

**By Dr. Alejandro Ordieres Sieres
Professor of General Studies Department, ITAM**

Originally published in the Fidelis Ethics Review, Winter 2015-2016 edition.

Every society is a complex web of relationships. People with different views and different purposes often interact together seeking common goals. Now, what would happen with a society that does not have common rules? How can one walk in the streets of a city without rules that indicate the right of way between cars?

To Friedrich Von Hayek, Nobel Prize in Economics, social and moral standards are conventions and “general observance of these conventions is a necessary condition of the orderliness of the world in which we live, of our being able to find our way in it, though we do not know their significance and may not even be consciously aware of their existence.”¹ The general function of a rule is to serve as a guide to behavior or actions that must be followed to achieve the desired outcome.

A norm serves as a model or an invitation to perform an action and, at the same time, acts, through fear of punishment that would follow on the violation of the norm, as a deterrent principle. Both functions are intended to facilitate the order of the world in which we live and as a way to a healthy coexistence and to prevent the occurrence of conflicts or situations that endanger social harmony.

To ensure human coexistence there are different types of norms: social norms, religious norms, moral norms and legal norms. They all seek to guide human behavior in its various dimensions: social, religious, personal and legal.

Law as a social guide

The law is the social norm for excellence because it expresses, clearly and concisely, what is expected from citizens. Thomas Aquinas defines law as “the dictate of reason in order to the common good, promulgated by who has the care of the community.”² Social norms, especially legal norms, adapt themselves to a pattern of coexistence that reason discovers as the best for itself and have as their main purpose the good of society.

Therefore, law is not a random act or the arbitrary desire of a representative majority. Instead, law arises from the need to regulate social life in order to achieve the

¹ Frederick Von Hayek. *The Constitution of Liberty*. Chicago: The University of Chicago Press, 1992, p. 23.

² “Ordinatio rationis in bonum comunem ab eo qui curam communitatis habet promulgata”. Thomas Aquinas. *Summa Theologica*, q. 90, a. 4.

common good that is an asset that can only be achieved as a society. The law comes from of a social group that seeks to interact for mutual benefit and, because of this, society gives itself norms to facilitate its common goals.

Normally, when we speak of laws we mean the positive legal norm but in reality, what has been said, can be said of any rule. In fact, the norm that becomes positive law is often only the explanation of social or moral standards and, in some cases, religious. “Civil law seeks to protect the rights of each individual but not as an isolated being, rather as a member of the community to which he belongs. Human rights and individual guarantees are only examples of civil laws that protect some social customs historically given as moral and religious norms that have defended, without been written, the human person. Civil laws are rooted in a living society that creates them.”³

Some rules are aimed at certain groups in society who are called to perform specific functions within it. Such is the case of public servants on whom are imposed burdens and responsibilities inherent in the nature of their job. The rules governing the behavior expected of public servants are necessarily demanding, since they manage public resources. The legal framework establishes standards of expected behavior as well as a punishment for non-compliance, that is, sets limits on the behavior of public servants and guides them in their activities.

However, “to rely too much the ethics infrastructure on legislation has its drawbacks, it tends to encourage the search for minimum compliance: the implementation of the sanctions, despite being necessary, is designed more to discourage undesirable behavior that to promote desirable.”⁴ Moreover, since the law depends on its objectivity and adherence to what is stated or contained therein, the law appears to have a little flexibility for the daily management of ethical issues. Also it seems to be insufficient because it can’t cover all possible cases of the daily exercise of common life.

Law and ethics are two related worlds but they are not necessarily the same. In fact, ethics is broader than the law because it goes beyond, where the law can’t reach and gets into intimate and private spheres. Many actions are not regulated by law but are still subject to an ethical evaluation.

³ Alejandro Ordieres y Carlos McCadden. *Fundamentos para una ética ciudadana*. México: McGraw Hill, 2010, p. 91.

⁴ Guadalupe Ocampo García de Alba. *Evaluación de la gestión pública y la auditoría del desempeño. Propuesta para implantar una estrategia de evaluación del desempeño en la Contraloría Interna de la Cámara de Senadores del H. Congreso de la Unión*. México: IPN – Escuela Superior de Comercio y Administración, Tesis de Maestría, June 2014.

Morality and immorality of law

Moreover, laws can sometimes be immoral and there are many examples in history: slavery was legal in several US states before being abolished throughout the union in 1865 by Abraham Lincoln; in the same way, it was illegal in some states of the country, that black people share public spaces with white; in the Nazi Germany was illegal to help the Jews in any way; etc. Great characters of history as Gandhi, Martin Luther King, Nelson Mandela, among others, opposed legal, but immoral, regimes.

The legitimacy of a rule does not depend on moral goodness or evil but in its legal validity. If a rule is part of the legal system of a country, or at least, not against it, we say that this rule is legal; otherwise we affirm that it is illegal. Someone could argue that built into the concept of legal validity is the claim of moral legitimacy. This may be so, and even somebody can argue that society can't permit something harmful to itself, "but a claim of moral legitimacy is not yet moral legitimacy. On particular conceptions of legal validity, laws are valid only if they are morally legitimate or only if they are just."⁵ In other words, to affirm that an action is legal does not mean it is morally good or socially practiced.

Given that, legality and morality are not necessarily the same thing, and the fact that a norm can be morally good or bad, raises the problem about its moral legitimacy. Not everything that is legal is legitimately good even if, in some cases, some rules help society to have a peaceful coexistence. For that reason, we must be prudent and not easily extract ethical valuations of legal judgments. Someone can act according to the law and still do morally questionable acts and, on the other hand, someone can break a law and, despite that, act ethically.

Many actions do not break any legal regulation but offend the moral sensibilities of society because they go against an ethically acceptable behavior. Society often fails to distinguish between the legal and the moral and believes that laws should punish evil beyond any physical evidence or what the laws dictate. Likewise, many CEOs may think that if there is no law prohibiting a specific action then, therefore, one is allowed to do it. Although legally the latter is true, this does not imply that legality of an action involves *ipso facto*, as an inevitable consequence, its moral goodness or at least its ethical neutrality.

Recent scandals that have occurred in Mexico with respect to the properties of the ruling class of the country can be better understood in this light. Indeed, them can fully meet the requirements of the law and therefore not be criminally prosecuted and yet these acts can be, at least, highly questionable ethically speaking.

⁵ Arthur Isak Applbaum. "Cultural Convention and Legitimate Law" in *Chicago-Kent Law Review*. Vol. 74:2 (April 1999), p. 623.

Moreover, it is impossible that the law covers all aspects of daily actions. An omnipresent law would eliminate the individual freedom and lead to the inability to memorize each and every one of the norms for compliance. To pretend that what is moral is precisely what the law allows and that what is immoral is just what it prohibits, is a way to reduce ethics to the field of law, confusing principles and common spaces that are not equivalent.

Unlike the moral norms that claim for themselves a sense of universality, “the law depends on the Constitution of each country. The rules proposed are heteronomous and are only fulfilled to avoid punishment that comes from its non-observance.”⁶ Moral standards pretend to be above any law and have validity beyond the legality or the acknowledgment of their claims.

To pretend that the law is what makes social morality, or to think that mutual agreement, where the rules come, is beyond evil or good, or that good and evil are determined by the human will, is to eliminate ethics as a categorical imperative that imposes norms upon the will unconditionally. The consequences of this view can destroy humanity because it will be enough, with the agreement of the majority (free or manipulated), to justify any type of crime or contempt for human dignity. Do not forget, for example, that slavery was legal and approved by the majority or that Jews were legally hunted in many regimes throughout history.

To hope that law is what builds social morality is to pretend to cancel morals as a different human dimension and to be subjected to the force of the majority or, worse, to the will of minorities who manage to impose their own views. Legal is not the same as legitimate and is not the same as moral. On the other hand, to claim that law is a-moral is to pretend to eliminate an essential dimension of the human spirit that feels reality as good or bad, as noble or vile⁷, and to reduce it to a mere democratic act (in the best case), *id est*, an invention of social control.

Moral, ethics and law are closely related but different. All of them regulate human and social relations. “The moral, that refers to individually accepted values, becomes social morality when they become part of the culture of a society”⁸ and tends to form part of the law that states, with the strength of its “imperativeness, the moral values that society considers necessary for the order, subsistence and development. Therefore, it has been said that the law is the leading social morality.”⁹

⁶ Alejandro Ordieres y Carlos McCadden. *Fundamentos para una ética ciudadana*. México: McGraw Hill, 2010, p. 117.

⁷ Cfr. Bochenski, Józef M. *Introducción al pensamiento filosófico*. Barcelona: Herder, 1976, p. 76.

⁸ Miguel de la Madrid H. “Los valores en la Constitución Mexicana” en *Los valores en el derecho mexicano*. México: UNAM – Instituto de Investigaciones Jurídicas, 1996, p. 261.

⁹ *Ibidem*.

But unlike morality and ethics, the law has not as its main purpose the improvement of the individual as a human being, but seeks to promote and defend the peaceful coexistence of men in society. So protects, and as it has been said above, only those values that are considered indispensable for human coexistence through established legal rules that are mandatory through the sanction of the state.

The danger of laws is that they give us the illusion of leading a moral life just because we comply with the general minimum required. Rules, regulations, certifications, etc. just give us the bare minimum to coexist based in bad past experiences. Having said that, it's clear that the main purpose of law and regulations is to assure a peaceful coexistence, meanwhile ethics and moral look for the inner good of the people as human beings.

It's true that many people see in morality the foundation on which rests the validity of the law, because, according to a customary view, making possible the moral (considered as social customs) is a legal goal. And that's true, law has his origin in the morals of people but it is not limited to it and, a lot less, in today's multicultural societies where the sources of morality are sometimes extremely different. According to legal positivism, there is no moral foundation of law based on the goodness or badness of the norms but they are founded in the convenience for society of what law is prescribing. From this point of view, the law no longer judges the goodness or badness of human acts, but their legality or illegality. Validity is an institutional fact, it depends on shared understandings. But nevertheless, it is quite plausible to suppose that cultures would include a shared understanding of moral legitimacy as a condition of legal validity, even if such a condition is not a formal requirement for having a shared understanding about valid law. As Arthur Applbaum, Professor of Political Leadership and Democratic Values at Harvard Kennedy School, said: "what a culture considers to be morally legitimate is not, by itself, morally legitimate. Cultural understandings about moral legitimacy [also] can be mistaken."¹⁰

Let's say it one more time: legal is not the same as legitimate. Not everything that is legal is honest and vice versa, not all that is honest is legal. Moral and law in modern legislation have suffered some separation in the foundations of each science even if in the imaginary of society, still prevalent the idea that both share the same sources and, therefore, what is legal is also honest.

Regulations, certifications and rules in business life.

Even if law and morality can agree on the content of an order, they differ in how they demand its realization. The law uses coercion and penalties established by the intervention of a judge who judges the act issuing a condemning or approving sentence; ethics, instead, interpellates personal conviction and personal conscience. Rules,

¹⁰ Arthur Isak Applbaum. "Cultural Convention and Legitimate Law" in *Chicago-Kent Law Review*. Vol. 74:2 (April 1999), p. 623-624.

regulations and certifications can be deceived or misinterpreted by those seeking to reach personal goals. Moreover, law only operates when there is a judge or a person that monitors or reports violations to the legal regulations, Habermas believes, for example, that law is not effective unless most people obey it not because they are coerced or bribed to do so but because they accept the moral authority of the law.

However, with the growing variety of cultures and world views that make up modern societies, governments seek to regulate some aspects of practical and social life. The fields in which ethics and morals are not always private or intimate but ascend to the category of public events whose importance should be regulated by the state through the law. This has required the existence of regulatory ethics that is a body of law and practical philosophy that attempts to govern the conduct of enterprises and his executive officers through regulatory agencies. Because of his legal character, it addresses concrete issues like bribery, whistleblowing, transparency, freedom of information, etc.

Regulatory ethics raises new fundamental questions about the economics of business models, organizational strategies, sustainability, regulatory frames, market structures, etc. Accumulation of power on behalf of some great corporations and the inexistence of borders in business that propitiate the migration of factories to less regulated countries accentuates the inefficiency of the law to protect individuals from large powers that can affect the everyday life of society. The extremely rapid transformation of markets and the increasingly more complex way of doing business poses a challenge for regulators and legislators as markets have become increasingly difficult to regulate.

So, even if regulations, certifications and general regulatory ethics, are important, they fall short. Human actions are more complex and varied than the law can foresee. To remedy this lack, the professional world has introduced ethics codes to serve as guide an orientation there where the law does not say what to do.

Ethics codes have emerged on the contemporary economic, social and political landscapes as subjects of intense interest as a way to “regulate” new standards of behavior beyond what is required by law. “What all ethics codes have in common is the belief that those whose behavior a code is designed to guide have ethical responsibilities, obligations, rights and duties. Where codes typically differ is in their understanding of the nature of those responsibilities, obligations, rights and duties.”¹¹

To institutionalize ethics within corporations, Milton Snoeyenbos suggest that top management should articulate the firm’s values, adopt an ethical code applicable to all members of the company, set up a committee to monitor compliance and enforce the code,

¹¹ Wesley Cragg. “Ethics, Globalization and the Phenomenon of Self-Regulation: an Introduction” in *Ethics Codes, Corporations and the Challenge of Globalization*. Wesley Cragg (ed.) Massachussetts: Edward Elgar Publishing, 2005, p. 1.

and incorporate ethics training into all employee development programs,¹² as a way to integrate ethics in company's life.

Until very recently, it was widely assumed that regulation of commerce was the responsibility and the prerogative of the nation state. "In the industrialized world regulation imposed by the state was the standard method of ensuring fair competition, respect for fundamental human rights, the distribution of wealth generated by economic activity in accordance with emerging principles of distributive justice, the control of criminal economic activity and the protection of the natural environment."¹³ Globalization took away the state's ability to perform these functions. Moreover, the thirst for profit has led companies and individuals to push the boundaries of what is legal and permitted. Corporations are now free to seek out those environments in which the laws in place provide the most favourable conditions for maximizing profits. Poor countries are persuaded by large corporations to create favourable legal environments with the fewest regulatory constraints of the conduct of business. Reducing regulatory burdens has become a powerful bargaining tool for governments intent on securing existing economic activity and luring new investment. Sanford F. Schram describe this attitude as a "race to the bottom" referring to the competition between states in the American Federalism: "The 'race to the bottom' implies that the states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation...so as to make itself more attractive to outside financial interests or unattractive to unwanted outsiders."¹⁴

Modern corporations are immersed in an environment increasingly complex that forcing them to use all the resources at their disposal not only to grow, but also to survive. The more important resource of an enterprise is human capital. Every corporation is based on extensive human relations not only among employees but with the rest of society where the company develops itself. It's increasingly clear, that what makes endure a business or contractual relationship is the handling of the relationship between the different factors of production, especially society.

People are gaining power by the media and the social network and are making count their own values and opinions. Moral perception of society is changing the way corporations are presenting themselves to the world. Ethics matters and, sometimes, a lot. Unfortunately, many CEO's and actionist look at ethics as a mean to increase their profits and solidify their brands, prostituting the value of ethics in the business world, approaching

¹² Milton Snoeyebos and Barbara Caley. "Managing Ethics", in Milton Snoeyebos, Robert Almeder and James Humber (eds). *Business Ethics*. Buffalo: Prometheus, 2001, p. 143.

¹³ Wesley Cragg. "Ethics, Globalization and the Phenomenon of Self-Regulation: an Introduction" in *Ethics Codes, Corporations and the Challenge of Globalization*. Wesley Cragg (ed.) Massachusetts: Edward Elgar Publishing, 2005, p. 2.

¹⁴ Schram, Sanford F. *After Welfare: The Culture of Postindustrial Social Policy*. NYU Press, 2000, p. 91.

to a moral vision of business not for the importance of the issue for the survival of society and the company itself but for economic gain that a facade of social responsibility provides.

Ethics is not just good for business. As a society, we realize that law, norms, rules, etc. are not enough for a pacific and enriching experience of life. Ethics is changing managerial world but I wonder if it is because of the correct reasons and not just for profit.

the law is not intended to regulate, nor can, every human activity in society.

Thus, ethics and morals have an impact on social life, they are the deepest amalgam that gives unity and peace to every human group.