

LAWS1230: LAWYERS, ETHICS AND JUSTICE

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1. INTRODUCTORY FRAMEWORKS (1) |

Overview of Course

1.1 'Ethics: Time to Revisit The Basics'

G D Foster (2003) 'Ethics: Time to Revisit The Basics'

- Ethics is a concept expressed daily, but has no real concrete definition/not used with any real understanding.
- Huge number of issues – whilst may be religious/political/social/economic etc. in nature, will also have an ethical dimension that can only be understood when the concept of ethics is understood.

What Ethics is about:

- **Right and wrong:** "We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency." – John Stuart Mill, *Utilitarianism*.
- **Good and bad, or good and evil:** Defined by reference to pleasure and pain – things that cause/increase pleasure, or preserve good/prevent evil is good – anything that does the opposite is evil: Locke, *Concerning Human Understanding*.
 - Good and evil determined by the different 'tempers, customs and doctrines' of people, and opinions will differ from person to person -> what is universal is idea that peace is good, and consequently anything that causes it is good ('justice, gratitude, equity, mercy') – everything contrary is evil: Hobbes, *Leviathan*.
- **Virtue and vice:** Virtue is something more than goodness – achieved in the face of difficulty and opposition (i.e. overcoming some great conflict): de Montaigne, *Essays*.
 - Vice is the opposite of virtue (defines it in opposition): Quintilian, *Institutio Oratoria*.
- **Benefit and harm:** Man can confer benefits by using certain traits properly (strength, health, wealth, generalship), and cause harm by using them wrongly: Aristotle, *Rhetoric*.
 - Two elements of justice – desire to punish person who has done harm, and knowledge that some individual has been harmed: Mill, *Utilitarianism*.
- **Propriety and impropriety:** The proper man does what is proper – act justly towards other men, act holy to the Gods: Plato, *Gorgias*.
 - If man is not proper, he cannot establish character: Confucius, *The Analects*.
- **Principle** – fixed, universal rules of right conduct not contingent on time, culture or circumstance.
 - Kant's quote – no idea about this one...
- **Character:** Traits, qualities and established reputation of a person is important.
 - Nothing can be good (except for good will) without certain qualities of temperament (intelligent, wit, judgment etc.) – characteristics are bad, if the

will to use them is not good: Kant, *Fundamental Principles of the Metaphysics of Morals*.

- **Example – established pattern of conduct that should be followed.**
 - If one wants to live well, one should look at the virtues of people around and seek to emulate: Aurelius, *Meditations*.
- **Conscience** – “a thousand witnesses”, “pulse of reasons” etc.
 - Moral sense comes from three places: 1) social instincts, 2) appreciation of fellow people’s approval and disapproval, and 3) high activity of mental faculties -> conscience is when he compares past impulses with current social instincts, feels sense of dissatisfaction and resolves to change: Darwin, *Descent of Man*.

What Ethics Involves

- “Ethics involves critical analysis of human acts to determine their rightness or wrongness in terms of two major criteria: **truth and justice**.”: Walton.
- Ethics has to do with quality of thinking -> may not guarantee right/best answer, but will improve chance of finding one.
 - Good quality thinking = **critical thinking** (conscious use of reason), and is preferred over other ways of thinking: Impulse, habit, faith and intuition.
 - **Impulse** is ‘unreflective spontaneity’ - effects of media more likely causing politicians to make impulsive decisions over critical.
 - **Habit** is ‘programmed repetition’ - when subconscious makes decisions without proper/thorough thought.
 - **Faith** is a belief not based on evidence that would be agreeable to every reasonable person - often evidence is not even considered necessary.
 - **Cognitive dissonance** - human tendency to reject events/data that are not consistent with their preconceptions.
 - Faith + trust go together, but blind faith (deadening of intellect) can lead to distrust.
 - **Intuition** is gut feeling or sixth sense - knowledge through experience instead of reason i.e. what appears to be produces **pseudo-knowledge** of what ‘is’.
 - Should be discounted in favour of true knowledge: George Santayana.
- **Distinction between critical thinking and above:** ‘systematic, investigative nature’ of critical thinking.
 - Critical thinking is disciplined pattern with three requirements:
 1. **Questioning** assertions/opinions/givens instead of just accepting them.
 2. **Seeking and weighing evidence on all sides of issues** instead of only pursuing one’s personal beliefs.
 3. **Employing rigorous logic** to reach defensible conclusions.
- **Objective of critical thinking:** To create a solid objective view that can counteract subjective/experience based bias -> this is important, as decisions in ethics will almost always affect someone, therefore decision must be measure of ‘investment’ in the situation.
- **Critical thinking should focus on human acts, not thoughts:** Walton.

- Humans are capable of intellectual thought, unlike other living species.
- Higher expectation of human actions as opposed to animals - however higher intellectual superiority (knowing what's wrong) does not mean humans are morally superior to other species (as they *do* wrong).
- Human acts have demonstrable effects on others - thoughts only have tangible effects when transformed into acts -> leads to assumption the two can be separated (not always the case hence moral ambiguity).
- Purpose of critical analysis of human acts is to determine their **rightness** or **wrongness**, based on:
 - **Principle, precept or rule** e.g. law, executive order or regulation OR other abstract guidelines of behaviour e.g. Golden Rule, Ten Commandments.
 - **Anticipated consequences or effects of actions** - who benefits/is harmed, physical, psychological and/or emotional consequences.
 - **Intentions or motives behind one's act** - are they relevant?
 - **Rights of people affected by one's choices** - human rights, which party's rights takes precedence etc.
 - **Obligations** (opposite of rights) - does decisionmaker, or people affected owe obligations to others?
 - **Values** e.g. traits, behaviours or qualities - which/whose values should be priorities?
 - Zeno: Wisdom, courage, justice and temperance.
 - Aristotle: Justice, courage, temperance, magnificence, magnanimity, liberality, gentleness, prudence and wisdom.
 - Other values: Compassion, competence, decisiveness, empathy, honesty, integrity, loyalty, reliability, tolerance and vision.
 - **Moral dilemmas often stem from value conflicts when two or more positive values are at stake in a certain situation.**
 - **Truth and justice** - "truth is the summit of being; justice is the application of it [truth] to affairs": Emerson -> Ethics requires truth, in order to have proper basis to achieve justice.
- **Truth** - 'what *is*' -> conditions, statements etc. whose existence and nature are contingent on observation or reason.
 - Truth -> knowledge (product of critical reasoning) -> knowledge of what is ethical i.e. **truth is precondition of justice**.
 - Truth is illusory and elusive concept -> multiple versions of 'truth' about one subject does not mean any of them are actual objective truth.
- **Justice** is receiving one's due, or what one deserves (standing/status, valuable resources, treatment at hands of others).

Trust: The Bottom Line

- **Truth + justice = trust.**
- Trust is **social glue** - if thinking and lasting trust exists in society, ethical conflict and choice are less importance, hence why restoring trust is focus of ethics.

1.2 INTRODUCTION: VALUES IN PRACTICE

P & E pp 1 - 12

Case Study 1.1 The case of the philanthropist QC and the tobacco company

- Prominent QC, philanthropist and businessman was appointed to board of prominent cancer hospital's fundraising board.
- Was also counsel for British American Tobacco and had acted for them in many instances.
- Australian government proposed plain packaging laws for cigarettes - three large cigarette companies (British American Tobacco included) to challenge legislation before HC on basis that it usurped their property rights.
- Controversy as to whether it was 'proper' for the QC to both sit on the board of a cancer hospital, whilst also actively representing a tobacco company (large cause of cancer).
 - Hospital stated HC challenge was about whether Tobacco Plain Packaging Act was constitutional, not about smoking hence there was no conflict.
- **Other situations:**
 - Criminal law barrister who was son of Holocaust survivors representing an alleged Naz anti-Semitic war criminal.
 - QC representing coal company in workplace death suit, whilst running as Greens party candidate.
 - Members of Saker Bar Association refusing to represent six alleged murders who had raped and killed a girl.
- **Raises (ethical) questions of proper role and conduct of lawyers:**
 - Should lawyers advocate for clients they personally to be morally repugnant?
 - To what extent are duties to own families, communities and other personal, social and political commitments relevant to how a lawyer represents and advocates for their client?
 - Is it possible to be a good person and a good lawyer?
- **Ethics concerned with deciding what is the good or right thing to do** + moral evaluation of own and others' characters and actions.
 - Must look for reasons motivation actions and/or character.
 - Examine competing interests and principles in each situation and decide which set should prevail/how to compromise.
 - In Case Study 1 - the fact that QC finds smoking repugnant, or could suffer reputational loss by representing the tobacco company is insufficient.
- **'Cab rank' rule:** Barristers should be available to any client who asks.
- Does lawyerly commitment override personal commitment financial issues, need for challenge etc - is it proper for lawyer to take on case and then influence client/court towards their personal view of doing things.
- Social rules, practices or attitudes can be ethically evaluated to determine whether they promote good character and right action:
 - Individuals will have **personal ethics** - developed from family upbringing, social environment and personal commitments etc.
 - **Public or shared expectations** of certain roles e.g. What makes a good doctor/friend etc.
 - Some expectations are u statutes, others could be codified in legal rules and regulations.
- **Three sources of ethical expectations for lawyers:**
 - Personal ethics;

- Professional conduct principles;
- Social ethics.

1.2.1 Professional Conduct

- Professional conduct is the **law of lawyering** - published rules and regulations that apply to lawyers and the legal profession.
- Rules are found in:
 - Legal practice/legal profession statutes of each State,
 - Professional associations' self-regulatory professional conduct and practice rules,
 - General law (contract, tort and equity) that applies to client-lawyer relationships.
- Discussion of lawyers' ethics dominated by **legalism** - treats legal ethics as branch of law i.e. 'professional responsibility' or 'professional conduct' law.
- **Professional conduct approach** provides certainty, predictability and enforceability in otherwise subjective context.
- Abandons ethical judgment for rules and are helpful for guiding behaviour - lawyers can use rules to make ethical judgments in different situations.
- Rules do not assist in considering what values should motivate a lawyer's behaviour or what kind of lawyer they should be.
- Lawyers need ethical view to judge what rules should be made on a professional level, and how they decide what the rules mean/how to obey them on a personal level.

1.2.2 Social Ethics

- Social ethics or **general philosophical theories** that stem from moral or ethical theory.
- Philosophical ideas about justice, social and environmental responsibility, minimising harm and respecting others.
- Theories divide in two categories:
 - Deontological or rule-based theories (deontological ethics);
 - Teleological or consequentialist theories (utilitarian ethics).

1.2.2.1 Deontological ethics

- **Deontological ethics'** main philosophy is Kant's **categorical imperative**: 'Act only according to that maxim whereby you can, at the same time, will that it should become universal law.' (Act only in a way that should be implemented as universal law).
 - Similar to the Golden rule (act as you want others to treat you).
- Religious formations of ethics are often deontological - sets **absolute rules** that emphasise fairness as important aspect of individual rights and entitlement.
- **Kant**: Right actions or policies respect individual autonomy by promoting fairness.
 - The ends never justify the means - the individual is an end themselves, not just a means.
 - Categorical imperative as it is an absolute and unconditional requirement.
 - The means is just as important as the ends - as means will involve individuals, hence just as important as outcome.

1.2.2.2 Teleological approach

- **Teleological approach** focuses on maximising good consequences and minimising bad consequences - end justifies the means, even if there is unfair treatment of individuals or organisations in the process,
- Utilitarianism (developed by Jeremy Bentham and John Stuart Mill) - ethical situations are those where the greatest good is produced for the greatest number of people.
- Singer: Animals are included on the greater good, but infants and intellectually disabled persons do not as they cannot feel pleasure or pain hence can be disregarded for someone else's happiness.

Standard deontological and teleological moral theories contrasted with virtue ethics and ethics of care.

1.2.2.3 Ethics of care

- **Ethics of care:** Focuses attention on people's responsibilities to maintain relationships and communities and to show caring responsive to others in specific situations.
- Developed by feminists in 20th Century as response to deontological and teleological moral theories that emphasised individual rights and formal and universalist thinking.
- D and T theories focus on how individual acts impact others, and make assumption individual acts without outside influence - ethics of care takes into account how individual action is influenced by their surroundings, and recognises response and interaction with other people as key question.
- Recognises importance of modern psychology in understanding human relations, and interpersonal skill and sensitivity as key to ethical decision-making.

1.2.2.4 Virtue ethics

- **Virtue ethics** focuses on the inherent quality and character of the actor as opposed to the impact of their actions.
 - Derives from ancient philosophy - Aristotle's emphasis on right character as a personal virtue.
 - Approach is not necessarily inconsistent with other theories - merely asks a different question.
 - Aristotle's central virtues:
 - **Phronesis:** 'practical wisdom' or the ability to choose wisely.
 - **Sophia:** 'theoretical wisdom.
 - Courage, generosity gentleness, honesty about oneself, justice and fairness, magnanimity and fortitude.
 - Aquinas' virtues: prudence, temperance, justice and fortitude in relation to other people, and Faith hope and virtue in relation to God.
 - Intentional, ethically defensible behaviour emerges from process of genuine personal reflection about virtues (and lack thereof) rather than acting without regarding values.

- Difficulties in applying these general theories to legal practice - to what extent should lawyers be held to different ethical standards due to their 'special' position?

Case study 1.2 Understanding different ethical approaches in practice

- Lee (close older sister) is over-indulging in drugs and engaging in dangerous behaviour, but says she'll pull back and warns you not to tell anyone. You feel as if she needs professional help.

Discussion Questions

1.2.3 An applied ethics approach

- Lawyers need to understand their role within social theories of ethics, but more is needed hence 'applied'.
- Four main ethical approaches:
 - Adversarial advocacy;
 - Responsible lawyering;
 - Moral activism; and
 - Ethics of care.

1.3 WHAT IS 'LAWYERING'?

B&C, pp 1-10.

1.3.1 What do we mean by 'lawyering'?

- 'Lawyering' is **what lawyers do** - but lawyers work in different contexts, hence there is no one concrete definition.
- **Fundamental lawyering skills** include: problem solving, legal analysis, legal research, factual investigation, communication, counselling, negotiations, and litigation and ADR.
 - Skills, although important, do not actually define what 'lawyering' is.
- Lawyering is often defined through **popular culture**:
 - **Asimow et al study**: News coverage is only source more useful than popular culture in assisting students in forming opinions about what constitutes lawyering.
 - News and popular culture generally more popular than any other source (inc. personal experience with lawyers etc.)
 - Reveals **public attitudes** towards layers e.g. change in representations of lawyers over time.
 - **Post**: Lawyers are celebrated for following clients' wishes, but also condemned for using the legal system to satisfy their clients rather than to uphold the right.
 - Representations often focus on criminal lawyers that work for large firms, but in reality lawyer roles are more diverse:
 - Barristers and/or solicitors;
 - Large firms or as sole practitioners;
 - In-house counsel or government lawyers;

- Generalists or specialists;
 - Work for the underprivileged or the elite;
 - Work in major cities, suburbs or regional/rural areas.
- Diversity of types of lawyers and various roles means diversity in describing what they do.
- **Traditional tripartite conception of a lawyer:**
 - Advising/directing client;
 - Active role in the litigation process;
 - Upholding the rule of law.
- **Lopez:** Lawyers solve problems, irrespective of what type of lawyer/their role.
- **'New lawyering'** - challenges traditional conception of lawyer-as-expert.
 - Is 'client-centred' not directive, so **autonomy** of client is highlighted and lawyer's role is more facilitative/collaborative/evaluative.
 - Looks for alternative dispute resolution options/alternate problem solving options as opposed to adversarial approach.
 - Lawyers look for creative solutions with respect to client, rather than 'win at all costs' approach.
 - Requires changes in way law students are taught -> should recognise that lawyers should promote justice and that professional decisions have consequences.

1.3.2 Who are the lawyers? The diversity of the profession

- Traditionally, law was elite and masculine - 'white, Anglo-Celtic, heterosexual, able-bodied, middle class' males.'
- In recent years, significant growth in diversity, organisation structures, specialisations and career paths for law graduates.

1.3.2.1 The diversity of the membership of the profession

- Increase in women and different ethnic backgrounds in the profession - can be attributed to multidisciplinary practices, 'mega-firms', transnational firms and small specialised firms.
- Profession is still conservative/exclusive - women tend to remain in lower levels of practice, and only small proportions achieve partnerships/Senior Counsel.
- **Thornton:** Impact of neoliberalism + corporations/quasi-privatisation of university prevents further diversification.
- **Moran:** Little discussion on sexuality.
- Indigenous membership seems low, but there is little information.

1.3.2.2 The diversity of organisational structures

- Traditionally, legal practices were either sole practitioners or partnerships.
- 2008 ABS report - 11, 244 business (diverse types) employing 84, 921 persons form the 'other legal services' category.
- Growth in incorporated firms allows more benefits: easier entry and exit paths, acceptance of non-lawyer contributions, increased ability to raise debt and equity.
- Legislation also allows formation of **multidisciplinary partnerships**.

- Incorporation is favoured organisational structure - esp. for sole practitioners and small law firms.
- Law Council of Australia report:
 - Incorporations have higher standards than traditional law practices.
 - No conflict between legal and corporations duty.
 - Legal business structures should focus on compliance of individual lawyers with **ethical standards and professional duties**.
 - Non-legal owners would create threat to professionalism.

1.3.2.3 The growth of specialisation

- **Specialisation:** Where practitioners confine practice wholly or largely to certain practice areas -> consequence of complexity of law and/or globalisation.
- Benefits of specialisation:
 - Improved access to legal services;
 - Reduced costs for legal consumer;
 - Lawyers can charge higher fees;
 - Law firms compete more effectively in marketplace.
 - Legal system benefits from growth of specialist expertise.
- Critique of specialisation by French CJ:
 - Specialisation needs better understanding of its definition, what the criteria is etc. - concern for complexity and inconsistency of regulation of specialisations in Australia.
 - Two meanings of specialisation:
 - **Concentration:** Limitation of activity to a particular area of practice.
 - **Expertise:** The acquisition of knowledge and skills.
 - Should be **national regulation** of specialisation - pays attention to two definitions of specialisation.
 - State of legal environment makes it different to segment - specialist lawyers need to maintain currency of knowledge of general law.
 - Also questions specialist courts and specialist divisions within courts.

1.3.2.4 The diverse paths open to law graduates

- Can work in legal services sector, government departments, accounting or corporate organisations etc.
- 'Other' legal services refers to traditionally understood legal settings.

1.5 PROFESSIONAL MATERIALS

4. Look through the professional materials: the professional codes and the legislation, and note the objectives and principles, major sections, and duties. Note Solicitors' Rules, rules 1-5 (hereafter SRs); Barristers' Rules, rules 1-10 (hereafter BRs).

1.5.1 Solicitors' Rules

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 under the *Legal Profession Uniform Law*.