

Values, Ethics and Teaching

by

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Ethics must first be taught before they can be understood and applied in practice.

Ethics require us to think carefully before we act and to ensure that our actions comply with all the rules of ethical conduct.

Those enrolled in higher education are very young adults who are ready to understand and adopt the universal values transmitted to them, which are the basis of culture and an inherent aspect of education itself. These young people can assimilate and master the specific values of a country and culture and, what is more, the values and the ethics of the subject that they are being taught.

These values must be transmitted through a system – ethics – which must then be applied to the practice of a specific occupation through a code of professional conduct.

Lawyers are fond of definitions, but today I would prefer to use a musical analogy – that of a musical score – to illustrate the trilogy of values, ethics and a code of professional conduct.

Values are like the lines that make up the stave of score, which provides the necessary framework for all the other points of reference.

Since ethics form a system of morality based on values, I would compare ethics to the bass and treble clefs, systems that allow a differentiated notation of music.

Lastly, the code of professional conduct is the exact placement of the notes within the system, giving meaning to the score, but also making it possible to appreciate the quality of the sound.

Admittedly, this image may seem somewhat far-fetched since we are discussing the field of philosophy and ethics and how they are relevant and applicable to everyday life, but I think that it is important to highlight here the role of higher education, which is responsible for transmitting a reference system that forms a whole.

Now, to refer to a different aspect, I would like to quote La Rochefoucauld:

“Nothing is as contagious as example.”

Who better than teachers can lay a firm foundation by setting an example, especially in higher education through their contact with young adults who are still open to being influenced but have already attained a degree of maturity?

However, in thinking about this role we must also consider the fact that not just moral values, but also ethics and codes of professional conduct are indispensable to the organisation of society, and even more so in a world that is, willingly or unwillingly, subject to the pressure of globalisation.

This being the case, ethics and codes of professional conduct play a regulating role by introducing a frame of reference and a common language into globalised relations, thereby reducing antagonisms and imbalances in a quest for universality.

However, I would like to illustrate these issues by focusing on several points that are closer to actual practice and to the subjects being taught.

The fact that values are shared and even defined can be seen as a wish to lay the foundations of ethics within a body of rules relating to specific sectors of activity.

The first example that can be given is the teaching of business ethics, as this is the field of globalisation and internationalisation *par excellence*.

The development of international rules, both in terms of financial requirements and the adoption of common accounting rules and principles of good governance, creates an international consensus among developed countries.

For legal scholars, it is important to focus on these international rules, which do not concern the relations of nations with each other, but the relations of economic players who, in order to do business, must have shared values.

Consequently, principles as fundamental as honesty, integrity, respect for rights and freedoms, equitable treatment, independence and accountability are organised into a body of rules that can be applied in all sectors and even in all fields of study.

Thus, before young people begin their professional life for which higher education is preparing them, they are taught the ethical rules adapted to the subject that they are studying and even to their future profession and are provided with an opportunity before they begin their careers to think about the meaning of ethics and the code of professional conduct adapted to all situations, since the core principles involved tend to be universal.

I would like to discuss two even more specific examples, *i.e.* business practice and good corporate governance, in the economic sphere, and naturally, among the professions, the code of professional conduct of lawyers.

1. Business practice and governance

It is now frequent for multinationals to establish their "system of values" by preparing for this purpose charters of ethics with the participation of their employees.

The company's "values" will determine its role in society and its commitment to its customers, the environment and its employees.

However, it is also the wish for these "values" to be shared with employees that prompts companies to have them participate in preparing charters. This makes it possible to establish a system of values that will be respected and applied by all for the common good.

This relates to both the smooth functioning of society and the link of dependency that exists between the company's activity and its environment and role within society.

To illustrate my point, I shall refer to the document of EDF (*Electricité de France*), "Core Values of EDF Group", which states in its preamble:

- its global character (companies from various countries, operating different businesses) and its common mission;
- its role of "*providing the vital commodity of energy to the greatest number of customers*".

Furthermore, although there are individual corporate identities, common core values are shared, such as universal access to power, equitable treatment, etc., which imply "*ethical behaviour*".

These values also imply a responsibility for preserving resources.

As a result, collectively and individually, the following values must be promoted: respect for individuals, respect for the environment, excellent performance and integrity.

The group affirms its commitment to public service and sustainable development on the world market.

Integrity "*precludes corruption and requires that we act at all times with honesty and openness*".

Naturally, this declaration of the EDF Group concludes with the affirmation of its commitment to the Universal Declaration of Human Rights, the European Charter of Basic Rights, the Declaration and Convention of the ILO, the Guiding Principles of the OECD for multinational companies and the Global Compact (a worldwide UN pact to which some 1 200 multinationals have adhered).

"Integrity, respect for individuals and transparency" now seem to have become indispensable terms that all companies feel compelled to use.

Transparency:

The need to fight corruption has sometimes perverted this concept, forcing the disclosure of more or less confidential information in spheres in which secrecy is not designed to protect criminals, but rather to protect the privacy of individuals and their right to confidentiality.

We shall see an example of this shortly in the case of the professional confidentiality of lawyers.

Integrity, on the other hand, is a legal obligation enshrined in the legislation of all countries, and failure to comply with this requirement is severely punished.

This value is set out in all charters of ethics and is referred to at every opportunity. It is a cornerstone of rules of conduct, especially in the economic sector where integrity must go hand in hand with loyalty.

A perfect and very full illustration of these values is provided by the OECD Principles of Corporate Governance.

These principles are not the only ones used as a basis for the rules of good governance in different countries, but they are a source of inspiration for these rules and a means of promoting them more widely.

It is for this reason that I shall now present several of these principles.

For the OECD, the very principle of the corporate governance framework is to take into account its impact not only on overall economic performance, but to ensure "*market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets*". The OECD has presented the principles under six headings followed by six annexes explaining them.

- Thus, the rights of shareholders include the right to relevant and material information on the corporation, their role and power in shareholder meetings, in particular the nomination and election of board members, and oversight of the remuneration of board members and key executives.

For example, there have been cases in the headlines involving the disproportionately high pay of certain executives, set by the board without oversight by shareholders, and leading to departures and resignations.

The Act of 25 July 2005 in France settled this issue by requiring that certain benefits and allowances paid to executives be approved by the general shareholder meeting.

This is an apt illustration of how recommendations that have proven their relevance in practice can become the basis for legislation.

- The OECD principle of corporate governance regarding shareholders addresses the issue of institutional investors and lays down a basic rule of professional conduct in this regard.

This principle points out the risk of a conflict of interest if these investors are not fully independent (particularly if they are managing the investment on behalf of a third party or if they are connected with a subsidiary or an affiliate of a financial institution).

Independence is the best guarantee against conflicts of interest.

With regard to equitable treatment, it is natural that minority shareholders should be protected from abusive actions, the most notable example being, with respect to the ethical and professional concerns being discussed today, the prohibition of insider trading and also the requirement that board members and executives disclose to the board whether they have a material interest in any transaction or matter directly affecting the corporation.

- It is also to ensure the respect for rights and freedoms that OECD Principle IV addresses the role of the various stakeholders, such as employees, suppliers and creditors.
- The rules regarding board members obviously refer to the basic principles:
 - honesty, "board members should act on a fully informed basis, in good faith",
 - equitable treatment, "the board should treat all shareholders fairly",

- “the board should apply high ethical standards. It should take into account the interests of stakeholders”.
- The responsibilities of board members (dealt with in OECD Principle VI), involve setting the compensation of key executives and board members, monitoring and managing potential conflicts of interest, implementing processes to combat the risk of misuse of corporate assets and abuse in related party transactions and ensuring the integrity of the corporation’s accounting and financial reporting systems.

The prime consideration is the board’s loyalty to the company and its shareholders.

Many of these rules are subject to criminal or civil sanctions while others, even though they are not, are so essential that the ultimate sanction for failure to comply with them would be to compromise the long-term future of all concerned.

Lastly, the principle of independence is defined as follows: “*the board should be able to exercise objective independent judgement on corporate affairs*”, and has been adopted in all national reports on governance.

These few examples chosen from the OECD Principles show to what extent the task of ensuring the basis for an effective corporate governance framework (the first OECD Principle) is inseparable from basic principles and the rules of ethics.

Four points of the first OECD Principle deserve in particular to be cited in this paper:

1. The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets.
2. The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable.
3. The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that the public interest is served.
4. Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfill their duties in a professional and objective manner. Moreover, their rulings *should be timely, transparent and fully explained*.

On this day sponsored by the OECD, it was only natural to refer to these principles. They are the foundation and basis for the corporate governance rules that have subsequently been adapted to the legal framework of various countries and that have inspired a number of national reports (and recommendations) laying down the basic rules of corporate governance. The latest French report was the well-known Bouton Report, which clarifies the concepts of independence and conflict of interest, the cornerstones of the principles of governance and security for markets, and also defines an independent member of a board of directors as follows:

“A director is independent when he or she has no relationship of any kind whatsoever with the corporation, its group or the management of either that is such as to colour his or her judgement”. This definition is aimed at preventing conflicts of interest.

For example, a director may not be a significant customer, supplier, investment banker or commercial banker of the company or group (or for whom the company or its group represents a significant share of activity), or have close family ties with a corporate officer, or have been an auditor of the company over the past five years or have been a director of the company for more than twelve years.

Another notable example concerns how long it took to realise that the concept of conflict of interest applied to auditors. For many people, the Enron case came as a revelation. In this case, the problem was the possibility of interaction between the role of certifying accounts and the advisory role played by the firms in these large networks.

In France, where statutory auditors belong to a regulated profession, a decree has been issued enacting provisions to define, in agreement with the profession, rules to ensure that auditors are independent and do not have conflicts of interest.

All of these rules reflect the general view that since systems of this type respect a minimum core of recognised and common principles, they ensure credibility, transparency and trust.

Consequently, their fundamental purpose is to increase trust, on the part of investors in particular, and to provide greater stability.

Many were not convinced of the importance of this relationship between values, ethics and a code of professional conduct until the full extent of its impact on markets had been shown.

The economic and business sectors have had to experience the sometimes painful consequences of ignoring these principles. They are now taking the lead and often anticipate future developments. This is illustrated by charters of ethics but, beyond this, it has been made necessary by the emergence of a common international approach to business.

The second example that I would like to discuss at this time concerns the code of professional conduct of lawyers.

The guiding principles of this code of conduct are close, if not identical, to those that have been discussed previously, for the codes of professional conduct of regulated professions all have analogous goals.

2. Professional code of conduct: lawyers

While the approach adopted by regulated professions is different from that taken by businesses, the fundamental principles nevertheless remain the same and are designed to ensure trust.

A profession is “regulated” when it adopts its own rules within a legal framework. Thus, lawyers have adopted strict rules of conduct since they need to establish trust, and this at all levels.

Lawyers must of course serve the interests of justice and of the law but they must also provide their clients with full and frank information about their rights and obligations. They must advise their

clients and defend their interests within a relationship of trust, which requires respect for the principle of confidentiality.

The profession is thus defined by its independence, its independence of spirit. This means that lawyers must not be dependent on anyone - the authorities or judges - and must be free of any influence which could distort their relationship with their clients.

- Before exercising their profession, lawyers take the following oath: *"I swear, as a lawyer, to perform my duties with dignity, integrity, independence, probity and humanity"*.

No-one may practice as a lawyer without taking this oath. Would it not be a good idea for anyone exercising a professional activity to consider that this commitment applies to all persons responsible for their role in society?

The Code of Conduct for lawyers in the European Union provides that: "Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilized societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction".

It is clearly in the interests of the countries of the European Economic Area to define uniform rules applying to all lawyers.

Moreover, the Service Directive encourages the adoption of a common code of conduct for all lawyers in the European Union, but the Council of Bars and Law Societies of Europe had already anticipated the draft Directive by formulating common rules.

Thus, one of the general principles common to lawyers throughout the world is independence: "absolute independence, free from all other influence, especially such as may arise from his personal interest or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties".

The second principle concerns trust and personal integrity.

- Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt, for these traditional virtues are professional obligations.
- Confidentiality: It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. Breaching such confidentiality is a criminal offence and professional confidentiality should therefore be protected by the State.

One consequence of applying the above rules is that lawyers are excluded from some occupations which might compromise their independence (business activities, for instance) and that personal publicity must be respectful of professional confidentiality.

- Conflicts of interest are also at the heart of lawyers' obligations.

A lawyer may not advise, represent, or *a fortiori* act on behalf of, two or more clients in the same matter if there is a conflict, or a significant risk of conflict, between the interests of those clients.

He must cease to act for all the clients concerned when a conflict of interest arises between them and also whenever there is a risk of a breach of confidence or where his independence may be impaired.

A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

- Turning to fees, *i.e.* the remuneration of lawyers, moderation is once again the rule, and the concepts of reasonable estimate and proportionality are based on an ethical principle of fairness. The fee must take account of the client's ability to pay.

Lastly, there are strict rules regarding transparency and traceability in order to protect monies paid over by clients.

- In accordance with all ethical rules and codes of conduct, lawyers may be held to account. Professional indemnity insurance is therefore obligatory. Like other professionals, lawyers are more likely now to be sued.
- Lastly, in addition to the principles contained in the oath, others have been added by the rules of professional conduct: respect, lack of personal interest, corporate spirit, fairness, moderation and courtesy as well as a duty of competence, co-operativeness, care and prudence.

A number of ethical rules and codes of conduct apply to other regulated professions, imposing constraints which are altogether justified in that they establish the place and role in society of those exercising the profession in question.

Needless to say, rules of professional conduct are taught in law school. This is mandatory, and ethics account for the most important part of the final examination.

The teaching of the principles is enhanced by the study of practical examples, often taken from cases considered by the Bar Councils.

These are extremely practical rules which are illustrated on an everyday basis. For example, the Bar Council of Paris has an Ethics Committee which rules on general matters, an arbitration procedure for disputes with clients the fees for which are fixed by the President of the Bar, a committee for assessing cases of conflict of interest (for the Bar Council is sometimes asked to assess the possible risk of a conflict of interest), a committee that rules on advertising for lawyers, etc.

These are the limits of the parallel that can be drawn with corporate governance, as described above.

An absence of governance in an enterprise, when not punished by the law incurs the wrath of shareholders.

Listed companies are the most concerned by the rules of governance, and markets react to developments in this respect, as shown by the way in which shares fall when the elementary rules of governance are flouted (for example, a director being paid far too much).

For a regulated profession, on the other hand, any sanction is first and foremost disciplinary (a lawyer can be struck off if guilty of dishonourable behaviour or deceit). Another possible consequence is a loss of clientele.

The similarities are obvious, however, when it comes to the actual basis of the rules.

Although ethical rules may vary somewhat depending on the activity, there are also constant, fundamental, values which appear in the formulation and application of all systems and codes of conduct.

That is why training of any kind in ethics at an early stage, *i.e.* in higher education, makes it possible to adapt immediately, irrespective of the profession or activity, to an “ethical standard”, a guarantee of security in social organisation and economic development.

The very expression “ethical standard” may seem strange in that it combines – though does not confuse – standard... morality, ethics and benchmarking. But we are already no longer in the realm of philosophy but in that of economic sectors and the quest for common rules for international trade.

Quite apart from transmitting knowledge, higher education serves to form a critical mind and teaches independence.

Students are taught what it is to respect rights and freedom.

Explaining codes of conduct for each sector or occupation would make it easier for students to apply the appropriate rules to their professional activities more quickly.

This is to pass from theory to practice, and both dimensions should, I feel, be addressed by higher education.

Higher education can and must teach the concept of conflict of interest, for example.

For anyone with professional responsibilities, a role in society, to be aware that there is a risk of a conflict between his personal commitment and obligations, on the one hand, and actions which could be in contradiction with one or the other because of different or new interests, on the other hand, has to be a good thing.

But such awareness can only result from a very detailed analysis of what the commitment entails (what commitment? Why? Alongside whom? To whom?).

There is nothing harder than detecting a potential conflict of interests, so tenuous is the line between tolerance and putting one interest before the other.

Allow me to illustrate my point one last time by means of a story which reveals an attitude you may feel is somewhat old-fashioned.

We once had a very famous President of the Paris Bar, René Bondoux (1963 – 1965), who won the gold medal in fencing at the Olympic Games of San Francisco.

When I was President of the Bar in 1999, I asked for him to be interviewed on film for he had also been the *Directeur de cabinet* of Maréchal Delattre de Tassigny, at whose side he was on the day the Armistice was signed.

It was thus in 2000 that I learned that when, as a brilliant young lawyer, he had taken the oath, he was immediately appointed *Secrétaire de la Conférence*, and as such, put in charge of a case which all young lawyers dreamed of having since it concerned a crime committed by an extremely important and well-known person, and was much in the news.

The young lawyer, René Bondoux, was to represent the victim claiming damages.

The accused, someone much older than himself, came from a family connected to that of President René Bondoux by ties of friendship dating back to the previous generation.

The young man enthusiastically told his father about the case he had been given. His father, however, said that given the ties linking the two families, it would be absolutely unethical for him to plead against this man. The President's father would never be able to look the accused's grandfather in the eye again.

It was a time when a father's opinion took priority over any other considerations, and President Bondoux withdrew from the case.

As it happened, the case, before the *Cour d'Assises*, came to court at the exact same time as President Bondoux was winning the fencing competition at the Olympic Games in San Francisco, where he also met his wife!!!

Speaking before the camera, aged 90, he concluded from this that respect for the rule of conflict of interest and scrupulousness was in all cases the path to follow. Had he not done so, he would never have gone to San Francisco!

Withdrawing on grounds of principle does not always bring with it any reward other than a good conscience, but is this not enough, indeed the essential?

The pedagogical mission of higher education comes into its own with the teaching of awareness of individual responsibility.

The society in which we live has become a 'risk society', and lawyers observe that we no longer look for fault since risk, when it materialises, is sanctioned outside any consideration of fault.

The principle of precaution is also linked to a degree of awareness, but should we not consider that this is an awareness of possible liability rather than awareness of risk? But should we think about an alleged liability without any fault having been committed, simply on the grounds that the risk was undetectable?

These are matters for reflection in society today, and give lawyers pause for thought on the new meaning of responsibility and liability.

All disciplines evolve, and no-one who graduated more than ten years ago could pass their exams today without the benefit of current teaching. Democratic values, on the other hand, ethics and rules of professional conduct, are lasting, and teaching them will therefore always be necessary.

It is no longer a question of an awareness transmitted by the family, rather a search for the fundamental rules that will prepare us for an active professional life.

These are immensely important issues from a cultural and human viewpoint, and schools, which must not ignore anything relating to the human condition, must take that into account.

They can do so by addressing them either as a constituent part of a given programme, or as a separate topic for analysis and discussion.

But this mission should, I feel, be taken much further. What we need to do is teach our youngsters to become responsible adults, capable of thinking for themselves about the purposes of scientific, financial and economic initiatives, teach them to be able to make a critical and reasoned analysis of the problems raised by progress, and give them awareness and, dare I say, an ethical conscience.

More than 20 years ago, the Minister for National Education stated that there was no such thing as education without morality and asked the General National Education Inspectorate what values each of the subjects taught in colleges and schools was capable of producing. Many years later, the transmission of such values is even more important.

The specific and moral references which not so long ago were used to constitute an individual personality and which enabled groups to form, have almost all disappeared.

Fashion, the ephemeral, modernity, and zapping have all gained ground.

Relativism is on the rise, a relativism according to which, since everything is worth the same, nothing, sometimes not even life itself, is of particular value any more. This can be seen from the behaviour of young people today which has become increasingly violent and dangerous at an ever earlier age.

To combat this trend, it is more important than ever for schools to teach the meaning of life and a sense of values.

For, very many young people today suffer from a cultural deficit born of their ignorance or failure to understand the world as it really is.

Surely it is important, through all the subjects taught in school, to give these youngsters the keys to certain values, to incorporate them into their actions, a solid basis providing benchmarks for life.

It is equally vital for higher education to consolidate these lessons (or if necessary teach them from scratch), and continue them further by giving students instruction in ethics and professional conduct, thus preparing them for professional life.

It is time to conclude with a quote, one which could no doubt serve as an epigraph to this conference.

When receiving the Nobel Prize for literature, Albert Camus said in his speech of thanks:

No doubt each generation feels obliged to re-invent the wheel. Mine, however, knows it will not do this but it has perhaps a more difficult task: to stop the wheel falling off.