

# Are Codes of Business Ethics Ethical?

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**ABSTRACT:** In response to a quickly evolving legal environment and more generally to changing conceptions about the role and responsibilities of the corporation and its executives, many firms have adopted codes of ethics whose legal relevance is uncertain, and whose relation to actual ethics is largely problematic. First, it is necessary to analyze the theoretical model of these codes, as business environments tend to be assessed in terms of “business ethics”, which is conceptually difficult not to discount, since ethics should possess a universalist vocation, hence the necessity to seek whether there could be a variety of ethics which could bear the same validity. More generally, can individuals (or corporations) bestow upon themselves any set of chosen ethical rules? We propose that ethical codes actually mimic and anticipate what legislators or judges have (or will have) considered as ethical behaviors. Since the law is itself an imitation of ethical rules, codes of business ethics are therefore imitations of imitations. The works of Kant and Levinas, in particular, will serve as points of reference.

**KEYWORDS:** ethics, business ethics, ethical codes, corporate governance

## Introduction

1. The Holy Roman Empire, wrote Voltaire, was neither holy, Roman nor an Empire. Likewise, codes of ethics are not codes. More aggravatingly, they have very little to do with ethics. Many see the temporary trend towards privately-issued codes as novel and surprising, however, one must keep in mind that among all the branches of law, business law is probably the one whose reliance on self-regulation and generally a polycentric model of legal production is the most significant. The same tendency towards a stateless law is verified by the constant recourse to non-governmental means of resolutions of conflict, such as indemnity clauses, mediation, arbitration etc.

The most striking feature of these codes of business ethics (here the observed terminology hesitates a bit in practice between the aforementioned term and “code of ethics”, and “ethical code” – as the article demonstrates, the latter is rather incongruous), however, is that they predicate rules for the very party which, in principle, apply exclusively to the very entity that has established them. To such extent, they are comparable to oaths or wills. A more malicious analogy would mention conflict of interest policies, with the same existential doubt at stake: can a corporation be virtuous enough that we should trust it to define how virtuous it ought to be? Does one get to elect the ethical rules one wishes to live under? Would it be more intellectually coherent if the content of those ethical rules were imposed upon me by another person? More generally, can one split Ethics in discrete sets of rules and pick the set one wishes to comply with? We stumble here upon some of the many paradoxes that would propel the research in many directions. Essentially, we propose that the main source of difficulty lies in the fact that ethical codes present themselves as solutions, whereas there are only ethical problems.

2. A rigorous epistemological approach requires at least a summary recension and/or taxonomy of the existing ethical codes, which appear to be either adopted directly by companies or, in other cases are adaptable standards.

3. *Company-scale ethical codes.* An ethical code is an official statement of values and business practices. This document formalizes a number of actions and standards, and aims to engage the company. By making public its ethical code, a company commits itself directly to implement it, and to make it apply by all actors revolving around it. Thus, many companies are designing their own ethical codes. This might be because they are better able to propose rules that are appropriate to their context and therefore easier to implement.

Ethical codes are an affirmation of core values of companies. It is a document that guides actions and decision-making. Ethics in this regard is essential because it creates trust and

transparency within the framework of companies' activities. Ethical codes are normally intended to help each employee or company's stakeholder to go beyond simply complying with applicable laws.

4. Current economic and trade relations are characterized by the need for companies to position products (goods and services) on the market in order to guarantee certain profitability. To achieve this, they need to build a new image, necessarily positive. To this end, multinational companies, in particular, want to impose their own rules, typically to fill a legal vacuum. This is why ethical codes are above all engaging acts. They are the guideline of companies, the thread of their action. Ethical codes are the textual translation of corporate commitments (Paredes 2011, 94-101).

5. *Ethical standards.* We will distinguish between standards developed by international organizations, or those proposed by consortia or private companies. Many international organizations have issued a number of rules for multinationals to promote, for example, respect for the most fundamental human rights.

For example, Conventions of the International Labor Organization (ILO) set standards for all aspects of working conditions and industrial relations (Gendron 2013, 49-62). Another example is the OECD Guidelines for Multinational Enterprises (1976 and revised 2000), which set out recommendations made by governments to multinational enterprises covering nine areas of business conduct (Brabet 2011, 38-50).

If the implementation of these recommendations by companies is purely voluntary, Governments having subscribed to the principles are however obliged to contribute to their implementation and to promote their application by companies which operate on their territory or from their territory.

6. Among the private instruments used as reference, we can mention:

1. BS OHSAS 18001, Occupational Health and Safety Assessment Series (Rossignol, Drais and Favaro 2016, 153-173).

This is an internationally applied British Standard (BS). Its objective is to help all kinds of organizations to put in place demonstrably sound occupational health and safety performance.

2. ISO 26000 standard. This model is an ISO (International Standards Organization) standard for corporate social responsibility. It defines how organizations can and must contribute to sustainable development (Cadet 2010, 401-439).
3. The Coalition for Environmentally Responsible Economies (CERES). It is an initiative of a non-profit American network of investors, environmental organizations, and interest groups. This network created in 1989 an environmental code of conduct (Oberoi 2013, 31-48).
4. The social certification standard SA 8000 (published in 1998) which defines procedures in the fields of corporate social responsibility (El Abboubi and Nicolopoulou 2012, 392-414).

The AA 1000 standard that manages the balance between economic, social and environmental performance through self-assessment tools put in place for firms.

The Global Reporting Initiative (GRI). This is a repository listing the topics to be addressed in social and environmental relationships (Gendron, Ivanaj and McIntyre 2013, 3-14).

There are many ethical and corporate social responsibility initiatives. However, some of these initiatives are only symbolic, while others have a contractual and binding value for both signatory countries but also for companies, which are then required to honor the commitments entered into. Thus, for lack of legal value, they have a real value due in particular to the multipartite recognition of the relevance of their content. In this sense, they constitute a social constraint for companies that could be subject to charges in the event that they do not respect their commitments with reference to those instruments (Payne 2007, 18-28).

7. *Content of the ethical codes.* However, we propose that, in essence, a vast majority of the "ethical" norms set forth by codes of ethics can be summarized by the following excerpt, found in the code adapted at the level of the *XPO Logistics* company:

“XPO complies with all laws and regulations that govern dealings with federal, state, provincial, county and local governments, including entities working on behalf of a government, or owned or controlled by a government.”

Or, if one could summarize even more briefly: “the Company will comply with the law”.

8. Certainly, one could object to the proposition above that many stipulations found in codes of ethics do not only affirm reverence for the law, but actually go beyond it in an attempt to purport values that the company will strive to foster. To this rebuttal, we respond, in anticipation of the developments below that the intention of the draftsman is probably to manifest its intent that the company will comply with the *intention* of the law, or (and these two formulations may be equivalent one another) to what a judge might decide the application of the law to acts might consist in. To the extent that the above rationale might not be the only one, skepticism as to the ethical intentions surrounding the promulgation of a code of ethics (or manifestation of intent to adhere to an ethical standard) is difficult to rebuke.

9. To support our position, let us seek not what is *ethical* (i.e. what conforms with ethics) but rather what *is* ethical, or in other words, what criteria can be applied to determine if any given action is ethical.

10. The Kantian approach on metaphysics is made explicit in his 1785’s opus *Groundwork on the Metaphysics of Morals* (Kant 1785). For Immanuel Kant, an action is not moral because it is compliant with one’s duty. It can accede to morality because it was motivated by duty (Kant 1785). The counter-example offered by Kant is that of a wise merchant, who elects not to overcharge a novice customer in order not to sully his reputation of honesty. It is obviously difficult to call such behaviour moral or ethical, insofar as compliance with ethics is in that instance, so to speak, coincidental. It results from the Kantian view on ethics that, in particular, compliance with ethics caused by fear of a legal sanction, or an adverse reaction from the corporation’s shareholders or partners should be assessed as not only unethical, but perversely anti-ethical. Schopenhauer, in an essay which, otherwise, is profoundly critical of Kant’s views clearly states that an action motivated by selfishness is utterly devoid of moral worth (Schopenhauer 1844).

11. Therefore, the criterion proposed by Kant for *ethicity* is remarkably clear. *A contrario*, any deed whose motivation is outside of the ethics is simply not ethical, and it might be the opposite of that: as Pascal put it “he who pretends to be an angel is a beast” (Pascal 1670) - in other words, there is probably more monstrosity in affecting saintliness than being honest about one’s genuine intentions. Perhaps (but this is subject to a discussion far outside the realm of the present article), the only corporate social responsibility (and thus, conversely the only valid ethics) is that proposed by Milton Friedman: maximise the shareholders’ profit (Friedmann 1962).

12. Authors have argued that the legal system should be content with resulting in a “good enough” justice:

“The perfect justice might be the cleanest in theory, but can be quite messy in practice; a good enough justice accepts compromise to various degrees in common circumstances and while it doesn’t exclude the dramatic exception, it doesn’t live constantly under the pressure of tragedy. It is true that “good enough” would be a hermeneutical concept and it might be that finally, it says not much more than prudence. Therefore, in order to have the advantages of prudence, of a serious devotion to practice that is nonetheless not insensitive to contingent circumstances, such prudence has to be given its proper place in ethical reflection.” (Wolff 2011).

This probably true for *justice*, but not for ethics. The excerpt below is from a quite serious and earnest attempt to reconcile the real-life demands of any legal system and Levinassian ethics. What is Levinas’ proposal?

13. The works of Lithuanian-born French philosopher Emmanuel Levinas have been immensely influenced by the Jewish tradition, by phenomenology, but also, somewhat incongruously by the works of Schopenhauer on the foundations of ethics. If we were to summarise his complex, difficult philosophy, we could say that he regarded the experience of the face of the Other, the realization of the Other’s vulnerability, in particular, as the source for *unconditional*,

*unlimited* responsibility which is indissociable with an equally unconditional, unlimited and transcendent ethics. Through the face of the others, Ethics *imposes itself upon me*, and this irruption occurs *ab origine* – it is not a man-made means of organizing human interactions but the root of human interaction. It would seem incongruous to admit that one can *elect* to be governed by ethics, and even more so by a particular sub-set of ethical rules (as is the case with ethical codes) – in a Levinassian sense, this would make exactly as much sense as electing to be governed by physics, *except* the third law of thermodynamics (or even worse, with the stipulation that Newtonian laws of viscosity must be followed *diligently* by all staff members, but within the limits of good practices regarding bullying in the workplace).

14. In a sense, the mere fact that the phrase “Business Ethics” exist and is used unironically is a nonsense from a Levinassian perspective. It seems to imply that a particular subset of ethical rules should apply to the world of business, excluding all others, or worse that *altogether different* rules (which reasonable suspicion would hold to be not genuinely ethical in nature) would be used in that instance as an ersatz to Ethics proper. Those hypotheses lay seem exceedingly harsh, but thinking of the example proposed by Kant brings to mind all-too-real example. If business must be governed by ethics, it must be by unqualified ethics, not by “business ethics.

15. Of course, the rationale for the adoption of such an ethical trompe l’oeil would be impossible to understand if corporations, most often represented by their board, did not carry the weight of actual legal responsibilities.

16. Although different taxonomies do exist depending on the legal system at stake (and arguably, on the predominant variety of capitalism in the relevant jurisdiction), the responsibilities of the directors can be summarised as follows: do what is best for the interests of the company (in the British terminology, “promoting its success”) in compliance with the rules applicable under the company’s bylaws and the rules applicable by application of the law, which can themselves be divided under those deriving from the private law subset and those which are applicable as a matter of criminal law. The particular criteria set forth by the law are vague, or at least formulated so as to comprise the immense variability of issues presenting themselves in the course of business activities: “due care”, “loyalty”, “proper purposes”, “adequate consideration” to be received by the corporation etc. – thus, even though it is universally presumed that the decision or the behaviour is good until proven otherwise, it is impossible to be *certain to be compliant*.

17. Let us examine for instance the case of director’s liabilities in Delaware, the place of incorporation of a disproportionately large number of large American corporations, so much that Delaware law is often considered as “common law” in terms of corporation law. For instance, in *Aronson v. Lewis* the Delaware Supreme Court held that “*a presumption that in making a business decision, the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company*” which must have signalled a presumption of immunity for directors of Delaware-based companies in the scope of their duty of care. However the case of *Smith v. Van Gorkom*, the Court narrows so much the scope of the solution found in *Aronson* that authors compared the opinion to the explosion of a bomb (Sharfman 2008, 288).

Indeed, the Delaware Supreme Court nearly overturned the *Aronson* findings only one after they were stated, by deciding that in establishing that the directors have complied with their duty of care as construed through the business judgment rule, the court must establish “*whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them'*” so that, from the moment the judge’s gavel fell down, not being informed became a breach of a director’s fiduciary duty of care owed to shareholders.

18. Most of the contemporaneous literature harshly criticized *Smith v. van Gorkom*, calling it “*surely one of the worst decisions in the history of corporate law*” (Sharfman 2008, 288) or “*atrocious*” (Sharfman 2008, 289). The dissent in the opinion compared it to a “*comedy of errors*” (Sharfman 2008, 289). Even though some others have found merit in the decision, what is difficult to deny is that it was unpredictable for the directors subject to the trial or to any directors, who could not have reasonably construed the phrase “duty of care” or, with further reason, the recent

*Aronson* solution as a signal that they should have started to gather information and document that gathering as fast as they could so as to stand the test of evidence. Hence, what other choice do boards have than striving to pile up as many elements as possible in order that they satisfy the “almost ethical” provisions of the law?

**19.** The classical distinction holds that law governs our external behaviour whereas the realm of morals or ethics is the conscience (De Naurois 1971, 309). However this geographical criterion does not account for the fact that the law, *at the very least*, aims to reach ethical purposes, or worse to imitate morals (for instance when the judge explores the range of directors’ “duty of care”, it employs a quintessentially moral terminology. Therefore, when a code of ethics attempts to anticipate or replicate the legal rules approximating ethics, it actually *imitates an imitation*.

**20.** If the corporate rules were effective, ethical codes would not be so popular. The latter are most often adopted to fill a legal vacuum, thus attesting to the ineffectiveness of corporate law. Black is one of the authors that strongly support this argument.

**21.** *Black’s thesis on the triviality of corporate law.* According to Black (Black 1990, 542-597), State corporate law contains a mix of mandatory and default rules. This author believes that mandatory rules are not effectively compulsory. Their mandatory characteristic is only apparent, it is just a mirage. Black underlines that State corporate law is trivial, in the sense that it lets companies (managers and investors together) establish any set of governance rules they would reasonably want.

Black acknowledges that rules that appear mandatory may be trivial for four good reasons:

1. Some mandatory rules would be universally adopted if people thought about them.
2. Some rules can be avoided by advance planning, including choice of capital structure and state of incorporation.
3. Some mandatory rules are unimportant, in the sense that they cover situations that occur rarely or matter little.
4. Some rules that used to be market mimicking, avoidable, or unimportant may matter, but precisely because these rules matter, they will soon be changed (are circumstances usually change). The political forces that led to the trivialization of corporate law will see to that.

Black supports that many apparently mandatory corporate law rules are trivial in one of these senses. Moreover, proving that nontrivial rules exist is hard, says Black. It is not trivial to disprove the extreme null hypothesis that all of State corporate law is trivial (Black 1990, 542-597).

To convince, Black argues that investors and managers are able, at least with the help of clever lawyers to establish any set of governance rules they want. Therefore, “the mandatory/enabling balance (...) isn't really there” (Black 1990, 542-597). Corporate law is in fact fully enabling because any mandatory rules are “either avoidable or have no bite” (Black 1990, 542-597).

**22.** *Applicability to codes of business ethics.* The thesis defended by Black is more verified at the international level. At present, there is no regulatory framework that can strictly control companies’ international activities. Indeed, multinational companies do not have an international legal status. By relocating their production, they are freed from a certain number of rules and decline their responsibility vis-à-vis rights violations committed by their subsidiaries and subcontractors abroad. This situation puts multinationals in a position of strength vis-à-vis States that lack regulatory mechanisms (Renouard 2007).

To fill this gap, most companies have developed ethical codes, as a strategy of self-regulation of the framework of their responsibility.

Referring to Black's abovementioned work, we can assume that ethical codes provisions either:

- Market mimicking
- Avoidable
- Unimportant
- Prone to obsolescence

But according to Orts (1993, 1565-1623), even if Black's "triviality hypothesis" proved correct, corporate law would nonetheless remain important. All the same, even if corporate law were entirely enabling, it would describe the rules by which economic power is socially structured, which is not a trivial matter, although corporate law would then collapse into a specialized category of contract and property law (Orts 1993, 1565-1623).

Concerning ethical codes provisions, if we only think about imposing rules to make them work, we might make things more complicated. Knowing that humans have the ability to distinguish right from wrong, we agree with Dodd when he says that "there is in fact a growing feeling not only that business has responsibilities to the community but that our corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities" (Dodd 1932, 1145-1163).

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