Legal Ethics: Text and Materials

Richard O'Dair
Butterworths, Sydney, 2001, ISBN 0 4069 9758 6, 497 pp

Most texts on legal ethics are predominantly descriptive. They concentrate on giving an account of the structure of the legal profession and the admission requirements and processes; and consider the duty of the lawyer to the client and to the court in particular jurisdictions. Generally, only restrained treatment is given to either the need for law schools to address ethical issues in all their courses, or to the question of whether ethics has something to do with morals. By contrast, O'Dair's book takes a much more in-depth approach to the meaning of legal ethics by examining the different philosophical and sociological contexts of the discussion of legal ethics. In so doing, O'Dair encourages law teachers to take a more comprehensive approach to teaching legal ethics.

O'Dair states that the 'book is not intended as a comprehensive guide to any particular professional code' but 'aims to inform and stimulate debate about fundamental questions of ethics as they relate to the practice (business?) of law at the beginning of the 21st century'.[1] The target audience for the book comprises undergraduate law students and law teachers.[2]

This text gives excellent coverage to all the issues concerning the practice of law. However, realistically, it will only be used as a required text by those law schools who adopt the view that legal ethics should be studied in a holistic way or choose to consider legal ethics as impacting on all the courses offered across the whole law degree. Most law schools in Australia teach legal ethics to final-year students and their courses usually concentrate on acquainting the students with the environment they will be entering. Such courses usually include topics dealing with the way that the profession is structured, the requirements necessary to join that profession and the many duty relationships that the lawyers will encounter. In this teaching mode, students are challenged by particular ethical dilemmas but only as they relate to the topics being discussed within that course.

While O'Dair is writing in the English context, he relies heavily on the writings and conclusions of the American literature, and in particular the views expressed by the American Bar Association, since he believes that there is an 'under-development of the subject almost everywhere else',[3] a view supported by the comments included in the First Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct delivered in 1996.

He therefore recommends that ethical considerations should pervade a student's legal education. He strengthens this argument in Chapter 4 in relation to the regulation of lawyers. In that chapter, he questions the effectiveness of the current modes of regulating lawyers. He then goes on to claim that if

---

1 O'Dair (2001), Preface.

2 O'Dair (2001), p 7.

3 O'Dair (2001), p 17.

students were introduced to legal ethics during their legal education, this would result in lawyers acting appropriately regardless of the effectiveness of the regulation. However, he has no illusions on this point and recognises that, in order for this to happen, curricula would need to be reformed. Therefore, law teachers would need to be convinced of its worth; to equip themselves with a broad knowledge; and to acquire a wide range of intellectual skills in order to present the material adequately. Even if this approach is not embraced, O'Dair believes that law teachers play an important role. He asserts that their attitude to the inclusion of ethics in their general discussions implicitly presents their views on its importance or otherwise. In discussing this point, O'Dair refers to the opinion of Kim Economides, who argues that legal education can be an exercise in 'Cynical Legal Studies'. Economides maintains that students who initially have a commitment to public-interest work have their interests quashed through a strict adherence to positivism. Adrienne Stone's work supports this. She argues that there are features which prevail in legal education that produce detached cynicism. For instance, students are required to justify their opinions on legal grounds as opposed to ideological or substantive ones. They must exhibit an ability to distinguish between similar cases and draw parallels between dissimilar cases, in order to argue — with indifference to the relative merits — for apparently opposing positions. Such features as these exclude any ideological or emotional arguments.

Set against this 'realistic', perhaps slightly cynical, understanding of the constraints inherent in legal education, O'Dair nonetheless argues for an understanding of the importance of legal ethics that goes well beyond even the most optimistic understandings of what might be possible in terms of incorporating ethics into the law curriculum. In order to make this argument, O'Dair draws upon the Lord Chancellor's Advisory Committee's plea for ethics to be incorporated into legal education because 'one of the central goals at every stage of legal education should be to inculcate "legal values" meaning "a commitment to the rule of law, to justice, fairness and high ethical standards"'.[4] Here O'Dair draws heavily on the writings of Shaffer and Kronman. Kronman advocates that legal ethics is not just an ideal but that it actually moulds the practitioner: it leads to the development of an ability not just to exercise judgement but to judge wisely.[5] This leads O'Dair to state that 'if career decisions can be life changing ... legal ethics should form part of the undergraduate curriculum'.[6] From this perspective, the codes of conduct are important but they are 'no more that a starting point in the study of legal ethics'.[7]

If ethics is more than just rules laid down in professional codes, and if it is properly understood as grounded in principles of moral reasoning, then in Chapter 2 O'Dair endeavours to identify a philosophical framework within

4 O'Dair (2001), p 116.

5 O'Dair (2001), p 9.

6 O'Dair (2001), p 13.

7 O'Dair (2001), p 16.

which such moral principles can be located. O'Dair gives particular attention to the writings of Shaffer and Pepper. Shaffer believes that the person's character is determined by the community; in contrast, Pepper maintains that an individual retains a certain amount of control over what he or she is to become by making choices. The contrast between these positions sheds light on the importance of autonomous moral reasoning — reasoning which is neither predetermined by 'community values' nor devoid of the influence of generally accepted moral principles — in determining conduct.

In Chapter 3, O'Dair considers the possible results that may occur if the present commitment of governments and consumers to deregulation is implemented: what would be the effects of understanding the practice of law as a business rather than a profession? This chapter focuses on the works of Richard Abel, Alan Paterson and William H Sullivan, and draws from these authors competing sociological interpretations of the legal profession. Abel argues that the profession created market control, in that lawyers alone were able to produce a legal service. Paterson admits that the professional ideal has lost some of its elements, but believes that those remaining are worth retaining. He believes that professionalism is being renegotiated. O'Dair then considers the writings of Sullivan, an American who suggests that lawyers pursue their careers not for wealth but in the belief that they are able to contribute to the betterment of the community. The chapter concludes by suggesting that the traditional professional ideal should be pursued and in this regard some authors believe that ethically motivated lawyers can succeed since their reputations for fair dealing will work to their advantage.[8] This seems to suggest that the legal profession can be a (competitive) business as well as a profession.

The book is divided into two parts. Part I (Chapters 1–5) deals with the pervasive issues in legal ethics and the material in this part is then applied to the activities of lawyers in Part II (Chapters 6–11). Building on the theoretical foundations of O'Dair's holistic understanding of ethics outlined in Chapters 1–4, Chapter 5 outlines the different theoretical frameworks that inform lawyers' views of legal ethics which will be discussed in Part II. The Standard Conception of Legal Ethics is considered the norm. This model is supported by the First Class Citizenship model advocated by Stephen Pepper, but there are two other models considered: Moral Activism (the liberal alternative suggested by David Luban); and the Contextual Approach (a radical alternative propounded by William Simon).

The Standard Conception of Legal Ethics rests on two principles: (a) the principle of neutrality — that is, lawyers should represent people regardless of their opinion; and (b) the principle of partisanship — that is, lawyers should use any means to further the client's interests as long as what they do is not illegal or a breach of a rule of conduct. This is generally described as role morality, and an adherence to this model supposedly allows lawyers to do things that they would normally find immoral. O'Dair points out that there is legislation that would alter this standard, but that case law seems to support its legitimacy.

---

8 O'Dair (2001), p 86.

The model advanced by Stephen Pepper — the First Class Citizenship Model — supports the Standard Conception of Legal Ethics. This model prioritises an individual's autonomy and states that the client's autonomy should not be limited by the law, the lawyer's morality or common morality. Therefore, as Pepper points out, the only moral guidance being brought to bear on any situation is that of the client. In this model, the lawyer's moral views are irrelevant.

In both of these models, the lawyer is conceived as playing a particular role: that of a lawyer — a role which is divorced from all other aspects of the lawyer's life. The two alternative models subvert the importance of the role. David Luban's moral activism suggests that common morality sees lawyers as having an existence outside their positions. However, this model still relies on role morality — an individual's actions may be justified by referring to the position he or she holds. But alternatively, in certain circumstances, the lawyer should comply with common morality and therefore break the obligations ordinarily binding the lawyer, particularly in cooperative relationships (such as cooperative schemes among citizens) as opposed to vertical relationships (such as those obligations commanded by the state). William Simon's contextual approach is described as the democratic approach. It requires lawyers to resolve disputes as the institutions would require them to do — in order to promote justice.

Part II of the book deals with the normal situations that one would expect in a book covering a lawyer's professional responsibility or legal ethics. These chapters cover: criminal defence and prosecution (Chapter 6); lawyer–client confidentiality (Chapter 7); competing models of lawyer–client relationships and their ethical implications (Chapter 9); models of Legal Aid and their effectiveness in addressing problems of access to justice (Chapter 10); and conflicts of interest (Chapter 11).

One very useful inclusion is a chapter on negotiation (Chapter 8). O'Dair defends his inclusion of this topic by asserting that most lawyers take part in negotiation, whereas they may not litigate matters. He notes that the Standard Conception of Legal Ethics is accepted as applying to the adversarial system where the judge or jury acts as a neutral referee. However, in negotiations there is no such figure. He then questions whether this model can still apply to negotiations when it could be argued that practices in negotiations are different in their nature. For example, if a party omits to offer certain information, is that lying? Here O'Dair presents the debate between James White and Roger Fisher. White argues that a successful negotiator is one who has the 'capacity both to mislead and not to be misled ... To conceal one's true position, to mislead any opponent about one's true settling point, is the essence of negotiation.'[9] This is known as the competitive approach. Alternatively, Fisher's problem-solving approach maintains that negotiators can be 'both successful and decent'.[10] Fisher and Ury suggest 'that the first thing you are trying to win is a better way to negotiate — a way that avoids your having to

9 White (2001).

10 O'Dair (2001), p 295.

choose between the satisfaction of getting what you deserve and of being decent. You can have both.'[11] Recognising that the current negotiating practices do raise some difficult ethical issues, O'Dair includes a discussion on a couple of strategies: the effectiveness of 'cost-shifting rules on settlement negotiations';[12] and the inclusion of more detailed standards in codes of ethics.

Although the style of the work — quoting at length from primary sources — detracts from its readability and might inhibit students from engaging with the material, this work is nevertheless a worthy addition to the rather limited coverage of legal ethics. If law schools decide to include legal ethics into the presentation of all their courses or increase their examination of the real meaning of legal ethics, then this text would prove an invaluable resource in providing a philosophical and sociological context for the topic.

References

Roger Fisher and William Ury (1981) *Getting to Yes: Negotiating Agreement Without Giving In*, Houghton Mifflin Company, cited in O'Dair (2001) *Legal Ethics: Text and Materials*, Butterworths, p 294.

Richard O'Dair (2001) *Legal Ethics: Text and Materials*, Butterworths.

James White, 'Machiavelli and the Bar: Ethical Limits on Lying in Negotiation' (1980) *ABF Research Journal* 928.

LILLIAN CORBIN
FACULTY OF LAW, GRIFFITH UNIVERSITY

11 Fisher and Ury (1981).

12 O'Dair (2001), p 305.