical evaluation of ethical conduct in line with the values of the *Constitution* in the interest of the public.

It is undisputed that the current legal culture in South Africa is still very much embedded in the formalist, traditionalist and positivist European culture from which it

254 This is a view that was raised by a respected colleague in a discussion about the LPC's decision. His opinion is that Le Roux's behaviour towards Mpofu was condescending and racist, but that the LPC probably considered it 'safer', less controversial, to find that 'shut up' is not disrespectful in the community where Mpofu was raised. If this is indeed the case then, as pointed out above, their decision creates a more problematic precedent.

255 Commission of Inquiry into State Capture Transcription, 25 March 2021, Day 368: p. 75. https://www.statecapture.org.za/site/files/transcript/382/Day_368_-_2021-03-25.pdf (accessed on 29 July 2022).

developed and that its transformation would be necessary in an attempt to truly realise the objectives of the *Constitution*. However, a legitimate protest against the current legal culture would necessarily have to entail a self-consciousness instead of self-interest and reflect respect for the notion of a continuous responsibility to think about, interpret and apply the law in line with the values of the *Constitution*. It is not complacency or mere compliance with laws that renders a person 'fit and proper', nor the abolition and resistance against all existing laws and traditions. What is required is a critical approach and a broader scope of thinking about the law and role of the legal professional; a more humanistic engagement in legal text with more appreciation of morality, ethics, meaning and consequence.[256]

Conclusionary note on case law considered

A final conclusion from the judgments considered above is that the content and meaning of what 'fit and proper' entails is not as clear as the courts seem to suggest. My suggestion is that the manner in which it has traditionally been interpreted needs to be reconsidered. A more critical approach with due consideration of moral and ethical values instead of a restricted formalist approach is proposed.[257] The shift from parliamentary sovereignty to constitutional supremacy should not only have influenced the way we think about the law, but also how we think about the role of legal professionals, their responsibility in the transformation process and also their role and professional responsibility towards society. Davis and Klare, more than ten years ago, warned that the South African legal culture might hold back efforts to realise the free, open and democratic aspirations of the *Constitution*.[258] As early as 1998, Klare identified a 'disconnect' between the *Constitution*'s transformative aspirations and the conservative character of South African legal culture. He claimed that the participants within a legal culture are to some extent influenced and constrained by it and that this inevitably has a constraining effect on legal outcomes.[259] Whether the legal culture has changed since 1994 and the extent to which it has influenced our thinking about the law and the role of legal professionals is not clear from the case law considered and is further questioned in Chapter 4.

256 Douzinas & Gearey 2005:4-5. See also Chapter 2.2.
257 See 3.4.12.
258 Davis & Klare 2010:406.
259 Klare 1998:151.

3.6 Conclusion

In an attempt to establish the current meaning, purpose and importance of the 'fit and proper' legislative requirement for admission to legal practice in this chapter, I reflected on the current 'fit and proper' legislative requirement, role and purpose of the LPC in the enforcement of this requirement, the opinion of legal scholars on the meaning of the requirement as well as the interpretation and application thereof by the judiciary.

The importance of the inquiry in this chapter, as set out in the introduction, is based on the understanding that what is considered 'fit and proper' must be closely related to the role of the legal professional in our society. As a result, I attempted to establish whether the current role of the legal professional, and therefore also what is considered to be 'fit and proper', is aligned with what is necessary in order to respond to the needs of the diverse, multicultural and democratic society of South Africa. The assumption is that what was previously considered to be 'fit and proper' in the fulfilment of a person's role as a legal professional would have changed substantially after 1994 with the dawn of a new constitutional democracy. Whether and to which extent the legal culture and perceived role of the legal professional has indeed changed, is a question raised in Chapter 2 and again in this chapter. My conclusion is that there is a need for reconsideration of the role of the legal professional and how the 'fit and proper' concept could be interpreted to align with this role, and I continue to develop this thought in Chapter 4.

With the overhaul of the legal practice due to the perceived ineffective regulation of legal practitioners by the previous regulatory bodies, the requirement that they must prove that they are 'fit and proper' to be so admitted to legal practice, was retained in the new legislation.[260] The LPA, similar to its predecessor, does not contain a definition of this 'fit and proper' requirement. The absence of a definition could imply that the meaning of the concept is clear and determined or that it is not possible to define it due to its vagueness. In my opinion, the reason for this concept not being defined is perhaps related to its vagueness but could also be indicative of the continued complacent acceptance of legal rules and unreflective or false certainty of the meaning and content of such legal rules or legislation.

[260] Act 28/2014: sec. 24(1)(c).

The objectives of the LPC are determined by the LPA and can be summarised as the protection and promotion of the public interest, regulation of a profession that is effective, efficient and transparent and ensuring proper administration of justice, and upholding and advancement of the rule of law and the *Constitution*.[261] My understanding from the available information of the LPC is that much value is attached to its Code of Conduct and that ethical behaviour seems to be behaviour that is in line with the prescribed Code of Conduct. It also appears that what is considered 'fit and proper' by the LPC is closely related to compliance with its Code of Conduct.[262]

Although not expressly acknowledged, the statistics on the number of reports received about the (mis)conduct of practitioners is indicative that the 'fit and proper' requirement for admission to legal practice does not ensure ethical conduct or even compliance with the professional Code of Conduct. My conclusion from this is that it would be more honest to admit that it is not actually possible to establish whether a person is indeed 'fit and proper' for legal practice upon admission thereto and that our pretending to do so has rather been misleading.[263] In attempting to achieve its ambitious objectives determined by the LPA, the new overhauled LPC would do well to heed to the TRC's warning that an uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than a formal sense.[264] In promoting and protecting the public interest with the objective of ensuring accountability of the legal profession to the public, the LPC and its individual members will have to continuously reflect on what the law is and how it relates to justice as its main responsibility towards the public.[265]

My analysis of legal scholars' opinion on the meaning of 'fit and proper' confirms the conclusion above that continuous ethical realignment is necessary to ensure that the virtues that constitute fitness and propriety are maintained throughout a practitioner's career. It does not seem to be something that can be established once and for always.[266] These virtues are accepted to broadly refer to a certain set of knowledge, competencies and values and are currently understood and interpretated in a very

261 Act 28/2014: sec. 5.
262 See 3.2.
263 See 3.3 and 3.4 with reference to Slabbert who questions the practice of labelling a person as being 'fit and proper' and whether it does not create a false warranty to the public.
264 See 3.3. See also Chapter 2.7; TRC Report, Volume 4, Chapter 4, 1998:100.
265 See 3.3. See also Chapter 2.7; TRC report, Volume 4, Chapter 4, 1998:105.
266 See 3.4. See also Chapter 4.2.3 and Chapter 5.4.

formalist manner. The argument that I pursue in Chapter 4 is that a broader understanding of their respective meanings and the integration thereof can contribute to a better, more honest understanding of what it means to become 'fit and proper'.

One of the foundational ethical values of legal practitioners is their conscience or 'moral compass'. In my opinion, a legal practitioner's moral compass should not so much be aligned with personal worldviews based on religion, politics or own beliefs, although it may play a role, but that it should rather be considered in terms of Sanders' notion of complicity which calls for more thoughtfulness, self-consciousness and a sense of personal responsibility.[267] This sense of complicity will necessarily remind the legal practitioner to continuously reflect on what the law is and how it relates to justice as its main responsibility towards the public.[268]

I agree with the opinions of legal scholars that the 'fit and proper' requirement entails honesty and personal integrity, which is important to serve and protect the public interest and that it must be aligned with the value and objectives of the *Constitution*. My argument is, however, that our understanding of this requirement is very superficial and that the courts continue to interpret it in a formalist and positivist manner as a result of our (still) largely unchanged formalist legal culture.[269]

Although I summarised my analysis of the judiciary's interpretation of the meaning of 'fit and proper' in subsection 3.5, it is necessary that I repeat some of these findings in this conclusion for the sake of completeness.

My intention with the consideration of different judgments ranging over a period from 1900 to 2022, was to determine whether the meaning of 'fit and proper' is or has ever been clear or determinable and consistently applied in different circumstances and over time. The only clear guideline that I could establish is that the courts are generally only consistent in finding that a person is not or is no longer suited for legal practice in matters where dishonesty, fraud or theft have led to the detriment of a client. What is in the public interest is described and defined by the courts in more certain terms in matters where there has been a monetary loss to a client, than in any of the other

267 See 3.4. See also Chapter 4.3.2.

268 See Chapter 5.5. This conclusion reminds of White's statement that, in becoming to know the law, it is important to know who you are in reading it and in writing it, and what it calls upon you to do and to be (2002:1396).

269 See 3.5. See also Chapter 4.6.

transgressions considered. It seems as if the courts are generally more comfortable with removing or suspending a person from the roll for transgressions that also constitute a contravention of the professional Code of Conduct.

Another significant finding is that there are very little matters of opposition against the application for admission to practice in relation to the applications for the removal or suspension from the roll. This finding relates very closely to the argument above that it is very difficult, if not impossible to actually establish whether a person is 'fit and proper' and therefore possess the necessary ethical values for legal practice. Not only because there is no clear measure for establishing a person's personal and professional ethics but also because, as stated above, it is a gradual process of attainment which requires dedication and continuous reflection and reconsideration.

A finding based particularly on the judgments of the Supreme Court of Appeal and Constitutional Court in the matter of *Jiba and another v General Council of the Bar of SA* and *Mrwebi v General Council of the Bar of SA,*[270] is that it is a misconception that only dishonesty, which results in personal gain, would render a person unsuitable for practice. My opinion, upon which I reflect in more detail in Chapter 4, is that the public has a much broader interest in the manner of practice by legal professionals. The legal profession is entrusted with thinking and interpretation of the law, the development of the law, transformation of the law, competent representation, social justice and access to justice. Being honest and acting in a client's best interest instead of their own, only constitutes the bare minimum of what is required, and that being or becoming a 'fit and proper' legal professional entail much more than not to be guilty of a crime related to dishonesty.

My final conclusion from the consideration of the interpretation of 'fit and proper' by the judiciary is that the courts have consistently failed to draw a clear distinction between conduct that constitutes non-compliance with a law and ethical values. My critique of applying 'fit and proper' as a legal rule or standard is considered more carefully in Chapter 4, but my inference from the consideration of case law is that the definite distinction made by the courts between the facts and legal interpretation is

270 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA); *General Council of The Bar of South Africa v Jiba and others* 2019 (8) BCLR 919 (CC).

indicative of our sustained conservative legal culture which continues to prevent true transformation envisaged by the *Constitution*.

It is my opinion that the content and meaning of what 'fit and proper' entails is not as clear as legal practitioners, the LPC and the courts seem to suggest and that the manner in which it has traditionally been interpreted needs to be reconsidered. My tentative suggestion is that this reconsideration will necessarily have to be continuous and therefore it is rather referred to as reimagining of the 'fit and proper' legal professional in Chapter 4.

Chapter 4
Reimagining the 'fit and proper' legal professional

4.1 Introduction

The purpose of this study is to ultimately indicate how the 'fit and proper' concept is closely related to the role of the legal professional in society and is, or should be, directly linked to objectives such as 'public interest', 'access to justice' and 'social justice' and that the interpretation thereof should necessarily be in terms of the *Constitution* if we are serious about transformation of the legal culture of South Africa.

My proposal is that 'fit and proper' should rather be interpreted as a continuous responsibility of all legal professionals than a prerequisite for admission to legal practice and that the meaning thereof must informed by variable values and principles and not mere compliance with fixed rules of conduct or a specific test. This interpretation will necessarily have an impact on our understanding of the role of the legal professional in society as well as the meaning and content of the knowledge, competencies and values traditionally required to determine a professional's fitness and propriety for legal practice. While I have considered the history and background of the legal profession in South Africa in Chapter 2 and attempted to establish the current meaning and interpretation of 'fit and proper' in Chapter 3, the focus of this chapter is on reimagining the 'fit and proper' legal professional in a South African context.

The question I consider in this chapter is whether a legal professional in South Africa today has a different from the traditional role to play in our diverse, multicultural society, and whether certain conceptions, but particularly the 'fit and proper' requirement for admission to the profession, should be reconsidered. It is my tentative opinion that the reconsideration thereof will necessarily have to be continuous and that the current practice of ascertainment of 'fit and proper' upon admission to legal practice should be replaced by a process of reimagining 'fit and proper' throughout the career of a legal professional, in whichever capacity. In reimagining the 'fit and proper' legal professional, I commence with a critique of applying 'fit and proper' as a legal rule, as it has been up until now. The different points of critique lead me to a consideration of what it would mean to become 'fit and proper' by aligning current

principles with a utopian objective that is continuously reimagined. In this consideration I reflect on the interpretation of the current principles of 'fit and proper', the effect of the moral aspect thereof, 'fit and proper' as a utopian concept and the meaning of knowledge, competencies and values necessary in becoming a 'fit and proper' legal professional. I finally consider how the interpretive change from being 'fit and proper' to always becoming 'fit and proper' could potentially have an impact on the understanding of professional responsibilities of the legal professional, the role of the legal professional, the legal culture and understanding of the law.

It is currently the requirement, and has been since 1934, that the High Court should admit to practice and authorise to be enrolled as a legal practitioner, conveyancer or notary, any person who, upon application, satisfies the court of being a 'fit and proper' person to be so admitted.[1] The manner in which this requirement has been uncritically accepted and applied in South Africa since the inception thereof is portrayed in my analysis of the opinion of legal scholars and interpretation by the courts in Chapter 3.[2] The continued uncritical acceptance and adherence to legislation can arguably be blamed on our largely untransformed legal culture inherited from the previous political dispensation. My reflection in Chapter 2 on the history and role of legal professionals in South Africa should be understood in light of its political history. It is undisputed that the current legal culture in South Africa is still very much embedded in the formalist, traditionalist and positivist European culture from where it developed, and that its transformation is necessary in an attempt to truly realise the objectives of the *Constitution*. In this chapter, I attempt to show why a legitimate protest against the current legal culture would inevitably have to entail self-consciousness instead of self-interest and reflect respect for the continuous responsibility to think about, interpret and apply the law in line with the values of the *Constitution*.[3]

Whereas the current role and purpose of the LPC is considered in Chapter 3, my reflection in this chapter is focussed on what it should be in supporting the transformative project and legitimate protest against the current legal culture. It is my tentative argument that it is imperative that the LPC, as the regulating body of the legal profession, endorses the transformative objectives and provides guidance to legal

1 *Legal Practice Act* 28/2014: sec. 24(1)(c). See Chapter 3.2.
2 See Chapter 3.4 and 3.5.
3 See Chapter 3.5.

professionals in an attempt to change the existing legal culture. In my opinion, the overhaul of this national regulatory body, described in Chapter 3, has not achieved its original proposed objectives because more is required than a mere reformulation and description of its formal duties or an expansion of the current Code of Conduct. The proposal is that the entire role and function of the legal professional in society should be reconsidered. This would necessarily impact on the content, meaning and interpretation of the 'fit and proper' concept, which is closely related to the role of the legal professional. This concept should signify an objective that is continuously reimagined and strived towards, rather than a requirement that can already be assessed and achieved upon admission to the profession. This proposal is in line with my suggestion in Chapter 2 that ethics demand continuous evaluation and reconsideration. It is also consistent with *ubuntu* as an African value, which entails that we are only to the extent that others are, that our becoming is always in relation to others and that our encounters with others compel us to continue reinterpreting what the world is for us and who we are in the world, also as legal professionals.[4]

In my consideration of the history and development of the professions in Chapter 2, I found that the provision of an unbiased service, aimed at the public good, independent of any concern for personal gain, is traditionally one of the main distinguishing features of a professional practice.[5] In response to this objective, but also against the background of our history marked by inequality, racism and gross human rights violations, a more humanistic approach to the understanding of law may be needed to honestly serve the interest of the South African public. Based on the conclusions drawn in Chapter 2, I am of the opinion that it is imperative for the legal practitioner who practices law in South Africa today, to replace the current restrictive view of the law with a broader approach thereto. This suggestion entails a more general jurisprudential approach with an understanding of the African value of *ubuntu* and compliance that demands a constant reconsideration (or rethinking) of what the ethical and politico-ideological require. It would require the incorporation of the conceptions of African law into the duties of lawyers, which does not imply adding specifications to the Code of Conduct but rather a foundational understanding of the meaning of these

4 Douzinas & Gearey 2005:16. See Chapter 5.2.
5 Western *et al* 2001:21. See Chapter 2.3.

values and principles, the fluidity thereof and constant reconsideration of the ethical.[6] I explore these ideas in this chapter in my reflection on the meaning of public interest and the practical implication of providing an unbiased service aimed at the public good in an attempt to gain a better understanding of how it relates to being 'fit and proper'.

The question of whether a legal professional has a different role to play in our society today partly arises from the conclusion in Chapter 2 that there must be a clear distinction between the law and laws and that law must be taught and understood in a broader context and in relation to other disciplines. The ultimate objective is for legal professionals to become better equipped and able to develop laws capable of responding to the changing needs of a multicultural society.[7] The responsibility for this development entails a renewed thinking about the law and what it calls upon us to do in order to transform the existing formalist legal culture to one that considers the consciousness as well as the conscience of the law with an increasing appreciation of morality, ethics and meaning.[8] My proposal regarding the possibility of transforming perceptions regarding the meaning of 'fit and proper' and the role of the legal professional through legal education is considered in Chapter 5.

4.2 Critique of applying 'fit and proper' as a legal rule and proposal in favour of an aspirational standard informed by principles

The practical application of the 'fit and proper' requirement in the admission process by the courts illustrates how they have mainly adopted a positivistic approach that has been restricted to compliance with laws and the profession's Code of Conduct.[9] This

6 See also Chapters 5.4 and 5.5.

7 Douzinas & Gearey 2005:10. With reference to the appeal of Douzinas and Gearey that we return to a general jurisprudence which returns to the classical concerns of legal philosophy and adopts a much wider concept of legality. See Chapter 2, par. 2.7.

8 Douzinas & Gearey 2005:3,15. See Chapter 2, par. 2.7. See also Chapter 5, par. 5.5 with reference to White's statement that, in becoming to know the law, it is important to know who you are in reading it and in writing it and what it calls upon you to do and to be (2002:1429).

9 Slabbert 2011:217. Slabbert explains that the practical process in South Africa entails that the prospective attorneys and advocates are interviewed by a senior person in the respective professions. This interview lasts no more than a maximum of fifteen minutes and the senior then testify if he or she found the applicant to be a 'fit and proper' person. *The purpose of the interview is mainly to determine whether the applicant has previous criminal convictions or has ever been accused in a disciplinary hearing*. For attorneys, it is also to check whether the candidate has knowledge of the profession's ethical rules and the application thereof. In the final instance, the court confirms this value judgment although the judges are at liberty to ask extra questions to their satisfaction. According to Slabbert, the process is, as a result, completely subjective and unsatisfying.

approach creates the impression that the content of the legislative requirement, which they have been applying as a rule, is clear and indeed determinable.

Currently, the application of the concept as 'a rule' entails the assumption that a practitioner who has not transgressed the Code of Conduct and does not have a criminal record, will have acquired the necessary *ethical values* that is associated with the 'fit and proper' concept. It is then accepted that all legal practitioners admitted to the profession, have attained and possess the necessary ethical values until their conduct should later prove otherwise. If readmission to the profession is considered, it has to be proven that the practitioner concerned has remorse and was not guilty of the same or similar conduct during the period of disbarment. The (mis)conduct of which the practitioner is accused of would typically be considered in light of rules or a code of conduct in order to find that such a person is no longer 'fit and proper'.

In terms of the value judgment understanding, the standard against which a prospective practitioner is measured to determine suitability for admission to the profession, is the person's conduct, namely legal compliance. It is, however, questioned whether ethical values can or should rely on a person's observable conduct and whether the existence (or absence) of ethical values can indeed conclusively be determined from a person's conduct.[10] Even if there is a correlation between ethical values and conduct, the equation of mere compliance with rules and regulations or a code of conduct to ethical values is a very narrow interpretation of such ethical values that could potentially result in missing the important purpose of the standard.

It is proposed that the concept of ethical values, also insofar as it relates to the 'fit and proper' requirement, specifically in consideration of our current constitutional dispensation, requires a broader, more comprehensive approach than merely applying it as a legal rule.

From the reasoning above, it is proposed that, although 'fit and proper' is a legislative requirement for admission to the legal profession, it cannot function or be applied as a legal rule and that it should rather be interpreted as an aspirational standard or measure informed by principles. The question then immediately arises whether it

[10] Slabbert 2011:212-213. See Chapter 3.4.

would be advisable or even possible to formulate an exhaustive list of such principles to inform the value judgments that are expected in such matters. My sense is that, even though a comprehensive list of principles could be identified and described in order to deepen the understanding of the standard or measure, it should never be regarded as exhaustive. This would result in limiting instead of expanding the scope of the value judgments that would in many instances also be influenced by prevailing circumstances. It follows that, if all the principles that would inform the standard from time to time cannot be clearly defined, then the standard, although determinable, is not fixed and attainment thereof never certain.[11]

It is also important at this point to be reminded that, as explained in Chapter 2, the law and the legal professional must develop together. Our current reality and transformative constitutionalism project entails that the law must be taught and understood in a broader context and in relation to other disciplines in order for the legal professional to become better equipped. This would, in turn, enable the legal professional to develop law that is capable of responding to the changing needs of a multicultural society.[12] In terms of this understanding, it would not be possible to define a definite standard with which legal professionals can be compared in order to determine their appropriateness for admission to the profession.

I am of the opinion that it would be more helpful to understand that the process of continuous interpretation and transformation of the law, with the objective of it being just, should be concurrent with the process of a legal professional's continuous self-reflection and alignment of values with the objective of becoming 'fit and proper'. The understanding of 'fit and proper' as an objective and part of a continuous process of *becoming*, essentially means that it cannot be interpreted or applied as a requirement or a legal rule.

The responsibility of legal professionals is therefore not to prove that they *are* 'fit and proper' but to continuously endeavour to *become* 'fit and proper'. It is also proposed that, even though the requirement of proving to be 'fit and proper' has traditionally only been applicable to members of the profession applying to be admitted as practitioners,

11 See par. 4.4 for a discussion of the 'fit and proper' person as a utopian concept.

12 Douzinas & Gearey 2005:10. This refers to the appeal of Douzinas and Gearey that we return to a general jurisprudence which returns to the classical concerns of legal philosophy and adopts a much wider concept of legality. See Chapter 5.4.

the responsibility and duty of becoming 'fit and proper' should be applicable to all legal professionals.[13] This proposal links to Pound's important remark that, for the law and the legal professional to grow together, the responsibility for training of legal professionals necessarily involves the responsibility for growth of the law and that it would be necessary for universities and practitioners to work together to achieve this purpose.[14] In the South African context, this would also entail the development and all-encompassing transformation of the existing formalist legal culture to one that considers the consciousness as well as the conscience of the law with an increasing appreciation of morality, ethics and meaning.[15]

The proposal is that 'fit and proper' be removed as a legislative requirement and that legal professionals who apply to be admitted as members of the LPC to practice as attorneys or advocates, solely have to prove adherence to the rules and Code of Conduct of the LPC, as determined from time to time. The importance of these rules for the regulation of the LPC and restriction of liability should be understood and respected by its members. The LPC should be able to determine the rules for admission of a legal practitioner as well as the removal or suspension of such practitioner, as they have done until now, but without linking it to the 'fit and proper' concept. In my opinion, this has been the practical application thereof in any case.

As illustrated in Chapter 3, the courts consider the admission (and particularly the removal) from the roll of a legal practitioner to be a factual inquiry. Upon finding that a person has contravened a particular rule, the court would then make a value judgment regarding the seriousness thereof in the particular circumstances. Only after this factual inquiry the court would reach its decision on whether the person has to be admitted, suspended or struck from the roll, or not. The court's subsequent finding that a person is, or is no longer, 'fit and proper' rather seems like an *ex post facto* expression of this ethical requirement based on its factual inquiry into the person's conduct. Based on the reasons outlined in this study, the above proposed approach to allowing or disallowing membership to the LPC would be more honest and practical.

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13 See description in Chapter 1: The reference to 'legal practitioner' in this study means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the LPA 28/2014, while 'legal professional' is an all-encompassing term including, but not limited to, legal practitioners, legal advisors, prosecutors, magistrates, judges, academics and law teachers.

14 Pound 1941:204. See Chapter 2.2 and Chapter 5.5.

15 Douzinas & Gearey 2005:3,15.

My suggestion of removing 'fit and proper' as a legislative requirement does however not entail that it be removed as a principle in its entirety, but rather that it be understood as a more foundational aspiration for everyone entering the legal profession and that the reimagining of the principles and objectives thereof be embedded in legal education.

Quinot and Greenbaum, in their consideration of the contours of a pedagogy of law in South Africa, consider the reconceptualisation of legal education in light of the imperatives of transformative constitutionalism.[16] The principles that would inform the reimagining of the 'fit and proper' concept and the role of the legal professional will be necessary in order to equip law graduates to develop and participate in the new legal culture and the constitutional project. This inevitably implies that the content, the design, the methodologies and the outcomes of legal education will have to be reconsidered.[17] I further reflect on this implication in Chapter 5.

4.3 Becoming 'fit and proper': Reconsidering current principles

If the proposal is accepted that becoming 'fit and proper' should be a continuous objective or aspiration of all legal professionals rather than a requirement that can be attained or assessed, then the principles which inform such an objective should still be described. It is, however, not proposed or advised that an exhaustive list be compiled, or rules be formulated that could be susceptible to a formalist approach as 'steps of becoming fit and proper'. My suggestion is that broader guidelines are identified that would contribute to a more foundational understanding and thinking of the law and its transformation as well as the role that the legal professional ought to play in the process.

This suggestion links to the ethical framework referred to by Wessels as the outcome-orientated approach which is determined by the consequences to which it will give rise.[18] As pointed out in Chapter 3, Wessels questions this framework because it is not clear how it would be determined whether the consequences are to be regarded as good or as bad. In this study, however, it is preferred over the rule-based and

16 Quinot & Greenbaum 2015:60. See Chapter 5.3.
17 Quinot & Greenbaum 2015:60. See Chapter 5.3.
18 Wessels 2021:403. Legal practitioners who follow this approach will make their ethical decisions based on what would produce the best outcome. See Chapter 3.3.

character-driven approaches that are either too formalistic or superficial in their application to truly provide a solution for the object of transformation.[19]

In reimagining the meaning of 'fit and proper' and describing the process of becoming, I again consider some of the principles referred to in the historic analysis in Chapter 2 and current principles indicated by the courts and legal scholars, which could be interpreted as broad guidelines or principles that could inform outcome-based decisions. This analysis indicates that it is not the traditional or current principles but rather the interpretation thereof that has led to our existing stagnant and formalist legal culture that is mostly disconnected with the values of the *Constitution*.[20] These principles can broadly be divided what informs the 'legal concept' as defined by the courts and legal scholars and principles that informs 'fit and proper' as a 'moral concept'. In the subsections below I attempt to highlight some of these principles before discussing the possible interpretation thereof and usefulness in the process of reimagination.

4.3.1 Current principles informing 'fit and proper' as a legal concept

As explained in the preceding subsections, it is a legislative requirement for a person to be considered 'fit and proper' upon admission as a legal practitioner. All legal practitioners must therefore at some point have been considered 'fit and proper' to be in that position in the first place.

As an English concept, *fit* is described by the *Oxford English Dictionary* as 'well adapted or suited to the conditions or circumstances of the case, answering the purpose, proper or appropriate'.[21] *Proper* seems to be a synonym of fit and as an adjective, according to the *Oxford English Dictionary*, it denotes suitability or conformity.[22] In plain English terms being 'fit and proper' therefore seems to mean that

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19 See Chapter 3.3.

20 See Chapter 3.5: 'However, a legitimate protest against the current legal culture would necessarily have to entail a self-consciousness instead of self-interest and reflect respect for the notion of a continuous responsibility to think about, interpret and apply the law in line with the values of the *Constitution*. It is not complacency or mere compliance with laws that render a person 'fit and proper', nor the abolition and resistance against all existing laws and traditions. What is required is a critical approach and a broader scope of thinking about the law and role of the legal professional; a more humanistic engagement in legal text with more appreciation of morality, ethics, meaning and consequence.'

21 *Oxford English Dictionary*, 2022, Fit, https://www-oed-com.ufs.idm.oclc.org/view/Entry/70747 (accessed on 14 October 2022).

22 *Oxford English Dictionary*, 2022, Proper. https://www-oed-com.ufs.idm.oclc.org/view/Entry/152660 (accessed on 14 October 2022).

a person is suited for the purpose of practicing law. An investigation of the origin and etymology does not shed more light on the meaning of these words in lay terms, except that it does not appear to have a moral connotation.

In a legal context, the courts' interpretation and method of determining fit and proper are explained below with reference to judgments relating thereto:[23]

- In considering whether a person should be suspended or removed from the roll, the court, after considering the facts and hearing arguments, must decide on a balance of probability whether the alleged offending conduct has been established and, if so, whether it shows that, by reason of character or otherwise, the person is indeed no longer a 'fit and proper' person to practise as an attorney. *Although that may sometimes necessitate making a value judgment to some extent, the Court's function is in essence one of making an objective finding of facts, and not the exercise of a discretion*.[24]
- A finding whether or not a person is 'fit and proper' does to some extent, *involve a value judgment*, but this by itself cannot in the context elevate a finding of that court in this regard, essentially a finding of fact, to an exercise of 'discretion'. A person admitted to practice after all becomes an *officer of the court*, so it is inevitable that the court also has the final say as to the fitness or otherwise of a person for such a task.[25]
- An advocate is required to be of *complete honesty, reliability and integrity*. These qualities are particularly required of an advocate who holds high public office in the administration of justice. The court found that whether a person should be struck from the roll of advocates for failure to comply with these standards, it had to be determined by a three-stage process. The first entailed a *factual finding* in respect of the alleged offending conduct. If that conduct was established, the second stage comprised a finding as to whether the person was a 'fit and proper' person to continue to practise. If not, the third stage

23 This is not a complete list of judgments but merely an illustration with reference to case law often referred to in matters where the courts are required to make a finding on the fitness and propriety of a legal practitioner.

24 *Hassim v Incorporated Law Society, Natal* 1979 (3) S.A. 298 (A.D.):307.

25 *Kudo v Cape Law Society* 1977 (4) S.A. 659 (A.D.):675.

involved the exercise of a discretion in respect of whether a removal from the roll of advocates or suspension from practise would be appropriate.[26]

The above summaries from judgments are only a few of many examples indicating the courts' interpretation of the 'fit and proper' requirement in considering whether a person is or is no longer suited for practice. Although it appears to be a value judgment based on the premise that a 'fit and proper' person is a person who is honest, has integrity and is an officer of the court, the finding is eventually based on a factual transgression of rules of conduct or legislation, or a criminal offence.

In contrast to the formalist, practical approach followed by the courts, South African legal scholars describe the 'fit and proper' concept as follows:

- Slabbert states that the requirement for being considered a 'fit and proper' person is neither defined nor described in legislation, despite the fact that it is a stringent requirement. Given the lack of definition, it has to be *interpreted in a subjective manner* and applied by seniors in the profession and ultimately by the courts.[27]
- Slabbert further states that membership to the profession is subjected to character screening, yet what exactly a 'fit and proper' person is, is not defined or described in legislation or regulations. Slabbert believes it is accepted that in order to be 'fit and proper', a person must show *integrity, reliability and honesty*, as these are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public.[28]
- According to Geldenhuys and Stoop, the law is not stagnant, and the evolving nature of the law requires all practitioners, students, and academics to study it continuously to keep up to date with new developments. Being a scholar of the law is, therefore, a life-long challenge. They are of the opinion that it is probably fair to describe the ability to critically read cases and legislation, analytical thinking and a studious, inquisitive nature as forming part of the multifaceted notion of what makes someone 'fit and proper' to be, and to remain, a lawyer.[29]

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26 *Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA* 2018 3 All SA 622 (SCA):635-636.
27 Slabbert 2011:209 (references omitted, emphasis added).
28 Slabbert 2011:212 (references omitted, emphasis added).
29 Geldenhuys & Stoop 2017:472 (references omitted, emphasis added).

- Van Zyl and Visser note that it is necessary for all the role players to step up to the mark in order to promote the interests of justice and that the first step would be to pay due regard to the pitfalls and problems that we are facing. The next step would be to own up to shortcomings, and where necessary, to recalibrate our moral compasses in order to direct us on how to remain on, or to return to, the narrow path of exercising a profession that is worthy of being considered reserved for those who are 'fit and proper'.[30]
- Van Zyl and Visser further note that legal ethics plays an important part in ensuring that the conduct of lawyers meets the requirement of a 'fit and proper' person and protects the public from unprofessional and unethical lawyers.[31]
- With regard to the moral compass, Van Zyl and Visser define it as a natural feeling that enables persons to distinguish between what is right and wrong and how they should behave. It is also a term used in reference to a person's ability to judge what is right and wrong and act accordingly. They further state that the definition of a 'conscience', which is a synonym of the moral compass, is also instructive in describing this metaphor.[32]
- According to Robertson and Kruuse, South African courts have long maintained and guarded their role as the ultimate deciders of the ethical rules of conduct for the legal profession. Judicial interpretations of lawyers' professional responsibilities in misconduct cases, particularly on the 'fit and proper' requirements, therefore, add to the stock of guidance and authority on this duty. In most of these cases, courts have emphasised values such as integrity, honesty and reliability. Yet, despite the judicial endorsement of these values in reaching a 'fit and proper' determination, their judgments in such cases typically say little or nothing about the application of the principles that lie at the heart of lawyers' responsibilities. Robertson and Kruuse note that these principles are those that apply within the broader context of the daily routines of legal practice or are about the nature of the many difficult ethical challenges actually faced by lawyers.[33]

30 Geldenhuys & Stoop 2017:473 (references omitted, emphasis added).
31 Van Zyl & Visser 2016:6 (references omitted, emphasis added).
32 Van Zyl & Visser 2016:7 (references omitted, emphasis added).
33 Robertson & Kruuse 2016:357.

Considering the opinion of legal scholars, the concept of 'fit and proper' in a legal context has a direct moral connotation without it expressly determined by the legislation that creates the requirement. It appears to be required that they must be able to show that they are honest, reliable, has integrity, knows the difference between right and wrong and are able to direct their judgments accordingly and are dedicated to being lifelong scholars of the law. However, nobody suggests how these virtues, if attainable, would be determined upon the admission of such a person to the profession. The problem is, apart from the fact that it would be impossible to determine whether a person possesses these virtues before admission to the profession, the suggested framework is basically inherited from Western (Christian) morality which is not necessarily true or the same for everyone.[34]

Slabbert points out that, in a post-modern society, questions can be asked about the universal applicability or understanding of some moral values that are traditionally attached to the 'fit and proper' requirement.[35] Robertson and Kruuse raise another significant question regarding the interpretation of legal ethics and ethical practice in South Africa. They state that both case law and the secondary literature on legal ethics and ethical practice in South Africa tend to convey the central message that ethical practice equates to compliance with professional rules or duties and that the rules constitute almost a complete resource for ethical behaviour.[36] The remarks by these writers provide an accurate summary and indication of the problematic interpretation and current understanding of the 'fit and proper' concept.

It would be less problematic if these principles informed an objective that is constantly reconsidered and therefore gradually developed in a process of attainment instead of principles informing a standard or requirement that must be proven to have been attained upon admission to the profession. In my view, and from my analysis of the meaning of 'fit and proper' from the judiciary's interpretation, a person's knowledge of the law will exponentially develop after their undergraduate studies while practicing as a legal practitioner, commencing with postgraduate studies or pursuing another career in law. Thinking about the law will influence a person's understanding of the law and therefore impact on their ability to make value judgments or distinguish between right

34 Slabbert 2011:217.
35 Slabbert 2011:217.
36 Robertson & Kruuse 2016:358.

or wrong, just or unjust in particular circumstances. Due to their interrelatedness, it would be incorrect to draw a clear distinction between a person's knowledge, competencies and values for the purpose of establishing that such a person is 'fit and proper'.

It is currently understood that a person, upon admission to the profession, has only just obtained the minimum knowledge in order to practice law and, instead of only attaching ethical values to the 'fit and proper' requirement, there must be the same understanding about a person's competencies and values. While it is agreed that certain values are inherent to a person, the values referred to in this context has a broader meaning than simply referring to the fact that a person is honest. (Also, because the conclusion that persons are honest is normally linked to a superficial factual finding that they have not made themselves guilty of stealing, fraud or other dishonest conduct.) I further reflect on how the meaning of knowledge, competencies and values should be understood with reference to *becoming* 'fit and proper' and how they relate to the concept of morality as discussed in subsection 4.3.2.

4.3.2 'Fit and proper' interpreted as a moral concept

The accuracy of Slabbert's assertion is evident from examples in case law where individuals with supposedly high moral values and ethical standards have been found not being 'fit and proper' for legal practice because their conduct did not comply with what was expected at the time. One such example is Bram Fischer, the general secretary of the South African Communist Party, morally dedicated to the fight against apartheid, but removed from the role of advocates because this party was banned at the time and membership thereto was illegal. In Fischer's case the Court found that it was 'impossible for this Court to foresee what will happen in the future. We are concerned with the laws in force at the present time and with the structure of society as it exists in this country at the present time.'[37] Subsequently, even though there had been character testimony by respected legal practitioners of Fischer's moral character, and regardless of the foreseen possibility that the specific laws may change due to political circumstances, the court was compelled to find that he was not 'fit and proper' because his conduct did not comply with the current laws.[38]

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37 *Society of Advocates of SA (Witwatersrand Division) v Fischer* [1966] 1 All SA 346 (T):351.

38 See Chapter 3, par. 3.4.9.

It is worthwhile to again note here that Fischer's life is a perfect illustration of Sanders' notion that being complicit is not static but occurs on a range between well-being and aversion, where aversion could be the turn which makes us aware of complicity. My interpretation is that Fischer's sense of complicity, as an Afrikaner, comes out of his attempt to dissociate from his thoughtful conscience and it seems to have been this awareness which intensified his experience that being an intellectual (and a lawyer) involved not only commitment to truth but also an assumption of ethical responsibility. Sanders argues that, when knowledge and thought become 'political' activities, the question of *what to think* leads to the question of what one *ought to do* and the intellectual then, aware or unaware of the politics of knowledge, confronts the question of ethical responsibility.[39]

From the case law considered, there seems to be a disconnect between the pragmatic method applied by the courts to determine whether a person is 'fit and proper' and the moral content attached to the concept. Understandably so, because it would be impossible for a court to determine at the commencement of someone's legal career whether the person is an honest person with integrity and ethical values. Even if such values could be objectively described, the determination of the existence or extent to which it is possessed would not be possible. The courts are therefore left with the objective of observable conduct of a person in order to establish the values of such person. If no conduct can be found in terms of which the person could be rendered 'unethical', then the person would be considered suitable for practice until such time they engage in conduct that indicates the contrary. As observed earlier, it can rightly be asked whether the current moral connotation to the concept of 'fit and proper' and the labelling of a person as such does not create a false warranty to the public that such a person will act ethically.[40] It is my opinion that we may have been fooling ourselves as well as the public by attaching a moral connotation to the 'fit and proper' requirement and, by finding a person 'fit and proper', implicating that the existence of ethical values could and have been established. Ironically and related to this, Wendel states that, other than the clergy, no profession in modern society makes the claim to

39 Sanders 1998:5-12. See also Chapter 2.7 and Chapter 3.5.9.
40 Slabbert 2011:209. See also Chapter 3.3 and 3.4.

be better at making moral decisions than its clients, and of course even the clergy's claim is bitterly contested.[41]

Wendel, in his consideration of moral judgment and professional legitimation, declares that legal practitioners should be told not to act on the basis of their principled moral convictions.[42] He believes that they should refrain from exercising moral judgment on the basis of non-legal values because legal ethics differs in kind from ordinary ethics. According to Wendel, the social function of the law is to settle normative disagreement procedurally and to adopt a provisional social settlement of moral conflict that disqualifies a person from acting upon the basis of first-order moral reasons.[43] He argues that if you consider the role of lawyers from a perspective of jurisprudence and the sociology of professions, it is apparent that the judgment characteristic of lawyers' expertise is not primarily the exercise of ethical discretion but rather the application of legal norms, which may incorporate moral principles but is distinct from morality.[44]

Wendel's argument reminds of Johnson's opinion that the profession is suffering from the impossibly high standard of its own rhetoric and the society is suffering for believing that rhetoric.[45] Both, in different terms, calls for demystification of the law and respect for the autonomy of the client. In this respect, Wendel states as follows:[46]

> The implication for legal ethics is when lawyers are acting in a representative capacity, where legal entitlements to morally wrongful conduct are concerned, they must be careful not to interfere with their clients' autonomy to do things that they would regard as wrongful, from the point of view of their own value commitments and form of life. A lawyer's moral integrity, in the sense of her own ideals and ambitions that constitute the form of life she aims to live by, is not the source of value in the lawyer−client relationship. Rather, the moral worth of the relationship is based on the legitimacy of the law from the point of view of citizens. The law establishes at least a provisional settlement of normative conflict that is sufficiently stable and clear that it provides the basis for coordinated action despite what would otherwise be interminable moral conflict.

If it is accepted that legal ethics is distinctly different from ethics and moral values in general, then what informs these values will necessarily also differ. While Van Zyl and Visser argue for the development and encouragement of students' internal moral compasses that is aligned with personal worldviews based on religion, politics and own beliefs, it should probably rather be aligned with the constitutional values which

41 Wendel 2007:1073.
42 Wendel 2007:1073.
43 Wendel 2007:1073.
44 Wendel 2007:1071.
45 Johnson 1971:20. See also 4.5 for a discussion regarding the public interest.
46 Wendel 2007:1082.

we swear to uphold.[47] In my reflection in Chapter 3 on Van Zyl and Visser's proposal of the metaphorical moral compass I find that, in order to be guided by this compass in one's judgment, thoughtfulness, self-consciousness and a sense of personal responsibility would be required.[48] Van Zyl and Visser regard the moral compass as a synonym for 'conscience', which is a person's moral sense of right and wrong, or at least the ability to distinguish between right and wrong and act in accordance with or defend such judgment. Sanders' notion of complicity could make a useful contribution to this interpretation.[49] According to Sanders, complicity breeds watchfulness. When the intellectual realises that thinking and knowing demand not only a fidelity to truth, but also a consideration of social consequences, there is a sharpening of ethical responsibility.[50]

In line with Sanders but also Wendel's argument, I propose that a legal practitioner's professional judgment in a South African context should therefore not be informed by an internal moral compass based on personal views, but rather legal ethics informed by the more tangible values of the *Constitution*, yet open for continuous reinterpretation. Adding to Wendel, I then argue that the moral worth of the relationship between the legal practitioner and the client is not based on the trust in the legal practitioner's morality, but rather in the belief that the law will be interpreted and applied with the values of the *Constitution* as a point of reference which, in turn, influences the values and views of the community. With our history in mind, confidence in legitimacy of the law is more likely to be cultivated by an openness for the development of the law than in a strict application of laws. The morality or ethical values of legal practitioners, in accordance with this interpretation, will then rather be assessed in accordance with their ability to contribute to the development of the *law* rather than their mere knowledge of *laws.* This view is aligned with the opinion related to what is 'professional' as expressed in Chapter 2, a part of which is repeated here due to its importance.[51] It is stated that the duty of legal practitioners to ensure that justice is done and must be seen to be done, should mean that they fulfil a function involving the information, communication, education and dialogue with the people they

47 Van Zyl & Visser 2016:7-8 & 13.
48 See Chapter 3.4.
49 Van Zyl & Visser 2016:8.
50 Sanders 1998:21. See also Chapter 3.4.
51 See Chapter 2.3.

serve. Scrutiny of the justice system should be continuous, and legal practitioners ought to identify the legal rules that would create the best system and that this would involve value judgments about moral and political considerations as well as an analysis of what the law is and what its outcomes are, or should be.[52] The impact of the law upon different communities with different values should not be underestimated in any attempt to safeguard the Rule of Law if we are to enhance trust, respect and confidence in it.

To this extent, the general constitutional values of human dignity, equality and freedom, but also access to justice and social justice, should be the measure of what is legally right or wrong and according to which the moral compass of the legal professional must be calibrated. If Whelan's proposal of professional responsibility based on professional judgment, instead of professional codes or rules, is considered in this context, it should be interpreted that legal professionals have the responsibility to align their professional judgments with legal ethics, which are informed by the values of the *Constitution*.[53] The ideal would be that the ethical values and morals of the professional are aligned with legal ethics in this sense, but since it has to be interpreted and cannot be objectively determined, it should not be a requirement or a condition of a person practicing law.[54]

It is not suggested that the content of legal ethics is clear and determined, but rather that it is determinable in different circumstances with the values of the *Constitution* as a point of reference. What is considered to be right or wrong in different circumstances is still not definite, but it is proposed that the legal practitioner interprets the law with legal ethics as the guiding principles, while keeping in mind the autonomy of the client and interest of the public. To this extent, according to Wendel, lecturers in law schools should be able to handle legal ethics in the same way as they treat any other policy discussion.[55] In his view, the discipline of legal ethics has suffered from self-imposed mystification that relied upon an implicit belief that ethical reasoning for legal practitioners is a skill that cannot be taught.[56] He states that ethical reasoning in

52 See Chapter 2.3. Blackstone Lecture 2020. https://www.ialsnet.org/wp-content/uploads/2021/01/blackstone_script-Sir-Ernest-Ryder-blackstone-Lecture-012121.pdf (accessed on 22 January 2020).
53 Whelan 2001:717. See Chapter 3.3.
54 'Professional' in this sense should be understood in the context of Chapter 2.
55 Wendel 2007:1074.
56 Wendel 2007:1074.

general may not be susceptible to teaching but that, for the purpose of training legal professionals, ordinary classroom faculty is perfectly suitable.[57] Because, as Wendel says, the law governing legal practitioners are not ethics and we as legal scholars are right to continue to question how ethics is taught.[58] In line with Wendel's argument, it is proposed that we continuously consider the way in which the law and ethics interact to steer us toward a more comprehensive approach to the 'fit and proper' concept and teaching professional responsibility in a South African context.[59]

4.4 Reimagining 'fit and proper'

4.4.1 Reimagining 'fit and proper' as a utopian concept

The implication of the idea of *becoming* 'fit and proper' as a continuous objective or aspiration of all legal professionals, rather than a requirement that can be attained or assessed, is that it should necessarily be interpreted as a utopian concept.

Douzinas explains that, while natural lawyers derive their systems of rights from the accepted principles about human nature in a way akin to mathematical deductions and scientific proofs, the utopian imagination uses narratives, images and metaphors to project the future society.[60] In this sense, natural law draws its power from the great thinkers of the past, while utopias are imaginary projections of the future. Douzinas describes utopianism as a dream of the future, fuelled by the past and immanent in the present.[61]

It is important to note the distinction made by Douzinas between the utopianism of human rights and that of the classical utopias which hoped to create a 'new man' to fit the collective plan.[62] He states that, like all utopias, its realisation is always deferred, turning human rights from governmental triumphalism into utopian hope. He states that human rights can fill the non-place of the postmodern utopia and that they can generate a powerful political and moral energy, unlike any other ideology.[63] In this sense, human rights – based as they are on the fragile sense of personal identity and the *impossible* hope of social integrity – integrally link the individual and the collective.

57 Wendel 2007:1074.
58 Wendel 2007:1090.
59 Wendel 2007:1090.
60 Douzinas 2000:225.
61 Douzinas 2000:225.
62 Douzinas 2000:239.
63 Douzinas 2000:239.

Like all utopias, they deny the present in the name of the future, which means that they paradoxically deny the rights of laws and states in the name of the plural humanities yet to come.[64]

In line with Douzinas' distinction between the utopianism of human rights and that of classical utopias, Van Marle argues that an ethical interpretation of equality will be more true to the promises and ideals contained in the *Constitution*.[65] She explains that such an ethical interpretation of equality would be concerned with transformation; however, not an abstract approach that is devoid of concrete elements. Van Marle states that an ethical approach differs from a substantive approach in the sense that it accepts the utopian ideal of the 'not yet', and a future that is always postponed. It also realises the shortcomings of any approach to fully achieve equality and justice. Ethical interpretation, according to her, encompasses the utopian moments of natural law as well as the minimum conditions of individuality. This approach does not accept any 'reality' as the only or final version and is therefore always open for multiple imaginations of reality. Van Marle significantly confirms that, in terms of this approach, all interpretations are in a process of interpretation and reinterpretation.[66]

The utopian concept of becoming 'fit and proper' proposed in this study must be understood and interpreted in a similar ethical manner as proposed by Van Marle. If the law and the legal professional are to develop together and the responsibility for training of legal professionals necessarily involves the responsibility for development of the law, then it can be accepted that the law will be shaped by the legal professional in a similar way that the legal professional will be shaped by the law and thinking about the law. Jurisprudence, or wisdom of the law, which encompasses the law's consciousness and conscience, therefore brings together what is and what ought to be the law and justice, as well as the legal professional being 'fit and proper'. The law and the legal practitioner in this realm are the concrete elements shaping one another, while relying on the constitutional aspirations of being just and becoming 'fit and proper' as the utopian ideals.

The 'fit and proper' legal professional is then rather a person who finds intrinsic value in own sustained critical study of legal doctrine and theory to formulate an own opinion

64 Douzinas 2000:239.
65 Van Marle 2002a:509.
66 Van Marle 2002a:509.

and exercise professional judgment in the interpretation and application of the law in an attempt to be just or find justice. The idea of the 'fit and proper' as well as justice in this sense, are utopian aspirations of what a legal practitioner of the law is or could be in that it can never be fully achieved. There is always a notion of impossibility, a future that is always postponed.[67] Derrida explains that:[68]

> Justice is an experience of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice. Every time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law (droit) may find itself accounted for, but certainly not justice. Law (droit) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule.

It is proposed that this explanation not only assists in the understanding of the limit of the 'law of lawyering' or the Code of Conduct to contribute to a transformative understanding of the 'fit and proper' legal practitioner, but also why an ethical interpretation thereof cannot be captured definitely. If it is agreed that legal practitioners have considerable potential to contribute to the transformation project in South Africa in that they are considered to be guardians of the constitutional values (or the interpretation thereof), from Derrida's argument, what is expected cannot be insured by a rule. Van Marle notes that it is essential to keep in mind that the anticipated wholeness or projected future integrity is non-existent and impossible and differs from one person to another and from one community to another.[69] This would also be true of a legal professional in an attempt to be 'fit and proper' in that the ethical values of justice, equality, human dignity, social justice and access to justice cannot be permanent or determined and therefore exists as a utopia providing guidance rather than existing as an obtainable destination or 'place'. An ethical approach is therefore preferred in that it realises the shortcoming of any approach (or rule or law) to fully achieve its ethical values such as equality or justice.[70]

It is finally contended that, with reference to the legal profession's mandate to transform the legal culture in South Africa, a code of conduct will rather restrict such objective than assist in the process. In this regard, Van Marle's claim of the law's

67 Derrida 1992:16.
68 Derrida 1992:16.
69 Van Marle 2002a:505.
70 Van Marle 2002a:509.

paradox must be noted: its aim to transform is hampered by its structural limits and its structural limits are constantly challenged by its own transformative aims.[71] This paradoxical interaction may continue to exist in the process of *becoming 'fit and proper'* and the expectancy to comply with the formal Code of Conduct. I am, however, of the opinion that it will have a less restrictive impact on the transformation of the legal culture if the distinction is at least acknowledged in legal education and practice.

In his article on 'Legal knowledge', White considers the question of what it is that we are or should be teaching when we teach the law.[72] He states that, in becoming to know the law, it is important to know who you are in reading it and in writing it, and what it calls upon you to do and to be. According to him, 'all law calls upon us to act, not merely to repeat or invoke, but to make something new'.[73] Once this is understood, the question arises of how this task can be performed well and how it can be taught well. White concludes that his understanding of the law and how it should be taught is that we, as teachers and writers, should be prepared to create new versions of our inheritance, good for our time and for our minds, while recognising that our opinions will need to be revised in turn by those who will come after us, everyone as writers using the materials of law in an attempt to make sense of our experience in a continuing and collective effort to imagine justice into reality. This endeavour solely relies on our capacity to imagine the world and ourselves with others in it and not something that can be done easily or once and for always.[74]

Rosenberg, in his consideration of 'The path not taken', states that Holmes, in his criticism of formalist-style education, have made useful contributions about educating lawyers so that they can make useful contributions to solving pressing questions of public policy.[75] But, he says, by not taking this path, law schools and courts are now traveling a path of increasing social irrelevance and irresponsibility.[76] In Chapter 5, I consider the truth of this statement in a South African context as well as the importance of White's notion of creating a new imaginative understanding of the law that is good for our time.

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71 Van Marle 2004:652.
72 White 2002:1396.
73 White 2002:1429.
74 White 2002:1431.
75 Rosenberg 1997:1044.
76 Rosenberg 1997:1044.

4.4.2 Reimagining 'fit and proper' as a concept that entails knowledge, competencies and values

Traditionally, teaching of knowledge, competencies (or skills) and values (or ethics) have been dealt with as separate areas of learning.[77] The extent to which particularly ethics has been considered as a separate or additional area of teaching is illustrated by the outcome of an ethics summit held in 2014. Snyman-Van Deventer and Swanepoel, in their article following the summit, reflects on the call for a legal ethics module which had to be introduced as a matter of urgency as part of the South African LLB degree programme.[78] Although they agree with the necessity of a stand-alone module in legal ethics, they argue that it need not be taught in isolation, but *should ideally be incorporated throughout the curriculum using a mixed-method* approach. According to them, such an approach would result in students understanding that ethical issues are not restricted to a lecture or a set of notes, and that ethics, whether based on students' personal moral values and philosophy, or the professional and disciplinary rules and codes of conduct of the legal profession, are and will remain an integral part of their everyday and future working lives.[79]

From the above recommended approach, the question arises: Legal ethics mixed with what? The proposal that ethics could be taught as a stand-alone module and then ideally also incorporated in other modules throughout the curriculum by using a mixed-method approach is similar to the approach of constitutional law presented as a separate module with the recommendation that it should ideally be incorporated in all other modules. At first glance, it appears to be sound, but by analysing what this approach practically entails, one realises that it simply means adding to what we already have or to what is existing. Froneman explains that this approach still has much to do with the prevailing formal vision of the law and our failure to engage with substantive as opposed to formal reasoning in our interpretation of the law.[80] The proposal of incorporating legal ethics or constitutional imperatives into an existing curriculum or by a mixed-method approach indicates a lack of substantive reasoning and therefore lack of understanding that ethics and constitutional values are foundational to understanding and teaching law. It should be understood as the

77 See also the influence of positivism in legal education described by Dugard in 4.6 below.
78 Snyman-Van Deventer & Swanepoel 2017:127.
79 Snyman-Van Deventer & Swanepoel 2017:127-128.
80 Froneman 2005:4-5.

starting point rather than an *ex post facto* validation for the application of traditional views.

With regard to responsibility, Froneman states the following:[81]

> The Constitution gives the courts no choice other than to make these substantive choices, choices that are of the kind that a formal vision of the law would not countenance as "real" law. *The Constitution appears to exclude the possibility that anything other than a substantive vision of the law still remains open to us.*
>
> This means that South African lawyers can no longer bluff themselves that they bear no responsibility for the law: that the law is "self-executing" in all cases. However, after substantive examination, we might agree that the Constitution is best served in particular areas of the law by allowing the existing rules to continue "self-executing", for the present, but it will always be a provisional conclusion, never purporting to exclude different substantive choices in the future. *It also means that all of us need to brush up on our ideas of constitutional and legal theory, because the substantive choices in law that the Constitution demands of us are inevitably made on the (sometimes unconscious) basis of some idea of how law and democracy works or should work.*

Froneman's statement regarding the responsibility of legal professionals for the law and how it relates to their vision of the law, ties to my contention in subsection 4.2 above that thinking about the law will influence a person's understanding of the law and therefore impact on the ability to make value judgments or distinguish between right or wrong, just or unjust, in particular circumstances. Due to their interrelatedness, it would be incorrect to draw a clear distinction between a person's knowledge, competencies and values for the purpose of establishing that such a person is 'fit and proper'. Whereas it is currently understood that a person, upon admission to the profession, has only just obtained the minimum knowledge in order to practice law and, instead of only attaching ethical values to the meaning of 'fit and proper', there must be the same understanding about a person's competencies and values. When reimagining the meaning of 'fit and proper', it would be necessary to similarly reconsider our understanding of the knowledge, competencies and values of such a person. My consideration of our understanding of such knowledge of the law, the competencies, skills and ethical values expected of a legal professional could provide a starting point for the process of reimagination.

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81 Froneman 2005:17 (references omitted, emphasis added). See Chapter 3, par. 3.6. Memory and reflection of the past is essential in the process of transformation. This reminds of Sanders' explanation that memory assigns the intellectual a special responsibility because they are guardians responsible for memory and culture in terms of the classic model of the European intellectual. He further states that it is the intellectual's task to carefully reflect on 'our old memory' since it can identify when the phantoms of the worst of the past present itself as 'new ideas', particularly in the name of cultural identity. It is also in this sense that the acknowledgement of complicity, as a folded-togetherness, must be understood (1998:199).

Understanding knowledge of the law

In light of our history, the shift from parliamentary to constitutional sovereignty and the crucial reminder by Pound that the law is not laws, it is essential that we reconsider what we regard as 'knowledge of the law'. What is important is that, without seeking to prescribe a rule for every possible case, lawyers are taught to find principles informing the rules from which they can construe decisions. More significantly, lawyers must be taught to construct ideals of the social order and what the legal order and legal institutions and legal doctrines and principles ought to be, and then to choose analogies and develop such principles, and interpret rules in light of those ideals. Pound claims that,[82]

> When we have not merely rules, but along with them principles, conceptions, and standards, with a technique of developing and applying them and a body of received ideals in the light of which to employ the technique, then laws have grown into law and we have arrived at the legal order characteristic of a matured politically organised society.

This requires thinking about the law, with a more critical approach and humanistic engagement in legal text as called for by Douzinas and Gearey. According to them, the movement in the history of jurisprudence from a general to a restricted interest, diminished the scope of thinking about the law with a technical and professional approach. Positivism supposes legitimacy of the law on formal reason and its strict distinction between fact and value resulted in the minimised influence of moral values and principles in law.[83] Douzinas and Gearey draws a link between jurisprudence and its relation to the legal culture, social consciousness and the public interest.[84] According to them, jurisprudence is the law's consciousness, and conscience and juristic issues have always been central to philosophical concerns in history. Jurisprudence, as the wisdom of the law, therefore, brings together what is and what ought to be; the law and justice. Consequently, the consciousness of the law and the conscience of the law cannot be separated.[85] A continuous reconsideration is therefore required by also adopting external theories that would not only prevent

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82 Pound 1941:192. See Chapter 2.2 – Discussion of the history of universities and the tradition of teaching law. The importance of Pound's work, also from a South African perspective, is his insistence that law must be distinguished from laws. He writes that it was a mischievous idea of the nineteenth century analytical jurisprudence that law was no more than a collection of laws and that a law was a rule of the type of a penal statute, attaching a definite detailed legal consequence to a definite detailed state of fact (1941:191).

83 Douzinas & Gearey 2005:4-6. See Chapter 2.2 and 4.6 below.

84 Douzinas & Geary 2005:3.

85 Douzinas & Gearey 2005:4. See Chapter 5.4.

excessive formalism of jurisprudence but also provide a background and methodology for research, which explores the economic and social effects of legal operations and domination.[86] To this extent, it is argued that a more general instead of restricted jurisprudence will assist in changing an existing formalist legal culture to one with more appreciation of morality, ethics and meaning.[87]

Understanding competencies or skills of a legal professional

The competencies of a legal professional traditionally relates to a person's capacities of legal writing and drafting, problem solving, written and oral communication, which are assessed in the admissions examinations of the LPC. It is suggested that, in light of the proposed meaning and content of 'knowledge of the law', a strict separation between the concepts of knowledge, skills or competencies and values are not possible and that it should rather be regarded as complimentary to one another with interrelated contents. It is suggested that two of the most important competencies necessary to become 'fit and proper' are the ability to think and the ability to judge.[88]

Understanding values, ethical values or legal ethics

Values, or ethical values, which are required from a legal professional in order to be 'fit and proper', have always been linked to honesty and integrity. From a consideration of case law, it would appear that this was in most instances found to be absent due to a practitioner's failure to comply with the Code of Conduct. With reference to Sanders' notion of complicity expanded on below, and with due consideration of South Africa's political history and the largely uncritical legal culture that continues to exist, it is

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86 Douzinas & Gearey 2005:4-5. See Chapter 5.4.

87 Douzinas & Gearey 2005:15. See Chapter 5.2, which discusses *ubuntu* that, as an ethical as well as a politico-ideological concept, always entails a social bond that must be understood as one that is fluid and continuously being shaped and reshaped by the heavy ethical demands it places on all its participants. Understood in this manner, it appears to be a perfect example of general jurisprudence.

88 See Chapter 3.5.9 – Discussion of Fischer's sense of complicity. Sanders argues that when knowledge and thought become 'political' activities, the question of what to think lead to the question of what one ought to do and the intellectual then confronts the question of ethical responsibility. Sanders' argument relates closely to Froneman's suspicion that 'the (traditional) belief that a formal vision of law is closer to the idea of "law as law", as opposed to a substantive vision of law which acknowledges the inevitability of the interplay of law and politics. Unless one accepts that law and politics cannot be separated and that the fact that they cannot be separated is not going to lead to the downfall of law, it is unlikely that one will give up one's cherished formal vision of law' (2005:4-5). Arendt (2003:188) similarly explains the importance of the ability to think by stating that, when everybody is swept away unthinkingly by what everybody else does and believes in, those who think are drawn out of hiding because their refusal to join is so obvious that it becomes a kind of action.

suggested that complacency, or mere compliance with laws or codes of conduct is not, and has never been, equivalent to ethical conduct.[89]

In his study, *Complicities: On the intellectual*, Sanders shows that being complicit is not static but occurs on a range between well-being and aversion, where aversion could be the turn which makes us aware of complicity.[90] He explains that an intellectual who is associated with belonging to a group can become uncomfortable with such tie, even to the point of disapproval and accusation. To him, complicity is a basic trait of connectedness that shades into complicity and which troubles conscience. He goes further to say that all human beings are complicit in the banal sense of being folded together in connection and that it is unlikely for such connections to exist, which would not trouble any conscience. Through the examples of intellectuals he examines, a sense of complicity comes out of their attempts to dissociate from what he considers thoughtful conscience. Sanders significantly notes that this awareness intensifies the experience that being an intellectual involves not only commitment to truth but also an assumption of ethical responsibility. He states that, when knowledge and thought become 'political' activities, the question of what to think leads to the question of what one ought to do and the intellectual then, aware or unaware of the politics of knowledge, confronts the question of ethical responsibility.[91]

Legal ethics or ethical values of a legal professional, interpreted in this sense, entails the ability to associate and have a sense of belonging to a group as well as the ability to disassociate from or disapprove of the same group on the basis of thoughtful conscience. An application of Sanders' theory to legal professionals as intellectuals, would imply a commitment to the truth as well as an assumption of ethical responsibility. In line with Froneman, Sanders proposes that when knowledge and thought become 'political' activities, the question of *what to think* leads to the question

89 See Chapter 2.7 – A discussion which integrates the concepts of 'public interest', the importance of 'protest' or 'resistance', the consequence of failure to speak out against injustice and 'moral' paralyses. Particular emphasis is placed on Mill's statement that 'he is not a good man who, without protest, allows a wrong to be committed in his name, … because he will not trouble himself to use his mind on the subject' (Mills 1867:36)

90 Sanders 1998:5.

91 Sanders 1998:5-12. See Chapter 2.7 – Discussion on the state of moral paralysis of white South Africa during apartheid.

of what *one ought to do* and the intellectual then, aware or unaware of the politics of knowledge, confronts the question of ethical responsibility.[92]

From a South African perspective, it is important for legal professionals to understand their belonging to and being part of society, and the role they play in this respect. As discussed in Chapter 2, the African value of *ubuntu* rests upon the need to secure social equilibrium, compassion, humaneness and a strong consideration for the other's humanity.[93] *Ubuntu* is therefore understood as an interactive moral belief in terms of which, who and how we can be as human beings, is continuously shaped in our interaction with each other.[94] It is submitted that *ubuntu*, as the basis of African philosophy, is important in our re-envisioning the role and purpose of the legal profession in the process of transformation. The literal meaning of *ubuntu*, that a person is a person only through others, is also closely linked to the concept of public interest and could potentially impact on how we understand this concept in the legal profession. Cornell and Van Marle remind that, as an ethical as well as a politico-ideological concept, *ubuntu* always entails a social bond. They explain that this social bond must be understood as one that is fluid and continuously being shaped and reshaped by the heavy ethical demands it places on all its participants.[95] It is a concept which contributes to an understanding of being human, but also inherently ethical because the being human also determines how we see the world. Because of this ethical nature, the social bond demands the constant rethinking of what the ethical and politico-ideological require. According to Cornell and Van Marle, *ubuntu* captures how we know the world as well as how we are in it through the moral obligations of human beings who have to live together. It therefore implies the moralisation of all social relations and it is the one aspect that is consistent.[96]

It must subsequently be understood that being 'fit and proper' entails knowledge of law, but also understanding the difference between laws and the law with a self-consciousness, able to think about the law with a more critical approach, conscious of the outcomes thereof with more appreciation of morality, ethics and meaning. It also entails having an understanding of the formal process, developing oral, writing and

92 Sanders 1998:5-12; Froneman 2014:480. See also Chapter 2.7.
93 Kamga 2018:625. See Chapter 2.7.
94 Cornell & Van Marle 2005:205. See Chapter 5.4.
95 Cornell & Van Marle 2015:3. See Chapter 5.4.
96 Cornell & Van Marle 2015:3. See Chapter 5.4.

drafting skills but, more importantly, an ability to think about the abstract that would develop into an ability to judge the concrete and therefore becoming able to differentiate between right and wrong, just and unjust, in particular circumstances. Finally, becoming 'fit and proper' entails the ability to associate and having a sense of belonging to a group as well as the ability to disassociate from or disapprove of the same group on the basis of thoughtful conscience and implies a commitment to the truth as well as an assumption of ethical responsibility. By becoming 'fit and proper', persons are continuously shaped in their interaction with others which, in turn, result in constant reconsideration of the questions of *what to think* and of what *one ought to do.*

Being 'fit and proper' is therefore constantly *becoming*, a postponed ideal consistently thought about and reconsidered in light of our social context and professional responsibility, particularly regarding public interest and social justice.

4.5 Public interest and social justice as professional responsibilities of *becoming 'fit and proper'* in the context of constitutional democracy

The law, justice and public interest

It is expected that laws, what is right in the circumstances, justice and public interest would always be aligned, but this is sadly not always the case.[97] In 1979, Didcott J, remarked that, [98]

> ...the trouble is that it was not. It may have been in accordance with the legislation and, because what appears in legislation is the law, in accordance with that too. But it can hardly be said to have been "in accordance with justice". Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.

In his reflection on the outcomes of the legal hearing of the TRC, Dyzenhaus considers the matter of *In Re Dube* over which Didcott J presided.[99] In this case it had to be determined in terms of the *Bantu (Urban Areas) Act,*[100] whether a person (Dube) was correctly declared to be someone who is 'idle and undesirable' which rendered him

97 To this extent the limit of the law and postponed justice will be equally important. See 4.4.1 for a discussion of the 'fit and proper' person as a utopian concept and Derrida's notion that justice is an experience of the impossible.

98 *In Re Dube* 1979 (3) SA 820 (N):821.

99 Dyzenhaus 1998:76.

100 *Bantu (Urban Areas) Consolidation Act* 5/1945.

suitable for removal from the white area and detention. Didcott J found that Dube did not fall within the scope of the 'idle and undesirable' section because his epilepsy rendered him not capable from being employed in the ordinary sense. Didcott set aside the commissioner's certification and said that on that occasion it was possible to apply the *Bantu (Urban Areas) Act* and do justice simultaneously.[101] Dyzenhaus remarks that although this was not a major victory against apartheid, it showed that a judge 'who paid attention to the fact that he was supposed to administer justice in particular circumstances of a case would have significant room for manoeuvre'.[102] According to him, judges would only be capable of doing that if they could see more than the substantive injustice of the law, which they were called upon to administer. It was clear, he pointed out, that an old-order judge had to acknowledge that the law was made by an illegitimate legislature before he would become inclined to adopt the necessary creative approach to the interpretation of statutes.[103]

More than a decade after Justice Didcott's remark, parliamentary sovereignty was replaced by constitutional sovereignty in 1994, with the *Constitution* as the supreme law of the Republic and any law or conduct inconsistent with it, invalid.[104] With regard to judicial authority, it is now determined that the courts are independent and subject only to the *Constitution* as the supreme law, which they must apply impartially and without fear, favour or prejudice.[105] Froneman's account of what this means, again comes to mind here. He states that the beauty of the *Constitution* is that it seeks to prevent us from making the same mistake again. It is expected that the common law (which includes our civil law tradition) must be applied and developed to give expression to the Bill of Rights; the Bill of Rights must be interpreted to promote the underlying values of an open and democratic society; whenever the common law is developed the spirit, purport and objects of the Bill of Rights must be promoted; and the development of the common law should take place by taking into account the interests of justice. As a result, whenever a common law rule is to be applied, it is not good enough to indulge only in formal reasoning, but to go further and enquire whether it fulfils a substantive purpose in line with the Bill of Rights, the *Constitution* as a whole,

101 *In Re Dube* 1979 (3) SA 820 (N):822.
102 Dyzenhaus 1998:76.
103 *In Re Dube* 1979 (3) SA 820 (N):821.
104 *Constitution*, 1996: sec. 2.
105 *Constitution*, 1996: sec. 165(2).

and the interests of justice. Froneman importantly remarks that the *Constitution* gives the courts no choice other than to make these substantive choices, choices that are of the kind that a formal vision of the law would not consider as 'real' law. The *Constitution* consequently excludes the possibility that anything other than a substantive vision of the law still remains open to us. [106]

The judicial officers who are mandated to apply and develop the law subject to the *Constitution* only, are described as 'appropriately qualified women or men who are *fit and proper persons*'.[107] Before judicial officers begin to perform their functions, they must take an oath or affirm that they will uphold and protect the *Constitution*.[108] This implies that the assurance that the *Constitution* will be upheld and protected in the application and interpretation of the law, is dependent on judicial officers and other officers of the court, all of whom are presumed to be 'fit and proper' to do so.

At the time of appointment, a judge must swear or solemnly affirm to be faithful to the Republic of South Africa, will uphold and protect the *Constitution* and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the *Constitution* and the law.[109] It is accordingly expected that legal practitioners, as officers of the court, shall have a corresponding objective to assist judicial officers in order to ensure that the *Constitution* is upheld and that justice is administered to all persons. The principles of justice must be in line with the values and objectives of the *Constitution*, which therefore becomes the principle upon which the value judgments must be based.

As proposed above in subsection 4.4.1, the meaning of *being* 'fit and proper' is a postponed ideal that requires consistent thought and reconsideration in light of our social context and professional responsibility regarding 'public interest' and 'social justice'.

The importance of the law and of legal practitioners in the development of societies appears to be equally true for South Africa than for developed countries such as the United States of America and the United Kingdom.[110] Research from foreign

106 Froneman 2005:17. See 4.4.2 above.
107 *Constitution*, 1996: sec. 174(1).
108 *Constitution*, 1996: sec. 174(8).
109 *Constitution*, 1996: Schedule 2, item 6.
110 McKay 1986:353.

jurisdictions with universally applicable themes is useful to reimagine the role of the 'fit and proper' legal practitioner in a South African context without necessarily conducting a comparative study. Some of the themes often encountered in research related to the professional ethics of legal practitioners are ethical values, public interest, justice, social justice and access to justice. The possible meaning of these concepts is studied and applied to a South African constitutional dispensation in an attempt to understand how these principles are to be understood in becoming 'fit and proper' and the responsibilities it entail.

In a public lecture with the focus on law, lawyers and the public interest, McKay notes that 'the practice of law is a profession – *if we can keep it*'.[111] With regard to the responsibilities of lawyers, he suspects we have not set our sights high enough, maybe because it is overwhelming to acknowledge that law and lawyers are guardians of the public interest, of liberty and even of justice.[112] According to McKay, the problem is not that lawyers are necessarily malevolent or evil but rather that they have failed to satisfy the high demands of their calling and that they have missed the opportunity, individually and collectively, to do justice. He expresses his disappointment of the failure of the law (and the legal profession) to satisfy the potential for leadership on behalf of fairness and also for its excessive indulgence in self-interest, whether that of individual clients or the perceived welfare of lawyers as a class.[113] Slabbert, in her investigation of the requirement of 'fit and proper' for the South African legal profession, similarly questions whether lawyers should still be seen as professionals or whether they have simply become ordinary business people.[114]

Responsibility of lawyers to challenge injustice

If one considers the injustices suffered as a result of the apartheid legal system and continued injustices and human rights violations as a result of poor service delivery, it can indeed be said that the remarks above by McKay also rings true in a South African context. In an article published in 1992, a South African attorney, Budlender, considers the responsibility of lawyers to challenge injustice, stating that one of the reasons why lawyers have a special duty to promote justice is due to the vast potential they have

111 McKay 1986:353.
112 McKay 1986:355-356.
113 McKay 1986:356.
114 Slabbert 2011:209.

to cause harm.[115] It would be fair to say that in this respect, at least in South Africa, the legal profession, as guardians of the public interest and social justice, has to a large extent historically failed to satisfy the high demands of their calling and that they have, in many instances, missed the opportunity to do justice. It can, however, similarly be said that the legal profession, as guardians of the public interest and justice, now informed by the values of the *Constitution*, is ideally positioned to be the cause of change and that they have as much potential to do good than they have to cause harm. They have the potential to change the legal culture and change the perspectives regarding the law and the law itself. I echo the sentiments of McKay who states that:[116]

> Law has been my mentor, my guide, even my bread and butter for my entire professional life. To paraphrase the cynical observation, "*Some of my best friends are lawyers*," I cannot turn my back on the law because of the perceived failures. I seek no more than the self-correction which I believe entirely possible.

Currently in South Africa, thirty years after Budlender's proposal for challenging injustice, the role and purpose of legal practitioners related to the public interest and justice are still valid and topical.[117] He lists the following six models for challenging injustice: (1) The 'cab-rank' model; (2) The public interest model; (3) The lawyer as organiser model; (4) The breaking rules model; (5) The moral confrontation model; and (6) The direct confrontation model. Although he made sound arguments for his proposal and each of these models at the time, many of them, although still helpful, need to be expanded on and adapted to suit the constitutional democracy in which legal practitioners now function. For the purpose of this study, only the 'cab-rank' and public interest models are considered in more detail in light of our current social context that informs the professional responsibilities of being 'fit and proper'.

Challenging injustice: The 'cab-rank' model

The 'cab-rank' principle applied to the barristers in England and was adopted by attorneys and advocates in South Africa. This principle entails that legal practitioners are under an ethical duty to accept any case in a court in which they ordinarily practice, subject only to the payment of a reasonable fee and their availability. The rule was intended to guarantee that unpopular individuals will be able to obtain the services of

115 Budlender 1992:477.
116 McKay 1986:357 (footnotes omitted; emphasis added).
117 Budlender 1992:479.

a legal practitioner.[118] One of the obvious criticisms against this principle is that it is predicated on the ability of the client to pay, with the result that the services of a legal practitioner are only available to clients that have the financial means to pay the asked price and thereby excluding the indigent. This principle has an obvious impact on access to justice and creates the perception that only the rich are entitled to justice. Budlender contends that, even though the principle was adopted to provide equal access to legal services, it has not been adequate in South Africa. He states that:[119]

> It falls into the common trap of assuming that all that is needed for equality is to treat everybody in the same way. However, to treat those who have been systematically disadvantaged on exactly the same basis as those who are powerful, repeats and reinforces the inequality. We do not all start from the same place … the myth that all that is needed is the repeal of discriminatory statutes, ignoring the accumulated deficit of generation of dispossession and discrimination, still holds sway in many places. If the scales of justice are already heavily tilted, obviously one has to do more to balance them than to put an equal weight in each pan.

The 'cab-rank' principle has been useful in providing protection by the organised profession to the legal practitioner representing the unpopular accused or challenging injustice, who would otherwise be vulnerable.[120] The question arises whether this principle does not also provide protection to legal practitioners who hide from their ethical obligations towards the public interest and duty to the court.

Whelan considers this question in his article related to the ethical conflicts in legal practice and the need to develop professional responsibility. He explains that the 'cab-rank' rule is important in so far as it reinforces the legitimacy of the neutrality and partisanship roles in that the legal practitioner is not personally identified with the client or the cause.[121] There are, however, different ideologies of professionalism and, depending on how the rule is interpreted, there will be different direct consequences both for clients and the administration of justice.[122] He compares the English approach of professional responsibility based on the individual practitioner's exercise of professional judgment with the American 'libertarian' ideology in terms of which the practitioner's loyalty to clients is absolute and undivided with no public obligation.[123] It is argued that the libertarian ideology represents a slippery slope to excessive vehemence and to uncontrolled instrumentalism. It demands that the practitioners do

118 Budlender 1992:479.
119 Budlender 1992:479.
120 Budlender 1992:480. See also Dyzenhaus 1998:104-105.
121 Whelan 2001:703.
122 Whelan 2001:704.
123 Whelan 2001:704-705.

everything they can to win their client's case, including using any law or any procedural mechanism, regardless of its purpose with the only limitation that it not be illegal.[124] With no responsibility to the legal system, the public or the law, there is no distinction between what the client has a right to do and what is right to do under the circumstances because the client's interest is the only consideration.

The implications of the English approach are in stark contrast with the libertarian ideology in that professional responsibility is based on the individual practitioner's exercise of professional judgment. Whelan argues that this professional regulation must not rely on changes or alterations to professional codes but must instead impose a duty on each individual practitioner to exercise professional judgment based on principles that are clear, appropriate and enforceable.[125] Whelan summarises the response of England and Wales to conflict situations as follows:[126]

> Zeal and efficiency alone … do not ensure the doing of justice. The just operation of the legal system depends upon lawyers acting honestly and ethically, and not deliberately delaying or lengthening the proceedings or employing obstructionist tactics. Although a professional person's first and particular responsibility is to his client, and for lawyers this professional duty of maintaining the client's interests is paramount, *it is subject only to their direct responsibility to the court*. A barrister, as an officer of the court concerned in the administration of justice, … has an overriding duty to the court, and an *overriding obligation to promote justice*, including a duty not to mislead the court.

Whelan states that legal practitioners' duties to the court are in reality owed to the larger community that has a fundamental public interest in the proper administration of justice. According to him, the public interest is in fact the source of the legal practitioner's duties.[127] The fact that the doctrine of legal professional privilege 'shields what passes between lawyer and client, the observance by the lawyer of his duty to the court is of particular importance'.[128] It is therefore paramount that, because the legal practitioner is privy to confidential information, the court (and the public) should be able to trust that the client's case will be presented in such a manner that the confidentiality is not breached but justice prevails. The court can only make a finding on facts placed before it and the legal practitioners, in this respect, bear the responsibility to ensure meticulous drafting of pleadings, thorough presentation of evidence, proper questioning of witnesses in order to ensure that the court considers

124 Whelan 2001:708.
125 Whelan 2001:704-705.
126 Whelan 2001:710 (footnotes omitted; emphasis added).
127 Whelan 2001:710.
128 Whelan 2001:716.

all the relevant information that can potentially have an impact on the final judgment. In this way, a legal practitioner's knowledge, skills and values, as reimagined above, will contribute to the fulfilment of a duty to the court and a fair (just) outcome that would serve the interest of the broader community. This professional responsibility should therefore be based upon an individual practitioner's exercise of professional judgment that is informed by different principles and the application of professional knowledge, skills and values.[129] According to Whelan, the exercise of professional judgment, by definition, constitutes a rejection of legalism and narrow following of the rules. He states that the foundations of professionalism lie within the collective community culture and that the manner in which professionalism is viewed will create professional responsibility.[130] The essence of Whelan's proposal of professional responsibility based on professional judgment instead of professional codes, is summarised in is explanation of true professionalism:[131]

> This approach endorses the view that professional codes cannot, in complex scenarios, provide definitive answers to ethical conflicts. It is a recognition that values sometimes conflict and there is not a single solution to an ethical dilemma. 'Professional' choices in complex conflict of duty scenarios cannot be resolved by following a simple rule. If they could, there would be no conflict. The professional response depends upon the circumstances, and it is for the individual barrister to weigh the factors and determine the matter. The barrister "is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities." In court, the barrister is "personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked."
>
> To some, this may sound less like professional responsibility and more like a personal ethic or "ethical discretion in lawyering."…
>
> Arguably, this is the essence of professional responsibility. *The exercise of professional judgment by an individual lawyer demands the mindful application of professional norms in difficult, grey, unpredictable, idiosyncratic, and complex areas where honest differences and real conflicts of opinion are legitimate. It means making judgments guided not exclusively by money, convenience, or what the client wants, but also by a professional ethic*.
>
> Arguably, true professionalism is: lawyer "independence [as] a matter of ethos, professional discipline and frame of mind, rather than a matter of how a lawyer is engaged or paid".
>
> Thus professional misconduct by a barrister is not just noncompliance with a rule, but "something which was dishonourable to him as a man and dishonourable in the profession".

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129 The understanding of what is professional, the knowledge, competencies (skills) and values further referred to in this subsection should be understood according to the interpretation of 'professional' in Chapter 2 and the reimagined concepts of what informs being or becoming 'fit and proper'.

130 Whelan 2001:717.

131 Whelan 2001:718-719 (footnotes omitted; emphasis added).

Similar to Whelan, according to whom foundations of professionalism lie within the collective community culture, Klare argues that legal constraint is 'culturally constructed' in that it has a cultural as well as an individual psychological dimension.[132] In the summary above, Whelan contends that professional responsibility is not unrelated to personal ethics and that personal ethics will necessarily play a role in the exercise of personal judgments. Professional responsibility should therefore also translate to personal responsibility and conduct dishonourable in the profession, necessarily dishonourable to self as a person. Legal practitioners are not merely functionaries or instrumentalists of the law because the interpretation and development of the law are dependent on their value judgments.

To this extent 'proposed protection' by the 'cab-rank' principle is illusory and cannot hold water. The principle is intended to be in favour of the public in that it ensures access to legal services regardless of the client's reputation or alleged conduct. Legal representation is a crucial element of access to justice and is also confirmed in the *Constitution*.[133]

A legal practitioner's professional responsibility, however, is not only towards the client but also the court and the broader public, to ensure fairness. From this interpretation it should follow that legal practitioners are personally responsible and accountable for their interpretation or value judgments made during the course of legal practice or litigation proceedings and that the 'cab-rank' principle cannot be raised as a justification for 'merely complying with a client's instructions'.

Challenging injustice: The public interest model

Another model proposed by Budlender to challenge injustice in South Africa is the public interest model. He contends that this starts from the assumption that the powerless need special and specialised representation in order to give them any prospect of obtaining justice.[134] South Africa, similar to the United States, makes the distinction between public interest lawyers and private practice lawyers. Public interest

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132 Klare 1998:160-161. This contention relates very closely to the proposal in 4.4.1 that the ethical values of a legal practitioner in South Africa must consider the concept of *ubuntu*, and Cornell and Van Marle's explanation that the concept of *ubuntu* necessarily entails a social bond which demands the constant rethinking of what the ethical and politico-ideological concept requires (2015:3). See also Chapter 5.4.

133 *Constitution*, 1996: sec. 35(3)(g).

134 Budlender 1992:480.

lawyers would typically be employed by the Legal Aid Board of South Africa, a law clinic of a university or the South African Human Rights Commission.

The Legal Aid Board of South Africa is an independent statutory body with the following aims:[135]

a) To give legal aid or to make legal aid available to indigent persons within its financial means.
b) To provide legal representation at state expense, as set out in the *Constitution* and relevant legislation giving content to the right to legal representation at state expense.
c) To provide education and information concerning legal rights and obligations.

The main role and purpose of Legal Aid South Africa is to provide legal aid to those who cannot afford their own legal representation. This includes poor people and vulnerable groups such as women, children and the rural poor and it does this in an independent and unbiased manner with the intention of enhancing justice and public confidence in the law and administration of justice.[136]

The law clinics operated by law faculties of different universities in South Africa have very much the same purpose and mandate than Legal Aid South Africa. Law clinics aim at advising economically impoverished members of the local community on various legal problems and will typically merge *pro bono* litigation services with student training. Some of these law clinics function independently while others are associated with Legal Aid South Africa.[137]

Private practice is explained by the Code of Conduct of the LPC as the practice of a legal practitioner who *places legal services at the disposal of the public for reward* and is actively engaged in the profession either as an attorney or as an advocate. A legal

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135 Mandate and mission of Legal Aid South Africa, https://legal-aid.co.za/legalaidsa/ (accessed on 14 February 2022).

136 Mandate and mission of Legal Aid South Africa, https://legal-aid.co.za/legalaidsa/ (accessed on 14 February 2022).

137 The University of the Free State Law Clinic (UFS Law Clinic), https://www.ufs.ac.za/law/faculty-of-law-home/general/community-engagement/ufs-law-clinic-home (accessed on 14 February 2022); The University of the Witwatersrand Law Clinic (WITS Law Clinic), https://www.wits.ac.za/lawclinic/ (accessed on 14 February 2022); the Nelson Mandela University Law Clinic, https://law.mandela.ac.za/Engagement-Entities/Law-Clinic (accessed on 14 February 2022); the Stellenbosch University Law Clinic, https://www.sulawclinic.co.za/ (accessed on 14 February 2022); the North West University Law Clinic, https://law.nwu.ac.za/law/law-clinic (accessed on 14 February 2022); University of Pretoria Law Clinic, https://www.up.ac.za/up-law-clinic-home-page (accessed on 14 February 2022).

practitioner employed by a law clinic or Legal Aid South Africa is considered a public interest practitioner. A private practice attorney can from time to time render *pro bono* services in which case it will be considered as public interest work. Item 19 of the Code of Good Practice determines that a private practice legal practitioner who renders services *pro bono* must declare such fact to all the interested parties as well as the court.

The distinction between public interest legal practitioners and private practice legal practitioners therefore seems to be determined by the fact that services are rendered in exchange for payment or not. In other words, public interest matters are the cases dealt with on behalf of people who are in need of legal assistance and who cannot afford the prescribed legal fees.

Regarding legal fees, the LPA determines that the prescribed fees will be determined by (a) the importance, significance, complexity and expertise of the legal services required; (b) the seniority and experience of the legal practitioner concerned; (c) the volume of work required and time spent in respect of the legal services rendered; and (d) the financial implications of the matter at hand.[138] The LPA further determines that, despite the guidelines, nothing precludes any user of litigious or non-litigious legal services, upon agreement with a legal practitioner, to pay fees for the services in question in excess of or below any tariffs determined.[139] These sections imply that the more important and complex the matter, and the more senior the legal practitioner with reference to experience, and the more money involved in a particular matter, the more they would be entitled to charge the client. And, even if the practitioner is already entitled to a larger tariff due to these reasons, nothing would prevent them to charge even more, as long as it is done so by agreement.

Strangely enough, the LPA stipulates in the next subsection that the South African Law Reform Commission must investigate and report back to the Minister with recommendations on the following: (a) The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people; (b) legislative and other interventions in order to improve access to justice by the members of the public; and (c) the desirability of establishing a mechanism which will

138 Act 28/2014: sec. 35(2).
139 Act 28/2014: sec. 35(3).

be responsible for determining fees and tariffs payable to legal practitioners.[140] In conducting this investigation, the South African Law Reform Commission should take into consideration best international practices, the public interest, the interests of the legal profession; and the use of contingency fee agreements.[141]

It seems that these provisions are in direct opposition to one another and that the legislator (and the LPC) refuses to acknowledge the paradox created by their own rules and application thereof. It is understood that private practice practitioners will adjust their fees depending on the complexity and importance of the matter and their level of experience, but that they could charge even more by agreement. The result of this is that the fees in litigious matters can add up to exorbitant amounts which the average South African, let alone impoverished South African, cannot afford. This truth is recognised by the legislature and leads to the instruction of the South African Law Reform Commission in section 34(5).

If the majority of legal practitioners are in private practice and most people cannot afford legal fees, then how does the current legal practice system in South Africa provide access to justice and social justice in terms of the *Constitution*? More importantly, whose interests are they serving? If only the minority of legal practitioners, mostly junior practitioners employed by Legal Aid South Africa and law clinics, are considered public interest lawyers, then what is the purpose and main objective of those in private practice? If the majority of the people in South Africa are impoverished and most of the remaining people still cannot afford legal fees, then who are the clients of the legal practitioners in private practice? This is the problem of the current legal system in South Africa and the paradox is emphasised in the few sections of the LPA considered above. As a result, the legal profession seems to be missing its constitutional mandate in that the aim of private practices is primarily set on personal financial benefit. The allegation is by no means that all legal practitioners in private practice are wealthy because there are simply not enough clients who can afford legal services. Moreover, the competition between the large private practices with experienced legal practitioners is so fierce that the single practitioner or smaller practices are left to cope with whatever work comes their way. They can rarely afford to act in the public interest because they are too focused on making a living. The

140 Act 28/2014: sec. 35(4).
141 Act 28/2014: sec. 35(5).

competition between them is equally fierce and they compete for the favour of estate agents for conveyancing instructions, of banks for bond registrations and cancellations, and for the favour of financial advisors and brokers for deceased estate instructions. The favour of these instructors would often come at a cost and is, although frowned upon in ethical terms, a usual and common practice disguised in some way, and business as usual.

In their analysis of the relationship between law, society and the legal profession in South Africa and the fiction of transformation, Matthews and Samaradiwakera-Wijesundara, consider the suggestions of sociolegal scholars that legal phenomena must be explained in terms of their social setting.[142] As a result, the law plays an integral role in shaping both a country's socio-political and socio-economic trajectory, as well as its national identity required to achieve the desired outcomes. They further state that the term *rainbow nation* became the symbol of South Africa's transformation after the collapse of apartheid, but that its focus on racial harmony assumed that the predominant conflict in South Africa centred around race alone. According to them, the class conflict, also created by apartheid, has not enjoyed the same attention but is equally important to the democratisation project.[143] They contend that the integral role that the legal profession has to play in facilitating the development and drawing attention to the numerous socio-economic disparities that continue to plague South African society, should be recognised.[144]

In his consideration of the problems and possible solutions of the legal profession, Johnson proposes to de-consecrate the law that has become a sacred cow and the legal profession, which has acquired an aura of being sacred by making itself indispensable to modern society by means of its monopoly on the machinery and the jargon of the law.[145] According to Johnson, the problem is that most lawyers practice law for the same reason that people practice any other trade or profession – it is about making a living.[146] He further states that, although the middle and upper classes are well served by the legal profession, it has completely failed to provide adequate legal

142 Matthews & Samaradiwakera-Wijesundara 2015:561.
143 Matthews & Samaradiwakera-Wijesundara 2015:561
144 Matthews & Samaradiwakera-Wijesundara 2015:568.
145 Johnson 1971:3.
146 Johnson 1971:20.

services to the poor and underprivileged.[147] With regard to the impoverished, Johnson contends that they sometimes have problems that they have not even characterised as legal problems. They are also often afraid of the law and see the law as a threat, something that demands or oppresses them.[148]

In his article on 'Practicing law for poor people', Wexler similarly remarks that poor people are not just like rich people but without money.[149] He states that poverty creates an abrasive interface with society in that the impoverished are always bumping into 'sharp legal things'.[150] The fact is that the law school model of personal legal problems, of solving these problems and returning the client to a smooth and orderly world, does not apply to poor people. According to Wexler, poor people do not have legal problems like those of the private plaintiffs and defendants in law school case books, and law schools do not train lawyers to take care of problems and to understand the role of the lawyer in terms of the poor people.[151] As a result, traditional legal practice rather hurts poor people by isolating them from each other and because it fails to meet their need for a lawyer, by completely misunderstanding that need because they have very few individual legal problems in a traditional sense. Wexler describes their problems as the product of their poverty and common to all poor people. Even though an individual problem can be solved with the intervention of a lawyer, clients who find themselves in poor conditions would not be restored to the textbook 'harmonious position' but rather stay in the same poor conditions in which they were found.[152] According to Wexler, if all the lawyers in the United States worked full time, they could not deal with even the articulated legal problems of the poor and, even if they could, they would never be able to change the mass of unarticulated legal troubles in which poor people find themselves.[153]

Wexler's description of the problems related to legal practice for the impoverished is undoubtedly also true in a South African context. Several examples from case law

147 Johnson 1971:3.
148 Johnson 1971:3.
149 Wexler 1970:1049.
150 Wexler 1970:1049.
151 Wexler 1970:1050.
152 Wexler 1970:1053.
153 Wexler 1970:1053.

could serve as an example, but reference to the matter of *Komape and others v Minister of Basic Education and others*[154] will suffice as illustration.

In this matter, a child who was at the time just five years of age, suffered the most appalling and undignified death when he fell into a pit latrine at his school in Limpopo, and drowned in its sludge and filth. In due course, the appellants, being Michael's parents and siblings, instituted action in the Limpopo Division of the High Court claiming damages they alleged they had sustained arising out of his death, including separate claims for emotional shock and grief. Their claims succeeded in part in the Limpopo division of the High Court but, in the main, were dismissed.[155] The family's claims in respect of emotional shock and grief suffered were in essence successful in the Supreme Court of Appeal and the respondents were ordered to pay the combined amount of about R1.2 million to the family for non-patrimonial damages.[156] The Supreme Court of Appeal also made the following order as to the costs of the matter:[157]

> The first and second respondents are to pay the appellants' costs of the appeal, jointly and severally, the one paying the other to be absolved. Such costs are to include the disbursements incurred by two counsel who appeared *pro bono* for the appellants in travelling to and being accommodated in Bloemfontein in order to present this appeal.

As far as textbook litigation matters are concerned, this matter had been sufficiently dealt with and finalised. But this was not an individual legal problem. The Komape family's problem was the problem of the entire community and the court ordering the respondents to pay the patrimonial and non-patrimonial damages suffered by the family did not restore the previously harmonious pattern of life, which never existed. They were living in extreme poverty in the rural parts of the Limpopo province, and they continued to live in those circumstances with their children, as well as the rest of the children of the community returning to schools with dilapidated sanitary facilities. In January 2019, SECTION 27, a public interest law firm that has done extensive research on sanitation in South Africa, focusing on the Limpopo province, confirmed

154 *Komape and others v Minister of Basic Education and others* [2019] ZASCA 192 (SCA). Hereafter referred to as 'the Komape-case'.
155 *Komape and others v Minister of Basic Education and others* [2019] ZASCA 192 (SCA): par. 1.
156 *Komape and others v Minister of Basic Education and others* [2019] ZASCA 192 (SCA): par. 73.
157 *Komape and others v Minister of Basic Education and others* [2019] ZASCA 192 (SCA): B.

that they were aware of at least two more deaths after that of Michael Komape in 2014.[158]

In August 2021, the Komape family, represented by SECTION 27, was back in the Limpopo High Court to fight for the enforcement of an earlier court order for the eradication of unsafe and unhygienic latrines at rural schools. When asked for commentary on the matter, Mathanzima Mweli, director-general of the Department of Basic Education, said that the use of pit toilets in Limpopo and other provinces will be a thing of the past in the next two years. He was quoted saying: 'I have resolved that, come the 2022/23 financial year, we will not have pit latrines anymore in this country. And we have been building beautiful toilets.'[159]

In the Komape-case the lawyers admirably assisted their client on a *pro bono* basis and the case was won on these merits. Justice was apparently served and that was the end of it for the legal practitioners, but not for their clients. According to Wexler, law schools rarely ask questions about how the law came to be as it is and they never concern themselves or their students with what leads clients to become involved with the law, or what happened to them after they have won or lost in court.[160] He significantly remarks that:[161]

> From all that one hears in law school, one comes to believe that a lawyer is doing his job and being a good person if he is honest and works as hard as he can for the interests of his client. This technical 'morality' is a fraud; it is a way to avoid, rather than to address the real moral questions which a lawyer ought to face. It is morality within a game.
>
> The chief theoretical justification for the game is the adversary notion of the law: each side has an advocate, each advocate is competent and fully devoted to the interests of his client, and from this structure justice will emerge. Among the not-poor, the adversary system might lead to justice; the most usual criticism of lawyers from not-poor people concerns their dishonesty and failure to be fully committed and fully competent advocates. But if justice can be obtained for the not-poor through an adversary system of law, it is because they are involved with the law on a case-by-case basis. But a case-by-case injustice is not what poor people face; they confront a host of unjust institutions, acting for and within an unjust society. The whole notion of an adversary proceeding is unsuited to dealing with social problems. *Insofar as it is used to resolve social injustices, the lawyer's game is like monopoly. The lawyers play as hard as they can; they charge whoever lands on their property as much as the rules will allow; they build houses and hotels;*

158 Hazvineyi, 'Have 'hundreds' of kids drowned in school pit latrines in South Africa?' https://www.polity.org.za/article/have-hundreds-of-kids-drowned-in-school-pit-latrines-in-south-africa-2019-01-25 (accessed on 28 March 2022).

159 Mukwevho*, 'Eradication* of pit toilets at Limpopo schools still a pipe dream', *Health E-News*, https://health-e.org.za/2021/08/12/eradication-of-pit-toilets-at-limpopo-schools-still-a-pipe-dream/ (accessed on 28 March 2022).

160 Wexler 1970:1050.

161 Wexler 1970:1059 (references omitted, emphasis added).

their actions have no consequences in the real world; in the end, they sweep the pieces and the play-money into a box and play again tomorrow.

Even though Wexler's description of the 'game of lawyering' dates back to 1970, it is still a very accurate summary of everything that is wrong with the law from the perspective of the impoverished, particularly in South Africa where the majority of the population live in severe poverty.

Wexler's argument that the adversary system is not necessarily suited in matters involving impoverished people relates to the same problem discussed under the 'cab-rank' principle above and ties in with Slabbert's proposal that it may be one of the reasons for lawyers not acting as 'fit and proper' persons. Slabbert states that lawyers in an adversarial system only focus on their clients' interests and do not essentially strive for justice or the promotion of the general good. If the lawyer is required to present the client's case in the best possible manner with an indifference to the moral merits of the case, it necessarily implies that the client's interest is placed ahead of the interest of the adversary, as well as of public values such as justice.[162]

It then follows that this (established) method of practice is in contrast with constitutional objectives of the law such as social justice and access to justice. It also follows that, lawyers who practice law in a manner that exclusively serve the client's interest and in turn their own, will get trapped in the game. The impression is created by the game which only the lawyer can play, and playing it justifies the receipt of fees far in excess of the client's income. As a result, lawyers are placed on a pedestal, with superior moral intellectual abilities but always dependent on clients who are able to pay the prescribed fees to enable them to play the game and thereby creating the ultimate trap; the invention of a way to feel useful and in reality, not be useful.[163]

Wexler cynically states that lawyers would do well to rid themselves of the ego that is called their professional manner or bearing and to realise that what makes them a lawyer, are accidents of birth and interest and that these accidents have not made them special but rather afforded them the opportunity to help someone else.[164]

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162 Slabbert 2011:221-222.

163 Wexler 1970:1062-1063.

164 Wexler 1970:1061. As referred to in Chapter 3, Arendt states that egoism can only be opposed by plurality, which is a frame of mind in which the self regards itself as a citizen of the world. This is again in line with the African value of *ubuntu* that rests upon the need to secure social equilibrium, compassion, humaneness and a strong consideration for the other's humanity.

In his proposal to de-consecrate the legal profession that has become the sacred cow, Johnson makes it clear that it is not individual lawyers but rather the profession as a whole which he is calling into question. According to him, both the profession and society suffer under the system that measures the profession to an impossibly high standard of its own rhetoric about service and dedication to society, because it believes the rhetoric and fails to take the necessary steps to make law relevant in the modern age.[165] Johnson makes the profound statement that the law is simply too important to be left to the legal profession and then sets out a four-teared proposal changing the current system. He proposes that:[166]

a) The law and the profession must be de-mystified in the eyes of the public.
b) Society has to seek alternatives which would reduce the scope for lawyers and increase the possibilities for laymen to handle their own problems.
c) The state and society have to actively intervene to exercise greater control over the legal profession.
d) The state has to go far beyond present legal aid plans to ensure that comprehensive legal services are available to all.

Johnson's proposal is exactly in line with that of Wexler who argues that the hallmark of an effective public interest practice is that the lawyer does not do anything for the clients that they can do for themselves:[167]

a) The impoverished should be helped and taught to serve themselves.
b) It is better for the impoverished to acquire new skills than new dependencies.
c) Impoverished people can often do what lawyers cannot or will not do.
d) The law needs to be demystified for all laymen, but especially for the poor.

Wexler's summarised argument, similar to that of Johnson, is that the legal practitioner should offer information so that the people can structure their own alternatives and make their own choices. He states that the lawyer may know what the law can do but the people should know what needs to be done and what can be done.[168]

Ubuntu is understood as an interactive moral belief in terms of which the who and how we can be as human beings is continuously shaped in our interaction with each other. This understanding can significantly contribute to a legal practitioner's understanding of the community to be served.

165 Johnson 1971:20.
166 Johnson 1971:21.
167 Wexler 1970:1055.
168 Wexler 1970:1064.

The proposal is therefore that, in order to serve the public interest, the legal practitioner should develop the necessary humility and understanding of the client's circumstances before, during and after their encounter with the law and develop the necessary respect for clients' autonomy and dignity. Genuine and honest service in the public interest requires a deeper understanding for human dignity, care and a desire to help. A shift in focus in legal education may not only be possible but important to effect the necessary change to mindset and de-consecration of the holy cow.[169]

4.6 Legal professional, legal culture and the law

Consequences of positivism and formalism on the law and legal culture

In his inaugural address as a Professor of Law in the University of the Witwatersrand in 1971, Dugard stated that the two major reasons for the acceptance of positivism in South Africa had been the decline of the natural law doctrine in Europe and the pervasiveness of English influence.[170] As a result, positivism dominated legal education and lawyers were trained to concern themselves with the rules of law alone and the mechanical application thereof in order to avoid any speculation about the law as it ought to be.[171] According to Dugard, the twin principles of positivism – command and the separation of law and morality – has clearly manifested in the statutory interpretation of laws by the courts. He explains that the courts have accepted a strict distinction between the legislative function and the judicial function inherent in the command of theory and that they regard it as their duty to analyse and interpret the will of Parliament without inquiring as to the reason why. This has enabled the judiciary to apply the harshest of laws with an easy conscience.[172] He further states that the strict distinction between law and morality has led to a rejection of legal values, as opposed to positive legal rules, which resulted in the repudiation of policy considerations in the judicial process.[173] Dugard concludes his address by stating that adherence to legal positivism has reduced the legal profession to the status of a technical trade in the eyes of the public and has undermined the profession's claim to

169 A focus in Chapter 5 on critical citizenship as an essential aspect in legal education further elaborates on this proposal.
170 Dugard 1971:184.
171 Dugard 1971:184-185.
172 This again reminds of Arendt's notion of banality of evil and the 'strange interdependence of thoughtlessness and evil' (1963:288). See also Chapter 2, par. 2.6 and 2.7, in the discussion of Afrikaner nationalism and apartheid.
173 Dugard 1971:186-187.

leadership in society. He calls for a new creed, one based upon scepticism by infusing legal realism and idealism inherent in natural law that would transform our forensic bricklayers into social architects.[174]

Cornell comments that 'legal positivism, when left unchallenged, creates a system, a kingdom which reigns over possibility and excludes the dream of a truly different future.'[175] She further states that the ethical resistance to positivism is crucial for the development of an adequate conception of legal interpretation and that the process of invention and restatement (or reimagination) of legal norms would also entail judges' responsibility toward memory.[176] An interpretation of Cornell in terms of this study would be that an ethical resistance to the largely formalist and positivist legal culture in South Africa would be necessary for the reimagination of the 'fit and proper' concept and resultant responsibilities of the legal professional in South Africa. The memory of legal professionals and their responsibilities will be closely related in this interpretation. Cornell explains that the unique Derridean contribution to legal interpretation shows us why the act of memory in judging involves the seemingly contradictory notion that judges, in their decision, remember the future.[177] This Derridean deconstruction of the present should remind us of the responsibility of judges, lawyers, and law professors for what the law 'becomes' and that this responsibility is connected with the very idea of judgment.[178]

More than a decade after parliamentary sovereignty was replaced by constitutional sovereignty, a central concern for Davis and Klare was still the potential of the traditional South African legal culture to constrain the transformative project. They identify the urgent priority to transform the judicial mindset that inform the training, outlook, analytical methods and discursive repertoire of legal professionals.[179] This concern and related priority to change the legal culture is in line with Budlender's

174 Dugard 1971:200.
175 Cornell 1990:267.
176 Cornell 1990:268.
177 Cornell 1990:269.
178 Cornell 1990:269. See Chapter 2.7 – Memory and reflection of the past is essential in the process of transformation. This reminds of Sanders' explanation that memory assigns the intellectual a special responsibility because they are guardians responsible for memory and culture in terms of the classic model of the European intellectual. Sanders further states that it is the intellectual's task to carefully reflect on 'our old memory' since it can identify when the phantoms of the worst of the past present themselves as 'new ideas', particularly in the name of cultural identity. It is also in this sense that the acknowledgement of complicity, as a folded-togetherness, must be understood (1998:199).
179 Davis & Klare 2010:405.

assertion of legal practitioners' vast potential to cause harm but conversely, also the potential to be the cause of change as intended by the *Constitution*.[180]

The problem identified by Davis and Klare is that, even though South Africa has an advanced *Constitution* informed by the values of social interdependence and *ubuntu*, jurists continued to deploy traditional methods of legal analysis.[181] In order to achieve the *Constitution*'s democratic aspirations, these values need to inform legal practitioners' professional judgments in their interpretation, argument and manners. According to Klare and Davis, this necessarily implies changing the legal culture or 'legal consciousness' to align it with the spirit and purport of the *Constitution*.[182] Similar to Whelan's proposal of what professional judgment entails, Davis and Klare contend that legal interpretation should be less literal and rule-bound and more contextual and purposive in order to fully realise the potential justice intended by the *Constitution*.[183] This could be interpreted as the professional responsibility of the South African legal practitioner.

Vision of the law and the useful distinction between formal and substantive legal reasoning

In his consideration of the legal reasoning and legal culture as our 'vision' of the law, Froneman speculates about the prevailing 'vision' of the law in South Africa and the useful distinction between formal and substantive legal reasoning.[184] Froneman explains that formal reasoning relies primarily on the authoritative origin of a legal rule, while substantive reasoning is also concerned with the underlying justification for the rule, whether it is just or serves a legitimate purpose for society.[185] He states that a formal vision or culture will tend to apply the rule without further attention to its substantive origin and will be likely to exclude other substantive legal reasoning from 'law as law'. However, a more substantive legal culture or vision will rather apply the rule only for the substantive purpose it was incorporated into the formal legal system and regard other substantive legal reasoning as part of the law in the sense of legal principles or values underlying the legal system;[186] although neither formal legal

180 Budlender 1992:477.
181 Davis & Klare 2010:403.
182 Davis & Klare 2010:406.
183 Davis & Klare 2010:407.
184 Froneman 2005:4.
185 Froneman 2005:4.
186 Froneman 2005:6.

reasoning nor substantive legal reasoning is inherently good or bad, Froneman explains the problem with formal reasoning in a South African context as follows:[187]

> One of the advantages claimed for formal legal reasoning is that it is objective and neutral in its application. Substantive legal reasoning is said to leave too much scope for undue subjectivity, because it means that the decisionmaker has to make evaluative choices between competing political or social alternatives. Much better to let the rules themselves do the work. Once the applicable rule to the case in hand is determined, deductive logic or the predetermined consequences of the rule kicks in and the judge merely goes along for the ride without applying his own subjective reasoning in the process. This version of how things work may indeed apply in many cases in countries with a relatively homogenous population and shared legal tradition, but even then there are instances where the rules run out and substantive reasoning needs to be employed. The comfort of a shared legal tradition is not available to South African lawyers, but nevertheless the virtues of our Roman Dutch civil law heritage are still being sung as representing a flexible and just system capable of being adapted to our changed constitutional circumstances. That, however, is only possible by substantive legal reasoning: by changing the conceptions or content of the concepts and definitions of private law rights and the relations between them under the system. No amount of formal reasoning from the existing conceptions and definitions will lead to that result.

In line with Davis and Klare, Froneman warns that the mere fact that we have a new constitutional dispensation is no guarantee that the legal culture or vision of the law will change. He explains that our civil-law method and application of the broad principle that forms part of the old South Africa's vision of the law has often been praised for its objectivity, neutrality, generality, adaptability and certainty. However, according to Froneman, the claim of it being exclusively a formal vision of law is false. He reminds that the conceptualisation of the notions with which it works is not derived from formal reasoning but that these conceptualisations are particular conceptualisations that flow from substantive political and social choices made in earlier times. He states that the failure to recognise this, and the continued treatment of these conceptualisations as formal, neutral and value-free, has resulted in the South African legal community to delude ourselves that we were not making social and political choices ourselves and that we were merely innocent bystanders.[188]

Froneman states that it appears to be almost unavoidable that, whenever legal reasoning is formalised in a conceptualisation, historical interpretation or textual construction, the effect, if not intention, is to ignore or hide the political or social choices that were made that led to the particular formalisation.[189] While conceptualisation,

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187 Froneman 2005:7-8.

188 Froneman 2005:9.

189 Froneman 2005:10. This also reminds of Dyzenhaus' reference to the memory struggle, when he shows how many of the lawyers who made written and oral submissions to the legal hearing of

historical interpretation and textual construction cannot be avoided in making law, formalisation can be avoided by subjecting the outcomes of formal legal reasoning to continuous substantive scrutiny.[190] Froneman suggests that this is precisely what the *Constitution* requires of us. I contend that this is what is expected of being a 'fit and proper' legal practitioner. Changing the legal culture and our vision of the law will necessarily entail some introspection and honest admission of the role and responsibility of legal practitioners in their contribution to the current vision of the law in the way they practice law.

I therefore agree that South African legal professionals should no longer bluff themselves that they bear no responsibility for the law. In order to comply with this duty, everyone will need to review their ideas of constitutional and legal theory, because the substantive considerations in law that the *Constitution* demands are inevitably made on the basis of some idea of how law and democracy works or should work.[191]

In similar vein, Klare points out that the *Constitution* invites a new imagination and self-reflection about legal methods, analysis and reasoning that are consistent with its transformative goals.[192] Judicial mindset and methodology are, according to Klare, *part of the law* and should therefore be investigated and reconsidered to promote equality, a culture of democracy and transparent governance. He states that it could not have been intended that the constitutional rights and duties be interpreted through the lens of classic legalist methods and that the ideals of the *Constitution* would be constrained by the intellectual instincts and habits of mind of the traditional common law trained and professionally socialised during the apartheid era.[193]

Importance of honesty and critical understanding of the plasticity of legal interpretation

To be transformative and transparent, Klare explains that it is imperative that legal practitioners are honest about and have a critical understanding of the plasticity of legal interpretation and of the importance of interpretative practices to articulate social

the TRC fell prey to the temptation to try to manage public memory in their own self-interest. He states that, in their attempt to forget what is uncomfortable and to persuade others to forget, this management of memory was evident by the presentations of many lawyers at the hearing (1998:91). See also Chapter 2.7.

190 Froneman 2005:10-11.

191 Froneman 2005:18.

192 Klare 1998:156.

193 Klare 1998:156.

visions.[194] He states that legal reasoning needs to be more open and self-conscious about the politics of adjudication and this necessarily implicates that legal practitioners will have to rethink their analytical and argumentative methods and consider the burden their legal culture imposes on their work.[195] A commitment to the democratic objectives of the *Constitution* will require a conversion from the traditional formalistic legal culture and a cultivation of a tradition of substantive political discussion and contestation through the medium of legal discourses.[196]

The common argument in the work considered by Davis, Klare and Froneman is that, if we are indeed committed to the constitutional objectives and transformative project in South Africa, it will be necessary for the prevailing culture of the legal profession to change. The change suggested is a fundamental move away from hiding behind a formalistic approach in pretending that our legal reasoning is not influenced by anything outside of the law to a more honest, substantive approach that justifies the reasoning in the interest of what is right and would serve the community best. The key factors of the work considered are important aspects that would inform the reimagining of the 'fit and proper' legal professional. These aspects require honest consideration by legal practitioners of their own methods of legal reasoning and legal interpretation as well as their commitment to the objectives of the *Constitution*, including social justice, access to justice, the public interest, and the degree to which these aspects play a role in their practice as a legal practitioner or other legal professionals. But also, as found in Chapter 2, a continued consciousness of our complicity, critical engagement with the memory of our possible pasts and a conversion of this knowledge to acknowledgement. Such a transformation of the legal culture would then only impact the law, and have a continuous impact on our understanding of the law if the process of reconsideration and reimagination remains continuous in a democratic and multicultural society.[197]

When Dugard described the legal culture and the attitude of legal professionals as being largely quiescent towards statutes invading individual liberty and their firm adherence to the distinction between the strict law and legal values, he stated that legal academics had to accept a major part of the blame for this. He stated that the

194 Klare 1998:187.
195 Klare 1998:187.
196 Klare 1998:188.
197 See Chapter 2.7.

failure of legal education to relate law to the social sciences had to be recognised as the general lack of interest among lawyers in the nature and role of law in the modern South African society.[198] Dyzenhaus makes an important remark regarding the 'academic amnesia' in his consideration of the outcomes of the TRC on the institutional hearing of the legal community:[199]

> The ideal of judicial independence is one which academics no less than practising lawyers should help to sustain. If one values the rule of law and understands the role of judges in upholding that rule, then the importance of an independent legal academy is clear. But that independence is instrumental to the rule of law. And as I will argue in Chapter 4, unexercised independence is worse than worthless; it legitimates oppression which seeks to operate under the guise of the rule of law. Hence, *legal academics who fail to take up a role of critics of the law and of the legal institutions of their society fail in their duty*, as by far the majority of such academics failed in South Africa, a failure still largely unacknowledged today.

Chapter 5 considers the idea of legal education as the foundation of our legal culture and the potential starting point for change and therefore *becoming 'fit and proper'*.

4.7 Conclusion

My assumption in this study is that what is required 'fit and proper', a century-old legislative requirement for admission to the legal profession, is very closely related to the role of the legal professional in society. I therefore attempt to establish what it means to be a 'fit and proper' legal professional, or what it should mean, in order for such a professional to properly fulfil the important role and purpose of serving the interest of the public while responding to the needs of the entire multicultural, democratic South African society.

In Chapter 2, it was my tentative conclusion that the legislative 'fit and proper' requirement could have been a recognition of the necessity to include a value component in the education and competency of a legal practitioner but that a question could be raised about the extent to which this has realised.

My analysis in Chapter 3 of the current formalist and positivist manner of interpretation of this requirement confirmed the conclusion in Chapter 2 that the legal culture and the values inherited from the previous dispensation are still largely untransformed. My focus in this chapter was on the reimagining of the 'fit and proper' legal professional and the possible implications of such reimagination. The most important finding of this

198 Dugard 1971:186.
199 Dyzenhaus 1998:119 (references omitted, emphasis added).

chapter is that the reimagination of this concept in an attempt to change the current legal culture would rely almost solely on legal education as a starting point for thinking differently about the law and the role of the legal professional. This idea is further considered in Chapter 5.

It would be a mistake to think that a new constitution or a new constitutional dispensation provides a guarantee that the legal culture or vision of the law would change.[200] After almost 30 years of constitutional democracy, the need for change of the legal culture of South Africa still exists. It has to be acknowledged that the legal culture has not adapted sufficiently to suit and respond to a diverse, multicultural society and that legal practitioners still mostly play a traditional, complacent role in their acceptance and application of traditional, formalist rules and principles. It also appears that the value judgments according to which 'fit and proper' is determined, are still mostly informed by these traditional and formalist rules and principles.

From a consideration of case law, it appears that the 'fit and proper' requirement for admission to legal practice is applied as a legal rule of which the content is clear, determinable and attainable.[201] Although, according to prominent legal scholars, the 'fit and proper' requirement is based on ethical values and professional ethics, the current formalist approach entails that a person would be found 'fit and proper' or suitable for legal practice if the person's academic qualification complies with the professional Code of Conduct and the person has not been found guilty of a criminal offence.[202] To this extent the legal practice has been equating legal compliance with legal ethics and continue to do so in an uncritical manner. The mere acceptance of this requirement for admission to the legal profession and superficial attachment of ethical values to the requirement has created the impression that all legal practitioners have acquired and maintain the expected standard of professional ethics. It would be a step in the right direction to admit that this is a false impression and that it is actually not possible for any court or the LPC to determine the attainment of ethical values by a practitioner upon admission to practice. In my opinion, we should rather admit that

200 Froneman 2005:9. See 4.5.
201 See Chapter 3.5 and 4.2.
202 See Chapter 3.2 and 3.3.

the application of the 'fit and proper' requirement as a legal rule is flawed and requires reconsideration.[203]

My contention is that the LPC, as the regulating body of the legal profession, may prescribe rules of conduct for legal practitioners in an attempt to ensure that quality services are rendered to the public but that there should be a clear distinction between conduct in compliance with the Code of Conduct and ethical values. Even though there will certainly be a commonality or obvious overlap, a codification of legal ethics and values is not only injudicious but, if correctly understood, impossible due to the consistent reconsideration and therefore its illusive nature. Legal practitioners could be expected to comply with a code of conduct, but the legal culture should be of such nature that a practitioner should also be able to be critical of the rules on the basis of ethical values. This implies that the conduct of a legal practitioner in the compliance of rules must be regarded as a distinct different concept than the ethical values of such legal practitioner and that the profession's Code of Conduct should not be considered as the embodiment of the ethical values expected by its members. Uncritical acceptance of rules and codes of conduct will perpetuate an uncritical formalist legal culture against which prominent legal scholars have been advocating since the inception of democracy in South Africa.

While compliance with a code of conduct may ensure conformity and reduce legal liability of the LPC, legal ethics are directed or are supposed to be directed at a more critical view of legal rules and conformation in favour of transformation in line with the *Constitution* and the 'other values' not contained in the formal rules. There is, or there should be, a distinct difference between the LPC's interpretation of compliance of the Code of Conduct and transformative legal ethics in the practice of law. Legal practitioners could be expected to comply with the profession's Code of Conduct, but compliance therewith should not render them 'fit and proper'.[204]

My proposal of removing 'fit and proper' as a legislative requirement for admission to practice does not entail that it be removed as a principle in its entirety, but rather that it be understood as a more foundational aspiration for all persons entering the legal

203 See 4.2.
204 See 4.2.

profession and that the principles and objectives of reimagining thereof be embedded in legal education.

This proposal links to my finding in Chapter 2 that the law and the legal professional should develop simultaneously and that the responsibility for training of legal professionals necessarily involves the responsibility for development of the law. To this extent, it is therefore necessary for universities and practitioners to work together to achieve this objective.[205] In our South African context, it would also entail the development and all-encompassing transformation of the existing formalist legal culture to one that considers the consciousness as well as the conscience of the law with an increasing appreciation of morality, ethics and meaning.[206]

My assumption is that such broader understanding and thinking about the law will influence a person's understanding of the law and therefore have an impact on their ability to make value judgments or distinguish between right or wrong, just or unjust in particular circumstances. What is considered 'fit and proper', in my opinion, should relate to the entire *being* of a person and not only to their supposed values such as honesty and integrity. My proposal is that it is incorrect to draw a clear distinction between a person's knowledge, competencies and values for the purpose of establishing that such a person is 'fit and proper'. It is currently understood that a person, upon admission to the profession, has only just obtained the minimum knowledge in order to practice law and, instead of only attaching ethical values to the 'fit and proper' requirement, there must be the same understanding about a person's values than just knowledge and competencies. While it is agreed that certain values are inherent to a person, the values referred to in this context has a broader meaning than simply referring to the fact that a person is honest. (Also, because the conclusion that persons are honest is normally linked to a superficial factual finding that they have not made themselves guilty of stealing, fraud or other dishonest conduct.) The meaning of knowledge, competencies and values should therefore be interpreted in terms of a broader meaning and rather be understood as a continuous process of attainment with the continuous objective of *becoming* 'fit and proper'.

205 Pound 1941:204. See Chapter 2.2 and Chapter 5.5.
206 Douzinas & Gearey 2005:3,15.

In terms of this broader meaning*, becoming* 'fit and proper' should entail knowledge of law, but also an understanding of the difference between laws, and the law with a self-consciousness and ability, to the law with a more critical approach while conscious of the outcomes thereof. *Becoming* a 'fit and proper' legal professional also entails the association with or having a sense of belonging to a group but with the ability to disassociate from or disapprove of the same group on the basis of thoughtful conscience. It therefore implies a commitment to the truth as well as an assumption of ethical responsibility. By *becoming* 'fit and proper', a person must continuously be shaped in their interaction with others that, in turn, will result in constant reconsideration of *what to think* and of what *one ought to do. Becoming* 'fit and proper' should be understood as a postponed ideal, consistently thought about and reconsidered in light of our social context and professional responsibility, particularly regarding public interest and social justice.[207]

My conclusion from considering the role of legal professionals in relation to the public interest, is that it is necessary to develop a sense of humility and understanding of clients' circumstances, before, during and after their encounter with the law, and to develop the necessary respect for clients' autonomy and dignity. Genuine and honest service in the public interest requires a deeper understanding for human dignity, care and a desire to help. A shift in focus in legal education may not only be possible but important to effect the necessary change to mindset.[208]

In reimagining the 'fit and proper' legal professional the proper fulfilment of the responsibilities that result from such reimagination, I propose that an ethical resistance to the (still) largely formalist and positivist legal culture in South Africa is necessary. The memory of legal professionals and their responsibilities are closely related in this proposal and entails a consistent reflection of the past in an attempt to imagine a possible future. Changing the legal culture and our vision of the law will therefore necessarily entail some introspection and honest admission of the role and responsibility of legal practitioners in their contribution to the current vision of the law in the way they practice law.

207 See 4.5.
208 See Chapter 5 below.

The fear is that, if we continue to ignore the call for transformation of the legal culture, we risk the danger of traveling a path of increasing social irrelevance and irresponsibility.[209] The idea of legal education as the foundation of our legal culture and the potential starting point for change and therefore *becoming 'fit and proper',* is considered in Chapter 5.

[209] Rosenberg 1997:1044.

Chapter 5
Transforming the current understanding of 'fit and proper' through legal education

5.1 Introduction

The research question guiding this chapter is how legal education contributes to the understanding of the concept and process of becoming a 'fit and proper' legal professional. The overall argument of this chapter, as also emphasised in the preceding chapters, is that the law and lawyers must grow together and that the responsibility for training legal professionals necessarily involves the responsibility for continuous transformation of the law.[1] Law faculties should accept responsibility for the role they play in shaping the legal profession and the practise of law. I expand in this chapter on the argument in Chapter 2 that legal education should do more to develop critical thinking and invoke Pound's argument that we should not regard the law as merely laws.[2]

Related to the above is the impact of modern legal theory that led to the cognitive as well as moral impoverishment of legal study and jurisprudence. Douzinas and Gearey assert that as a result, legal education has taken the form of vocational skills training and legal scholarship that replaced humanistic engagement in legal text with rationalism and positivism.[3] This historical movement of jurisprudence from a general to restricted interest, diminished the scope of thinking about the law. Positivism, which resulted from this movement, supposes legitimacy of the law on formal reasoning and its strict distinction between fact and value resulted in the minimised influence of moral values and principles in law.[4] The impact of positivism as a consequence of modernity is also evident in the development and interpretation of law in a South African context, particularly during apartheid South Africa, as deliberated on in Chapter 3.

I refer also to the claims of legal scholars that positivism traditionally dominated legal education in South Africa and that lawyers were trained to concern themselves with the rules of law alone and the mechanical application thereof in order to avoid any

1 Pound 1941:204. See Chapter 2 and Chapter 4.
2 Pound 1941:191. See Chapter 2 and Chapter 4.
3 Douzinas & Gearey 2005:4. See Chapter 2.2.
4 Douzinas & Gearey 2005:6.

speculation about the law as it ought to be.[5] The allegation is that this strict distinction between law and morality has led to a rejection of legal values, as opposed to positive legal rules, which resulted in the repudiation of policy considerations in the judicial process.[6] The uncritical manner in which parliamentary sovereignty was accepted and the manner in which legal practitioners and the judiciary alike applied unjust laws in the twentieth century in South Africa, represents of this allegation.

It is therefore appropriate to be reminded again in this chapter of the TRC report on the institutional hearing of the legal community, in which it states that the purpose of the exercise was to draw lessons from the past so that the legal process could be transformed in the future in an attempt 'to avoid the tragic injustice of apartheid-at-law'.[7] I specifically draw attention to the criticism of law teachers in this report for concentrating on 'safe' areas of law during apartheid, or that they taught in such a way that no critical ability was imparted to the students and the finding that students were blinded by the so-called 'glamour and material returns of the conventional mainstream of the profession, while neglecting their potential role as fighters of justice for all in South Africa'.[8] The TRC significantly states that it is not enough for South African lawyers to parade the sovereignty of Parliament as if that alone explained and excused their conduct and that more was required by way of response and responsibility from the judiciary and the legal profession.[9]

I emphasise Froneman's sentiment (as I unpack in Chapter 4) that the mere fact that we now have a new constitutional dispensation is no guarantee that the legal culture based on formalism will change. Changing the legal culture will necessarily entail an honest reconsideration and admission of the role and responsibility of legal professionals in their contribution to the current vision of the law and the manner in which law is practiced.[10] In agreement with Klare, I state in Chapter 4 that a commitment to the democratic objectives of the *Constitution* requires a conversion from the traditional formalistic legal culture and a cultivation of a tradition of substantive political discussion and contestation through the medium of legal discourses.[11]

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5 Dugard 1971:186-187. Chapter 4, par. 4.5.
6 Dugard 1971:186-187. Chapter 4, par. 4.5.
7 TRC Report Volume 4, Chapter 4, 1998:101. See Chapter 3.
8 TRC Report Volume 4, Chapter 4, 1998:102-103. See Chapter 3.
9 TRC Report Volume 4, Chapter 4, 1998:105. See Chapter 3.
10 Froneman 2005:9. See Chapter 4.6.
11 Klare 1998:188. See Chapter 4.6.

My contention is that reimagining the meaning of becoming 'fit and proper', as an ideal strive towards by all legal professionals, could contribute and result in a changing legal culture as envisaged by Klare. This would entail a prioritised thinking about the law with a more critical approach, while remaining conscious of the outcomes of the law, the important role that memory plays in this consciousness, and the responsibility towards the public, the public interest and social justice. As I explain in Chapter 4, thinking about the law will influence a person's understanding of the law and therefore impact on the person's ability to make value judgments or distinguish between right or wrong, just or unjust in particular circumstances. Due to the interrelatedness of these concepts, it would be incorrect to draw a clear distinction between the knowledge, competencies and values expected of a legal professional. I propose that a broader understanding of the meaning and interpretation of these concepts is necessary to achieve the transformation required, particularly insofar as it relates to the interpretation of what it means to be or to become 'fit and proper'. This proposal ties into the argument and overarching purpose of the study that the current content or meaning of being a 'fit and proper' legal professional should be reviewed and adapted to suit and respond to a diverse, multicultural and democratic South Africa. The research problem of the study is that the traditional and current understanding of 'fit and proper' is too superficial and one-dimensional and that this, in turn, results in a perpetuating conservative legal culture that obstructs transformation of the legal profession, the law and transformation of society through law.

The conclusion I reach in Chapter 4, subsequent to considering or 'reimagining' the principles that could inform being 'fit and proper' and the objective thereof, is that a shift in focus of legal education is necessary to challenge and transform the current legal culture. This conclusion is also drawn from the statement that new possibilities and dreams of a truly different future cannot be realised if legal positivism is left unchallenged.[12] The reconceptualisation of legal education in light of the imperatives of transformative constitutionalism therefore necessarily implies that the content, the design, the methodologies and the outcomes of legal education need to be reconsidered.[13]

12 Cornell 1990:267. See Chapter 4.
13 Quinot & Greenbaum 2015:60. See Chapter 4.

The purpose of this chapter is limited to reconsidering the broad guidelines of legal education in South Africa in order for it to align with what is considered necessary in becoming a 'fit and proper' legal professional. The outcome of this chapter therefore directly relates to the main research problem of the study, as described above, and is not intended to be a complete overview or consideration of the entire LLB curriculum. In my proposal for transforming the perceptions of being fit-and-proper through legal education, I reflect on the traditional formalist approaches to the law and legal education in South Africa, the calls for transformation by legal scholars, the current state of legal education and the meaning of critical pedagogy with the aim of achieving critical citizenship as a potential direction for legal education.

5.2 Traditional approaches to the law and legal education in South Africa and the calls for change

In their consideration of the contours of a pedagogy of law in South Africa, Quinot and Greenbaum claim that reform in higher education can be dangerous and counter-productive if it is driven purely by policy agendas and in the absence of sound pedagogical considerations, and that legal education in South Africa is evident of this danger.[14] They explain that the current structure of the LLB and the debatable quality of education it provides, is an illustration of the view that a lack of a pedagogical foundation can at least be partly blamed for the implementation failure of the 1997 reform that led to the introduction of the four-year programme.[15] Greenbaum, in her attempt to harmonise the aspirations of transformative constitutionalism with our educational legacy, states that a single four-year undergraduate degree was at the time strongly supported by the new Ministry of Justice and the Black Lawyers Association. The historically black universities also called attention to the barriers of insufficient resources and facilities to train the number of law students required to serve their communities.[16] She criticises this step by stating that no theoretical considerations were given to, nor prior research undertaken about the pedagogical soundness of the proposed single four-year degree. It even appears that the deans who were involved in the participatory process were reluctant to embrace the new dispensation but that concerns about lowering standards were surpassed by the

14 Quinot & Greenbaum 2015:29.
15 Quinot & Greenbaum 2015:29.
16 Greenbaum 2015:467.

overwhelming support of the proposal by other stakeholders.[17] The *Qualification of Legal Practitioners Amendment Act*[18] was subsequently promulgated, which required all universities to introduce a four-year undergraduate LLB degree, with agreement by law deans on twenty-three core courses that would be incorporated into the curricula, to be designed by each university. The changed legal framework in South Africa, founded upon a Bill of Rights as part of a supreme *Constitution*, were to ensure that law curricula were infused with a pervasive human rights and social justice discourse. According to Greenbaum, the importance of academic freedom would be central to this discourse and was motivated by recollections of a recent past in which the apartheid government had imposed its prescriptions on all state-funded higher education institutions and interfered with the autonomy of university teaching.[19]

Greenbaum ironically notes that '[it is] perhaps this very adherence to the notion of academic freedom that has permitted law schools in the post-apartheid era to continue to do business as usual, or at least transform their curricula according to the dictates of their own visions of transformation'.[20] She further ascribes the lack of transformation to the maintenance of a relatively stable set of courses retained in most LLB degrees due to the specific twenty-three courses and six skills identified by the Task Group on Legal Education in 1996.[21]

In a paper delivered at a conference at the University of Pretoria in 1991, Dlamini analyses the relation between the law teacher, the law student and legal education in South Africa.[22] In his view, these three entities constitute the angles of a triangle with the law teacher at the top of the triangle. The law teacher decides on the curriculum design, curriculum content and the most effective method of conveying legal knowledge to the student. Dlamini states that, in this sense the law teacher is the link between the law student and legal education.[23] He makes an important remark for the purpose of this study that students, like all human beings, become interested in a course if they can relate to it, regard it as being important or as having value for them.[24]

17 Greenbaum 2015:468.
18 *Qualification of Legal Practitioners Amendment Act* 78/1997.
19 Greenbaum 2015:468.
20 Greenbaum 2015:468.
21 Greenbaum 2015:468-469.
22 Dlamini 1992:595.
23 Dlamini 1992:595.
24 Dlamini 1992:596.

Dlamini then explains that the value of law and studying law should serve the important purpose of achieving justice, which also entails equality, and that legal education in the past, particularly in respect of black students, did not achieve this ideal. He is doubtful that it even achieved this purpose in respect of white students due to the havoc caused in our legal system and society by apartheid and the oppressive legal system it produced.[25] Dlamini summarises his opinion of legal education in South Africa at the time as follows:[26]

> First, our legal education in South Africa was strongly influenced by the government policy of apartheid. This policy was not based on the idea of justice, and it had an effect on our approach to law, as well as on the relationship between law teacher and law student. As a result, our legal education was riddled with contradictions, anomalies and inconsistencies. There are various ways whereby our legal education either bolstered apartheid or was influenced by it. The positivistic theory of law dominated the South African scene in the past. What a lawyer was supposed to do was to look at the law as it is and not as it ought to be. Any consideration of the concept of justice as involving equality of treatment was accorded a back seat … if it was not simply regarded as a gimmick by politicians masquerading as lawyers. A true lawyer was regarded as the one who concerned himself with the black-letter law and not its implications in practice … The law that has been taught at South African universities has been regarded as being to a large extent relevant to what a legal practitioner in a capitalist, First-World, free-enterprise economy would be required to know. Law has largely been taught in the abstract, divorced from its social context. To be sure, law should be taught as law and not necessarily as politics, philosophy or economics.

It is clear from this account by Dlamini that the majority of black students did not relate to the law, or the vision of the law, as taught during the time of apartheid and that legal education, as a result, did not have any intrinsic value to students. With regard to law teachers, Dlamini points to the moral dilemma caused by apartheid that resulted in a situation where all white law teachers had to either admit that the law in South Africa was discriminatory or adopt an 'ostrich philosophy'.[27] If they admitted that the bulk of South African law was unjust, it would have created another moral conflict for law teachers because of the fact that apartheid was meant to exclusively benefit and protect white people in South Africa.[28] A convenient way out of the dilemma was for the law teacher to focus on the aspects of the South African law which put the legal system in a better light and to turn a blind eye to those aspects that could embarrass them. When squarely faced with deliberately discriminatory law, judges as law teachers would seek refuge in the literal approach to the interpretation of statutes that

25 Dlamini 1992:597.
26 Dlamini 1992:598.
27 Dlamini 1992:600.
28 Dlamini 1992:600.

would ostensibly absolve them from complicity in legalised injustice.[29] Dlamini explains that the natural law approach, adopted by the great Roman−Dutch law masters such as Grotius, was not that popular among scholars. He remarks that, although many judges and textbook writers made it abundantly clear that our common law is Roman−Dutch and not English law, it was strangely enough the strict Benthamite and Austinian positivism that became the legal creed of South Africa.[30] This resulted in the law being taught as Roman−Dutch law with a spirit of English law. According to Dlamini, positivism deals with the law as it is and not as it ought to be and was therefore regarded 'safe' because it claims to make a clear separation between law and morality.[31]

Commenting on Dlamini's experience, Greenbaum notes that it was inevitable for the effects of a positivist approach to law to 'percolate down through the teaching of "black letter" law at universities'.[32] The problem with black letter law or positivism, as Dlamini explains it, is that it deals with the structure of the law, its making and its operation, but that it does not deal with the content of the law. He compares the study of the law in this manner with a person who claims to know a human being because he has studied the skeleton and muscles but omitted to deal with its mind and spirit.[33]

In 1971, Dugard similarly noted that legal education was mainly directed at teaching of the rules of law and their mechanical application to avoid any speculation about the law as it ought to be.[34] In his inaugural address, 'The judicial process, positivism and civil liberty', he notes that legal academics had to accept a major part of the blame for the largely quiescent attitude of the legal profession towards statutes invading individual liberty, the judiciary's mechanical search for the legislature's intention, the

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29 Dlamini 1992:601. An ironic choice of words by Dlamini if considered in light of Sanders' interpretation of complicity. Sanders, following Gramsci and Sartre, states that we can say that all human beings are intellectuals by virtue of thoughtful conscience. According to him, to be human is to be complicit, to be folded into connection and yet divided at the same time. 'Complicity' is therefore rather about constitutive human duality or multiplicity. The judges and teachers Dlamini refer to were comfortable with belonging to a group, a partial fold of complicity, but without troubling themselves to dissociate which could be indicative of their lack of thoughtful conscience or simply their self-interest and a refusal to acknowledge their privilege. Because, according to Sanders, it is not possible for these connections to exist which would trouble no conscience. We are all complicit in the banal sense of being folded together in connection (Sanders 1998:9-12). See also Chapter 2, par. 2.7.

30 Dlamini 1992:601.

31 Dlamini 1992:601.

32 Greenbaum 2015:466.

33 Dlamini 1992:601.

34 Dugard 1971:185.

failure of legal education to relate law to the social sciences and the general lack of interest among legal practitioners in the nature and role of law in modern South African society.[35] Dugard aptly remarks that adherence to legal positivism has reduced the legal profession to the status of a technical trade and that it has undermined the profession's claim to leadership in our society. He calls for a 'realist−cum−natural law' approach based upon a scepticism that infuses legal realism in combination with the idealism inherent in natural law in an attempt to transform 'forensic bricklayers into social architects'.[36]

In his reflection on the TRC report on the institutional hearing of the legal community, Dyzenhaus emphasises the importance of an independent legal academy in upholding the rule of law and judicial independence.[37] According to Dyzenhaus, unexercised independence is worse than worthless because it legitimates oppression that seeks to operate under the pretext of the rule of law. He urges legal academics and legal institutions to take up their role and social responsibility of being critics of the law, and states that their historical and continued failure to do so are still largely unacknowledged.[38]

The conclusion I draw from the commentaries above on our traditional understanding and teaching of the law before 1994 is that it was infused by formalism and positivism. The characteristic pedagogy that prevailed entailed dialogues under the control of an authoritative lecturer. What was being taught was the theory of the law and 'how to think like a lawyer', with a clear distinction between legal reasoning and moral judgment.[39] The objective of the interpretation of the law was to find the intention of the legislator without any consideration of what it ought to be in relation to 'justice' and with no reference to the social context or circumstances of the client or broader community. Students, and particularly black students, could not relate to what was taught and were distanced from the law and the outcomes thereof in their own context and experience. This is the background and foundation of the view of the law, the legal culture and legal education that prevailed and which the South African legal profession inherited from the pre-constitutional era. According to this view, 'fit and proper' persons

35 Dugard 1971:186.
36 Dugard 1971:200.
37 Dyzenhaus 1998:119.
38 Dyzenhaus 1998:119.
39 Quinot & Greenbaum 2015:30.

would be regarded as persons who have a sound knowledge of the laws, applies it with a literal and technical approach and adheres to it without question or speculation. This continued uncritical acceptance of the law as laws can largely be blamed on academics and law faculties who persist in their failure to adhere to their professional responsibility to be more critical in their approach to the law. This reminds of Budlender's contention that one of the reasons why lawyers have a special duty to promote justice is due to the vast potential they have to cause harm.[40] It could similarly be said of law faculties' responsibility to be the starting point for change and duty to play a leading role in transforming perceptions of the law through legal education.

One of the main arguments in this study is that the law and lawyers must grow together and that the responsibility for training legal professionals necessarily involves the responsibility for growth of the law. This brings me back to Greenbaum's statement referred to above that it was ironically 'perhaps this very adherence to the notion of academic freedom that has permitted law schools in the post-apartheid era to continue to do business as usual, or at least transform their curricula according to the dictates of their own visions of transformation.'[41] If it is accepted that the law has been taught and interpreted in an uncritical positivistic manner for decades, then it can also be accepted that the majority of legal professionals, the scholars, the teachers, the judiciary and the practitioners who were the products of this type of education over decades, would be uncritical of the law, unconcerned with its outcomes and resolute in their belief in the separation between the law and morality. At the time of entering an era of constitutional democracy, it was not expected of the 'fit and proper' legal professional to consider what the law ought to be. That was not the view of the law at the time, and it had not been the approach of legal education. The law and the legal professional had grown together into a largely stagnant, quiescent, formalist legal culture with a positivist and technical approach to the law. From this perspective, it makes even more sense for Froneman to state that the mere fact that we have a new constitutional dispensation is no guarantee that the legal culture or our formal vision of the law will change. It is also clear why he argues that the significance of the *Constitution* must rather be understood as necessitating a change of the legal culture that entails an honest reconsideration and admission of the role and responsibility of

40 Budlender 1992:477. See Chapter 4.5.
41 Greenbaum 2015:468.

legal professionals in their contribution to the vision of the law and the manner in which law is practiced.[42] Klare shares this view by stating that a commitment to the democratic objectives of the *Constitution* requires a conversion from the traditional formalistic legal culture and a cultivation of a tradition of substantive political discussion and contestation through the medium of legal discourses.[43]

In his article on the 'Legal history, legal culture and transformation in a constitutional democracy', Van der Walt asserts that it is not so much the historical sources of law or even the traditional interpretation of those sources as aspects of the legal culture that creates tension with transformation. According to him, the cause of resistance is rather the deeply entrenched attitudes towards and thinking about 'the law', the meaning, how it works and its function in the legal system and in society.[44] It is this legacy of the legal culture, its continued restricted view of the meaning and function of the law in society, which in turn restricts the development of the law and therefore jeopardises the entire transformation process. The faculty to think, which should lead to the faculty to judge, are impaired by this deeply entrenched complacent view of the law.[45] In agreement with Klare, Van der Walt states that it is the absence of critical reflection and deeply embedded legal culture that results in an absence of consciousness and unawareness of the cultural code, which shapes their ideas and steer their reaction to legal problems.[46] Van der Walt reaches the conclusion that critical legal history could find a useful entry point into the current legal discourse by way of a thorough reconsideration of the origin and development of the contradictory foundational principles and hierarchical structure of our view of the law. He claims that critical legal history suggests that we could ensure a sustained relevance of legal history by contesting the superficial sophistication of reconstructed formalism.[47]

Van der Walt's claim about the important role of history, and particularly critical legal history, relate to my earlier claim about the importance of memory of the past and

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42 Froneman 2005:9. See Chapter 4.6.

43 Klare 1998:188. See Chapter 4.6.

44 Van der Walt 2006:5-6.

45 Arendt describes this interconnection between thinking and judging so well when she states that 'if thinking, the two-in-one of the soundless dialogue, actualizes the difference within our identity as given in consciousness and thereby results in conscience as its by-product, then judging, the by-product of the liberating effect of thinking realizes thinking, makes it manifest in the world of appearances … The manifestation of the wind of thought is no knowledge; it is the ability to tell right from wrong, beautiful from ugly. And this indeed may prevent catastrophes …' (2003:189)

46 Van der Walt 2006:17.

47 Van der Walt 2006:44.

consciousness as essential elements in the process of transformation.[48] This relates to Sanders' notion of 'complicity' as he explains that memory assigns the intellectual a special responsibility for being guardians of memory and culture and to carefully reflect on 'our old memory', since it can identify when 'the phantoms of the worst of the past present itself as new ideas', particularly in the name of cultural identity and recognition of complicity.[49] Van Marle links these concepts to legal education in her reflection on the issue of complicity, the link between complicity and legacy and how we should engage memory, in our thinking, with students about the reimagination of a legal culture, legal scholarship and the law.[50] She remarks that the task to remember links with the refusal to forget and with reference to De Beer, states that memory could mean memory as remembering, memory as imagination and memory as invention.[51]

To me, this interpretation of memory is important and directly relates to the contention that ethical resistance to the largely formalist and positivist legal culture in South Africa would be necessary for the reimagination of the 'fit and proper' concept and resultant responsibilities of the legal professional in South Africa. Memory of legal professionals and their responsibilities are closely related in this interpretation. I indicate in Chapter 4 how the Derridean contribution to legal interpretation shows us why the act of memory in judging involves the seemingly contradictory notion that judges, in their decisions, remember the future. The deconstruction of the present should therefore remind us of the responsibility of judges, lawyers, and law professors for what the law 'becomes' and that this responsibility is connected with the very idea of judgment.[52]

It must be noted that none of the scholars who called for a change of the legal culture at the dawn of the new constitutional era were of the opinion that the legal culture would automatically change or that it was guaranteed or that it would not entail a process of gradual change. The view of the law at the time was cultivated and practically applied over decades and was based on a curriculum and legal pedagogy designed by law teachers over a similar extensive period of time. Change would rely on these same persons who previously taught and who were previously taught in a particular different manner from what was now needed. It would necessarily be a

48 See Chapter 3.
49 Sanders 1998:199.
50 Van Marle 2014:199.
51 Van Marle 2014:208.
52 See Chapter 4.6.

gradual process, if we could convince the entire profession that this change was indeed necessary. Linked to my argument that the law and lawyers must grow together, I suggest that in terms of legal education, it will be necessary for universities, the legal practice and courts to work together in assuming these responsibilities as pathfinders of the law for the future.[53] Law faculties will have to play a guiding role in this regard. This would entail a process of reconsidering our view of the law and the role of the legal professional, or what it ought to be, in striving towards the ideals *being* just or *becoming* 'fit and proper'.

5.3 Process of transformation and current state of legal education in South Africa

It is justifiably still questioned whether progress has been made with transformation of the legal culture and our traditional approach to the law and research suggests a continued and even more pressing call for change.[54] The extent to which this process of change has realised in legal education since 1994 is equally doubtful, despite efforts by the Council for Higher Education (CHE) to intervene. This is evident from several academic publications, but particularly the article by Matthews and Samaradiwakera-Wijesundara in which they consider the fiction of transformation in South Africa and analyse the relationship between law, society and the legal profession.[55] They make an important claim that South Africa, having (then) celebrated 20 years of democracy, remains one of the most unequal societies in the world. Although the South African *Constitution* guarantees the right to equality, the country is still divided along racial lines in spite of numerous legislative and policy attempts to achieve substantive equality. When reflecting on the current demographic statistics, it appears that the South African legal profession finds itself embedded in this division. They argue that the role of the legal profession in its facilitation of transformation in the institutional cultures that inform it, particularly with regard to legal education and language, must be explored and reconsidered. And further, that the profession needs to be invested to ensure that its professional constituency adequately reflects the society it represents, not only as a means of achieving transformation within the profession, but

53 Pound 1941:204. See Chapter 2, par. 2.2 and Chapter 4.
54 Greenbaum 2015; Modiri 2016; Robertson & Kruuse 2016.
55 Matthews & Samaradiwakera-Wijesundara 2015:553

more importantly, of ensuring that as custodians of the *Constitution*, it lives the values contained therein.[56]

In its report on the state of the provision of the LLB qualification in South Africa, the CHE sets out the reasons, objectives and outcomes of the national review of the LLB programmes presented by seventeen universities in South Africa.[57] In his foreword, the chairperson of the CHE at the time states that a serious concern was voiced by all the stakeholders who had a direct interest in the legal profession and in legal education at the LLB Summit in May 2013. The concerns of the stakeholders were related to the perception that the quality of law graduates was generally poor, and that they were ill-equipped to practice law in a professional environment.[58] The resolution was that the CHE would develop a standard-setting process for the LLB qualification. A Qualification Standard for the Bachelor of Laws (LLB Standard) was subsequently developed and endorsed by all universities in 2015.[59] A national review process of the LLB programmes of the seventeen different universities was then conducted on the basis of the qualification standard and the 2018 report was the outcome of this review process. For the purpose of this study, I do not discuss the outcomes of the review but only concentrate on a few aspects of the qualification standard, as far as it relates to the claims of my study.

In the preamble of the LLB Standard, it is stated that law is central to creating a cohesive and successful society, it plays a significant role in facilitating economic development and, most importantly, it is pivotal to entrenching the ethos and values of the country's constitutional democracy. The preamble contains references to Klare's notion of transformative constitutionalism as first described in his article on 'Legal culture and transformative constitutionalism' in 1998, by confirming that 'legal education cannot be divorced from transformative constitutionalism'.[60] It also specifically quotes Langa by stating that,[61]

> It is when adherence to the word is taken too far, when the upholding of a law obscures or ignores that law exists to try, however difficult, to ensure justice, that formalism becomes dangerous. It is

56 Matthews & Samaradiwakera-Wijesundara 2015:553.
57 Council on Higher Education. The state of the provision of the Bachelor of Laws (LLB) qualification in South Africa – Report, http://www.derebus.org.za/wp-content/uploads/2019/06/CHE_LLB-National-Report_2018.pdf (accessed on 20 August 2022). Hereafter referred to as the CHE Report 2018.
58 CHE Report 2018:4.
59 Appendix A to the CHE Report 2018:62.
60 Appendix A to the CHE Report 2018:65.
61 Appendix A to the CHE Report 2018:65.

> this type of conservative or formalist approach to law that is inconsistent with a transformative Constitution. At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws.

The purpose of the LLB degree is stated as offering a broad education that develops well-rounded graduates with, [62]

- a knowledge and appreciation of the values and principles enshrined in the *Constitution*;
- a critical understanding of theories, concepts, principles, methodologies and procedures of the discipline of law;
- the ability to apply the above appropriately to academic, professional and career contexts; and
- the capacity to be accountable and take responsibility in academic, professional and relevant societal contexts.

The meaning of knowledge, skills and applied competence referred to in the context of the purpose and as the attributes that must be achieved, are then defined in more detail.[63] It will not be useful to repeat the contents of these attributes here, apart from just stating that it is very broadly formulated and entirely open for interpretation, a point to which I get back to shortly. With regard to applied competence, ethics and integrity is listed as one of the components, along with communication skills and literacy, numeracy, information technology, problem solving, self-management and collaboration, transfer of acquired knowledge and agency, accountability and service to the community.[64] Ethics and integrity, as an applied competence, is described in the report as knowledge of relevant ethical considerations in law attained by the graduates and competence to conduct themselves ethically and with integrity in their relations within the university and beyond, with clients, the courts, other lawyers and members of the public.[65] My interpretation of this description is that it is expected that graduates know what it means to act ethically and with integrity and to conduct themselves in such a manner. There appears to be no real meaning attached to this 'applied competence'. It is noteworthy that neither the CHE Report nor the LLB Standard refers to the legislative requirement for legal practitioners to be 'fit and

62 Appendix A to the CHE Report 2018:65.
63 Appendix A to the CHE Report 2018:65.
64 Appendix A to the CHE Report 2018:66-67.
65 Appendix A to the CHE Report 2018:67.

proper' upon admission to the LPC. It is not referred to in the report and none of the standards are linked to this requirement.

Specific guidelines are listed for the presentation of the LLB programme: Some knowledge of a discipline other than law; advanced knowledge of select area(s) of the law or specialisation in one or more area(s) of the law; proficiency; language; continuous basis; transfer of knowledge to others; examples of assessment methods or types; appropriately qualified to effect meaningful assessment and, Student: Staff ratio. Only three of these guidelines are highlighted here before returning to my argument of interpretation.

Some knowledge of a discipline other than law

The guideline of some knowledge of a discipline other than law is explained as follows:[66]

> The qualification is premised on the notion of a broad societal context. The study of "a discipline other than law" provides the graduate with a satellite disciplinary knowledge base and methodology which can enhance appreciation and understanding of "the dynamic nature of law and its relationship with relevant contexts such as political, economic, commercial, social and cultural contexts." This broad contextual scope allows for a wide range of disciplines beyond law. "Some knowledge" implies sufficient breadth and depth *to provide understanding of a coherent range of fundamental concepts in the discipline and competence to perform basic tasks involving relevant knowledge and skills*.

In terms of this guideline *the law* is considered as being separate instead of integral and integrated with the other humanities such as politics, history, sociology, and anthropology. The purpose of this guideline is rather directed at providing an understanding of a coherent range of fundamental concepts in the discipline and competence to perform basic tasks involving relevant knowledge and skills. It thereby ignores claims by writers such as Douzinas and Gearey about the critical importance of a more general jurisprudential approach to the law with a humanistic engagement in the interpretation of legal text and more emphasis on moral values and principles in law than a mere technical and positivist approach.[67] It also fails to consider Van der Walt's claim that critical legal history could find a useful entry point into the current legal discourse by way of a thorough reconsideration of the origin and development of the contradictory foundational principles and hierarchal structure of our view of the

66 Appendix A to the CHE Report 2018:68 (emphasis added).
67 See Chapter 4, par. 4.3.4.

law.[68] Adding to this, Van Marle states that what is regarded as the broader humanities, is of crucial importance in how we teach 'technicalities of the trade' to students.[69] According to her, law and legal education as a humanities discipline should be underscored and the philosophical underpinnings of reconciliation, frailty, disturbance and discomfort should be haunting the law curriculum as far as substance and approach or method is concerned. Van Marle explains that we could continue to train students in writing, drafting and citation as if these attributes are neutral, negating that they are part and parcel of a formalist and conservative legal culture that keeps the *status quo* in place. Or we could highlight these complexities in the manner we teach writing, accompanied with reading and conceptual skills. She concludes that the responsibility on us as legal scholars and educators makes this a non-choice.[70] My reading of this guideline is that it is not primarily directed at the development of a broader, more critical approach of the law, the understanding of the complexities in the view and interpretation of the law, or the promotion of critical legal skills. I cannot conclude from the wording of the guideline that any scholarly research related to 'knowledge to disciplines other than law' were taken into account with the drafting of the guideline or that it was formulated in an effort to contribute to changing the legal culture or transformation of the law.

Proficiency

With regard to the meaning of *proficiency* as a guideline, it is stated:[71]

> Language proficiency would include formal and substantive components. The formal component would include aspects such as style (consistency, e.g., use of italics for case names), consistent bibliography (alphabetical, complete), subdivision for primary sources (legislation, case law) and secondary sources (books, journal articles, etc.), language (grammar, appropriate word choice), and appropriate diction. The substantive component would include aspects such as topic (relevance, clarity, precision), scope of the research undertaken (comprehensive, most important sources consulted), systematic and clearly structured treatment of the topic, logic and persuasiveness of arguments, and correct use of authority.

My understanding of the substantive component of this guideline is that it still relates to form rather than substance, and ignores writers like Froneman in his proposal about the useful distinction between formal and substantive legal reasoning in transforming

68 Van der Walt 2006:44. See par. 5.3 above.
69 Van Marle 2014:212.
70 Van Marle 2014:212.
71 Appendix A to the CHE Report 2018:68.

the law.[72] He explains that formal reasoning relies primarily on the authoritative origin of a legal rule, while substantive reasoning is also concerned with the underlying justification for the rule, whether it is just or serves a legitimate purpose for society.[73] According to Froneman, the formal version of how things work may be successfully applied in countries with a relatively homogenous population and shared legal tradition, but even then there are instances where the rules do not provide an answer and substantive reasoning needs to be employed. In South Africa, we do not have the comfort of a shared legal tradition, but nevertheless the virtues of our Roman−Dutch civil law heritage are still being taught as representing a flexible and just system capable of being adapted to our changed constitutional circumstances. Froneman states that this is only possible by substantive legal reasoning that necessitates changing the conceptions of private law rights and the relations between them under the system. No amount of formal reasoning from the existing conceptions and definitions will lead to that result.[74] I find it disconcerting that the purpose of the substantive component of this particular guideline is not expressly stated as expecting critical thinking about the law with a transformative purpose. The fact that it is left open for interpretation creates the impression that there could be another interpretation of substantive reasoning as a 'language proficiency'. This again ties into Van Marle's argument above regarding our responsibility of highlighting complexities in the manner in which we teach writing, accompanied with reading and conceptual skills. The manner in which these competencies are taught should not be open for interpretation, it should be a 'non-choice'.

Language

The guideline pertaining to 'language' entails the following:[75]

> Language is the most important tool of a lawyer. In all instances a lawyer must be able to find and understand the sources of the law before s/he can convey her/his message to her/his clients, opponents and the court. The same applies to the person sitting on the bench in court as a result of the underlying guidelines contained in section 174 of the *Constitution*. This implies sensitivity to the language(s) of all concerned parties.
>
> Sources of South African law, especially when one works and researches in private law, are written in Latin, Dutch, Afrikaans and English and if comparative work is to be done, German, Dutch and French law often provide insights since they are comparable systems of law. The

72 Froneman 2005:4. See Chapter 4.6.
73 Froneman 2005:4. See Chapter 4.6.
74 Froneman 2005:7-8. See Chapter 4.6.
75 Appendix A to the CHE Report 2018:68.

> commercial world in South Africa is dominated by English and a student wishing to embark on a career in the business and commercial world especially in the urban areas of the country would have to be proficient in English. In the more rural parts of the country, law is practiced in Zulu, Xhosa, Afrikaans and the other indigenous languages. International trade takes place in a number of foreign languages.
>
> Graduates should thus be able to acknowledge and appreciate linguistic diversity, and programmes leading to the LLB ought to take this need into account, in order to prepare graduates to practice law competently in a context of such diversity.

I find this guideline problematic in more than one aspect but will again only concentrate on how it is not formulated to contribute to transformative constitutionalism. The relevant sources for research in private law would not be Latin, Dutch or Afrikaans if such research is directed at contributing to understanding of the law in a new constitutional dispensation. These sources may of course contribute to a historic study but then only to a limited extent and that is not the way in which the guideline is framed. I agree with and rely on Van der Walt's opinion that there is definitely room and a need for a continued study of legal history in all its specialised areas, provided that the study of legal history takes account of and responds to the challenges of the interpretive turn in a credible way. Van der Walt proposes an approach for the study of legal history from a critical or deconstructive perspective that would allow recognition and reflection upon the influence of the dominant legal culture on our perception of the law and its past.[76] Le Roux, similar to Van der Walt, argues that the purpose of such a historic study should be aimed at uncovering the values animating our legal system after decades of legalistic stricture during which the letter of the law has overshadowed the spirit of the law. Our aim, in his words, should be to end the 'tyranny of a-moral legal technicians'.[77]

The guideline also refers to comparative systems of our law as being German, Dutch and French, which is not only an admission of the Western roots of our legal system but also a proposal for the perpetuation thereof. This is particularly problematic and harmful to our transformative constitutionalism project because it does not aim or encourage an understanding of the law from our own societal African perspective. Mnyongani, in his consideration of the duties of a lawyer in a multicultural society, importantly notes that lawyers in a society are the medium through which the law

[76] Van der Walt 2006:46.
[77] Le Roux 2000:137.

reaches the people.[78] A lawyer framing an argument with a possible remedy in mind should therefore be mindful of the multicultural nature of the South African society and know what the African conceptions of the law entail in an attempt to truly assist in the process of justice.[79] It is important to understand that the purpose and penalties of African law are directed towards the maintenance and restoration of harmony within a community and not against specific infractions. Unlike European law, the interest of the community in matters of conflict will always rank higher than those of the individual in terms of African law. The duties and responsibilities of each member must therefore be interpreted in relation to the community.[80] Mnyongani states that most of the post-apartheid customary law court decisions display this struggle between balancing the right of the community to its cultural practices and the right of the individual litigant and that the courts have not always succeeded in getting the balance right.[81] In agreement with Mnyongani, my argument is that lawyers, or legal professionals, who are only trained in accordance with the dictates of Western norms, would never understand their broader responsibility towards the South African community and its African heritage.[82] Continued thinking about our law as being comparative only to that of European countries, will not contribute to this understanding.

I now return to my earlier remark that the LLB Qualification Standard is very broadly formulated and entirely open for interpretation. Generally, and in any educational context, a widely framed standard that makes provision for interpretation and allows academic freedom is not only preferable but also necessary. I referred to the importance of academic freedom that was to be central in the new legal framework and undergraduate LLB degree in 1997.[83] I have also referred to Greenbaum's remark that it could have been the adherence to the notion of academic freedom that has permitted law schools in the post-apartheid era not to transform or only according to their own understanding of transformation.[84] With a once again broad description of the LLB Standard that is not explicitly directed at transformation of the legal culture or the development of critical legal skills but rather technical skills focussed on suitability

78 Mnyongani 2012:365.
79 Mnyongani 2012:365.
80 Mnyongani 2012:366.
81 Mnyongani 2012:366.
82 Mnyongani 2012:367.
83 Greenbaum 2015:468. See 5.2 above.
84 Greenbaum 2015:468. See 5.2 above.

for employment, I cannot help but wonder whether we are not neglecting our responsibility as true legal professionals. However, in any circumstances less restrictive standards or guidelines always provide more hope than otherwise. I argue in Chapter 4 that it would be fair to say that the legal profession has historically failed to a large extent to satisfy the high demands of their calling and in many instances missed the opportunity to do justice. It can, however, similarly be said that the legal profession, acting upon the values of the *Constitution* as a point of departure, is ideally positioned to be the cause of change and that they have as much potential to do good than they have to cause harm. They have the potential to change the legal culture, change the perspectives regarding the law and the law itself.[85] What is needed is that at least the majority of legal professionals must understand their responsibility in changing the traditional approach to the law, in order for it to respond to the needs of our multicultural society. The role of legal professionals in this process is twofold: in their capacity of being professionals and therefore having an obligation to serve the public interest; and in their capacity as members of the community, having a responsibility of being self-conscious and therefore aware of their complicity. As described before, the law and the legal professional must grow together, and this entails a continuous process of simultaneous development with the respective objectives of achieving justice and becoming 'fit and proper'. This role and responsibility of legal professionals in this sense relate to the concept of critical citizenship, which is considered below in subsection 5.5 as a possible approach in legal education.

5.4 Influence of African traditional law and leadership on the legal culture

One of the *complexities*[86] of the South African legal system and an example of how wide and divergent the influences and components are, is the traditional authority that existed in South Africa even before 1652 and the continued recognition and protection of the institution of traditional leadership in post-apartheid South Africa.[87] Mokgoro states that the demands for enhanced protection for this institution may be attributed to the underlying confirmation of African symbolism in a political system known for its

85 Chapter 4, par. 4.4.
86 Wildenboer 2010:224-225. See Chapter 2.5 above.
87 Mokgoro 1996:60.

suppression, manipulation and exploitation by successive colonial and apartheid governments.[88]

Nicholson describes the pre-colonial concept of chiefdom as a mobile group, with no fixed or permanent territorial boundaries that followed a particular chief.[89] The traditional hierarchy consisted of a chief and below him were headmen who were representative of leading families. The chief and the headmen, who reported to him, constituted a council and below them were the family and kraal heads.[90] The selection of traditional leaders was rooted in ancestry, and they were therefore not elected or trained for these positions. Chiefs were, however, expected to act in the benefit of the people, and they could be challenged to the office of the chief, which served as an incentive to act appropriately.[91]

Mokgoro states that traditional leadership simultaneously played the role of development facilitator, lawmaker, executive and judiciary. She points out that the obvious downside of this system was that an incompetent leader may potentially remain in leadership for years and that the absence of ordinary checks and balances of power renders the system vulnerable to corruptibility and abuse.[92] The above system has also been criticised for being patriarchal, sexist and non-democratic with a lack of separation of powers.[93]

It should, however, be born in mind that much of what we know about traditional leadership and customary law in Africa is in fact a colonial creation and interpretation thereof.[94] Fitzpatrick supports and reiterates Twining's point that custom, as originally set within the traditional group, was integral to intimate processes of dispute settlement and therefore 'something of infinite subtlety and adaptability'.[95] He states that, to tear it from its traditional context and attempt to reduce it to fixed and formal legal rules, would change its nature and that any attempt to write down custom in a way meant to be juridically or intellectually definitive would result in loosing custom.[96] Fitzpatrick, in

88 Mokgoro 1996:61.
89 Nicholson 2006:184.
90 Nicholson 2006:184.
91 Nicholson 2006:185.
92 Mokgoro 1996:66.
93 Mokgoro 1996:63-64,71.
94 Fitzpatrick 1984:21.
95 Fitzpatrick 1984:21
96 Fitzpatrick 1984:21. This idea or notion by Fitzpatrick interestingly relates to the deconstruction theory of Derrida, which is discussed in greater detail in Chapter 4. The nature of the African

contradiction to the general criticisms raised against African traditional leadership referred to above, is of the opinion that leaders in the post-colonial period exploited the distorted understanding of the customary law to legitimise their arbitrary rule and to assert authority over women.[97]

Similarly, Nicholson writes that the distortion in our current legal approach to traditional leadership is a consequence of a lack of understanding of traditional law and politics on the part of the early colonialists in addition to attempts to establish traditional structures within a modern Westernised legal context.[98] Nicholson is of the opinion that forcing traditional law into a Western mould, resulted in it becoming static, incapable of appropriate development and used as a tool to dominate the African people.[99]

Today, in a post-apartheid South Africa, chiefs are still considered to be leaders of their people and guardians of their culture and customs.[100] The status and role of the traditional leadership is acknowledged by section 211 of the *Constitution* and regulated by legislation.[101] The importance of the validity and legitimacy of the traditional legal system, as with any other legal system, lies in the acceptance thereof by the community it is supposed to serve. It is therefore imperative that the actual living law applicable to the real social context should prevail rather than official versions thereof.[102] According to Dlamini, African customary law originally, before the colonisation of Africa, occupied a central position in the integrated culture at the time.[103] He describes customary law as a creative response of the people to the environment in which they found themselves in, which resulted in it embodying the common moral code of the people.[104]

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tradition was institutionalised by Western writers with Western concepts. Fitzpatrick states that the highly constrained sexual and social disciplines found an identity as social mirrors to create an African identity in opposition to the European. African traditional law, as institutionalised or written by colonial scholars, therefore embodies the desired meaning as intended by the authors and constraints are placed on the meaning through the act of interpretation of the text.

97 Fitzpatrick 1984:21.

98 Nicholson 2006:192.

99 Nicholson 2006:192.

100 Nicholson 2006:189.

101 *Traditional Leadership and Governance Framework Act* 41/2003 (as amended); *National House of Traditional Leaders Act* 22/2009; *Local Government: Municipal Structures Act* 117/1998.

102 Nicholson 2006:192.

103 Dlamini 1991:72.

104 Dlamini 1991:72.

Although the system and custom of traditional leaders and African customary law have not at all or not significantly contributed to the legal culture or formal development of the legal profession in South Africa, these principles are gaining increasing importance in the transformation of the legal culture and legal education in South Africa. This was also pointed out by the Council for Higher Education (CHE) during the national review of the LLB qualification offered by South African universities in 2018, as alluded to above.

In his consideration of the duties of a lawyer in a multicultural society from a customary law perspective, Mnyongani emphasises that, although the African customary law now coexists side by side with the Western-inspired dominant common law, the available literature on the two legal systems reveals that there are more differences than similarities.[105] He argues that the duties of lawyers in South Africa are still framed in an individualistic manner to respond mainly to the needs of a Western-inspired dominant legal system and are therefore not equally equipped to respond to the needs of a multicultural society.[106] Mnyongani further mentions that the majority of the population in South Africa adheres to principles of the living customary law and its underlying philosophy of *ubuntu*, in terms of which the services of a lawyer are not required. The traditional customary law therefore has no knowledge of any class of persons called lawyers, is silent on their duties and has no role for them in its processes and procedures.[107] However, he states that the move to a non-traditional court setting brings with it a number of changes involving the context of the hearing, moving from a familiar environment to one that may be less familiar to the parties involved in the disputes. Engaging the services of a legal practitioner may become a necessity in these circumstances.[108] It is therefore imperative that the conceptions of African law should also have bearing on the duties of a lawyer, particularly when they deal with African customary law matters.[109] Mnyongani aptly summarises his argument as follows:[110]

> *The right to legal representation has now become synonymous with access to justice*. Despite the fact that customary law has no role for lawyers in its processes and procedures, it is now a

105 Mnyongani 2012:352-353.
106 Mnyongani 2012:352-355.
107 Mnyongani 2012:353-354.
108 Mnyongani 2012:354.
109 Mnyongani 2012:355.
110 Mnyongani 2012:369 (references omitted, emphasis added). The duties of lawyers relating to public interest and social justice are further considered in Chapter 4.

> constitutional imperative for accused persons appearing in courts higher than the traditional courts to have legal representation. It has been argued that lawyers understand their duties with reference to the dominant system. Duties of a lawyer are based on rules, but rules espouse a certain Western notion of reality based on the sovereign individual. This contribution has argued that if customary law is to develop in its own right, it has to begin to conceptualise what the duties of lawyers dealing with customary law matters should be. In the absence of such duties, lawyers in South Africa will continue to practice law in a void in as far as customary law is concerned. To fill the void, lawyers will automatically revert to the system they know best, which is more developed, readily ascertainable and is currently dominating the discourse. In a multicultural society with a transformative agenda, such an approach is not desirable.

Kamga believes that, although the current global human rights system is predominantly based on Western Enlightenment ideas, ancient African values may still be significant in decoding some national legal systems.[111] He makes the point that, whereas Western philosophy is expressed in abstract terms and focusses on individualism, the African value of *ubuntu* rests upon the need to secure social equilibrium, compassion, humaneness and a strong consideration for the other's humanity.[112] *Ubuntu* is therefore understood as an interactive moral belief in terms of which, who and how we can be as human beings is continuously shaped in our interaction with each other.[113] It is submitted that *ubuntu*, as the basis of African philosophy, is a typical example of how traditional African custom could and should play a role when re-envisioning the role and purpose of the legal profession in the process of transformation. The literal meaning of *ubuntu*, that a person is a person only through others, is also closely linked to the concept *public interest* and could potentially impact on how we understand this concept in the legal profession.[114]

In their tentative reflections on *ubuntu* feminism, Cornell and Van Marle argue that, as an ethical as well as a politico-ideological concept, *ubuntu* always entails a social bond.[115] They explain that this social bond must be understood as one that is fluid and continuously being shaped and reshaped by the heavy ethical demands it places on all its participants. It is a concept which contributes to the understanding of the being of the human but also inherently ethical because the being of human also determines how we see the world. Because of this ethical nature, the social bond demands the constant rethinking of what the ethical and politico-ideological require. According to

111 Kamga 2018:626.
112 Kamga 2018:625.
113 Cornell & Van Marle 2005:205.
114 See Chapter 4.5.
115 Cornell & Van Marle 2015:3.

Cornell and Van Marle, *ubuntu* captures how we know the world as well as how we are in it through the moral obligations of human beings who has to live together. It therefore implies the moralisation of all social relations and it is the one aspect thereof that is consistent.[116]

In line with Mnyongani's argument, it is therefore imperative that a legal practitioner in a multicultural society with a transformative agenda understand the concept of *ubuntu* and comply with the demand of constant rethinking of what the ethical and politico-ideological require. Incorporating the conceptions of African law into the duties of lawyers does not necessarily entail adding specifications to the Code of Conduct but rather requires a foundational understanding of the meaning of these conceptions, the fluidity thereof and the continuous reconsideration of the ethical. To this extent Mnyongani's expectation necessarily implicates quite a radical review of the current Code of Conduct and duties of the legal practitioner.[117]

5.5 Critical pedagogy with the aim of achieving critical citizenship as a potential direction for legal education

What do we know when we know the law? This is the question that White poses in his article on 'Legal knowledge', which later leads him to the question of what it is that we are or should be teaching when we teach the law.[118] In becoming to know the law, White says that it is important to know who you are in reading it and in writing it, and what it calls upon you to do and to be. According to him, 'all law calls upon us to act, not merely to repeat or invoke, but to make something new'.[119] Once this is understood, the question arises of how this task can be performed well and how it can be taught well. White comes to the conclusion that, in either performing the task of knowing the law or teaching it, we cannot issue or follow directions, or formulate rules for inventing topics, for composing introductions or conclusions, or for shaping our style to meet our audience. Similar to Van Marle, he states that the art of writing cannot be reduced to a programme that can be taught and applied and particularly not by way of a set of tricks or techniques.[120] It must instead be studied and taught in the same

116 Cornell & Van Marle 2015:3.
117 See Chapter 3.2 and 3.3 for a detailed consideration of the duties of the legal practitioner, the Code of Conduct and how it links to ethics and the requirement of being ethical.
118 White 2002:1396.
119 White 2002:1429.
120 White 2002:1430. See also Van Marle 2014:212.

way than other arts: by practice, by critical examination, by more practice and deeper reflection, by considering the works of others and discussing it. When you then return to your own work, you should attend to the nature of the languages we are given to use, 'by thinking of the ways in which we define ourselves and others, as minds, as institutional and social actors, as member of a community and culture'.[121] White concludes that his understanding of the law and how it should be taught is that we, as teachers and writers, should be prepared to create new versions of our inheritance, good for our time and for our minds, while recognising that our opinions will need to be revised in turn by those who will come after us, everyone as writers using the materials of law in an attempt to make sense of our experience in a continuing and collective effort to imagine justice into reality. This endeavour solely relies on our capacity to imagine the world and ourselves with others in it and not something that can be done easily or once and for always.[122]

In linking White's notion of creating a new imaginative understanding of the law that is good for our time, Modiri makes a similar claim from a South African perspective in his paper, 'The time and space of critical legal pedagogy'.[123] Similar to White, he emphasises the importance of the ability to grasp shifts in the structure and consciousness of a society, and transformations in the legal and political order that call for a new imagination. Modiri states that, without a sense of time and space or an account of the world and society today, a person would lack the tools and vision to comprehend the specificity of the present as a construction of particular histories, practices and discourses.[124] Modiri claims that it is exactly this failure of law teachers and law faculties to adjust to our current context by not recognising and responding to the complexity and character of living, knowing and doing after 1994 that constitutes the central problem upon which all the current shortcomings and failings in legal education can be blamed.[125]

I do not fully agree with all Modiri's arguments raised in this paper, particularly insofar as he distances himself from scholars who argue for the reform of legal education

121 White 2002:1430.
122 White 2002:1431.
123 Modiri 2016:507.
124 Modiri 2016:507.
125 Modiri 2016:507.

centred upon transformative constitutionalism and the values of the *Constitution*.[126] I am not convinced that the project of transformative constitutionalism will necessarily result in the perpetuation of a hegemonic Western legal culture but argue that a critical reading of the *Constitution*, with its values referred to only as a point of departure, should be of assistance in decolonising our approach to the law rather than being oppositional thereto. Although in terms of a different line of thought with reference to the *Constitution*, I am however in agreement with Modiri's view that a decolonising reading of modern law and of South African law involves questioning the cultural assumptions embedded within legal rules and the epistemological frameworks that structure our interpretations and conceptions of law, legality, justice and fairness. I also fully agree with his contention that the difficulty, but also the promise of the transformation of how we view the law, may transform the legal culture, the legal profession and the judiciary and, therefore, society as a whole.[127] Although my interpretation of the content may differ slightly, I also support the following three lines along which Modiri proposes the revisioning of legal education in South Africa: 'the social and political context', 'intellectual paradigms and epistemology', and a 'pedagogical method'.[128] For the purpose of this chapter, I concentrate only on this pedagogical method proposed by him and which he explains as 'a way of teaching and conveying legal materials that emphasises critical thinking, conceptual engagement and theory while immersing students within the current social reality'.[129]

According to Modiri, the prevailing method of legal education in South Africa is still instruction by way of traditional black-letter law. He describes traditional legal education in South Africa and its problematic consequences as follows:[130]

> Traditional legal education depicts the Law Teacher as the Expert, the one who has deciphered the Truth of law and legal reasoning and positions the Law Student as an empty vessel into whom formal legal knowledge is to be deposited and then recorded, memorised and mechanically applied to changing sets of facts. Such legal knowledge is generally underpinned by the myth of a neutral and virtuous law, thereby producing law students who either see law as innocent in relation to unequal social arrangements or who adopt a humanitarian, even messianic, view of law as the panacea for all social problems. Both responses lack complexity and nuance and make it harder for students to realise the existence and extent of structural injustice and more importantly, to recognise the strong legal dimension to the reproduction of that injustice. More problematically, it deprives students of the intellectual and political tools of analysing and

126 Modiri 2016:514.
127 Modiri 2016:523.
128 Modiri 2016:523.
129 Modiri 2016:523.
130 Modiri 2016:525 (references omitted).

addressing intersecting forms of subordination and hierarchy at the level of roots rather than symptoms.

As an alternative to the traditional teaching and learning of law, Modiri proposes that we should consider Freire's critical pedagogy.[131] I believe that critical pedagogy should be considered as a method of understanding and teaching law that may bring us closer to our transformative objective. For the purpose of this study, I only consider a few main aspects of this proposal and only insofar as it may be relevant in our approach to the law in becoming 'fit and proper'.

This liberatory pedagogy consists of acts of awareness, of thinking, understanding, experiencing and sensing and not simply the transferral of information.[132] Modiri understands this process of education of one that is always becoming within the context of an equally unfinished reality. In this sense, education is an endless acquisition of a deepened consciousness.[133] Critical pedagogy is therefore oppositional to an instrumental and functionalist conception of education as mere job-training. It therefore opposes the reduction of knowledge into information and of pedagogy of questions and investigations into a pedagogy of answers and certainties. The core aims of critical pedagogy is summarised by Modiri as consciousness about the political and social reality, clear apprehension of injustice and an interrogation of deeply embedded values, assumptions and practices.[134]

Mitchell's consideration of the development of critical citizenship in LLB students, relates to Van der Walt's claim of the importance of critical legal history in understanding and teaching law from a transformative perspective as well as Modiri's proposal for a critical pedagogy. She argues for the need to focus on delivering more than practically skilled LLB graduates, but rather holistically developed legal professionals who are committed to the upliftment of constitutional values and principles. Mitchell is of the opinion that this can be addressed if higher education prioritises critical citizenship education.[135] She explains that while critical thinking is based on the development of logical thinking, critical pedagogy is aimed at political thinking. Political thinking, in turn, is an aspect central to the development of a critical

131 Modiri 2016:525.
132 Modiri 2016:525.
133 Modiri 2016:526.
134 Modiri 2016:527.
135 Mitchell 2020:344.

citizen and yet the current LLB is arguably lacking in this regard. According to Mitchell, a law graduate should be able to be critical of both the law and the political state in order to serve the law and the aims of justice.[136]

It is argued that the plea for teaching humaneness to students is as relevant today as it ever was.[137] Mitchell claims that higher education is not only failing in adhering to this plea, but that legal education seems to be gradually reduced to the practical training of a human commodity.[138] She importantly states that:[139]

> When educators are merely teaching students practical skills, this indicates a failure in the key task of the LLB. This furthermore neglects to acknowledge the immense impact that students' ideologies and critical thinking will have on the future of this country. Educators should thus go beyond simply nurturing lawyering skills and moulding practical lawyers. There is a further obligation on educators to provide students with more, namely, to give them a basis for becoming holistically and developmentally critical citizens. Students need more than a tendency towards the development of critical thinking; they need exposure to critical pedagogy and to truly transformative education.

In line with my own study and findings, I cannot agree more with Mitchell's conclusion that law educators can, and have a responsibility, to guide their students to act more humanely.[140] By pursuing small shifts in the thought patterns of law graduates, they can obtain a deeper understanding of the history and involvement of law within the functions and realities of the daily lives of their fellow citizens and in this sense become critical citizens, while becoming 'fit and proper' legal professionals.

5.6 Conclusion

In this chapter, I focus on how legal education in South Africa could be reconsidered and adapted to contribute to the understanding of the concept and process of becoming a 'fit and proper' legal professional.

Traditional approaches to law and education in South Africa, and the teaching of the law before 1994 were mainly formalist and positivist. The characteristic pedagogy which prevailed entailed dialogues under the control of an authoritative lecturer. The theory of the law was taught in a technical manner with a clear distinction between legal reasoning and moral judgment. The objective of the interpretation of the law was

136 Mitchell 2020:347.
137 Mitchell 2020:358.
138 Mitchell 2020:359.
139 Mitchell 2020:359.
140 Mitchell 2020:360.

to find the intention of the legislator without any consideration of what it ought to be in relation to 'justice' and with no reference to the social context or circumstances of the client or broader community.

The South African legal profession inherited a formalist and largely uncritical legal culture and legal education system from the pre-constitutional era. According to this legacy, 'fit and proper' legal professionals would be regarded as persons who have a sound knowledge of the laws, applied with a literal and technical approach and adhered thereto without question or speculation. My conclusion regarding this inherited legal culture is that it can be accepted that the majority of legal professionals, the scholars, the teachers, the judiciary and the practitioners who were products of this system over these decades, would be uncritical of the law, unconcerned with its outcomes and resolute in their belief of the separation between the law and morality. At the time of entering into an era of constitutional democracy, the requirement of 'fit and proper' did not entail legal professionals to consider the ethics of law, law as it ought to be. That was not the view of the law at the time, and it had not been the approach of legal education. The law and the legal professional were caught up in a quiescent, formalist legal culture with a positivist and technical approach to the law. From this perspective, it is understandable that the mere fact that we had a new constitutional dispensation was no guarantee that the legal culture or our formal vision of the law would change.

The allegation that there had been little or no growth or change of the legal culture brought about by the new constitutional dispensation could be attributed to the fact that change would unfortunately rely on the same persons who previously taught, and who were previously taught in a particular different manner from what was now needed. It would necessarily be a gradual process. Linked to my belief that the law and lawyers must grow together, is that it is necessary for universities, the legal practice and courts to work together in assuming these responsibilities with regard to legal education. In my opinion, law faculties will have to play a guiding role in this regard, and it would entail a process of reconceptualisation of our understanding of the law and the role of the legal professional, or what it ought to be, in striving towards the ideals of respectively *being* just or *becoming* 'fit and proper'.

My analysis of the process of transformation and current state of legal education in South Africa brought me to the conclusion that the broadly stated description of the LLB Standard is not explicitly directed at transformation of the legal culture or the development of critical legal skills but rather technical skills focussed on suitability for employment. As a result, I cannot claim that we are currently adhering to our responsibility as true legal professionals. However, in any circumstances, less restrictive standards or guidelines always provide more hope than otherwise. What is needed is that at least the majority of legal professionals must understand their responsibility in changing the traditional approach to the law in order for it to respond to the needs of our multicultural society. In my opinion the role of legal professionals in this process is twofold: in their capacity of being professionals and therefore having an obligation to serve the public interest; and in their capacity as members of the community, having a responsibility of being self-conscious and therefore aware of their complicity. As described before, it would be a continuous process of the law and the legal professional growing together in achieving justice and becoming 'fit and proper'. This role and responsibility of legal professionals in this sense must be understood in line with the concept of critical citizenship and our approach to legal education.

I draw on White in my understanding of the law and how it should be taught. We, as teachers and writers, should be prepared to create new versions of our inheritance, good for our time and for our minds, while recognising that our opinions will need to be revised in turn by those who will come after us, everyone as writers using the materials of law in an attempt to make sense of our experience in a continuing and collective effort to imagine justice into reality. This endeavour solely relies on our capacity to imagine the world and ourselves with others in it and not something that can be done easily or once and for always.[141]

In an attempt to identify a suitable alternative method of legal education for our time and context, I agree with the critical pedagogical method proposed and explained by Modiri as 'a way of teaching and conveying legal materials that emphasises critical thinking, conceptual engagement and theory while immersing students within the current social reality'.[142] This process of education is one that is always becoming within the context of an equally unfinished reality. In this sense, education is an

141 White 2002:1431.
142 Modiri 2016:523.

endless acquisition of a deepened consciousness.[143] Critical pedagogy is therefore oppositional to an instrumental and functionalist conception of education as mere job-training, and opposes the reduction of knowledge into information, and of a pedagogy of questions and investigations into a pedagogy of answers and certainties. The core aims of critical pedagogy can be summarised as consciousness about the political and social reality, clear apprehension of injustice and an interrogation of deeply embedded values, assumptions and practices.[144]

Relying on Mitchell, I finally reach the conclusion that, in contributing to the understanding and process of law graduates becoming 'fit and proper', educators should go beyond simply nurturing lawyering skills and moulding practical lawyers. There is a further obligation on educators to provide students with a basis for becoming holistically and developmentally critical citizens. Students need more than a tendency towards the development of critical thinking; they need exposure to critical pedagogy and to truly transformative education.[145]

143 Modiri 2016:526.
144 Modiri 2016:527.
145 Mitchell 2020:359.

Chapter 6
Conclusion

It is my assumption in this study that what is considered 'fit and proper' – a century-old legislative requirement for admission to the legal profession – is very closely related to the role of the legal professional in society. I therefore attempt to establish what it means to be a 'fit and proper' legal professional, and what it should mean, in order for such a professional to properly fulfil the important role and purpose of serving the interest of the public while responding to the needs of the entire multicultural, democratic South African society. In Chapter 2, it was my tentative finding that the legislative 'fit and proper' requirement could have been a recognition of the necessity to include a value component in the education and competency of a legal practitioner but that a question can be raised about the extent to which this has realised. My analysis in Chapter 3 of the current formalist and positivist manner of interpretation of this requirement confirms the conclusion in Chapter 2 that the legal culture and the values inherited from the previous dispensation are still largely untransformed. My focus in Chapter 4 is on the reimagining of the 'fit and proper' legal professional and the possible implications of such reimagination. The most important finding of Chapter 4 is that the reimagination of this concept in an attempt to change the current legal culture would rely almost solely on legal education as a starting point for thinking differently about the law and the role of the legal professional. I then concentrate on this finding in Chapter 5, which is focussed on how legal education in South Africa could be reconsidered and adapted to contribute to the understanding of the concept and process of becoming a 'fit and proper' legal professional.

My reflection in Chapter 2 on the history of the legal profession from a global as well as a South African perspective is aimed at gaining a better understanding of the position and purpose of the legal professional within the dynamics of the legal history, legal tradition and current legal culture. Although it is evident that the legal profession in South Africa has retained its strong traditional Western character, specifically influenced by Roman, Roman−Dutch, Dutch and English principles, our reality is that we teach and practice law in a multicultural society. This necessitates the law being influenced and transformed by African traditional principles if we are serious about

serving the public, or even just upholding constitutional imperatives. The outcomes of the TRC in the institutional hearing of the legal community, considered in Chapter 2, are indicative of the legal culture and the values inherited from the previous dispensation.[1] The allegation against the legal profession was that they could have done more. The judges, the advocates, the attorneys and the academics were all in a position to provide more resistance against apartheid legislation, which was not self-executing. However, their complacency and lack of self-consciousness during this time were well-noted. It is this continued failure, or perhaps refusal to remember, to turn knowledge into acknowledgment when asked to do so in an effort to reconcile, that should be blamed for the failure of true reconciliation.[2]

My summary of Chapter 2 is that we would do well to remember that the law has always been a taught tradition and that the law is not laws;[3] that positivism, which supposes legitimacy of the law on formal reason, results in a minimised influence of moral values and principles in law;[4] that the true value of a profession is that the service it renders is a social good and that community welfare would be impaired by its absence;[5] that all human beings are complicit in the banal sense of being folded together in connection, and that it is unlikely for such connections to exist, which would trouble no conscience;[6] bad persons need nothing more to compass their ends than that good persons should look on and do nothing;[7] that the past can only be given meaning within a framework that is future-orientated; and meanings will always be tentative and conditional due to the continuous possibility of reinterpretation.[8]

In Chapter 3, I reflect on the role and purpose of the LPC in the enforcement of the 'fit and proper' requirement, the opinion of legal scholars on the meaning of the requirement, as well as the interpretation and application thereof by the judiciary. The importance of the inquiry in this chapter is based on my understanding that what is considered 'fit and proper' should be closely related to the role of the legal professionals in our society. As a result, I attempt to establish whether the current role

1 See Chapter 2.7.
2 See Chapter 2.6 and 2.7.
3 See Chapter 2.2.
4 See Chapter 2.7.
5 See Chapter 2.3.
6 See Chapter 2.6.
7 See Chapter 2.6 and 2.7.
8 See Chapter 2.7.

of the legal professional, and therefore also what is considered to be 'fit and proper', is aligned with what is necessary in order to respond to the needs of the diverse, multicultural and democratic society of South Africa. The assumption is that what was previously considered to be 'fit and proper' in the fulfilment of a person's role as a legal professional would have changed substantially after 1994 with the dawn of a new constitutional democracy. Whether and to which extent the legal culture and perceived role of the legal professional has indeed changed, is a question raised in Chapter 2 and again in Chapter 3. My finding is that there is an increasing need for the reconsideration of the role of the legal professional and how the 'fit and proper' concept could be interpreted differently to align with this role.

The requirement that prospective legal practitioners must prove that they are 'fit and proper' to be admitted to legal practice was retained in the new legislation (LPA) with the overhaul of the legal practice due to the perceived ineffective regulation thereof by the previous regulatory bodies.[9] The new LPA, similar to its predecessor, does not contain a definition of this 'fit and proper' requirement. The absence of a definition could imply that the meaning of the concept is clear and determined or that it is not possible to define it due to its vagueness. In my opinion, the reason for this concept not being defined is related to its vagueness, but that it is also indicative of the continued complacent acceptance of legal rules and unreflective or false certainty of its meaning and content. My consideration of the statistics and reports of the LPC about the misconduct of practitioners shows that the 'fit and proper' requirement for admission to legal practice does not ensure ethical conduct or even compliance with the professional Code of Conduct. My conclusion from this is that it would be more honest to admit that it is not actually possible to establish whether a person is indeed 'fit and proper' for legal practice upon admission, and that our pretending to do so has rather been misleading.[10] In attempting to achieve its ambitious objectives determined by the LPA, the new overhauled LPC would do well to heed to the TRC's warning that an uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than a formal sense.[11] In promoting and protecting the public interest with the objective of ensuring accountability of the legal profession

9 Act 28/2014: sec. 24(1)(c).
10 See Chapter 3.3.
11 See Chapter 3.2 and 3.3.

to the public, the LPC and its individual members will have to continuously reflect on what the law is and how it relates to justice as its main responsibility towards the public.[12]

My analysis of the opinions of legal scholars on the meaning of 'fit and proper' in Chapter 3 confirms the finding that continuous ethical realignment is necessary to ensure that the virtues that constitute fitness and propriety are maintained throughout a practitioner's career. It does not seem to be something that can be established once and for always. These virtues are accepted to broadly refer to a certain set of knowledge, competencies and values and are currently understood and interpretated in a very formalist manner. I agree with the opinions of legal scholars that the 'fit and proper' requirement entails honesty and personal integrity that is important to serve and protect the public interest and that it must be aligned with the value and objectives of the *Constitution*. My finding is, however, that our current understanding of this requirement remains very superficial and that the courts continue to interpret it in a formalist and positivist manner as a result of our (still) largely unchanged formalist legal culture.[13]

The most important deduction from my consideration of the judiciary's interpretation of 'fit and proper' in Chapter 3 is that the courts have consistently failed to draw a clear distinction between conduct that constitutes non-compliance with a law and ethical values. My critique of applying 'fit and proper' as a legal rule or standard is also considered in Chapter 4, but my inference from the consideration of case law is that the definite distinction made by the courts between the facts and legal interpretation, is indicative of our sustained conservative legal culture that continues to prevent true transformation as envisaged by the *Constitution*.[14]

My conclusion in Chapter 3 is that the content and meaning of what 'fit and proper' entails is not as clear as legal practitioners, the LPC and the courts seem to suggest and that the manner in which it has traditionally been interpreted, needs to be reconsidered. The proposal is that this reconsideration will necessarily have to be continuous and rather be a project of reimagining of the 'fit and proper' legal professional, than an overhaul of the regulatory body with fixed rules of conduct. A

12 See Chapter 3.3.
13 See Chapter 3.4.
14 See Chapter 3.5.

more substantive, continuous project guided by values and principles that aims at transforming the legal culture with the *Constitution* as the starting point, would arguably be more valuable than better regulation by way of stricter rules and formal codes of conduct.

One of my conclusions in Chapter 4 is that it would be a mistake to think that a new constitution or a new constitutional dispensation provides a guarantee that the legal culture or vision of the law would change.[15] After almost 30 years of constitutional democracy, the need for change of the legal culture of South Africa still exists. It has to be acknowledged that the legal culture has not adapted sufficiently to suit and respond to a diverse, multicultural society and that legal practitioners still mostly play a traditional, complacent role in their acceptance and application of traditional, formalist rules and principles. It also appears that the value judgments according to which the attainment of the 'fit and proper' requirement is determined, are still mostly informed by these traditional and formalist rules and principles.

From my consideration of case law in Chapters 3 and 4, it appears that the 'fit and proper' requirement for admission to legal practice is applied as a legal rule of which the content is clear, determinable and attainable. Although the 'fit and proper' requirement, according to prominent legal scholars, is based on ethical values and professional ethics, the current formalist approach entails that persons would be found 'fit and proper' or suitable for legal practice if they have the necessary academic qualifications, comply with the professional Code of Conduct and have not been found guilty of a criminal offence.[16] To this extent, the legal practice has been equating legal compliance with legal ethics and continue to do so in an uncritical manner. The mere acceptance of this requirement for admission to the legal profession and the superficial attachment of ethical values to the requirement has created the impression that all legal practitioners have acquired and maintain the expected standard of professional ethics. In my opinion, it would be a step in the right direction to admit that this is a false impression and that it is actually not possible for any court or the LPC to determine the attainment of ethical values by practitioners upon their admission to practice. We

15 See Chapter 4.2.
16 See Chapter 3.2.

should rather admit that the application of the 'fit and proper' requirement as a legal rule is flawed and requires reconsideration.[17]

My contention is that the LPC, as the regulating body of the legal profession, may prescribe rules of conduct for legal practitioners in an attempt to ensure that quality services are rendered to the public, but that there should be a clear distinction between conduct in compliance with the Code of Conduct and ethical values. Even though there will certainly be a commonality or obvious overlap, a codification of legal ethics and values is not only injudicious but, if correctly understood, impossible due to the consistent reconsideration and therefore the illusive nature thereof. Legal practitioners could be expected to comply with a code of conduct, but the legal culture should be of such nature that practitioners should also be able to be critical of the rules on the basis of their ethical values. This implies that the conduct of a legal practitioner in the compliance of rules should be regarded as a distinct different concept than the ethical values of such legal practitioner and that the profession's Code of Conduct should not be considered as the embodiment of the ethical values expected by its members. Uncritical acceptance of the rules and codes of conduct will perpetuate an uncritical formalist legal culture against which prominent legal scholars have been advocating since the inception of democracy in South Africa.[18]

While compliance with a code of conduct may ensure conformity and reduce legal liability of the LPC, legal ethics are supposed to be directed at a more critical view of legal rules and conformation in favour of transformation in line with the *Constitution*. There should be a distinct difference between the LPC's interpretation of compliance with the Code of Conduct and transformative legal ethics in the practice of law. Legal practitioners could be expected to comply with the profession's Code of Conduct, but compliance therewith should not render them being a 'fit and proper' person.[19]

My proposal for removing 'fit and proper' as a legislative requirement for admission to practice does not entail that it be removed as a principle in its entirety, but rather that it be understood as a more foundational aspiration for all persons entering the legal profession. In my opinion, the only manner in which this could be achieved is if the

17 See Chapter 3.2.
18 See Chapter 3.2, 3.3 and 4.2.
19 See Chapter 4.2.

principles and objectives of reimagining the objective of becoming 'fit and proper' are embedded in legal education.

This proposal links to my finding in Chapter 2 that the law and the legal professional should develop simultaneously and that the responsibility for training of legal professionals would necessarily involve the responsibility for development of the law. In the South African context, this would entail the development and all-encompassing transformation of the existing formalist legal culture to one that considers the consciousness as well as the conscience of the law with an increasing appreciation of morality, ethics and meaning.[20]

In terms of the broader understanding of 'fit and proper' proposed in Chapter 4, becoming 'fit and proper' entails knowledge of law, but also an understanding of the difference between laws and the law with a self-consciousness and ability to be critical about the law with a more general jurisprudential approach, while being conscious of the outcomes thereof. Becoming a 'fit and proper' legal professional also requires association with a group – as a member of the legal community, the South African society or a particular ethnic group – but with the ability to disassociate from or disapprove of the same group on the basis of thoughtful conscience. It therefore implies a commitment to the truth as well as an assumption of ethical responsibility. By becoming 'fit and proper', persons are continuously being shaped in their interaction with others, which in turn results in constant reconsideration of *what to think* and of what *one ought to do.*[21] Becoming 'fit and proper' should be understood as a postponed ideal, consistently thought about and reconsidered in light of our social context and professional responsibility, particularly regarding 'public interest' and 'social justice'.[22] My proposal regarding the legal professionals' role in relation to the 'public interest' is that it is necessary to develop a sense of humility and understanding of clients' circumstances before, during and after their encounter with the law and develop the necessary respect for clients' autonomy and dignity.[23]

My conclusion in Chapter 4 is that reimagining 'fit and proper' legal professionals and their proper fulfilment of the responsibilities resulting from such reimagination, will

20 See Chapter 2.7 and 4.2.
21 See Chapter 4.3.
22 See Chapter 4.4 and 4.5.
23 See Chapter 4.5.

entail an ethical resistance to the (still) largely formalist and positivist legal culture in South Africa. The memory of legal professionals and their responsibilities are closely related in this process of reimagination, which requires a consistent reflection of the past in an attempt to imagine a possible future. Changing the legal culture and our vision of the law therefore demands introspection and an honest admission of the role and responsibility of legal practitioners in their contribution to the current vision of the law in the way they practice law.[24]

In Chapter 5, I focus on how legal education in South Africa could be reconsidered and adapted to contribute to the understanding of the concept and process of becoming a 'fit and proper' legal professional. In this chapter, I deliberate on my understanding of the law and how it should be taught. We, as teachers and writers, should be prepared to create new versions of our inheritance, good for our time and for our minds, while recognising that our opinions will need to be revised in turn by those who will come after us, everyone as writers using the materials of law in an attempt to make sense of our experience in a continuing and collective effort to imagine justice into reality. This endeavour solely relies on our capacity to imagine the world and ourselves with others in it and not something that can be done easily or once and for always.[25]

My conclusion from previous chapters regarding our inherited legal culture is that it can be accepted that the majority of legal professionals who were products of the system over decades of parliamentary sovereignty, would be uncritical of the law, unconcerned with its outcomes and resolute in their belief of the separation between the law and morality. At the time of entering into an era of constitutional democracy, the requirement of 'fit and proper' did not entail legal professionals to consider the ethics of law or law as it ought to be. That was not the view of the law at the time, and it had not been the approach of legal education. The law and the legal professional were caught up in a quiescent, formalist legal culture with a positivist and technical approach to the law. From this perspective, it is understandable that the mere fact that we had a new constitutional dispensation was no guarantee that the legal culture or our formal vision of the law would change.[26]

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24 See Chapter 4.6.
25 See Chapter 3.6, 4.4 and 5.5.
26 See Chapter 5.5.

What would be needed for this change is that at least the majority of legal professionals need to understand their responsibility in changing the traditional approach to the law in order for it to respond to the needs of a multicultural society. In my opinion, the role of legal professionals in this process is twofold: in their capacity of being professionals and therefore having an obligation to serve the public interest; and in their capacity as members of the community, having a responsibility of being self-conscious and therefore aware of their complicity. As described before, it would be a continuous process of the law and the legal professional growing together in achieving justice and becoming 'fit and proper'. This role and responsibility of legal professionals in this sense must be understood in line with the concept of critical citizenship and our approach to legal education.

My finding in Chapter 5 is that the critical pedagogical method may be a suitable alternative method of legal education for our time and context. This method is described as 'a way of teaching and conveying legal materials that emphasises critical thinking, conceptual engagement and theory while immersing students within the current social reality'.[27] Critical pedagogy is therefore oppositional to an instrumental and functionalist conception of education as mere job training and opposes the reduction of knowledge into information and of a pedagogy of questions and investigations into a pedagogy of answers and certainties. The core aims of critical pedagogy can be summarised as consciousness about the political and social reality, clear apprehension of injustice and an interrogation of deeply embedded values, assumptions and practices.[28]

The conclusion I reach in Chapter 5 is that, in contributing to the understanding and process of law graduates becoming 'fit and proper', educators should go beyond simply nurturing lawyering skills and moulding practical lawyers. This imposes an obligation on educators to provide students with a basis for becoming holistically and developmentally critical citizens. Students need more than a tendency towards the development of critical thinking; they need exposure to critical pedagogy and to truly transformative education. By pursuing small shifts in the thought patterns of law graduates, they can obtain a deeper understanding of the history and involvement of

27 See Chapter 5.5.
28 See Chapter 5.5.

law within the functions and realities of the daily lives of their fellow citizens, and in this sense become critical citizens while becoming 'fit and proper' legal professionals.[29]

When considering the research question in light of the summarised findings of the respective chapters, it is clear that, whatever the meaning, reason, purpose and importance of the 'fit and proper' requirement was when it was first promulgated, it had to be reconsidered in a new constitutional dispensation. Transformation of the law would necessarily impact on the role of the legal professional and, since the 'fit and proper' requirement and the role of the legal professional are closely related, reconsideration of this requirement was inevitable. Since transformation of the law with the aim of becoming just is a continuous process, so too would be the transformation of the legal professional in becoming 'fit and proper' and the process would be a revolving and endless strive towards utopian concepts, not fixed but good for our time. Because the endeavour to make sense of our experience in a continuing and collective effort to imagine justice into reality, solely relies on our capacity to imagine the world and ourselves with others in it and not something that can be done easily or once and for always.[30]

I now return to the question of what it means to be a 'fit and proper' legal professional, and what it should mean, in order for such a professional to properly fulfil the important role and purpose of serving the interest of the public while responding to the needs of the entire multicultural, democratic South African society. My proposal is that we must discontinue the practice of finding that a person is 'fit and proper' to be admitted to legal practice but rather expect of all legal professionals to continuously reconsider the role they play in society. Reimagining our understanding of 'fit and proper' therefore requires an endless contribution to the collective effort of thoughtful thinking about the law in an attempt to imagine justice into reality and thereby becoming 'fit and proper'.

A shift in focus of legal education may be the starting point or even the solution to the research problem that our thinking about the law, the role of the legal practitioner and interpretation of 'fit and proper' is too superficial to allow for transformation. It is my recommendation that the focus of legal education must be adapted to deliver more than practically skilled law graduates. Law graduates should be able to be critical of

29 See Chapter 5.5.
30 See Chapter 5.5.

both the law and the political state in order to serve the law and the aims of justice. Critical pedagogy with the aim of developing legal professionals who are committed to transformative constitutionalism could be a viable alternative to the current instrumental and functionalist conception of legal education in South Africa.

Finally, it must be kept in mind that the difficulty but also the promise of the transformation of how we view the law, may also transform the legal culture, the legal profession and the judiciary, and therefore, society as a whole.

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