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Class Two: Ethics Theory and Law

TOPICS
a. Morals and ethics
b. Values and emotions
c. Ethical approaches – virtue ethics, deontological ethics, consequentialist ethics
d. Lawyering approaches – adversarial, responsible lawyer, social justice/ethics of care

READINGS
From Baron and Corbin: Chapter 2 (pp.38-48)
From James and Field: Chapter 1 (pp. 33-38) Chapter 13 (pp. 436-443; 456-468)

Morals and ethics
1. What is the difference between ‘morals’ and ‘ethics’?
   - Morals: standard of behavior or beliefs that determine what is acceptable
   - Ethics: The study of the principles that guide people in to choosing between what is wrong and right., in deciding upon the best course of actions themselves and others

Legal Ethics
- Extrinsic controls – rules of professional responsibility and relevant legislation
- Intrinsic controls – personal values

Common law affirms the authority of the state to instill these morals and values
Morality:
- ‘Professional responsibility’: responsibility to the legal system, to the court, to other members of the profession and to the clients.
- Arises from the individual, a personal sense of right and wrong that transcends social and cultural barriers
Morals are how things are in “perfect world” Ethics is more practical in society

**Academic integrity**: Academic integrity means honesty and responsibility in scholarship. Students and faculty alike must obey rules of honest scholarship.

2. **Feldman article. What would you do in lawyer’s situation in the Lake Pleasant case?**
   - Do not get involved: consider the greater good.
   - Attempt to detach oneself from curiosity of the case
   - Mistake; interfering with evidence by moving the skull, looking for it in the first place and later taking pictures
   - Your lawyering approach will affect how you would act in this situation.
   - Consider: greater public good, breaching confidentiality,

**Values and emotions**

1. **Do one’s own values or emotions play a role in the legal system?**
   - Compartmentalise
   - Professional demeanour
   - Depends on area of law you practice in;
   - Do volunteering and pro bono work to balance the more commercial aspect of practice

2. **Should judges be ‘emotion-less’ in order to be objective?**
   - Emotion should exist but not to the level it damages the impartial nature of the court
   - Don’t have to be wholly emotionless, but they need to show a degree of compassion – never just black and white
   - Judges interpret the law, to do this they need a level of compassion, emotion and awareness of feeling to form decision

3. **CONSIDER: What is the importance of empathy in the law?**

**Do you think there is a difference in what lawyers value and what lay persons’ value?**
   - A lawyer’s duty is first and foremost to their client, and in this case it would be towards a murderer – to try their utmost to maintain their evidence and if convicted, help mitigate their client’s punishment.
   - As a lawyer, your perspectives must be put aside, best attempt to be unbiased.
   - The adversarial system depends on the knowledge that both sides have been represented to the best of each ability, ‘everyone deserves a defence’, innocent until proven guilty

   Civil nations have an ‘inquisitorial’ system, judge will ask more questions, they are sanctioned to do more in order to reach the truth whilst here it is up to the two sides to establish their cases.

**Ethical approaches**

**Virtue ethics**: An approach to ethics that emphasise the development of virtuous character rather than compliance with rules or the consequences of actions¹
   - ‘Alternative concept of lawyering’; that a lawyer’s duty is not only to their clients, but also to greater society and to themselves – ‘fidelity to their own personal ethical values and commitments’.
   - Focus on the character and integrity of the lawyer

¹ New lawyer definitions
Oliver Wendell Holmes — “the process of law school and the background of those who choose to study law will ultimately be someone who have the right ethics and character to know what is the right thing to do in most situations.”

Deontological ethics: An approach to ethics according to which ethical rules are universal rules with which a person must comply regardless of the consequences
- Known as the standard concept of lawyering which simply looks to abide rules where they will pursue their client’s objectives without regard for the outcome and consequences.
- Outside of their ‘rights’ to determine what is right and wrong

Strong ‘firm culture’ which demands lawyers stick to deontological ethics in satisfying their clients and furthering their firm as a business, however this is a ‘moral tunnel vision’, portraying lawyer’s as a client’s ‘hired gun’.

Consequentialist ethics: ‘responsible lawyering’, where consideration is always given to how their advice to their clients will impact on the general public.

Lawyering approaches – adversarial, responsible lawyer, social justice/ethics of care

Traditional, adversarial approach
- Solely concerned for their client’s objectives, pursues it without regard for the consequences
- Two sides present their cases, discrediting the other in an ethical manner

Responsible lawyer approach
- Awareness of the ethical ramifications of their actions as a lawyer in society
- Your duty to the law and court comes first, before your duty to the client – what you’re doing is to further the system rather than to benefit your client before anything else.

Social justice - moral activism
- Lawyers should be held personally and morally accountable for their actions

Social justice - ethics of care
- Perceives clients as collaborators in the good, seeks to make both the client and lawyer better people

In 2005, the Crown Prosecutor Margaret Cunneen spoke to law students at Newcastle University. Her comments concerning the co-accused in the Skaf rape cases were reported in the press. Ms Cunneen was due to represent the Crown in a retrial against the co-accused. This caused the accused to appeal. In the case of, MG v R [2007] NSWCCA 57, one of the co-accused with Bilal Skaf, criticised Cunneen for publicly supporting the complainant, on the basis that the criminal trial process was not fair to the accused.

In terms of the Crown Prosecutor’s conduct, the Court of Criminal Appeal held:

83 However, because of the special role of crown prosecutors in the criminal justice system they are subject to obligations beyond the court room, both before and after any trial. The relevant Bar Rules and Prosecution Guidelines have been made with the object of ensuring that crown prosecutors conduct themselves in a manner which will ensure the integrity of the criminal justice system. A breach of them may diminish public confidence in that system. In an exceptional case it may be necessary for the courts to intervene to ensure that public confidence is maintained.

84 The trial judge … required that Ms Cunneen be removed as the prosecutor. However, as recent experience in this Court demonstrates, there have been occasions when prosecutors have fallen short of the standard of conduct required of them in court, resulting in a miscarriage of justice, requiring an order for a new trial. These
problems usually have their source in the excessive zeal of the prosecutor, who in an endeavour to persuade the jury of the accused’s guilt leaves aside the fairness and detachment required.

She concluded her address with the following:

Yet I am informed that in some law schools the teaching of criminal law revolves around the supposed epidemic of the conviction of the innocent. This is very old-fashioned teaching. What I wish to challenge you to do, in your practice of the criminal law, is to bring your sense, your humanity and your conscience with you. Justice isn’t achieved by ambush, trickery, dragging proceedings out in a war of attrition with witnesses. It’s achieved by honesty, balance and proportion. As lawyers, you have a power. Be good with it.”

What approach did Crown Prosecutor Cunneen take when making the speech?

- Her approach; common morality is more important that moral morality
- Not appropriate, maintaining the sanctity of procedure is important
- Not allowed to give interviews to present an unbiased front; can’t talk about matters that are in court,

READINGS

Heidi Feldman (1996), ‘Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?’

- Statutory prohibitions and permissions are likely to stunt sentimental responsiveness, a key feature of good ethical deliberation.
- Technocratic lawyer is a kind of legal minimalist- aims at efficiency.
- Honorable lawyer seeks to ensure goals serve clients genuine best interest
- Both technocratic and honorable legal analysis can be components of good lawyering.
- In contrast, technocratic and honorable legal analysis are not both components of good ethical deliberation.
- If good lawyering demands good ethical deliberation, a technocratic style hinders the attorney’s performance
- If one believes that good lawyering practically always demands good ethical deliberation, then it follows that the honorable mode of legal analysis should practically always dominate technocratic one.
- Arguments of article: “I argue simply that to the extent that sound lawyering calls for healthy ethical deliberation, the technocratic style interferes. I also argue that statutory codes of lawyers’ ethics elicit the technocratic style rather than the honorable one. Finally, I suggest that a common law approach would at least tend to reverse this effect.
- The Model Rules of Professional Conduct, adopted in 1983, represent the American Bar Association’s most recent codification of lawyers’ ethics
- LAKE PLESEASNT BODIES CASE: case is a classical legal and ethical dilemma- goes against moral obligations. After client confessed to murder, lawyers went and found bodies and took pictures. Lawyer had to move skull to take pictures. They did not disclose this to anyone even though the police were still searching for bodies. Bodies
were found 4 months after. Police were still unable to connect murderer to bodies, thus had no case. Model rules were used to justify why the lawyers did not give evidence – e.g. confidentiality.

- Lynne Henderson (1987), ‘Legality and Empathy’
  - Rule of law for social control- but also sought wistfully to incorporate human beings into legal thinking, stating, "Abandonment of the rules produces monsters; so does neglect of persons."
  - Feeling is denied recognition and legitimacy under the guise of the "rationality" of the Rule of Law.
  - Rule of Law, raises terrifying specters of destabilization, chaos, and anarchy.
  - Ironically, while emotion may generate laws via "politics," once those laws meet whatever criteria are necessary to constitute legitimacy in a system, they are cleansed of emotion under this vision of the Rule of Law
  - The law becomes not merely a human institution affecting real people, but rather The Law.

CLASS NOTES:

- Dudley v Stevens
TOPICS

a. Defining ‘Lawyers’
- Solicitors and Barristers
- The cab-rank rule
- QCs and SCs

b. Regulation of Lawyers
- The bodies that regulate lawyers – Law Society, Bar Association, Office of the Legal Services Commissioner (OLSC), Attorney-General, Admissions Board and Supreme Court
- The ‘rules’ that regulate lawyers – Conduct Rules (for both Barristers and Solicitors), Legal Profession Act 2004 (NSW), Legal Profession Regulations 2005 (NSW) and common law
- Admitting lawyers
- Disciplining lawyers

From Baron and Corbin:
- Chapter 7 (pp. 157-178)
- Chapter 2 (pp. 30-38)
- Chapter 5 (pp. 128-130)
- Chapter 3 (‘The Admission Process’, pp.51-55)

From James and Field:
- Chapter 1 (pp. 3-21)

QUESTIONS

a. Types of Lawyers

1. What is the difference between solicitors and barristers?
   Solicitor:
   - Works behind the scenes, does the paper work and has contact with the client.
   - Is employed by a firm and can be sued for negligence.
   Barrister:
   - Argues in court, works independently in a chamber and is up against other barristers. Barristers cannot be business partners with each other.
   - Cant be sued
   - Technically cant choose who to represent due to the cab-rank rule.
   - Only gets involved where there is a dispute

2. The ‘cab-rank rule’ has been criticised for being ineffective. What is the ‘cab-rank rule’? Do you think the rule serves an important purpose?
   Cab rank rule- first in, first served.
   Barristers have an obligation to represent anyone that comes to them
   Avoids people being bias
   Only applies to barristers
   The only reason as to why it is ineffective is because there are many ways for barristers to easily get out of a case. It serves an important purpose as it presents the legal process as being fair to the public.
   Ways of getting out of the cab-rank rule:
   - Say you are busy, don’t have the area of expertise, client may not able to pay the fee for the barrister, if it is in appropriate (ie business partner, family is involved in the case).