# PART I

# PROFESSIONAL ETHICS

# 1

# Ideals

'Well, I don't want to be a lawyer mama, I don't want to lie'.[1]

## I. Introduction

Occupations develop ideas about the right way to do the work they do. In the case of lawyers, this involves reconciling some apparently incompatible aspirations. A popular view is that they profess virtue, for example acting with integrity, while making money from helping murderers, tax avoiders or polluters to evade justice. This chapter deals with the issue of how that can be justified. It will explain how moral ambiguity is intrinsic to the job that lawyers do by considering the nature of the lawyer's role.

Later in the chapter the issue of whether the professional ethics of lawyers can or should be consistent with principles of 'ordinary morality' is considered. These issues are approached by exploring the implications of the commitment to the 'rule of law'. This shapes the roles of judges and lawyers in the Western democracies. It takes on a particular character in an adversarial system. The chapter examines the so-called 'standard conception' of the lawyer's role, together with criticisms of its moral orientation. It concludes with a defence of how the role of lawyer is interpreted in England and Wales.

## II. Professional Ethics and Conduct

Ethics is a branch of philosophy concerned with how people make good and right decisions on the issues confronting them. Different ethical theories suggest distinct ways of thinking about making such decisions. Deontology is concerned with whether

[1] J Lennon, 'Don't Want to be a Soldier' from *Imagine* (Parlophone, 1971).

there is a duty to behave in a particular way.[2] Consequentialism advocates that one must consider outcomes before deciding on a course of action. Virtue ethics suggests that good character is essential to ethical decision-making. Principlism suggests that ethical decisions should be based on four basic ethical principles.[3]

In practice, decision-making tends to be intuitive. Most people do not consciously apply ethical theory. They may, however, take into account considerations that reflect one or more of these ethical theories. If making decisions is a complex process, it is more so if one is a lawyer. Considerations informing ethical decision-making for ordinary people apply differently to members of professions. Professionals have a distinct social role to perform. Consequently, they are placed in different relationships to clients, to individual third parties and to society as a whole. As a part of this process they are inducted into the nuances of decision-making in their field of practice.

## A. Professions

For present purposes, professions are defined as occupations which the state has endowed with a degree of freedom in running their affairs. They are given this autonomy because they control an esoteric field of knowledge of vital concern to the functioning of a healthy society. This freedom includes having a degree of control over how services in their field of expertise are delivered. The actions of professionals are guided by values that underpin the role they perform.

Members of professions enjoy a high level of autonomy in guiding clients in making important decisions. In return for their freedom, professionals commit themselves to upholding high standards of behaviour. They are placed in an unusual position of trust and responsibility in relation to others. Accumulated practical experience helps them to choose the right course of action in difficult situations.

## B. Professional Values

Values are standards influencing choices between courses of action.[4] They tend to fall into one of three groups: moral values such as fairness, justice and truth; pragmatic values such as thrift, efficiency and health; and aesthetic values such as beauty, softness and warmth. A value system is a collection of consistent and coherent values ranked according to importance. Professional value systems include a mixture of moral and pragmatic values. The core professional values of lawyers can be elusive,

[2] Derived from the Ancient Greek *deon*, meaning binding duty (J Pearsall and B Trumble (eds), *The Oxford English Reference Dictionary* (Oxford, New York, Oxford University Press, 1995); and see D Luban, 'Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice' (1990) 49 *Maryland Law Review* 424, at 424–28).

[3] TL Beauchamp and JF Childress, *Principles of Biomedical Ethics*, 4th edn (New York, Oxford, Oxford University Press, 2001) at 12.

[4] N Rescher, *Introduction to Value Theory* (New Jersey, Prentice Hall, 1969) at 2.

or even controversial.[5] They may be unarticulated, reflect differences of opinion or change over time.

Three examples of lawyers' values illustrate shades of difference and emphasis. In 2003, a President of the Law Society opined that independence, integrity and confidentiality were the core values for solicitors.[6] In 2007, another President of The Law Society said that solicitors should possess the 'level of honesty, integrity and professionalism expected by the public and members of the profession'.[7] The Code of the International Bar Association emphasises 'the highest standards of honesty and integrity',[8] serving 'the interests of justice', observing the law, maintaining ethical standards[9] and maintaining sufficient independence to allow barristers to give their clients unbiased advice.[10]

## *i. Core Values*

### a. Client Goods

Professional values reflect client goods, such as a right to self-determination, privacy and protection from harm. These may also be limited by professional self-interest, such as the need to obey the law and keep personal feelings separate from work decisions. The realisation of these values has practical implications. For example, a profession may be committed to the value of client autonomy. In that case, it would promote client self-determination by ensuring that clients make their own moral choices. This would mean training professionals to present options for clients and facilitate client decisions.

### b. Neutrality

Neutrality represents the value of disinterestedness. This enables professionals to take a detached view and to reconcile a pull on their loyalties in more than one direction. The value of neutrality is essential to any judicial role, but is relevant to lawyers in general. The idea of equality before the law means that lawyers must be able to represent morally indefensible individuals without compromising their own personal integrity.

### c. Public Service

An aspiration to service is not confined to lawyers. In *Bhagavad Gita*, Lord Krishna says that '[o]ne must perform his prescribed duties as a vocation, keeping in sight the public good'.[11] The key professional value of legal professions in common law countries is the idea of a professional role as 'service'. Today this generally means working

[5] D Nicolson and J Webb, *Professional Legal Ethics* (Oxford, Oxford University Press, 1999) 13–21.
[6] P Williamson, 'When Core Values Matter' *Young Solicitors Group Magazine* Issue 21, July 2003, at 8.
[7] SRA, *Guidelines on the Assessment of Suitability and Character* (2007).
[8] *International Bar News* (1995) Summer, at 23, r 1.
[9] ibid, r 2.
[10] ibid, r 8.
[11] OP Dwivedi, 'Ethics for Public Sector Administrators: Education and Training' in RM Thomas (ed), *Teaching Ethics: Government Ethics* (London, HMSO, 1996) 339, at 345.

for the good of the community, being more interested in the work, or vocation, than in the extrinsic reward, money or prestige, it offers.[12] This is consistent with the traditional role of professions in providing alternatives to 'the tidal pull of the profit motive'.[13]

While there are different conceptions of what it might mean to be a 'good lawyer',[14] most are linked to intrinsic rather than extrinsic motivation. This is implicit in Alasdair MacIntyre's analogy between professional virtue and the game of chess.[15] A player who cheats at chess may succeed, acquiring the external goods of fame, fortune or prestige, but will not achieve the internal goods of the game. These come only to those who play honestly, according to the rules, *and* with knowledge and skill. MacIntyre argues that the 'internal goods' of a practice can only be achieved by 'subordinating ourselves within the practice in our relationship to other practitioners'.[16] A young professional is inculcated into the practices of a community performing a role well for its own sake. But it does not explain what defines the role. For this we need to look at the good that the role serves.

d. Justice

The status of professions is often attributed to a key good that they deliver to society. Just as the medical profession delivers health, lawyers deliver justice. There are many different meanings of justice and lawyers are associated with procedural justice of a kind delivered by courts. There is no reason why lawyers' notion of justice should be limited in this way. Lawyers' concept of justice could be defined to include responsibilities to fairness, to the accessibility of legal services or to striving for social justice.

## C. Professional Virtues

Whereas values are standards set by a society or individual, virtues are aspirational qualities for individuals. Professionals aspire to 'an ideal defining a standard of good conduct, virtuous character, and a commitment, therefore, to excellence going beyond the norm of morality ordinarily governing relations among persons'.[17] Professionals also embrace values that it is not necessary for ordinary people to achieve. An advocate, for example, has to be brave to stand up in court. Professions often express their values as the virtues they expect to find in their members. Therefore, honesty is both a value and a virtue.

[12] R Pound, *The Lawyer from Antiquity to Modern Times: With Particular Reference to The Development of Bar Associations in the United States* (St Paul, Minn, West Publishing, 1953).

[13] WM Sullivan, 'Calling a Career: The Tensions of Modern Professional Life' in A Flores (ed), *Professional Ideals* (Belmont, CA, Wadsworth Publishing, 1988) at 41.

[14] AT Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard, Belknap Press, 1993) at 367.

[15] AD MacIntyre, *After Virtue: A Study in Moral Theory* (London, Duckworth, 1985) at 127.

[16] ibid, at 191.

[17] A Flores, *What Kind of Person Should a Professional Be?'* in A Flores (ed), *Professional Ideals* (1988) (n 13) at 1.

### D. Conduct

Professions typically set and police standards for education, training and work. These standards are often systematised and reproduced as a code of conduct. This takes some of the effort out of ethical decision-making, but there are a number of reasons why codes do not resolve all problems. Professional codes cannot answer every question arising in professional work. The rules in different parts of a code of conduct may conflict, leaving doubt about which should prevail. Applying a rule may produce an outcome that a professional considers to be unethical. In these instances, professionals are presented with an ethical dilemma. Where rules do not provide an obvious and satisfactory answer, they may resort to underlying values to reach an ethical decision.

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## III. Systems and Roles

### A. Professional Roles

Legal roles reflect economic systems. Considering why industrial capitalism developed in Europe and not in other regions of the world, Max Weber pointed to the roles played by social structure, religion and law.[18] In most capitalist countries, the practice of law is dominated by business. Nevertheless, the social good of justice has huge symbolic importance. The Western liberal democracies are committed to human emancipation from exploitation, inequality and oppression, and to institutions promoting justice, equality and participation.[19] In order that citizens can enjoy these goods, access to justice must usually be supported by the state.

European legal systems contributed to the development of the modern state by developing rational legal rules. These were deliberately made free of religious and other traditional values or direct political interference and were universally applied. Weber called systems of control by autonomous rules 'legalism'. Constitutional regimes require judges to protect human and property rights.[20] Independent lawyers monitor judges and prevent all but the most arguable cases reaching court. The legal system defines the work and tasks lawyers perform, which becomes integrated into a social role.[21] In Western societies, lawyers' roles are defined by the rule of law.

[18] M Weber, *Economy and Society* (G Roth and W Wittich, eds) (Oakland, CA, University of California Press, 1968) and for critical summaries, see DM Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) 3 *Wisconsin Law Review* 720 and M Albrow, 'Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law' (1975) 2 *British Journal of Law and Society* 14.

[19] A Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, Polity Press, 1991) at 212.

[20] GC Hazard and A Dondi, *Legal Ethics: A Comparative Study* (Stanford, CA, Stanford University Press, 2004) at 92–93.

[21] F Znaniecki, *Social Relations and Social Roles* (San Francisco, CA, Chandler Publishing Co, 1965).

## B. The Rule of Law

### *i. Origins and Contemporary Significance*

The rule of law means that no person or institution is above the law. This idea has ancient origins beginning, as far as is known, with Aristotle's assertion that the rule of law is preferable to the rule of man.[22] In England, this meant controlling the absolute power of the monarchy, starting with Magna Carta in 1215. The rule of law continues to be evoked in legal cases and in legislation. The Constitutional Reform Act 2005,[23] a significant piece of constitutional legislation, requires that the Lord Chancellor swear an oath to uphold the rule of law and judicial independence.[24] Because the rule of law is used as a rhetorical device, some legal theorists regard the concept as devalued and meaningless.[25] Comparative study suggests, however, that it is of fundamental importance both in Europe and the common law jurisdictions based on the system in England and Wales.[26]

### *ii. Different Conceptions of the Rule of Law*

Tamanaha identifies three formal versions of the rule of law.[27] These describe the source and form of legality, moving from 'thin', or minimalist, versions through to 'thicker versions', which add to the requirements of the previous form. The thin version, 'rule *by* law', means that government does not act arbitrarily but acts in accordance with its own laws. The next stage, formal legality, requires that law is also general, prospective, clear and certain. Finally, in the 'thick' version, formal legality is linked to democracy, whereby the governed are ruled by laws they have contributed to making. Formal equality before the law guarantees that everyone is treated alike. This is not the same as substantive equality, which could only be achieved by equalising intrinsic inequalities.

While formal versions of the rule of law describe legal processes, none say anything about the content of law. Governments, even democratic ones, could therefore make repressive or discriminatory laws that satisfy formal versions of the rule of law. This had led to suggested substantive additions to formal versions. The 'thin' substantive model protects the right to property, contract, privacy and autonomy. The mid-range position asserts the individual's right to dignity or justice. The 'thick' version of the rule of law promises equality, welfare and preservation of community. The last of these, by asserting an overtly political agenda of social reform, is arguably a step too far in describing the reality of the rule of law in Western society. Here, the rule of

[22] Aristotle, *Politics*, Bk III, 1286, 78, cited by BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004) at 9.
[23] Constitutional Reform Act 2005, s 1(a).
[24] Constitutional Reform Act 2005, s 17(1).
[25] EE Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 4(2) *Indiana Law Journal* 301.
[26] Hazard and Dondi, *Legal Ethics* (n 20).
[27] Tamanaha, *On the Rule of Law* (n 22).

law reflects the commitment to personal liberty. This version is linked to the triumph of liberalism in the late-seventeenth and eighteenth centuries following centuries of religious and political conflict.

### *iii. Liberalism and Formal Legality*

In Britain, the dominant version of liberalism emphasised the right of every individual to pursue their notion of the good in their own way, provided it did not impinge on the rights of others to do likewise.[28] This does not mean that law is socially fair or moral. In fact, liberalism supports capitalists and businesses by protecting them from the democratic will of the majority. A legal system that tolerates social injustice is the price of preferring formal legality over 'thick' substantive versions of the rule of law. Notwithstanding that the system may be tilted in favour of the wealthy and privileged, formal legality offers advantages to individual citizens and minorities.

The protection afforded capitalism by the rule of law also protects ethnic, religious and sexual freedom. It allows dissenters to predict how government will respond to their actions and to know that the law will offer them a fair hearing. This predictability also has some disadvantages. To effectively fulfil its function, the legal system is rule bound. This inflexibility can have negative consequences, such as the possibility that guilty offenders go free. The absence of moral content in this version of the rule of law means that the consequences of its operation, and the role of agents such as lawyers, must be judged from 'the standpoint of justice and the good of the community'.[29]

Although there are different formulations, there is some agreement on the requirements of the formal version of the rule of law. The eminent political theorist, Joseph Raz, proposed that laws should be produced by open processes. They must be clear, accessible, predictable and prospective, not retroactive. The courts must be accessible to ordinary people, the principles of natural justice should be observed and the independence of the judiciary must be guaranteed. The courts should have the power of judicial review and they must be able to control law enforcement and any other agencies that might pervert the law. The rule of law is, however, a contested concept, including in England and Wales.

The notable judge and jurist, Tom Bingham, former Master of the Rolls, Lord Chief Justice and Senior Law Lord, bases his concept of the rule of law on that of AV Dicey.[30] Bingham goes further than both Dicey and Raz, however, adding requirements for adequate protection for human rights.[31] He quotes the European Commission, which treats 'democratization, the rule of law, respect for human rights and good governance as inseparably linked'.[32] He also regards compliance by the state with obligations arising under international law as part of the rule of law. This is an

[28] ibid, citing JS Mill, *On Liberty and Other Writings* (Cambridge, Cambridge University Press, 1989) at 16.
[29] Tamanaha (n 22) at 141.
[30] AV Dicey, *Introduction to the Law of the Constitution* (Indianapolis, Liberty Fund, 1982).
[31] T Bingham, *The Rule of Law* (London, Allen Lane, 2010).
[32] ibid, at 67.

example of a senior judge pressing for the addition of elements of 'thicker' versions to the formal version of the rule of law.

### *iv. The Control of State Power*

In the Western democracies, the rule of law guarantees freedom by limiting the power of the state.[33] This gives rise to different kinds of liberty. First, through elections, all citizens play a role in determining the laws that govern them (political liberty). Secondly, government officials are bound to act in accordance with law that is declared in advance (legal liberty). Thirdly, a core of individual rights, for example, civil liberties, is treated as inviolable and protected by law (personal liberty).

The final mechanism for restricting the power of the state involves the different functions being allocated to different units. This provides checks and balances on the exercise of power. Horizontally, there is the constitutional separation of powers between executive, legislature and judiciary. Vertically, central and local government have distinct spheres of political influence. This dispersal of power contributes to the institutional preservation of liberty. Courts, therefore, protect political, legal and personal liberty.

## C. The Common Law and Adversarial System

Common law systems, which originate in England and Wales, place emphasis on treating like cases alike. The decisions of superior courts in previous cases are binding on inferior courts. The reason for the binding decision is wrapped up in the judgment and a high level of skill is required to identify the material facts and the binding rationale. In common law countries, the dominant mode of dispute resolution is adversarial. In England and Wales, the adversarial trial arose in the medieval era when centralised courts replaced blood feuds, trial by combat and appeals to divine judgement by judicial authority.[34]

The adversarial trial has a number of distinctive features. The judge in court takes a relatively passive role, acting almost as an umpire, while lawyers take a leading role in questioning witnesses. Having heard all the factual evidence and the representatives' arguments on law, the judge delivers a verdict covering findings of fact and law. In serious criminal cases, juries are directed on the law by the judge and reach a verdict based on their finding of fact. This contrasts sharply with the tradition in continental Europe, where the inquisitorial system gives judges greater control of proceedings.

It is sometimes argued that the adversarial trial remains pre-eminent because it is the best way to test evidence. The presentation of conflicting theories and evidence tests factual accounts effectively. Indeed, cross-examination, where an advocate questions opposing witnesses, has been described as the 'greatest legal engine ever invented

[33] See further Tamanaha (n 22) ch 3.
[34] Sward, 'Values, Ideology' (n 25) at 321.

for the discovery of truth'.[35] It can also be argued that the formality of the adversarial process protects legal values[36] and that the impersonal nature of adversarial processes offers the best protection of individual dignity and autonomy.

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# IV. The Judicial Role

The adversarial system fits perfectly with the rule of law based on formal legality. It underpins the structural independence of lawyers and judges from the machinery of the state and provides a platform for the institutional separation of powers[37] and the rule of law.[38] From this position, the judiciary and legal profession are strongly placed to control government powers and restrict government immunities.[39]

## A. Judges

Locke conceived of a social contract based on the state's promise to respect individual autonomy in return for the citizen's observance of positive law.[40] Restraints such as bills or declarations of rights are only flimsy protections against state power. Judges have a primary responsibility for limiting the state. They must follow the example of Chief Justice Coke who, in 1610, asserted that James I had no extra-legal or personal prerogative. Even a king could not judge cases personally because he was not versed in the 'artificial reason and judgement of the law'.[41] Confidence that judges can fulfil this constitutional role, without being influenced by other organs of state, hinges on the separation of state powers.

[35] JH Wigmore, *Evidence in Trials at Common Law* (Boston, MA, Little Brown, 1974) at 32.

[36] R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford, Clarendon Press, 1995) at 156.

[37] See generally TC Halliday and L Karpik, *Lawyers and the Rise of Western Political Liberalism* (Oxford, Clarendon Press, 1997).

[38] TC Halliday and L Karpik, 'Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism' in Halliday and Karpik, ibid, at 15, 21 and 30.

[39] N MacCormick, 'The Ethics of Legalism' (1989) 2(2) *Ratio Juris* 184.

[40] J Locke, *Second Treatise of Government* (Indianapolis, Hackett, 1980).

[41] *The case of Proclamations* (1610) and see D Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State: The Private and Public Life of the Law Society 1825 to 1914' (1996) 3(1/2) *International Journal of the Legal Profession* 81, at 83–84.

## B. The Judicial Role

### *i. Maintaining the Separation of Powers*

The traditional conception of the division of constitutional roles under the doctrine of the separation of powers was expressed by Lord Mustill in 1995:

> Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed.[42]

Prior to the Constitutional Reform Act 2005 there was considerable doubt that the structure of the state supported the effective separation of powers.[43] The Act addressed the central criticisms, most notably by confining the Lord Chancellor to an executive role, transferring his judicial functions to the Lord Chief Justice and relocating the highest appeal court from the House of Lords to a new Supreme Court.

Under the Constitutional Reform Act the Lord Chief Justice became President of the Courts of England and Wales, with the exception of the Supreme Court.[44] The Lord Chief Justice was given statutory authority to lay before Parliament any representations about the judiciary or administration of justice.[45] In another act of separation, a Judicial Appointments Commission was created[46] replacing the process whereby the Lord Chancellor selected judges following confidential and informal consultations.[47] Although the Lord Chancellor was no longer required to be a lawyer,[48] the Act imposed an obligation on him to support the effectiveness of the court system[49] and uphold the independence of the judiciary.[50]

The elaborate measures introduced by the Constitutional Reform Act were intended to safeguard the judicial role in checking the activity of the other constitutional powers. Any conflict between the judiciary and legislature would ultimately involve the Supreme Court, established in 2009 to assume the judicial function of the senior appeal court in the UK.[51] This step removed judges who had formerly sat as life peers in the House of Lords from the legislature, with the intention of increasing transparency and the appearance of independence of the superior civil court of appeal.[52] With this in mind, the Supreme Court was sited near to, but outside of Parliament, with one of the Justices as President.[53] Supreme Court Justices were to be appointed by the

[42] *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, at 567.
[43] K Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Aldershot, Ashgate, 1999) at 44–47.
[44] Constitutional Reform Act 2005, ss 7 and 7(4).
[45] ibid, s 3(1) and ss 5(1) and 5(5)(a).
[46] ibid, s 61.
[47] Formally, the appointment is made by the monarch; ibid, s 14(a).
[48] ibid, s 15 and sch 4.
[49] ibid, s 10.
[50] ibid, s 3(1).
[51] ibid, s 40 and sch 9.
[52] Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court or the United Kingdom* (London, DCA, July 2003).
[53] Constitutional Reform Act 2005, s 23(5).

President and Deputy President and a representative of one of the judicial appointment committees for the three jurisdictions in the UK.

The close relationship of the executive and legislature places responsibility on the judiciary to resist erosion of the separation of powers. The physical separation of judicial institutions from government and administration provides some insulation from day to day pressure or influence. It is also argued that the judiciary must control the administration and financing of courts if they are to be truly independent of government. In 2012, the Supreme Court judges asserted the principle of independence in resisting draft legislation allowing the chief executive of the court to be appointed by a government minister.[54]

The Justices are to a large degree self-regulating, the President having statutory power to create Supreme Court rules.[55] The true test of the judiciary's success in maintaining the separation of powers arguably lies in its record on holding the executive and Parliament to account. The scope of this role can be summarised as the defence of the rule of law.

## *ii. Formulation and Defence of the Rule of Law*

### a. Controlling Abuse of State Power

The judiciary has, both historically and more recently, invoked the rule of law when controlling government. An early example of court control of state power occurred in 1765, in *Entick v Carrington.*[56] The defendant was authorised by the Secretary of State to conduct a search of the plaintiff's property for papers evidencing seditious libel. In an action for trespass the defendant claimed that he

> held himself bound by his oath to pay an implicit obedience to the commands of the secretary of state; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrants; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all.

The court said that, if, the power was so broad 'one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant... If it is law, it will be found in our books. If it is not to be found there, it is not law'. The court decided that there was no authority to 'sweep all' and the defendant was liable in trespass to the plaintiff. The responsibility to check the executive survives in modern jurisprudence. In *R v Secretary for State of the Home Dept, ex p Fire Brigades Union*,[57] Lord Mustill said that '[t]he task of the courts is to ensure that powers are lawfully exercised by those to whom they are entrusted, not to take those powers into their own hands and exercise them afresh'.[58]

[54] O Bowcott and R Syal, 'Judges take on ministers over supreme court' *The Guardian* 17 December 2012. The Constitutional Reform Act 2005, s 48(2) gave the power of appointment to the Lord Chancellor.
[55] Constitutional Reform Act 2005, s 45.
[56] *Entick v Carrington* (1765) 19 Howell's State Trials 1029.
[57] *R v Secretary for State of the Home Dept, ex p Fire Brigades Union* [1995] 2 AC 513.
[58] ibid, at 560–61.

Ministers and public officials may only act prospectively, so government cannot deprive citizens of accrued rights.[59] In *Congreve v Home Office*,[60] for example, the claimant was one of many viewers who tried to avoid an increase in the television licence fee by purchasing a new licence before the old one expired. The government tried to revoke all such renewals. The Court of Appeal held that it was an improper exercise of the Minister's discretionary power to revoke a licence validly obtained.

The courts also ensure that the powers of the state are used fairly. In *R v Rimmington*,[61] a defendant's private joke, sending some salt in a letter to a friend containing a cheque, backfired. He was charged with public nuisance when the postal sorting office mistook it for anthrax. Overturning the conviction, Lord Bingham said that conduct forbidden by law should be clearly indicated, so that a person is capable of knowing what is wrong before he does it. No one should be punished for doing something which was not a criminal offence when it was done.

The courts also ensure that government does not interfere in the exercise of powers it has delegated to others. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*,[62] the government tried to stop a new Conservative local council from adapting the former Labour council's plan for comprehensive schools by retaining grammar schools. The House of Lords held that it had no power to do so, unless the proposed conduct was that 'which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'.[63] These cases illustrate the ways in which courts have defined the powers of the state by invoking the rule of law. In those occurring over the last 30 years, the mechanism of judicial review has usually been used to hold the executive to account.

### b. Failure to Exercise Adequate Control

There are examples of where the judiciary has not been sufficiently vigilant in protecting rights and the state has abused its power. In *McIlkenny v Chief Constable of the West Midlands*,[64] for example, men convicted of a terrorist bombing had claimed that confessions were extracted by torture. While the men were serving prison terms, the Court of Appeal halted their civil action for assault against the police because, it said, the allegations were too serious to be believable. The men were, much later, exonerated.

In *Gillan v United Kingdom*,[65] police stopped a couple under anti-terrorism legislation. One was wishing to protest against an arms fair, and the other was a journalist intending to film the demonstration. Both were detained and the journalist was ordered to stop filming. The courts unanimously upheld the right to stop and search, which were used to interfere with the right to protest. The European Court of Human

[59] *Phillips v Eyre* (1870–71) LR 6 QB 1.
[60] *Congreve v Home Office* [1976] 1 All ER 697, CA.
[61] *R v Rimmington* [2005] UKHL 63.
[62] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.
[63] ibid, per Lord Diplock at 1064.
[64] *McIlkenny v Chief Constable of the West Midlands* [1980] 2 WLR 689.
[65] *Gillan v United Kingdom* (2010) 50 EHRR 45.

Rights held that the detentions violated the right to respect for private life under the European Convention on Human Rights 1950, Article 8.

### c. Subverting the Rule of Law

Allegations that judges are sometimes political in their role have re-surfaced recently in relation to the Profumo scandal. In 1963 John Profumo resigned as a Conservative Minister over lies he told to the House of Commons about a brief affair with Christine Keeler, an alleged call-girl. A recent book by Geoffrey Robertson QC suggests that the prosecution of a friend of Keeler, Stephen Ward, for living off earnings of prostitution was a politically motivated witch hunt.[66]

The prosecution of Ward was allegedly driven by the Home Secretary, with the active support of senior judges, in a spirit of 'Christian solidarity'. The prosecution apparently knew, but did not reveal, that Keeler, on whose evidence Ward's conviction hinged, was a liar. Ward killed himself on the last day of the trial. The fact that the narrative of the rule of law is not always positive underlines how important, and potentially fragile, it can be.

### d. Control of the Legislature

Despite occasional tension between the judiciary and the executive, there is less conflict between judiciary and legislature. The judiciary tends to cast itself in a partnership role, ensuring that legislative intent is realised. In fact, if a test of judicial independence lies in the right to invalidate legislation, the Supreme Court has lesser powers compared with superior courts in other advanced states. It can overturn secondary legislation it finds to be ultra vires, but not primary legislation. In interpreting legislation, however, the rule of law is a powerful tool in divining the intention of the legislature.

In *R v Secretary of State for the Home Department*, for example, Lord Steyn said that 'unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural'.[67] This principle is illustrated in *Ghaidan v Godin-Mendoza*,[68] where the House of Lords reinterpreted the Rent Act 1977 in such a way as to protect homosexual couples. It was said that to do otherwise would be discriminatory and that 'discriminatory law undermines the rule of law because it is the antithesis of fairness'.[69]

In common with some other courts, the Supreme Court can make a declaration that primary legislation is incompatible with the Human Rights Act 1988.[70] While this does not invalidate the legislation, Parliament usually does, but is not required to, make amendments to it.[71] Despite the restrictions on judicial power, the Human

[66] G Roberston, *Stephen Ward was Innocent OK?: The Case for Overturning his Conviction* (London, Biteback Publishing, 2013).
[67] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, at 581.
[68] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[69] ibid, per Lord Nicholls at 565, [9].
[70] Human Rights Act 1988, s 4.
[71] ibid, s 10.

Rights Act represents a 'higher law' than the domestic law. Judges have been active in upholding the rights of suspected terrorists against executive action and legislative provisions.[72] In future the judiciary may regard it as its duty to defy legislation on the issue.[73]

The combined effect of the Human Rights Act and the Constitutional Reform Act is to strengthen the legitimacy and authority of the judiciary. These Acts could ultimately lead to a codified constitution in which the judiciary is given formal powers to override legislation that does not conform to defined constitutional principles. In the meantime, the limit of judicial power is unclear. Could, for example, the Supreme Court strike down action that conflicts with the rule of law, such as legislation that removes a sphere of executive action from judicial review? [74]

In *Jackson and others v Attorney General*,[75] the House of Lords cast doubt on whether parliamentary sovereignty was an absolute constitutional principle. Some of their Lordships said that it was a doctrine of the common law that could be changed by the judges. As to whether there is a supreme principle, Lord Hope said that '[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.[76]

The absence of formal powers under the Constitutional Reform Act means that the scope of judicial responsibility for defending the rule of law against the legislature is unclear. Lord Bingham found evidence both in favour of the supremacy of Parliament; for example, the Human Rights Act makes clear that the courts cannot declare legislation in breach of the Act because that would breach sovereignty. He also saw evidence of the supremacy of the rule of law in the decision of the House of Lords in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* to 'disapply' UK legislation applying to part-time employees because it violated an EU directive.[77]

The *Factortame* decision briefly invited the conclusion that the House of Lords was setting itself up as a constitutional court.[78] In common with most commentators, however, Bingham concludes that parliamentary sovereignty always prevails. This means that the British Parliament can legislate to infringe the rule of law or human rights. To do so would, however, invite conflict with the judges and could precipitate a constitutional crisis.[79]

[72] *A and Z and others v Secretary of State for the Home Dept*, for example, led to replacement of the Anti-Terrorism, Crime and Security Act 2001 with the Prevention of Terrorism Act 2005.
[73] V Bogdanor, *The New British Constitution* (Oxford, Hart Publishing, 2009) at 72–74.
[74] House of Lords Select Committee on the Constitution, *Fifth Report of Session 2005–06: Constitutional Reform Act 2005* (HL 2005–06, 83) at para 43.
[75] *Jackson and others v Attorney General* [2005] UKHL 56.
[76] ibid, at [120] (cited in Bogdanor, *The New British Constitution* (n 73) at 82).
[77] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1990] 3 WLR 818.
[78] Bogdanor (n 73) at 57.
[79] ibid, at 83.

### *iii. Maintaining Public Trust in the System of Justice*

The judiciary has primary responsibility for maintaining public trust in the system of justice. This responsibility has at least two dimensions, reflected in the code of ethics, the Supreme Court Guide[80] (the 'Guide') adopted by the senior court, which is similar to that applying to judges in other UK courts.[81] The first dimension is to uphold the designated constitutional role. The statement in the Guide that the 'judiciary of the United Kingdom have been independent of the government since at least the early 18th century'[82] can be seen as a claim for legitimacy for the judicial role in maintaining and defending the rule of law. The second dimension of maintaining public trust in the justice system is the demonstration of proper conduct in the handling of day to day matters in the courts.

## C. Judicial Ethics

The ethics of a judge under a system based on the formal version of the rule of law is based on the six 'values' of the Bangalore Principles of Judicial Conduct. This code is endorsed by the United Nations Human Rights Commission in 2003 and was published with a commentary in 2007. It set out widely accepted standards for the conduct of judges. They are judicial independence, impartiality, integrity, propriety, competence and diligence.

### *i. Independence*

The independence of judges is seen as fundamental to good government[83] and, according to the Supreme Court Code, 'a prerequisite to the rule of law and a fundamental guarantee of a fair trial'.[84] There is potential overlap between the requirements of independence and impartiality. Separation from the other organs of state may best be seen as a collective dimension of the condition of judicial independence. This could mean, for example, that judges should not be trained by the state, work with state officials or be too aligned with state institutions.

Freedom of thought, of a kind necessary to bring an open and unbiased mind to hearing cases and making decisions, is the personal dimension of independence.[85] Both kinds of independence are required for judicial decision-making. It is presumably this distinction referred to by the Guide when it states that '[a] judge shall therefore

[80] *United Kingdom Supreme Court Guide to Judicial Conduct* (2009).
[81] *Guide for Judges in England and Wales* (March 2008).
[82] *Guide to Judicial Conduct* (n 80) at para 2(1).
[83] 'Commonwealth Principles on the Accountability of the Relationship between the Three Branches of Government' (2004) 96(1) *Commonwealth Legal Education* 7, Principle IV.
[84] *Guide to Judicial Conduct* (n 80) at para 1(2)i.
[85] This distinction is made in the Canadian case *Valente* (1983), cited by Malleson, *The New Judiciary* (n 43) at 44.

uphold and exemplify judicial independence in both its individual and institutional aspects'.[86] This section addresses the institutional aspect of independence.

The independence of the judiciary from executive influence is underpinned by the Constitutional Reform Act 2005. The Act explicitly provides that '[t]he Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary'.[87] It continues by providing that 'the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary'.[88] The Lord Chancellor must have regard to the need to defend judicial independence.[89]

The House of Lords Select Committee on the Constitution speculated on whether this duty went far enough. The Select Committee mischievously asked whether the duty not to influence applied to 'Ministers who publicly ask for judges to be tough on suspected terrorists, or who threaten the courts with the prospect of amending legislation if they do not give effect to government policy?' It also wondered '[h]ow substantial is the duty placed by Section 3(6) on the Lord Chancellor to have regard to… the need to defend that independence?',[90] whether it went go beyond the duty to uphold judicial independence and, if so, how.

## *ii. Impartiality*

### a. The Impartial Disposition

Independence from state control is necessary before a judge can be said to be impartial, but it is not sufficient. Impartiality reflects the attitude to a particular case of a specific tribunal. To achieve this, judges must be independently minded, rationale, dispassionate and able to ignore every other opinion. It is fundamentally important in delivering the protection of minority rights and interests that are the promises of liberalism. Judges must be able to assume a neutral disposition towards an issue, uninfluenced by their own beliefs, the establishment or popular opinion. Therefore, the Guide provides that:

> The Justices must be immune to the effects of publicity, whether favourable or unfavourable. But that does not mean ignoring the profound effect which their decisions are likely to have, not only on the parties before the Court, but also upon the wider public whose concerns may well be forcibly expressed in the media.[91]

To this end, Supreme Court Justices swear a judicial oath, stating: 'I will do right to all manner of people after the laws and usages of this Realm, without fear or favour,

[86] *Guide to Judicial Conduct* (n 80) at para 1(2)1.
[87] Constitutional Reform Act 2005, s 3(1).
[88] ibid, s 3(5).
[89] ibid, s 3(6)(1).
[90] House of Lords Select Committee on the Constitution, *Fifth Report of Session 2005–06: Constitutional Reform Act 2005* (n 74) at para 43.
[91] *Guide to Judicial Conduct* (n 80) at para 2(4).

affection or ill-will'.[92] The apparently clear promise of the judicial oath is not as easy to deliver as first appears.

### b. The Scope for Judicial Law-making

A system of formal legality demands that judges are not just rational, neutral and dispassionate. They must be predictable. The theory of the rule of law pre-supposes that law is fixed and certain and that judges merely apply the rules to reach their decisions. In the 1930s the legal realist movement demonstrated that judges brought their own values to judicial decision-making. Recognition that law was malleable in the hands of judges led to suggestions that the rule of law was a sham.

Critics on the left, like Roberto Unger,[93] echoed the critique of those on the right, like Dicey and Hayek,[94] that the growth of social welfare legislation demanded more interpretation by judges. Applying open-ended concepts, such as fairness or reasonableness, would lead different judges to diverse conclusions. This undermined law's certainty and precision, that is, its determinacy. According to the critics there could be no rule of law without predictability of outcome. British judges did conform to a conventional, passive role until the mid-1950s. Thereafter, it began to be acknowledged that judges filled in the legislative gaps left by Parliament.[95] By the 1990s the growth of judicial review had given rise to a culture of 'judicial activism' whereby judges began to act as policy-makers.

### c. Judicial Activism

Tamanaha argues that the increased space for judicial interpretation is potentially dangerous; 'if judges are seated on the bench who have few qualms about exploiting the indeterminacy of law to favour personal of political objectives, the law is defenceless'.[96] The main hope that judges will faithfully apply the law lies in their commitment to a legal tradition in which the rule of law is central. This development was arguably fuelled by the use of courts to create law in controversial areas, like abortion, rather than to legislate. In reviewing executive action, judges might 'refuse to countenance behaviour that threatens either basic human rights or the rule of law'.[97] A crisis point occurred in the 1990s when Tory politicians suspected that political opponents among the judiciary were using the power of review to block reform.

In 1998 Lord Woolf sought to defuse a situation in which the judiciary was seen to be acting against the state. He asserted that it was the constitutional role of the judiciary to ensure that effective checks operated in the constitution.[98] In fact, judicial activism may be a global trend, but, in the UK, the degree of activity seems to

[92] ibid, at para 2(2).
[93] R Unger, *Law in Modern Society* (New York, Free Press, 1976).
[94] FA Hayek, *The Political Ideal of the Rule of Law* (Cairo, National Bank of Egypt, 1955).
[95] Lord Reid 'The Judge as Lawmaker' (1972–73) *Journal of the Society of the Public Teachers of Law* 22; and Malleson (n 43).
[96] Tamanaha (n 22) at 90.
[97] *ex p Bennett* [1994] 1 AC 42, at 62, cited by Malleson (n 43) at 11.
[98] H Woolf, 'Judicial Review—The Tensions between the Executive and the Judiciary' (1998) 114 *Law Quarterly Review* 579.

respond to increases in administrative activity.[99] Lord Woolf later conceded that, when parliamentary opposition to the Thatcher and Major Governments was weak, the judges' scrutiny of executive action was more rigorous.[100] Latterly, perceptions of judicial activism may well be fuelled by parliamentary attempts to devise standards for controlling the executive.[101] This inevitably provides material and scope for judicial interpretation.

It is currently unclear how the judiciary should defend the rule of law while maintaining impartiality. Which issues are constitutional and which political? The Prime Minister's recent proposal to exclude some categories of judicial review,[102] and make all such cases more difficult to bring,[103] is a case in point. Judges are increasingly likely to speak out on issues such as human rights. For example, Lord Neuberger, President of the Supreme Court, attacked the home secretary for criticising judges' decisions against the government in human rights cases.[104] The use of judicial review to control the executive has made the issue of political affiliations more relevant.[105]

### d. Political Affiliation

In addition to impartially applying the law, it is arguable that judges must be seen to be impartial.[106] They should maintain a neutral persona and be free of bias towards or against any cause, group or party to a case.[107] This behaviour is critically important to maintaining faith and confidence in the rule of law. If 'the rule of law, not man', is to be meaningful, judges must embody the law, demonstrating the qualities inherent in the legal system. To avoid the appearance of bias it is often regarded as important that wider affiliations and political sympathies are concealed.[108]

The courts in England and Wales have adopted a fairly closed approach to the issue of judicial bias. A rare exception was *Re Pinochet (No 2)*, in which the House of Lords overturned its own judgment on the grounds that there was an appearance of bias.[109] The case concerned attempts to extradite a politician accused of human rights abuses in Chile. Their Lordships overturned their own decision that Pinochet was not entitled to immunity. The grounds were that one of them was a member of Amnesty International, which organisation had been given permission to intervene in the case.

[99] Malleson (n 43) at 19.

[100] 'The Rise and Rise of Judicial Review' *BBC* 2008 (http://news.bbc.co.uk/1/hi/programmes/law_in_action/7289243.stm).

[101] T Zwart, 'Overseeeing the Executive: Is the Legislature Reclaiming Lost Territory from the Courts?' in S Rose-Ackerman and PL Lindseth, *Comparative Administrative Law* (Cheltenham, Edward Elgar Publishing, 2010).

[102] P Wintour and O Boycott, 'David Cameron plans broad clampdown on judicial review rights' *The Guardian* 19 November 2012.

[103] T Dyke 'Why Cameron has got it wrong on judicial review reform' *The Lawyer* 29 January 2013.

[104] O Bowcott 'Judge defends court role over terror suspects' *The Guardian* 5 March 2013.

[105] J Rozenberg, *Trials of Strength: The Battle Between Ministers and Judges over Who Makes the Law* (London, Richard Cohen Books, 1997).

[106] *R v Sussex Justices, ex p MaCarthy* [1924] KB 256, per Lord Hewart at 259.

[107] K Malleson, 'Safeguarding Judicial Impartiality' (2002) 22(1) *Legal Studies* 53.

[108] *Guide to Judicial Conduct* (n 80) at para 3(3).

[109] *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (*Re Pinochet (No 2)*) [1999] UKHL 52.

After *Re Pinochet (No 2)*, the House of Lords moved to close down the possibility of a surge of similar applications.

In *Locabail (UK) Ltd v Bayfield Properties Ltd*, the House of Lords restricted the potential for disqualification of judges to cases where there is a real likelihood or danger of bias.[110] This apparently closed the door on disqualification for appearance of bias, potentially making it more difficult to detect or correct for the risk of bias. It arguably led attention away from the possibility of individual challenges for judicial bias and towards measures to ensure greater diversity in the judiciary.[111] This aim was advanced by the creation of the Judicial Appointments Commission.

e. Transparency

The suppression of affiliations may sometimes be insufficient to allay suspicion of bias, particularly when membership of an organisation seems inconsistent with the proper administration of justice. An example is membership of the freemasons, a semi-secret society in which members pledge to assist fellow masons. There is suspicion that judges who are freemasons may be unable to judge other freemasons fairly. A step towards transparency on the issue was taken in 1997, when the Home Affairs Select Committee demanded to know which judges were freemasons. The judiciary objected strongly and a compromise was adopted in 1998 whereby new judges declared membership on a register. This practice was abandoned in 2009 after successful appeals by Italian judges to the European Court of Human Rights against an obligation to declare freemasonry.[112] It is difficult to see how this is consistent with the avoidance of perceived bias.

## *iii. Integrity and Propriety*

The Guide provides that judges must not accept gifts, lend their prestige to advance private interest or reveal any information gained through judicial activity in any other context.[113] The Guide goes on to state more generally, that judges

> will try to avoid situations which might reasonably lower respect for their judicial office, or cast doubt upon their impartiality as judges, or expose them to charges of hypocrisy. They will try to conduct themselves in a way which is consistent with the dignity of their office.[114]

It is particularly important that judges convey a polite and neutral demeanour in carrying out their official role. The Guide provides that:

> In Court, the Justices will seek to be courteous, patient, tolerant and punctual and to respect the dignity of all. They will strive to ensure that no one in Court is exposed to any display of bias or prejudice on grounds such as race, colour, sex, religion, national origin, disability, age, marital status, sexual orientation, social and economic status and other like causes. Care

[110] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870, at 885.
[111] Malleson, 'Safeguarding Judicial Impartiality' (n 107) at 70.
[112] H Pidd, 'Freemasons shake off ruling on judiciary' *The Guardian* 5 November 2009.
[113] *Guide to Judicial Conduct* (n 80) at paras 4(4), 5(3) and 5(4).
[114] ibid, at para 4(2).

> will be taken that arrangements made for and during a hearing do not put people with a disability at a disadvantage.[115]

In the few cases in which judges fail to meet these standards they may be removed from the case.[116]

Difficult situations inevitably arise when judges consistently fail to meet prescribed standards. In order that judges are in a position to exercise effective control over government they cannot be vulnerable to pressure or removable on a whim. They are therefore protected from civil action in respect of 'any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice'.[117]

Judges have secure tenure. They are required to retire at the age of 75, or 70 if first appointed to a judicial office after 31 March 1995. Justices may only be removed from office on address by both Houses of Parliament.[118] The Lord Chancellor has power to dismiss more junior judges and tribunal chairs after following prescribed procedures. Judicial office holders can however be warned, reprimanded or suspended (under prescribed circumstances) by the Lord Chief Justice.[119] Removal from protected judicial offices can only take place after a hearing by a specially convened tribunal.[120] The office of the Judicial Appointments and Conduct Ombudsman investigates complaints against judges.[121]

In addition to enjoying secure tenure, judges also enjoy immunity from actions in tort or other civil proceeding arising from acts in their judicial role.[122] This right can be traced to the immunity claimed to derive from the divine rights of monarchs. Recently, it has been argued that such immunity should be available only on a qualified basis.[123] The argument is that, in principle, judges should be potentially liable for the tort of misfeasance in public office for judicial acts motivated by corruption.

### *iv. Competence and Diligence*

The Lord Chief Justice is responsible for the training, guidance and deployment of judges. In addition to undertaking any prescribed training, judges have personal responsibility for keeping up to date with practice in their areas of work.[124] The duty of diligence demands steady and careful application to the task at hand.

[115] *Guide to Judicial Conduct* (n 80) at para 4(3).
[116] *El Farargy v El Farargy* [2007] EWCA Civ 1149, [2007] All ER (D) 248.
[117] *Anderson v Gorrie* [1895] 1 QB 668.
[118] Constitutional Reform Act 2005, s 33.
[119] ibid, s 108.
[120] ibid, ss 133–35.
[121] ibid, s 62.
[122] *Sirros v Moore* [1975] QB 118, per Lord Denning at 134.
[123] J Murphy, 'Rethinking Tortious Immunity for Judicial Acts' (2013) 33(3) *Legal Studies* 455.
[124] *Guide to Judicial Conduct* (n 80) at para 6.

# V. The Lawyer's Role

Weber perceived that legal systems were determined not only by political and cultural factors, but by the needs and preferences of stakeholders such as lawyers. He saw a professional group of lawyers as a key factor in the development of a rational system. Weber argued that values only become rules when adopted in the intellectual system devised by such groups. After the rules have been formulated, professional lawyers are necessary in order to maintain the unique skills and modes of thought that characterise the system. To Weber the independence of lawyers from political and other influence were essential to the autonomy, generality and universality of law as a system.

## A. Lawyers and the Rule of Law

Lord Bingham considered an independent legal profession to be 'scarcely less important' to maintaining the rule of law than an independent judiciary.[125] This was partly because the production of independent judges committed to legality depends on the existence of a profession committed to the same goals. In addition to being schooled in the traditions of legality, lawyers have a separate and distinct duty to the rule of law that is intrinsic in their role. Therefore, the ascendancy of the rule of law assumes 'a legal profession sufficiently autonomous to invoke the authority of an independent judiciary'.[126]

Because judges in the common law tradition take the role of a neutral umpire, it falls to lawyers to present the case for the parties. This offers lawyers a role as 'the fearless advocate who champions a client threatened with loss of life and liberty by government oppression'.[127] This role places in ethical balance the legal profession's two basic affiliations; to clients and to the judiciary. These affiliations are reflected, in the case of clients, by the key ethical obligations of loyalty and confidentiality and, in the case of the judiciary by the duty of candour to the court.

## B. The Standard Conception of the Lawyer's Role

The standard conception of the lawyer's role is a model proposed and developed by academics, mainly moral philosophers, in the US.[128] It is based on an interpretation of the American Bar Association model code, case law and other materials. The standard

[125] Bingham, *The Rule of Law* (n 31) at 92.
[126] Hazard and Dondi (n 20) at 1.
[127] GC Hazard Jr, 'The Future of Legal Ethics' (1991) 100 *Yale Law Journal* 1239, at 1243; M Bayles, *Professional Ethics* (Belmont, CA, Wadsworth Publishing, 1981) at 18–19.
[128] See eg ML Schwartz 'The Professionalism and Accountability of Lawyers' (1978) *California Law Review* 66; WH Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978)

conception provides a clear and simple description of how the role of lawyers in society is manifest in responsibilities towards prospective clients and actual clients. While it is contentious, even in the US, it is an important starting point for analysis. Most discussions of professional legal ethics assume the relevance of the standard conception.

The standard conception comprises two overarching principles, neutrality and partisanship. The principle of neutrality demands that lawyers present cases on behalf of unpopular causes or those they disagree with morally. The principle of partisanship demands that they follow their client's instructions so far as the law allows, even if this produces unjust outcomes. The first two principles of the standard conception are supported by a third, the principle of non-accountability. This suggests that, provided lawyers observe the principles of partisanship and neutrality, they are absolved of personal moral responsibility for the consequences of actions on behalf of clients. This is on the grounds that the role they perform is itself good.[129]

## *i. The Principle of Neutrality*

The purest practical expression of the obligation of neutrality is a duty not to select clients. The importance of this principle flows from the imperative of representation. Neutrality ensures that every accused person has a champion because lawyers can act for unpopular clients without being associated with their cause. This increases social goods such as civil liberties and human rights. Success in individual cases, albeit for unpopular causes, produces a culture of rights which promotes the general welfare of society as a whole. This demonstrates the reality of the liberal promise to tolerate difference.

The second element of neutrality requires that lawyers are emotionally detached from their client's purposes. They focus on the legal merits of the case, offer dispassionate advice and resist emotional involvement with the client.[130] They should be indifferent regarding the final outcome of litigation because, otherwise, they may become excessively zealous and self-righteous or over-involved in their client's cause.[131] This may be contrary to their clients' interests. The mind that is independent of ties and conflicting interests can see the whole picture objectively and is more likely to offer wise advice.[132]

## *ii. The Principle of Partisanship*

Partisanship fulfils the liberal promise to respect individual rights, and the dignity of the individual, by providing a 'champion against a hostile world'.[133] The need for

*Wisconsin Law Review* 29; D Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988).

[129] See esp Schwartz, ibid, and Luban, ibid.

[130] TJ Johnson, *Professions & Power*, (London, MacMillan, 1972) at 36; V Denti, 'Public Lawyers, Political Trials and the Neutrality of the Legal Profession' (1981) 1 *Israel Law Review* 20.

[131] RE Rosen, 'On the Social Significance of Critical Lawyering' (2000) 3 *Legal Ethics* 169, at 170.

[132] Kronman, *Lost Lawyer* (n 14) at 144.

[133] M Freedman, 'Are there Public Interest Limits on Lawyers' Advocacy?' (1977) 2 *Journal of the Legal Profession* 47.

such a champion is acute where the individual is pitted against the power of the state, as in criminal cases. It can be just as important in areas like immigration or asylum. It is often argued that citizens should mistrust the power of the state because of the many ways in which it can be abused. Therefore, critics argue, partisanship demands that lawyers do not seek a fair result, or try to find the truth, or explore compromise between the parties.

According to some of the US literature, lawyers are there to defend a client's rights, even when they consider their goals to be unjustified, and regardless of harm to others.[134] They must not compromise their zeal in cases that challenge the establishment or a powerful force. In fact, powerful opponents demand more of lawyers, because the lawyer ensures equality of arms. In the early-nineteenth century, for example, a leading advocate threatened to discredit the king and 'throw the kingdom into confusion' for his client's sake.[135]

The partisan disposition, which guards against lawyers' co-optation by third parties against their clients' interests, is reflected in the most fundamental principles of lawyers' ethics, such as confidentiality. In the eighteenth-century case, *Annesley v Anglesey*, for example, it was said that (i) a 'gentleman of character' does not disclose his client's secrets; (ii) an attorney identifies with his client, and it would be 'contrary to the rules of natural justice and equity' for an individual to betray himself; and (iii) attorneys are necessary for the conduct of business, and business would be destroyed if attorneys were to disclose their communications with their clients.[136]

### *iii. The Principle of Non-accountability*

An important restraint on the principle of partisanship is the requirement that the client's goal must not be an illegal purpose and does not require illegal means. Some critics of the standard conception suggest that an obligation to pursue client goals all the way up to the limit of the law, justifies acts that are legal but morally dubious.[137] This might include taking advantage of loopholes in the law, mistakes by the other side or grey areas in legal ethics.

Such renderings of the standard conception create a morally ambiguous role for lawyers. Neutrality, an obligation not to refuse clients, gives lawyers cases that they do not believe in, and partisanship forces them to vigorously pursue ends they do not agree with. The perception that lawyers are no more than 'guns for hire' can generate a cynical and sometimes hostile public opinion, particularly when a lawyer helps free a criminal or achieve a corporation's anti-social purpose.

[134] See esp M Freedman, 'Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions' (1966) 64 *Michigan Law Review* 1469; J Leubsdorf, 'Three Models of Professional Reform' (1982) 67 *Cornell Law Review* 1021.

[135] See further ch 19: 'Advocacy'.

[136] *Annesley v Anglesey* 17 How St Tr 1140, 1223–26, 1241 (Ex, 1743); JT Noonan, 'The Purposes of Advocacy and the Limits of Confidentiality' (1966) 64 *Michigan Law Review* 1485.

[137] G Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *NY University Law Review* 63.

## C. The Critique of the Standard Conception

Academics in key common law jurisdictions have criticised the standard conception on a number of grounds. They argue that it requires lawyers to follow clients' immoral instructions, provided they are within the law. Consequently, the professional role requires them to represent a position they do not believe to be true, which is deceitful. The critics then argue that the standard conception requires that lawyers act in their client's interests, using tactical delay if necessary, which is tantamount to cheating.[138] This denies lawyers their right to exercise ethical discretion and may produce outcomes that some see as immoral.

Critics of the standard conception further argue that lawyers' ethics extend the rationale for such consequences from the criminal trial, where there may be some justification, to other contexts, where there is no justification. They suggest that the immorality at the heart of professional role distorts lawyers' ethical judgement, so that they are not attuned to behaving ethically.

Academics arguing for change in the professional ethics of lawyers suggest that the standard conception of the lawyers' role is not justified by the social role lawyers perform.[139] Not only is it intrinsically wrong for a profession to compromise professional values, like honesty and integrity, it is unprincipled to justify this position based on a reading of the role in relation to the adversary system, which they label 'the adversary system excuse'.[140]

The neutral disposition projects lawyers as amoral manipulators of legal rules;[141] shallow and unprincipled. The pursuit of clients' causes, right or wrong, seems at odds with wider social purposes and the common good. This places the underlying ethos of lawyers at odds with that of other professions, including those in fields involving personal conflict.[142] Some compelling and high profile examples are often quoted to support the proposition that the standard conception leads lawyers to undertake unethical actions.

When governments are contemplating illegal activity, for example, torturing insurgents, breaking into the offices of political opponents or embarking on war, government lawyers provide cover for the actions. When corporations are at the middle of financial or other scandals, lawyers are often criticised for complicity. Lawyers' ethics based on the standard conception are blamed for these situations, because of the imperatives of neutrality and partisanship and the corollary of non-accountability for consequences. When a scandal breaks, around government or corporation, critics

[138] D Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton, NJ, Princeton University Press, 2009).

[139] See eg in the UK, Nicolson and Webb, *Professional Legal Ethics* (n 5) at 215–18 and Nicolson and Webb 'Public Rules and Private Values: Fractured Profession(alism)s and Institutional Ethics' (2005) 12 *International Journal of the Legal Profession* 165, and, in Canada, A Hutchinson, 'Taking it Personally: Legal Ethics and Client Selection' (1998) 1(2) *Legal Ethics* 168.

[140] D Luban, 'The Adversary System Excuse' in D Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, NJ, Rowman & Allenheld, 1983) 83.

[141] ED Cohen, 'Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversarial System' in A Flores (ed), *Professional Ideals* (Belmont, CA, Wadsworth Publishing, 1988) at 87.

[142] D Rueschemeyer, 'Doctors and Lawyers: A Comment on the Theory of the Professions' (1964–65) 1 *Canadian Review of Sociology and Anthropology* 17.

ask, 'where were the lawyers?' The answer is that lawyers were often at the centre of the decision-making process.

Finally, there is concern that a role built on the standard conception harms lawyers themselves. Feminist and critical scholars argue that training lawyers to equate logic with reason, leads them to deny the value of feeling and imagination and to become cold and uncaring. The obsession with formal rationality is said to have a negative impact on personality.[143] Training to adopt the neutral disposition means that lawyers and judges block out an empathetic response to the human issues raised by legal problems.[144]

The dissonance between personal values and professional roles, it is said, induces 'role conflict', allegedly leaving lawyers suffering from 'debilitating psychic tension'.[145] This has been blamed for unusually high levels of drink and drug abuse among lawyers in the United States.[146]

## D. Alternatives to the Standard Conception

Having characterised the standard conception as requiring morally problematic behaviour its critics in the US offer one from a range of solutions. William Simon advocates that lawyers have moral autonomy in making ethical decisions.[147] They should have 'discretion to disobey' when partisanship produces immoral consequences. Luban calls for 'moral activism', whereby lawyers should act as if the 'adversary system excuse' was not available to them.[148] Postema argues that lawyers' professional role does not exclude personal morality.[149] Rather, they should exercise 'engaged moral judgement' in deciding what it is legitimate to do for clients.

The critics do not deny that there is a professional role, but see it as what Postema calls a 'recourse role'. This means that lawyers have the recourse of not acting in accordance with role in a few extreme situations. The role expands or contracts depending on the underlying institutional objectives the role is designed to serve, with lawyers having discretion to disobey their code of ethics when the rule contradicts the objectives of the role.[150]

Some critics of the standard conception have advocated degrees of de-professionalisation of roles. These range from Simon's consideration of the abandonment of a neutral professional role to making it an institutional rather than a personal

[143] But see T Campbell, 'The Point of Legal Positivism' (1998–99) 9 *The King's College Law Journal* 63.

[144] LH Henderson, 'Legality and Empathy' (1986/87) 85 *Michigan Law Review* 1574; TM Massaro 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' (1988/89) 87 *Michigan Law Review* 2099.

[145] LE Fisher, 'Truth as a Double-Edged Sword: Deception, Moral Paradox, and the Ethics of Advocacy' (1989) 14 *The Journal of the Legal Profession* 89.

[146] P Goodrich, 'Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality' (2000) 9(1) *Social and Legal Studies* 143; and see Nicolson and Webb (n 5) at 175.

[147] W Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083.

[148] Luban, 'The Adversary System Excuse' (n 140); and D Cotterrell, 'In Defence of Contextually Sensitive Moral Activism' (2004) 7(2) *Legal Ethics* 269.

[149] Postema 'Moral Responsibility in Professional Ethics' (n 137) at 83; RS Tur, 'The Doctor's Defense' (2002) 69 *The Mountsinai Journal of Medicine* 317, at 327.

[150] S Kadish and M Kadish, *Discretion to Disobey* (Stanford University Press, CA, 1973) at 31.

responsibility. In a fully de-professionalised market, where legal services are treated like any other service, lawyers could negotiate with clients what level of service and commitment they would provide. Many people might think this a step too far in avoiding lawyers having to perform a morally ambiguous role.

The standard conception is not a purely American construct. English academics have levelled similar criticisms to those of their US counterparts against lawyers in England and Wales. Nicolson and Webb suggest that English lawyers are subject to similar obligations as US lawyers and are similarly compromised ethically.[151] Regarding partisanship, they follow Simon, arguing that lawyers should have discretion on moral questions. On neutrality, they suggest that unpopular clients should be able to select from panels of lawyers provided by the profession.[152]

## E. How Far is the Standard Conception Relevant to England and Wales?

Much of the discussion of the morality of lawyers' roles is based on examples that do not apply in England and Wales. A common situation is that of an advocate told by a client that he is guilty of rape, but who conducts brutal cross-examination of the victim. This is an emotive example and one that is not sanctioned by the rules in England and Wales. Nevertheless, much theoretical discussion of legal ethics proceeds as if this practice represents the norm.[153] Therefore, before considering whether the standard conception of the lawyer's role can be justified, it is necessary to consider whether the standard conception is an accurate representation of lawyers' ethics.

### *i. The Standard Conception in Lawyers' Codes of Conduct*

#### a. Neutrality

The codes of conduct of lawyers in England and Wales suggest a limited engagement with the standard conception. A famous example of neutrality in practice is the obligation of English barristers to accept any brief or instructions in any field in which they profess to practise. This so-called 'cab rank rule' goes beyond an obligation not to discriminate. It suggests responsibility to accept briefs in the order that they are received. Solicitors, however, are not subject to any such obligation, even as advocates, although they must not discriminate unlawfully, including in the selection of clients.[154] This is by no means the same as moral neutrality.

[151] Nicolson and Webb (n 5) at 46–49.

[152] See also Nicolson, 'Afterword: In Defence of Contextually Sensitive Moral Activism' (n 148) at 27.

[153] Luban, *Lawyers and Justice* (n 128) at 150, S Galoob, 'How do Roles Generate Reason? A Method of Legal Ethics' (2012) 15(1) *Legal Ethics* 1, at 6 and see ch 17: 'Advocacy'.

[154] SRA, *Code of Conduct 2011*, Indicative Behaviour 2.5. (www.sra.org.uk/solicitors/handbook/code/content.page).

b. Partisanship

In the US, partisanship is usually identified with requirements to represent clients 'zealously, within the bounds of the law'[155] and to 'not intentionally fail to seek the lawful objectives' of clients.[156] Similar obligations to client loyalty are found in the English codes, but no similar commitment to promoting client autonomy. For example, the version of partisanship in the Bar Code of Conduct is to 'promote fearlessly and by all proper and lawful means the client's best interests'.[157] While the fierce language is suggestive of partisanship, pursuing a client's best interests falls well short of an obligation to carry out the client's lawful preferences. Indeed, barristers must not limit their own discretion in deciding how the client's best interests are served.[158]

The Solicitors' Code of Conduct also talks in terms of acting in clients' best interests.[159] Both codes therefore follow the professional principle identified in the Legal Services Act, of acting in the best interests of their clients. While this is not necessarily inconsistent with partisanship, it does not require it. The codes therefore present a weak version of partisanship at best. In fact, the obligation is consistent with lawyers acting in accordance with what they perceive to be the client's best interests. This is consistent with acting in a paternalistic way and is therefore ethically problematic.[160]

c. Overriding Duty to the Administration of Justice

Language that appears to limit partisanship permeates the codes. The Solicitors' Code of Conduct stresses that any conflict between principles should be resolved in a way that 'serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice'.[161] It stresses that solicitors should 'uphold the rule of law and the proper administration of justice, act with integrity and not allow your independence to be compromised'.[162] The preamble to the Code preserves solicitors' discretion in interpreting the provisions, thereby providing considerable latitude to avoid immoral action. The Bar Code contains similar admonitions against dishonesty or discreditable behaviour, actions prejudicial to the administration of justice and conduct likely to diminish public confidence in the legal profession.[163]

The opportunities to subvert justice are greater in an adversarial process than in other judicial systems. Lawyers' obligations to clients are, however, balanced by a wider duty to legality. In the case of advocates, this obligation is expressed as a duty to the court, which is defined by specific rules. They must be careful not to coach their clients on the law before hearing their story. They must be careful not to influence witnesses, leading to presentation of distorted evidence.[164] They must not deliberately mislead

[155] American Bar Association, *Model Code of Professional Responsibility 1969*, Canon 7.
[156] ibid, Disciplinary Rule 7-101(A)(1).
[157] *Bar Code of Conduct 2014*, rC15(1).
[158] ibid, rC15(4).
[159] SRA, *Code of Conduct 2011,* Principle 4.
[160] See further ch 9: 'Loyalty'.
[161] SRA, *Code of Conduct 2011*, The Principles.
[162] ibid, r 1.
[163] BSB, *Bar Code of Conduct 2014*, gC25.
[164] See GL Wells and EF Loftus (eds), *Eyewitness Testimony:* (Cambridge, MA, Harvard University Press, 1996) and Sward (n 25) at 312.

the judge. The wider duties of lawyers have been reinforced by the Legal Services Act 2007. It specifies professional principles requiring any person appearing before a court or conducting litigation to act 'with independence in the interests of justice'.[165]

The evidence of the English codes of conduct suggests that an attenuated version of the standard conception operates in England and Wales. There is a strong commitment to neutrality by the Bar, but not the solicitors' profession. There is no commitment to partisanship to compare with that originally derived from the American Bar Association Model Rules in either the barristers' or solicitors' codes. Further, as in the US, codes of conduct generally provide scope for lawyers to avoid acts they consider immoral.[166]

### *ii. The Standard Conception in Lawyers' Behaviour*

Studies of how lawyers' actually behave contradict the idea that neutrality is a significant problem in legal practice. Most lawyers are involved in transactional work, where the conflicts presented by partisanship and neutrality rarely arise. Litigation is probably the area where neutrality could cause some moral conflict. Because lawyers specialise, as criminal defence advocates or as prosecutors, they can act consistently with their personal values most of the time.[167] Indeed, studies of how US lawyers behave in practice show that, away from metropolitan centres, they often refuse to act for unpopular defendants for fear of inciting local hostility.[168]

Studies of lawyers' behaviour do not support the idea that extreme partisanship is prevalent among practitioners, even at the Bar.[169] The standard conception is a 'straw man' erected for the sake of academic debate. In fact, lawyers often try to mediate their client's more extreme demands and, depending on the type of case, seek 'reasonable solutions'.[170] Just as non-contentious work is more voluminous than litigation, a fully-fledged adversarial trial is but a small part of litigation. Analysis of what most lawyers actually do suggests that the problem of 'role conflict' may be overstated by critics of the standard conception.

## F. Defence of the Standard Conception of Lawyers' Role

Charles Fried tried to justify a partisan disposition in lawyers on the ground that the lawyer and client relationship is akin to friendship. This approach was based on the proposition that ordinary morality accepts that people do things for friends that they

[165] Legal Services Act 2007, s 1(3)(d).

[166] T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' (1984) *Wisconsin Law Review* 1529.

[167] Rosen, 'On the Social Significance of Critical Lawyering' (n 131); A Boon 'Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression' (2004) 7 *Legal Ethics* 250.

[168] Schneyer, 'Moral Philosophy's Standard Misconception' (n 166).

[169] D Pannick, *Advocates* (Oxford, Oxford University Press 1992) at 105.

[170] S Macaulay, 'Lawyers and Consumer Protection Laws (1979) 14 *Law and Society Review* 115.

would not do for anyone else.[171] This argument, that a lawyer is a 'special purpose friend', was heavily criticised, not least because the analogy is difficult to sustain.[172] Unswerving loyalty is reserved for people we are very close to, not given to acquaintances and strangers for money. Lawyers have little opportunity to develop genuine concern for clients as people so as to justify treating them in the same way as family members or close friends.

Recently, supporters of the conventional legal role have tended to suggest that lawyers' obligation of partisanship depends on the circumstances of representation.[173] In criminal defence, for example, partisanship is given freer reign, within the constraints imposed by the system. Partisanship dictates that a lawyer can make the state prove its case even when the client is guilty, yet the system requires that no perjured evidence is presented. Lawyers' loyalty to client wishes is therefore conditional at best.

Although the obligation of partisanship is strong in criminal law, in civil litigation it is weaker. In family disputes, for example, lawyers should not inflame the situation or assert a case that is not legally defensible. In transaction work, lawyers should arguably be more co-operative and more aware of public interest considerations. Like judges, lawyers have an underlying obligation to support the rule of law. This includes a responsibility not to exploit the indeterminacy of law.[174]

The main argument in justification of the standard conception is that it is better than any alternative. Giving lawyers 'moral autonomy', as suggested by Simon, may be seen as unrealistic, impractical and an abrogation of regulatory responsibility.[175] If the standard conception is the only viable way of representing clients in a way that respects the rule of law, we are left with the issue of how to justify the lawyer's role morally.

## G. Limiting Partisanship

Recently, a new wave of scholars has sought to divest the standard conception of the lawyer's role of the negative connotations alleged by its critics. Markovits argues that lawyers must be neutral and partisan if society is to derive the political benefit that resolving disputes through the legal system offers.[176] Dare argues that the obligation of partisanship only entitles clients to a level of commitment he calls 'mere zeal', rather than 'hyper zeal'.[177] Mere zeal, Dare suggests, is desirable whereas hyper-zeal is to blame for the worst excesses of lawyer behaviour.

[171] C Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.

[172] EA Dauer and AA Leff, 'Comment on Fried's Lawyer as Friend' (1976) 85 *Yale Law Journal* 573.

[173] T Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Farnham, Ashgate Publishing Ltd, 2009).

[174] Tamanaha (n 22); WB Wendel, *Lawyers and Fidelity to Law* (Princeton and Oxford, Princeton University Press, 2010).

[175] Hazard and Dondi (n 20) at 173; MJ Osiel, 'Lawyers as Monopolists, Aristocrats and Entrepreneurs' (1990) 103 *Harvard Law Review* 2009, at 2016; L Sheinman, 'Looking for Legal Ethics' (1997) 4 *International Journal of the Legal Profession* 139.

[176] Markovits, *A Modern Legal Ethic* (n 138).

[177] T Dare, 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7(1) *Legal Ethics* 24.

Wendel argues that it is not fidelity to clients that is the underlying justification of the lawyer's role, but fidelity to law.[178] The key change to the partisan obligation envisaged by the notion of fidelity to law is that lawyers' ethical duties are performed by providing that which clients are entitled to in law, rather than by delivering every advantage that the law allows. This involves respecting the determinacy of law, where the law is clear, by providing clear advice. Lawyers involved in corporate and government wrongdoing have often failed to carry out their role properly, for example, by suggesting that there are no clear rules against state torture.[179] This undermines formal legality and is therefore, according to this analysis, unethical.

Wendel's position regarding neutrality is less satisfactory and somewhat inconsistent with his general argument and his limitation on partisanship. In client selection he conceives a moral permission to represent unpopular clients rather than a moral obligation. He does, however, advocate that decisions to refuse clients be based on legal rather than moral values. This appears to offer lawyers a way of subverting their social role.

The idea of fidelity to law is located in the political system and its goals. It is consistent with the dominant version of the rule of law, formal legality. It is not the same as justice, meaning fair outcomes, but with fair processes. This approach recognises that lawyers need not strive for outcomes unacceptable to ordinary morality. This rationale for partisanship and neutrality limits the potential for immoral consequences alleged to arise from the standard conception of the lawyer's role. This is a more elevated notion of a professional role for lawyers,[180] at least contrasted with the image of the 'hired gun'.

## H. Is a Professional Role for Lawyers Justified?

Partisanship is an unavoidable disposition for lawyers where clients' interests conflict with those of another person. The degree of partisan commitment or neutrality that is essential to the adversary process is, however, debatable. More extreme partisan behaviour may be reserved for lawyers acting for those threatened by the oppressive power of the state, for example, in criminal proceedings. The purpose of criminal justice is not merely to ensure a fair trial, but to secure order, suppress crime and reduce fear of crime.[181] Civil justice has rather different goals and a more co-operative ethos may be appropriate.[182] Whether different levels of dedication to client goals can be satisfactorily represented in universal principles of conduct is debatable.

Even within an adversarial system, therefore, legal roles find justification in the need 'to administer and to facilitate the operation of law'.[183] Ethical neutrality is the correct disposition for lawyers in modern, diverse, competitive societies because

[178] Wendel, *Lawyers and Fidelity to Law* (n 174).
[179] ibid, at 182–84.
[180] ibid, at 50.
[181] R Young and A Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7(2) *Legal Ethics* 190.
[182] L Webley, 'Divorce Solicitors and Ethical Approaches—the Best Interests of the Client and/or the Best Interests of the Family?' (2004) 7(2) *Legal Ethics* 231.
[183] TW Giegerich, 'The Lawyer's Moral Paradox' (1979) 6 *Duke Law Journal* 1335.

neutrality facilitates pluralism.[184] Neutrality needs to underpin institutions and practices and procedures for selecting officials, judges and governments. Abrogating neutrality weakens the justification for partisanship. If all people are not entitled to partisan advice, why should a few people have that right? While lawyers' freedom to refuse clients is defensible, it is not very practical.[185] The logic of a system based on formal legality and a society of plural values is that all citizens should have representation in principle, even if their cause is not one that a particular lawyer approves of.

## VI. Conclusion

Legal or professional ethics as a subject is often treated either as a discussion of codes of conduct or of personal morality. Neither approach is entirely satisfactory. Simon argues that 'the essence of the professional judgement of the lawyer is in his educated ability to relate the general body and philosophy of the law to the specific legal problems of the client'.[186] This involves a creative judgement that is informed by complex considerations. The challenge of such decisions is the essential appeal of professionalism.

Professional ethics ought to ensure that the practice of law achieves the social good of justice. On the one hand, lawyers work within an adversarial court system that prioritises individual rights. On the other, they aspire to high values and to personal virtue. The adversarial system itself may exacerbate tensions in the lawyer's role by placing the interests of clients and the demands of the system in sharper conflict than do other systems. This brings the ethic of lawyers into potential conflict with personal virtues such as honesty and integrity, leading some to argue for the alignment of professional ethics with wider social values.

The call for lawyers to observe 'ordinary morality' raises fundamental questions about the legal role. Is the lawyer's ultimate duty to protect clients from 'the oppressive power of the state'[187] or simply 'to administer and to facilitate the operation of law'?[188] The answer, it seems, is that lawyers must do both these things to some extent. This gives them licence to represent the guilty and to provide the best defence available within the rules governing the particular situation. Lawyers' obligations in an adversarial system are finely balanced. They must pursue their client's rights assertively and single-mindedly, but within the limits and consistent with the purposes of the law.

[184] Dare, 'Mere Zeal' (n 177).
[185] Postema (n 137) at 81.
[186] W Simon, 'The Trouble with Legal Ethics' (1991) 41(1) *Journal of Legal Ethics* 65.
[187] J Weinstein, 'On the Teaching of Legal Ethics' (1972) 72 *Columbia Law Review* 452; JF Sutton and JS Dzienowski, *Cases and Materials on the Professional Responsibility of Lawyers* (St Paul, MN, West Publishing, 1989) at 3.
[188] Giegerich, 'The Lawyer's Moral Paradox' (n 183).

Bringing lawyers' ethical decisions into line with 'ordinary' moral values would legitimise client cherry picking and encourage half-hearted representation. Lawyers could impose their own view of legal merit on their client. This would be both paternalistic and elitist, and at odds with the liberal philosophy of emancipation that underpins the rule of law. Clients are entitled to have cases determined according to objective standards rather than the subjective standards of their lawyer's conscience.

One of the issues posed in legal ethics in recent years is whether lawyers can live a 'good life' on this basis.[189] This means, in classical terms, can they live according to independent moral principles while fulfilling their professional role. Some critics of the standard conception of the legal role argue that it mandates lying and cheating and so cannot be consistent with a good life. Others argue that the standard conception, properly understood, is perfectly consistent with a life of virtue because of the good the role performs and the limitations it imposes on improper professional conduct.[190]

[189] Bayles, *Professional Ethics* (n 127) at 11.

[190] J Oakley and D Cocking, *Virtue Ethics and Professional Roles* (Cambridge, Cambridge University Press, 2001).