INDIVIDUAL ROLES AND CONFLICTING MORAL OBLIGATIONS

EXAMPLES FROM CORPORATE AND PROFESSIONAL NEW ZEALAND

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Abstract

This paper is concerned with the notion of role morality. It attempts to answer the question of how individuals deal with conflicts between role morality and personal convictions. Based upon the answer to this question the paper further attempts to answer the question of how institutions that establish role morality need to proceed in order to ensure that the rules and principles issued by them are actually followed. Finally, the paper takes a look at the situation in professional and corporate societies in New Zealand and the way professional associations and business corporations in New Zealand deal with the fact that obligations under professional and corporate ethics may conflict with the personal convictions of professionals and employees.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 35,000 words.

Subject and Topics

Role morality, legal ethics, medical ethics, professional ethics, corporate ethics, codes of ethics, monism, relativism, pluralism, minimum consensus, conflict of interest, New Zealand Code of Legal Ethics.

I Introduction

This paper is concerned with the notion of role morality and the conflicts that occur when obligations of role and ordinary moral obligations collide. The way individuals deal with such conflicts is an indication to the answer to how institutions can ensure that rules and principles of role morality are effective. The latter is the central question of the paper.

From a certain age on, human beings judge and decide based on a system of personal morals. Typically, the system of personal morals consists of a set of moral rules and principles that are held justified by the person applying these rules. Methods of justification vary and depend on the cultural and religious background, for example. However, people in modern societies tend to assume social roles that follow their own very particular rules. Many people decide to engage in professional careers; some spend a large part of their lives in a corporate environment. Personal and professional ethics may differ. Also, some employers may subject their employees to an even more specific and particular set of moral rules: A code of ethics implemented by a certain company may be the single most particular system of morals an individual will subscribe to.

One question arising out of this situation is how individuals react to situations where personal moral obligations conflict with the particular morality of one's professional or corporate role. Much has been written on moral conflicts that legal professionals in the United States encounter. Even though the debate relies on the specific situation in the United States, some of the theories apply to conflicts between personal morality and professional or corporate morality in general. The first part of this paper will provide a brief overview of the relevant theories. It will be argued that whether conflicts between personal morality and morality of role do occur and how such conflicts are resolved ultimately depends on the individual moral agent and whether the agent's personal set of morals is capable of accommodating the particular obligations of role. Given that personal morals differ from agent to agent, the attempt to provide a universal concept to ensure that obligations of role are generally recognised within personal morality is bound to fail.

From a professional and corporate point of view conflicts between personal and professional or corporate moral obligations are not desirable. The question therefore is how professional associations and corporate employers should deal with the fact that the moral rules and principles, to which they subject their members and employees, may conflict with personal morality. The second part of this paper attempts to find an answer to the question of moral diversity in a professional and corporate environment. The answers provided in the literature are regularly based on empirical studies analysing the effects of a certain approach and comparing them to those of a different approach.[1] Authors in legal ethics, however, are typically concerned with the functioning of normative systems. Their theories can provide a theoretical basis as underpinning for empirical attempts. The paper will provide a brief overview of the main theories in regard to coping with diversity in general. It will be argued that an optimal approach for coping with moral diversity in a professional and corporate environment involves combining a set of precise rules with a set of basic moral principles. Both rules and principles need to gain a minimum consensus and should be characterised by moral restraint. An optimal approach would further include a system of procedural justice which conflicts that do occur are subjected to.

The third and final part of this paper will put this theory to the test. Moral diversity turns into a challenge especially for multicultural societies such as New Zealand. While the majority of New Zealanders are descendants of European immigrants, New Zealand has a large indigenous Māori minority. Moral diversity is more prominent here than in other countries in the world. Professional associations and business corporations in New Zealand face greater challenges, accordingly. The final chapter of this paper is concerned with codes of ethics and conduct in professional and corporate New Zealand and the question of how a society, that has significant experience in dealing with the fact of diversity, accommodates this fact in professional and corporate life.

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[1] With further references Stuart Gilman "Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons" (2005) OECD Directorate for Public Governance and Territorial Development <www.oecd.org>.

II Role Morality and its Implications

In interacting with one another people assume different social roles. The roles people assume influence the way they perceive their moral obligations. The following - not so far fetched - example may serve to illustrate this:

> *Rudy is a religious man. He attends mass every Sunday and generously gives to charity. It is his firm belief that the rich have a strong moral obligation to give to the poor what they can spare. Rudy is also a lawyer for a large law firm currently representing an insurance company. The insurance company is being sued by Dotty. Dotty argues that Rudy's client is liable to pay for the medical treatment that would save her severely ill son from certain death. The costs for the medical treatment roughly equate to the sum spent on the client's last office party. Rudy notices that Dotty made a procedural error. He knows that it is highly likely, that (1) no one except for him will notice this error and (2) that Dotty's claim will be dismissed if he argues accordingly. Despite his personal moral convictions Rudy prepares an according statement and Dotty's claim is dismissed.*

It appears that the concepts of role and morality affect one another. This notion is regularly referred to as *role morality*. The first question this paper attempts to answer is how individuals react to situations where personal moral obligations conflict with particular obligations of role. A precondition for fully understanding the dependencies of social roles and morality and the implications of the according notion of role morality, is a basic understanding of the initial concepts of social role and morality.

a.   *Morals and Ethics*

The term *morality* is often used interchangeably with the term *ethics*. In the strict sense of the word, however, ethics is the science of morals while morality describes

a system of morals.[1] The term morality can refer to a system of morals that one or more moral agents subscribe to. Traditionally, morals are thought to be the norms and principles concerned with *how we ought to live* and determining *right* and *wrong*.[2]

The system of morals a specific person subscribes to may be referred to as *personal morality*. Research on moral development by Jean Piaget, Lawrence Kohlberg and others suggests that personal morality is developed systematically over time, is influenced by factors such as social interactions and undergoes transformations while the person passes through different cognitive stages.[3] This process begins in early childhood and progresses into adulthood.[4] It is a peculiarity of personal morals that a person will hold his or her personal morals to be universal and absolute in nature.[5] Most people intuitively reject the notion that their personal morals depend on the society they live in but feel that they would hold the same moral convictions in any society and at any time.[6]

The term *common morality*, on the other hand, describes the set of morals the majority of the members of a specific society subscribes to.[7] In most societies, if not all, common morality would hold that one ought not to kill an innocent person. Common morality in some of these societies, however, could hold that it would be morally justified to deviate from this rule and kill a terminally ill person if that person wishes to die, whereas common morality in other of these societies could hold that terminal illness does not justify deviating from the rule that one ought not to kill.

Common and personal morality may differ.[8] However, they depend on one another. Moral agents tend to reassure their personal moral convictions by comparing them

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[1] See John Roth (ed) *Ethics* (Salem Press, Pasadena (Calif), 2005) vol 2 at 957 and 971.

[2] See David Copp (ed) *The Oxford Handbook of Ethical Theory* (Oxford University Press, New York, 2006) at 4 and John Roth (ed), above n 1, vol 2 at 957 and 967.

[3] See, for example, Jean Piaget *The Moral Judgment of the Child* (Kegan Paul, London, 1932); Lawrence Kohlberg *Essays on Moral Development* (Harper & Row, San Francisco, 1981-1984). Compare also Daniel Lapsley "Moral Stage Theory" in Melanie Killen and Judith Smetana (eds) *Handbook of Moral Development* (Lawrence Erlbaum, Mahwah (NJ), 2006) 37.

[4] Elliot Turiel "Thought, Emotions, and Social Interactional Processes in Moral Development" in Melanie Killen and Judith Smetana (eds) *Handbook of Moral Development* (Lawrence Erlbaum, Mahwah (NJ), 2006) 7 at 9 and Daniel Lapsley, above n 3; for an overview of the topic compare Melanie Killen and Judith Smetana (eds) *Handbook of Moral Development* (Lawrence Erlbaum, Mahwah (NJ), 2006) at 1.

[5] Bernard Gert *Morality. Its Nature and Justification* (Oxford University Press, New York, 2006) at 112. See also Katherine Kruse "Lawyers, Justice, and the Challenge of Moral Pluralism" (2005) 90 Minn L Rev 389 at 404. This is not to say that moral rules may not be particular or do not have exceptions; Bernard Gert, above, at 116.

[6] Bernard Gert, above n 5, at 113.

[7] Compare HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1994) at 169.

[8] Ted Schneyer "Some Sympathy for the Hired Gun" (1991) 41 J Legal Educ 11 at 13.

to common morality. Effectively common and personal morality are bound in a circular relationship.[9]

In contrast to morality, the related concept of *law* describes a system of norms constituting an institutionalised social order.[10] Legal rules are regularly codified, as are the sanctions for breaches of these rules.[11] Sanctions, however, are insufficient means to ensure that rules, whether legal or moral in nature, are practiced. Rather, the validity of norms has effects on whether they are practiced.[12] The validity of norms again depends on whether "the norm subjects are justified in guiding their behaviour by it whenever it applies [...]."[13]

The particular area of ethics concerned with the methods for justifying moral rules is referred to as *normative ethics*.[14] There are numerous theories and approaches concerned with justifying moral norms and principles. Some ethicists, for example, promote moral intuitions as way of justifying moral rules; others hold that moral rules need to promote the *greatest good for the greatest number* in order to be justified. There are different methods for categorising normative theories and approaches. A very basic differentiation is the one between consequentialist and deontological theories. According to consequentialist or teleological ethics the effects of a particular action decide upon its rightness while according to deontological ethics the act itself decides upon its rightness.[15]

One of the first observations ever made in regard to morals is that they depend on the social context of the person practicing them.[16] A person's social role is a factor relevant in determining his or her moral obligations. In order to further this theory it is necessary to determine what roles are and how they function.

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[9]Don Welch describes this circular relationship of checking personal versus communal behaviour; Don Welch *Conflicting Agendas: Personal Morality in Institutional Settings* (Pilgrim Press, Cleveland, 1994) at 48 and 148.

[10]Kurt Seelmann *Rechtsphilosophie* (4th ed, Beck, München, 2007) at 51.

[11]On the relation of moral and legal obligation see HLA Hart, above n 7, at 167 and 185.

[12]Joseph Raz *Practical Reason and Norms* (Hutchinson, London, 1975) at 81.

[13]Ibid, at 80.

[14]John Roth (ed), above n 1, vol 2 at 1084.

[15]For an overview see Hugh LaFollette (ed) *Ethics in Practice: an Anthology* (3rd ed, Blackwell, Malden (MA), 2007) at 9.

[16]Compare Emile Durkheim *Professional Ethics and Civic Morals* (Greenwood Press, Westport (Conn), 1983) at 4 and CP Wolf "The Durkheim Thesis: Occupational Groups and Moral Integration" (1970) 9 JSSR 17 at 19.

b. *Ethics of Roles People Play*

In sociology a social role is defined "a set of ideas associated with a social *status* that defines its relationship with another position in a *social system*."[17] Differently put, a social role refers to the behaviour of a person holding a certain social status.[18] The term *social status* refers to a position in a social system which is equipped with distinct rights and obligations. This behaviour, associated with a certain role, is orientated toward "the patterned expectations of others".[19] A social status, however, is not limited to a single role but may be associated with a complex of roles.[20]

Within sociology, role theory is concerned with social roles and positions and their according implications. According to role theory, there are different categories of social roles.[21] Some social roles are differentiated on cultural and others on purely social grounds.[22] While some roles are assumed voluntarily, others are not. A person may choose to be a lawyer, doctor or soldier; he or she has, however, little influence on assuming the role of being a child or grandparent. An agent will be subject to expectations and obligations depending on the role(s) he or she assumes. A parent will be subject to a special set of obligations towards and expectations by his or her children; a lawyer will be subject to a special set of obligations towards his or her clients and expectations by them. Rudy the lawyer, for example, will be obliged first and foremost to the insurance company he is currently representing and his client will expect him to argue the procedural claim against Dotty's suit. Regardless though of the particularities of moral conflict that bearers of multiple social roles might encounter, sociologists observe that incompatible social roles and

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[17] Allan Johnson *The Blackwell Dictionary of Sociology* (Blackwell, Malden (MA), 2000) at 263; alternatively, a social role is defined as "the expected behaviour associated with a *social position*. A position is simply the label or the means of identifying a particular social role, and often [...] the two terms are used interchangeably"; G Duncan Mitchell (ed) *A New Dictionary of Sociology* (Routledge and Kegan Paul, London, 1979) at 159. Compare also Dennis Wrong and Harry Gracey *Readings in Introductory Sociology* (2nd ed, Macmillan, New York, 1972) at 74-104.

[18] The Stanford Prison Experiment is an example for the power of roles; see Michael Gottlieb "Executions and Torture: The Consequences of Overriding Professional Ethics" (2006) 6 Yale J Health Pol'y L & Ethics 351 at 382.

[19] Robert Merton *On Theoretical Sociology* (Free Press, New York, 1967) at 41.

[20] Ibid, at 42; further Richard Hilbert "Merton's Theory of Role-Sets and Status-Sets" in Jon Clark, Celia Modgil and Sohan Modgil (eds) *Robert K Merton. Consensus and Controversy* (Falmer Press, London, 1990) 177 at 177.

[21] See Robert Merton *Social Theory and Social Structure* (3rd ed, Free Press, New York, 1968) at 41 and 42.

[22] Roles that are differentiated on cultural grounds include those that men and women hold in raising children. These roles depend on cultural expectations towards the person holding the role. Roles differentiated on purely social grounds include those as hair dresser and construction worker. Social roles depend on the expectations by society towards the person holding the role. Compare S Frank Miyamoto "The Impact on Research of Different Conceptions of Role" (1963) 33 Sociological Inquiry 114.

conflicts of roles typically lead to significant frustrations.[23]

Turning to the particularities of moral conflict and in accordance with the aforesaid, *role morality* can be defined as set of moral rules and principles a person subscribes to when assuming a position within a social system that is associated with a specific set of ideas.[24]

The question was raised whether morality can be "role-free".[25] This would appear possible if a person could assume a position which would not be associated with a specific role.[26] If by definition, a role depends on a social position and morality depends on social context, morality can never be free from all considerations in regard to the respective moral agent's role.

In order to further the analysis into the functioning of morality in the context of social roles, however, it appears useful to apply a more narrow definition of the term *role morality*. From here onwards, the term *role morality* will refer to the sum of moral rules and principles a person subscribes to when assuming a position within a social system that is associated with a specific set of ideas and where this position is differentiated on social grounds and voluntarily assumed.[27] Limiting the object of study to roles differentiated on cultural grounds and voluntarily assumed will allow contrasting role morality to *ordinary morality* which is widely perceived as applicable to all roles that anyone may assume at any time and for any reason.[28]

Even though role morality would include moralities associated with all roles differentiated on social grounds and voluntarily assumed, the role that philosophers concerned with role morality have shown the most interest in is the role of professionals.[29] This special interest may be due to the fact that professional associations regularly issue written codes of ethics that allow for clearly defining a specific set of applicable moral rules and principles that again can easily be contrasted to other

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[23]Robert Merton, above n 21, at 170.

[24]The role of a lawyer, for example, is associated with a set of ideas about lawyers in relation to clients and courts. These ideas include, for example, the belief that a lawyer will be more competent in dealing with the client's legal issues than the client him- or herself; Allan Johnson, above n 17, at 263

[25]Compare Ted Schneyer "Moral Philosophy's Standard Misconception of Legal Ethics" (1984) Wis L Rev 1529 at 1532; Benjamin Freedman "What Really Makes Professional Morality Different" (1981) 91 Ethics 626 at 626.

[26]Compare Benjamin Freedman, above n 25, at 626.

[27]Bernard Williams seems to consider something of the like; Bernard Williams "Professional Morality and Its Dispositions" in David Luban (ed) *The Good Lawyer* (Rowman & Allenheld, Totowa (NJ), 1984) 259 at 259. The basic differentiation between acquired and non-acquired obligations was suggested by Benjamin Freedman; Benjamin Freedman "A Meta-Ethics for Professional Morality" (1978) 89 Ethics 1 at 5.

[28]Compare Bernard Williams, above n 27, at 259.

[29]Law including notary, accounting, nursing, medicine including dentistry and pharmacy and to a certain degree also teaching are widely recognised as professions. See further below p 9.

moral systems. Another role comparable to the role of professionals, in that respect, is the role of employees in business corporations. Similar to the role of professionals their role is differentiated on social grounds and they may be subjected to a distinct morality of role based on a written code of ethics.

The subsequent sections will be concerned with the specifics of both professional and corporate morality. Authors that have shown particular interest in conflicts between personal convictions and obligations of professional morality have developed numerous theories in regard to how these conflicts may be dealt with.

III *Professional and Corporate Morality*

a. *Development of Professional Morality and Sources of Professional Ethics*

The idea that professionals are subject to specific moral rules is not new. The Hippocratic Oath, as the principle governing the medical professions, may be the oldest code of ethics known.[1] During the middle ages in Europe craftsmen formed guilds and subjected themselves to strict codes of conduct.[2] Emile Durkheim pointed out that the industrial division of labour led to a division of society and had a disruptive effect on common morality. People, however, that conducted similar work, would form groups. These groups, again, would be considered societies which would institute occupational ethics as form of self-regulation.[3] According to C P Wolf, this thesis may not be applied equally to all occupational groups but is best applied to the professions.[4] Over time, the idea that professionals are subject to particular moral obligations has become one of the characteristic features of a profession.

Numerous authors describe the characteristics defining a profession.[5] Their definitions differ in parts. However, the common understanding is that a profession requires institutionalised education and training in a field of expertise particular to the profession. The services rendered by professionals require knowledge intellectual in nature and a qualitatively high level of expertise. The people rendering such services enjoy work autonomy. In order to uphold the quality of professional services, entry into a profession and membership are restricted to those qualified;

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[1] Russell Hardin "The Artificial Duties of Contemporary Professionals" (1990) 64 Soc Service Rev 528 at 531; for the wording of the Hippocratic Oath see "The Hippocratic Oath" <www.nzma.org.nz>.

[2] Further Emile Durkheim *Professional Ethics and Civic Morals* (Greenwood Press, Westport (Conn), 1983).

[3] CP Wolf "The Durkheim Thesis: Occupational Groups and Moral Integration" (1970) 9 JSSR 17 at 25.

[4] Ibid, at 27.

[5] See for example Jack Behrman *Essays on Ethics in Business and the Professions* (Prentice Hall, Englewood Cliffs (NJ) 1988) at 96 and John Cullen *The Structure of Professionalism: A Quantitative Examination* (PBI, New York, 1978) at 12. See also Magali Sarfatti Larson *The Rise of Professionalism* (University of California Press, Berkeley, 1977). Nursing, accounting, law including notary, medicine including dentistry and pharmacy and to a certain degree also teaching are widely recognised as professions.

professionals are certified or licensed. The basic notion is that the professions provide fundamental services to the community.[6] This is the reason why professions are regulated either by the state or by professional associations as "state proxies".[7] A professional association accounts for the profession's system of self-governance and colleague control and implements a code of conduct or ethics concerned with the individual professional's behaviour towards other members and members of society. The professions are by definition dedicated to serve society. Accordingly, members of a profession will also provide services to people in distress that lack the ability to pay.[8] Professional roles - like other roles - regularly give special prominence to the needs of certain individuals or groups.[9] While some professions have a wider focus of ethical concern, others have a more narrow focus. A medical professional is obliged primarily to his patient, an accountant is obliged primarily to the public and a lawyer is obliged to his client as well as to the court.

Magalli Sarfatti Larson sociologically analysed the professions and found that there is a trend toward professionalisation including a trend toward the development of new professions.[10] This observation is backed by CP Wolf, who similarly observes an ongoing professionalisation of society. This trend, so Wolf, is based on the growing demand for a highly skilled workforce.[11] While growing in size and number, the professions are increasingly externally governed. Richard Devlin and Porter Heffernan describe a trend to deny professions their traditional right to self-governance.[12] The effects of these trends are twofold: Effective codes of ethics will be of increasing importance in an environment of ongoing professionalisation. At the same time, however, authority to issue such codes is shifted from professional associations as "state proxies" to the state and thereby away from the professions.

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[6] Richard Greenstein "Against Professionalism" (2009) 22 Geo J Legal Ethics 327 at 349.

[7] Ibid, at 328. In regard to the legal profession, that will be of further interest in the course of this paper, Duncan Webb points out that "historically the legal profession has been left to regulate itself" Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis NZ, Wellington, 2006) at 9. As arguments in favour of self regulation, Webb emphasises the need for independent professionals and that the area of regulation is highly special; Duncan Webb, above, at 95.

[8] See Jack Behrman *Essays on Ethics in Business and the Professions* (Prentice Hall, Englewood Cliffs (NJ) 1988) at 97 and Magali Sarfatti Larson, above n 5, at 208.

[9] Professional morality is not special in requiring the moral agent prefer certain people or groups over others. This concept applies to ordinary ethics as well; compare Alan Goldman *The Moral Foundation of Professional Ethics* (Rowman and Littlefield, Totowa (NJ), 1980) at 5. Richard Greenstein accordingly finds that it is not about roles but more about relationships. In lawyering, for example, the client mandates priority over other individuals the lawyer might be obliged to; Richard Greenstein, above n 6, at 354-357. Similarly, for a mother or father the own child mandates priority over other children.

[10] Magali Sarfatti Larson, above n 5, at 178.

[11] CP Wolf, above n 3, at 28.

[12] Richard Devlin and Porter Heffernan "The End(s) of Self Regulation" (2008) 45 Alta L Rev 5.

b.   *Scope of professional morality*

Before turning to the central issue of conflict, it is necessary to understand the exact scope of professional morality. The scope describes the components professional morality consists of. Undoubtedly, the relevant code of ethics is one of the "prime ingredients" to professional morality.[13] Considering, however, the definition of role morality, professional morality comprises the sum of moral rules and principles that apply to members of a profession when acting in their capacity as professionals. Not all of the moral rules and principles applicable would need to be part of the relevant code of ethics. Effectively, there are two ways of defining the exact scope of professional morality. On one view professional morality would constitute the sum of moral norms and principles that are defined by the respective code of professional ethics. This would mean that every act permitted by the code would be considered to accord with professional morality. Alternatively, professional morality would constitute the sum of moral norms and principles that define what behaviour is morally permissible within the limits set by the respective code. This would mean that certain acts permitted by the code could be prohibited by rules that are part of professional morality, yet, not part of the code.

Defining the exact scope of professional morality, it appears one can compare rules contained in codes of professional ethics with legal rules. Legal rules will regularly be aligned with common morality. However, not all rules and principles of common morality need to be codified. In case common morality would demand that *one ought not to lie*, the legal rules applicable within the respective society would not need to include such a rule. Disregarding unwritten norms of common morality will, however, result in informal sanctions by the respective society. Similarly, rules and principles contained in codes of professional ethics will be aligned with the way professionals and their clients commonly consider professionals ought to act. Not all rules and principles professionals and their clients would commonly hold applicable in regard to the way professionals act, however, need to be codified. Disregarding unwritten norms concerned with professional conduct may, nevertheless, result in formal and informal sanctions. Considering this, it appears that linking professional morality to the respective institution itself is the most adequate way of defining it in scope. Professions are institutions and professional roles depend on and are defined in accordance with the respective profession.[14] As institutions

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[13] Patricia Rizzo "Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator" (1991-1994) 35 Cath Law 79 at 91.

[14] Compare also W Bradley Wendel "Personal Integrity and the Conflict between Ordinary and Institutional Values" (2007) The Social Science Research Network <www.ssrn.com> at 1; Wendel

the professions are subject to change and so are the roles held by professionals. Professional morality, therefore, must be defined as comprising all rules and principles that deal with how professionals ought to live their professional role in the institution as it currently is modelled.[15]

After having established the scope of professional morality, the subsequent section will be concerned with the sort of conflicts that may arise on the level of the moral agent when that moral agent is subjected to professional moral obligations.

c.   *Conflicting Moralities*

In order to understand the conflicts that potentially arise, it is important to recall the different moralities that are capable of giving rise to (possibly opposing) moral obligations.

So far five main systems of morality were identified: *Personal morality* was defined as being the set of rules and principles an individual person subscribes to. *Common morality* was defined as lowest common denominator of personal moralities within a certain society. *Role morality* - in the narrow sense of the word - was defined as set of morals that is associated with a role which is differentiated on purely social grounds and voluntarily assumed. *Professional morality* was defined as comprising all rules and principles that deal with how we ought to live our professional role in the institution as it currently is modelled and resembles one particular morality of role. Professional morality is a specific form of role morality. *Ordinary morality*, on the other hand, was defined as set of morals anyone may subscribe to at any time and for any reason. Ordinary morality is contrasted to role morality. Ordinary morality can refer to common morality and would comprise those rules and principles of common morality that do not refer to morality of role. Ordinary morality can also refer to personal morality and would comprise those rules and principles held applicable by a person without special regard to his or her role. The latter shall be referred to as *personal ordinary morality*.

In most cases common and personal, ordinary and role morality - the latter including professional morality - will overlap. Regularly, obligations under professional morality will not be counterintuitive in regard to ordinary morality. However, there

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distinguishes between ordinary and institutional values. Ordinary moral values give all persons a reason for action. Institutional values give reason only to people associated with the according institution.

[15]Professional and corporate morality would be considered universal and absolute in nature referring to the respective institution in its current state thus fulfilling the according requirements proclaimed by Gert; Bernard Gert *Morality. Its Nature and Justification* (Oxford University Press, New York, 2006) at 114.

are examples which show that moralities can conflict. In some instances common and ordinary morality may suggest that professional obligations ought to be disregarded.[16] For instance, a lawyer, being aware that a certain witness is truthfully testifying to the disadvantage of his client, may deliberately question the witness in a way that judge and jury are left with the impression that the witness is not credible. A medical practitioner may decide not to disclose a patient's medical condition to a third person even though there is a significant risk that the patient will infect that said third person.

The question of possible conflict between obligations of professional and such of personal ordinary morality is similar to the question of inter-role conflict referring to other obligations of role. Obligations of role need not be moral in nature. In regard to the sociological implications of role, Bruce Biddle observed that the levels of possible conflict of roles are in fact twofold. He describes inter-role conflicts as conflicts where one person holds two different positions and the according obligations conflict.[17] Intra-role conflicts, on the other hand, refer to a situation where a person holds one position, however, the expectations others have in regard to this position differ.

Whether inter-role conflicts on a moral level are at all possible is debated. Such conflicts could only occur in case a person could be subject to opposing moral obligations. Advocates of *Emotivism*, for example, would argue that moral judgments are nothing but utterances of approval or disapproval based solely on individual emotions.[18] A moral agent cannot, however, be subject to opposing moral emotions. Accordingly, inter-role conflicts in terms of morality would appear impossible. Also, even in case moral agents could experience opposing moral emotions, moral reasoning to resolve conflicts between such emotions would not appear possible. However, it appears to be a fact that moral agents do reason on morals and their according obligations.[19] Emotivism is not capable of explaining this fact. One author who does believe that moral obligations can conflict is Joseph Raz. Accord-

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[16]Christine Parker is concerned with the question of public interest as justification for breaching professional obligations; Christine Parker "Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness" (2002) 25 UNSWLJ 676 at 685.

[17]Bruce Biddle *Role Theory: Expectations, Identities, and Behaviors* (Academic Press, New York, 1979) at 197-199.

[18]Emotivism is a metaethical theory or family of theories. *"Negatively, what these theories have in common is a denial that the primary function of evaluative utterances is to convey true or false information about any aspect of the world. Positively, while differing in detail, they claim that evaluative utterance have the primary function of expressing the speaker's emotions and/or attitudes, and/or of eliciting certain emotions and/or attitudes to others."* Lawrence Becker and Charlotte Becker (eds) *The Encyclopedia of Ethics* (Garland, New York 1992) vol 1 at 304.

[19]Compare, for example, Melanie Killen, Nancy Geyelin Margie and Stefanie Sinno "Morality in the Context of Intergroup Relationships" in Melanie Killen and Judith Smetana (eds), *Handbook of Moral Development* (Lawrence Erlbaum, Mahwah (NJ), 2006) 155 at 158.

ing to Raz, statements that include an *ought* are similar to statements of fact which people consider to be reasons for action.[20] A person, however, may well find that he or she has reason to act in a specific way while finding that at the same time there is reason for him or her to act differently. Social roles, so suggested, may be considered reasons that exclude other reasons meaning that they would override other moral considerations.[21]

Raz's theory is convincing. It is evident that moral rules and principles can conflict.[22] On the basis of conflicting moralities inter-role conflict would, therefore, be possible. Such conflict could occur between rules and principles of ordinary morality held applicable by an agent and rules and principles of role morality.

Intra-role conflicts, on the other hand, are undoubtedly possible and could arise between a professional, subject to obligations of role, and a member of the general public, for example. The latter would expect the professional to act in accordance with common morality.[23] An intra-role conflict would describe the situation in which the professional's actions would accord with professional but breach common morality.

Summing up the aforesaid, a person holding a professional (or corporate) role and thereby holding multiple roles altogether may be subject to opposing obligations. Also, people may have different expectations in regard to the behaviour associated with a specific role.[24] The question arising out of this situation is how the possibility that such conflicts might occur is dealt with in the specific contexts of the different professions.

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[20] Joseph Raz *Practical Reason and Norms* (Hutchinson, London, 1975) at 28.

[21] Compare W Bradley Wendel "Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection" (2006) 34 Hofstra L Rev 987 at 1019.

[22] Roger Trigg "Moral Conflict" (1971) 80 Mind 41 at 42. James Griffin holds that it is likely "one will encounter incompatible moral norms"; James Griffin "Incommensurability; What's the Problem?" in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge (Mass), 1997), 35 at 51. It is heavily debated whether reasoning on moral *values* is possible. This would require that values are comparable. On the respective debate Ruth Chang (ed), above, at 1. Donald Regan on the other hand argues in favour of comparability; Donald Regan "Value, Comparability, and Choice" in Ruth Chang (ed), above, 129. Whether reasoning on moral values is actually possible and how moral reasoning be conducted is, however, irrelevant for the question of whether moral rules and principles can conflict.

[23] On expectations Richard Wasserstrom "Roles and Morality "in David Luban (ed) *The Good Lawyer* (Rowman & Allenheld, Totowa (NJ), 1984) 25 at 32. Most people, for example, would not expect a lawyer to question a witness in a way that judge and jury are left with the impression that the witness is not credible in case the lawyer knew that the witness is truthfully testifying.

[24] Fulfilling these expectations could well be considered an obligation that could be morally relevant.

i. Legal Ethics

Numerous philosophers and legal practitioners are concerned with the situation of legal ethics in the United States. This is mainly due to the particularities of the adversary system and the way it is practiced in the United States.[25] Fairly surprising, the pursuit of justice is not the main guiding principle in lawyers' role morality.[26] Traditionally, the role of a lawyer operating within the adversary system in the way it is practiced in the United States is considered to be that of a neutral partisan - or with slightly depreciative connotation - that of a hired gun to his client.[27] The concept of neutrality requires the lawyer be neutral to a clients ends; the concept of partisanship requires the lawyer be committed to a client and promote the clients ends by all means available within the limits of the law.[28] Murray Schwartz found that when acting as advocate within the adversary system a lawyer will not be morally accountable for promoting a client's interests. Schwartz calls this the "Principle of Nonaccountability".[29]

The traditional concept of role morality found its expression in Model Rule 1.2 (b) of the American Bar Association's Model Rules of Professional Conduct.[30] Rule 1.2 (b) states that a "lawyer's representation of a client [...] does not constitute an endorsement of the client's political, economic, social or moral views or activities." Law is thought to create a sphere of autonomy, basically, "if the code does not prohibit an act, the act is moral."[31]. Within this sphere individuals may act without being held accountable to society as long as they abide by the rules.[32] In effect, a lawyer ought to do everything permitted by law and the applicable code of conduct

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[25] Another and maybe the most decisive reason is that most of the authors concerned with questions relating to the role of lawyers within the adversary system are from the United States. The legal systems of other countries, such as New Zealand, show great similarity to the legal system of the United States. Accordingly, the theories developed may be considered within legal ethics in other jurisdictions, as well. Concerned with the situation in New Zealand Duncan Webb, above n 7.

[26] David Tanovich "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dalhousie L J 267 at 302.

[27] Duncan Webb, above n 7, at 34; "Neutral Partisanship", as William Simon calls it, is widely considered the "standard conception of the lawyer's role"; Gerald Postema "Moral Responsibility in Professional Ethics" 55 N Y U L Rev 63 at 73 and William Simon "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) Wis L Rev 28 at 36. Further on the concepts of neutrality and partisanship compare Patricia Rizzo, above n 13, at 84.

[28] See also Ted Schneyer "Some Sympathy for the Hired Gun" (1991) 41 J Legal Educ 11 at 11.

[29] Murray Schwartz "The Professionalism and Accountability of Lawyers" (1978) 66 Cal L Rev 669 at 671; see also Patricia Rizzo, above n 13, at 95; Greenstein calls this the principle of "No Remainder"; Richard Greenstein, above n 6, at 361.

[30] Michael Boulette "Two Concepts of Role-Morality: In Search of a Normative Language of Legal Ethics" (2009) The Social Science Research Network <www.ssrn.com> at 2; see American Bar Association "Model Rules of Professional Conduct" <www.abanet.org>.

[31] Patricia Rizzo, above n 13, at 82.

[32] Rob Atkinson "Beyond the New Role Morality for Lawyers" (1992) 51 Md L Rev 853 at 855.

or ethics to advance a clients' interests without regard for his own moral convictions. In the example proposed at the beginning of this paper, it would be considered morally wrong if Rudy gave special prominence to his religious convictions and failed to argue the procedural claim on behalf of his client.

Monroe Freedman and Stephen Pepper are two of the main advocates of this traditional concept of role morality.[33] Freedman argues what Alan Gewirth calls the "Separatist Thesis".[34] The *Separatist Thesis* holds that role specific morality "takes precedence over many other aspects of morality".[35] Thereby, professionals are considered to have rights and duties unique to themselves and different from ordinary morality.[36] Freedman further found that a lawyer is subject to regular moral responsibility and accountable to society only until he has entered into a professional relationship.[37] He found that a lawyer will be responsible for entering into a relationship with a client. However, once such relationship has been established the lawyer will be responsible only along the lines of role morality.[38]

Pepper justifies the "amoral role of lawyers" not based on the adversary system but based on the notion of client autonomy.[39] In the libertarian understanding, that coined the adversary system as practiced in the United States, it is the lawyer's primary objective to maximise a client's autonomy.[40] Similar to Freedman, Pepper therefore argues that once a lawyer has entered into a professional relationship, the lawyer is subject to role morality alone.[41]

This traditional concept as advocated by Freedman and Pepper is regarded as problematic. One of the main points of criticism is that the degree of role differentiation implied, requires a similar great degree of moral detachment.[42] Sociologically

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[33] Ibid, at 855; Rob Atkinson refers to this concept as "old role morality".

[34] One argument Gewirth finds against the *Separatist Thesis* is that ordinary morality is far more complex than it appears at first and can accommodate deviations from otherwise valid principles. Also, there is no common morality in the sense that all or even most people share the same opinions on morality in all instances. Therefore, common morality is inapt to serve as comparison; Alan Gewirth "Professional Ethics: The Separatist Thesis" (1986) 96 Ethics 282 at 286.

[35] Ibid, at 283.

[36] Ibid, at 282.

[37] For an overview see also W Bradley Wendel "Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection", above n 23, at 987.

[38] Monroe Freedman "Personal Responsibility in a Professional System" in David Luban (ed) The Ethics of Lawyers (Dartmouth, Aldershot, 1994) 81 at 94.

[39] Stephen Pepper "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) Am B Found Res J 613 at 634.

[40] W Bradley Wendel "Moral Judgment and Professional Legitimation" (2006-2007) 51 St Louis U LJ 1071 at 1081.

[41] Michael Boulette, above n 30, at 14.

[42] On role differentiation compare Richard Wasserstrom "Values and Conflicts in the Professional Role" (1976) 3 Learning and the Law 45 at 46.

speaking, conflicting social roles cause frustration; philosophically speaking, there are significant costs involved for the individual morally detached actor.[43] Authors have addressed this problem in different ways.

(a)   The Lawyer as Friend

Fried for instance, even though defending the adversary system itself, tries to explain the fact that lawyers are committed primarily to their clients and are obliged to promote their clients' interests over the interest of others. Fried suggests the relationship between lawyer and client be understood in a way that the lawyer is somewhat similar to a client's limited-purpose friend.[44] Friendship, in Fried's understanding, is a concept that allows a person to promote a friend's interests over the interests of others. Fried finds that as a legal friend "the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law."[45] In the "arena of legal friendship" personal morality does not transcend to the same degree as it would into the arena of regular friendship.[46] Fried suggests this analogy as a way of looking at the problem and not as means to resolve it.[47]

(b)   Moral Activism

David Luban, on the other hand, advocates what he calls "Moral Activism".[48] According to Luban *Moral Activism* means "accepting rather than denying moral responsibility for law practice, and therefore embracing the prospect that lawyers must confront their clients about the injustice of their causes".[49] *Moral Activism* thus requires lawyers to use "law practice to further justice".[50]

Effectively, Freedman, Pepper and Fried defend the adversary system as practiced

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[43] Katherine Kruse "Lawyers, Justice, and the Challenge of Moral Pluralism" (2005) 90 Minn L Rev 389 at 421.

[44] Charles Fried "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations" (1976) 85 Yale L J 1060 at 1071.

[45] Ibid, at 1073.

[46] Ibid, at 1084.

[47] According to Thomas Schaffer, certain professionals effectively find the concept of friendship between professional and client an alternative to the traditional understanding of professional role morality; Thomas Schaffer *Faith and the Professions* (State University of New York Press, Albany (NY), 1987) at 193.

[48] David Luban "The Inevitability of Conscience: A Response to my Critics" (2008) 93 Cornell L Rev 1437 at 1444.

[49] David Luban *Legal Ethics and Human Dignity* (Cambridge University Press, Cambridge, 2007) at 12.

[50] Ibid, at 11.

in the United States. They find the adversary system to be superior to its alternatives in finding the truth and determining justice.[51] Freedman, Fried and Pepper are advocates of what David Luban calls "an institutional excuse from the requirements of common morality" based on the adversary system as practiced in the United States.[52] Luban believes that conflicts cannot be resolved by preferring one form of morality (role morality or ordinary morality) over another.[53] He finds that there is a tension between ordinary and role morality that cannot be resolved in a straightforward way.[54] Luban argues that obligations of role are defeasible presumptions, meaning ordinary moral obligations are subordinate.[55] Ordinary moral obligations may, however, override these presumptions. It depends on how powerful they are.[56] Luban considers whether the adversary system may provide reasonable justification to deviate from ordinary morality and establish such defeasible presumptions. He finds that the adversary system can excuse only the "slightest moral wrongs. Anything else that is morally wrong for a non lawyer to do on behalf of another person is morally wrong for a lawyer to do as well."[57] Hence, in civil litigation at least, Luban advocates the promotion of justice, rather than client autonomy.

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[51] Duncan Webb, above n 7 at 41.

[52] David Luban "Review Essay: Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice" (1990) 49 Md L Rev 424 at 426. According to Luban, the idea of neutral partisanship rests on this "Adversary System Excuse"; Joram Graf Haber and Bernard Baumrin "The Moral Obligations of Lawyers" (1988) 1 Can J L & Juris 105 at 110. Luban explains that the institutional excuse operates in the form that *the agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing that they are essential to the role; and (4) justifies the role act by showing that the obligation require it.* David Luban "Review Essay: Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice", above, at 425. This excuse is consequentialist in nature and depends on the utilitarian principle; David Luban *Legal Ethics and Human Dignity*, above n 49, at 32 and Duncan Webb, above n 27, at 41. Reviewing his earlier work, Luban found that one could also apply a deontological understanding to his method of justification. Duncan Webb, above, at 432. However, Luban does not argue that such an excuse be impossible on the basis of the criticism the utilitarian principle is regularly subjected to; compare JJC Smart and Bernard Williams *Utilitarianism: For and Against* (Cambridge University Press, Cambridge, 1973). The idea of *Neutral Partisanship* may, as Luban points out, be justified by the institution that it serves; David Luban *Legal Ethics and Human Dignity*, above, at 23. Luban finds that the adversary system serves the moral good in a situation of criminal defence. In civil suits, however, Luban finds that the adversary system to be less justified; David Luban "Review Essay: Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice", above, at 427 and also David Luban "The Adversary System Excuse" in David Luban (ed) *The Good Lawyer*, above n 23, 83 at 91.

[53] David Luban *Lawyers and Justice: An Ethical Study* (Princeton University Press, Princeton (NJ), 1988) at 125.

[54] David Luban "Review Essay: Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice", above n 52, at 443.

[55] Ibid, at 435.

[56] David Luban "The Inevitability of Conscience: A Response to my Critics", above n 49, at 1445.

[57] David Luban "The Adversary System Excuse", above n 52, at 117.

(c)   Mitigating Excess

Ted Schneyer assumes a mediating position between advocates of the "old role morality" and Luban as advocate of the more paternalistic approach of Moral Activism. Similar to Luban, Schneyer finds that in criminal defence lawyers may be excused from the requirements of common morality. Criminal defence, so Schneyer, is where the origin and rationale lie of the "Adversary System Excuse".[58] However, hired-gun ethics can be justified in other areas of law practice, as well. Schneyer finds that "certain areas of law practice are clearly more appropriate for hired-gun thinking" than others.[59] Even though Schneyer basically defends the concept of *Neutral Partisanship*, he is aware of its excess and suggests a mitigating approach by applying some of the ideas that Luban used in constructing his concept of *Moral Activism*.[60] Doing so, according to Schneyer, could include banning legal rules as instrument to harass the opposing party and adjusting the adversary system and introducing a "limited duty to disclose adverse legal authority".[61]

(d)   Responsible Lawyer Approach

Christine Parker describes a much more radical approach that questions the adversary system and thereby the basis of the aforementioned theories. The "responsible lawyer approach" is understood as alternative to the "adversarial advocate approach".[62] Instead of focusing on his role as representative of his client the lawyer focuses on his role as officer of the court being obliged to maintain law and justice. Parker admits, however, that this approach has little tradition in most common law countries.

(e)   Role Differentiation

The aforementioned theories by Freedman, Pepper, Fried and Luban attempt to justify professional morality by referring to the legal system while the theories by Gerald Postema, William Simon, Richard Wasserstrom and Bradley Wendel, for example, directly refer to lawyers and their actions and are concerned with reinterpreting and adjusting obligations of role that lawyers are under. Effectively, Postema,

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[58] Ted Schneyer "Some Sympathy for the Hired Gun", above n 28, at 21.

[59] Ibid, at 24.

[60] Ibid, at 22-27.

[61] Ibid, at 26.

[62] Christine Parker "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" (2004) 30 Monash U L Rev 49 at 61.

Simon, Wasserstrom and Wendel are concerned with whether role differentiation is at all possible, necessary and desirable.

Gerald Postema finds that lawyers' skills depend on their specific moral facilities which again depend on their personal experience.[63] Role differentiation, therefore, is not desirable. In regard to conflicts between personal and professional morals, Postema advocates a so called "recourse role" to bridge these discontinuities.[64] One should "*recognize the unavoidable discontinuities in the moral landscape and* [...] *bridge them with a unified conception of moral personality.* [...] *Each lawyer must have a conception of the role that allows him to serve the important function of that role in the legal and political system while integrating his own sense of moral responsibility into the role itself.*"[65]

Richard Wasserstrom similarly believes that there is a gap between ordinary and professional morality. This gap, however, is not imperative and Wasserstrom argues in favour of closing this gap rather than bridging it.[66] Wasserstrom finds that the interpersonal relationship of lawyer and client is typically morally defective. The client is not treated with respect and dignity.[67] The relationship between lawyer and client is one of inequality.[68] Rather, Wasserstrom finds that one should "not do away with the professions entirely, but weaken or eliminate those features of professionalism that produce these kind of defective, interpersonal relationships."[69] According to him, lawyers ought to "see themselves less as subject to role-differentiated behaviour and more as subject to the demands of the moral point of view."[70]

William Simon, on the other hand, finds that the usual accounts of role morality in legal ethics tend to exaggerate the necessary distance between ordinary morality and legal ethics.[71] According to him, the gap perceived by Postema and Wasserstrom is the result of common misinterpretation. Simon advocates a more contextual approach.[72] Decisions about justice, so Simon, are legal judgements and are

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[63] Gerald Postema "Moral Responsibility in Professional Ethics", above n 27, at 76. See also W Bradley Wendel "Moral Judgment and Professional Legitimation", above n 40, at 1086.

[64] Gerald Postema "Moral Responsibility in Professional Ethics", above n 27, at 83.

[65] Ibid, at 82.

[66] Ibid and William Simon "Moral Freaks: Lawyers' Ethics in Academic Perspective" (2009) NELLCO Legal Scholarship Repository <www.lsr.nellco.org> at 2. Wasserstrom finds that the burden of proof for role-differentiated behaviour lies with the lawyers and there are no compelling reasons that would grant them to exempt themselves from ordinary morality; Joram Graf Haber and Bernard Baumrin, above n 52, at 107.

[67] Richard Wasserstrom "Lawyers as Professionals: Some Moral Issues" (1975) 5 Hum Rts 1 at 15.

[68] Ibid, at 18.

[69] Ibid, at 19.

[70] Ibid, at 12.

[71] William Simon, above n 63, at 2.

[72] See William Simon *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, Cambridge (MA), 1998). Simon outlines what he calls the "Contextual View"; William

not similar to personal preferences or applications of ordinary morality.[73] Law, according to Simon, is ultimately rooted in morality. A lawyer, therefore does nothing but enforce public values which are an inherent part of law. Conflicts between law and morality can be redescribed as conflicts between legal norms.[74] These conflicts can be resolved in terms of a contextual interpretation of the law.[75] A lawyer's role should, therefore, be regarded as being connected to and not separated from ordinary morality.[76]

Bradley Wendel also finds role differentiation to be undesirable.[77] Yet, he defends what he calls "Professionalism".[78] Professional skill ought to be technocratic, neutral in regard to values and objectives.[79] Lawyering requires interpreting legal rules and that in a way that law "will continue to have the capacity to coordinate social action against a background of persistent first-order normative disagreement."[80] However and according to Wendel, lawyers have moral obligations both towards their clients and towards the law as institution.[81] Hence, a lawyer is not just a client's agent but needs to regard the interests of third parties when interpreting the law.[82] Wendel advocates bridging remaining discontinuities between ordinary and institutional values by introducing the term *personal integrity* in the sense of maintaining fidelity over time to one's own commitments and loyalties.[83]

All of the above mentioned theories have in common that they claim universality. They do not consider that one theory might work in one individual case and fail in another. There is one notable exception from this rule though. Katherine Kruse (simply) suggests accepting the possibility of moral conflict and applying a "moral

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Simon, above, at 138. Simon finds that lawyers "should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."

[73] Ibid.

[74] David Luban "Reason and Passion in Legal Ethics" (1999) 51 Stan L Rev 873 at 875.

[75] Katherine Kruse, above n 43, at 428.

[76] William Simon "Moral Freaks: Lawyers' Ethics in Academic Perspective", above n 66, at 28.

[77] W Bradley Wendel "Value Pluralism in Legal Ethics" (2000) 78 Wash U L Q 113 at 205.

[78] Also referred to by him as "Weberian conception of professional expertise" Compare W Bradley Wendel "Moral Judgment and Professional Legitimation", above n 40, at 1075-1076; W Bradley Wendel "Motivation, Morality, and the Professionalism Movement" (2001) 52 S C L Rev 557 at 560 and W Bradley Wendel "Professionalism as Interpretation" (2004-2005) 99 Nw U L Rev 1167 at 1168. In regard to the Max Weber compare Max Weber "Der Sinn der "Wertfreiheit" der soziologischen und ökonomischen Wissenschaften" (1917) in Max Weber *Gesammelte Aufsätze zur Wissenschaftslehre* (Mohr, Tübingen, 1988) 489.

[79] W Bradley Wendel "Moral Judgment and Professional Legitimation", above n 40, and 1081.

[80] W Bradley Wendel "Professionalism as Interpretation", above n 78, at 1167.

[81] Michael Boulette "Two Concepts of Role-Morality: In Search of a Normative Language of Legal Ethics" (2009) The Social Science Research Network <www.ssrn.com> at 30.

[82] W Bradley Wendel "Professionalism as Interpretation", above n 78, at 1168 and 1177.

[83] W Bradley Wendel "Personal Integrity and the Conflict between Ordinary and Institutional Values" (2007) The Social Science Research Network <www.ssrn.com> at 6.

conflict of interest analysis".[84] She finds that lawyers should be able to refuse representation on moral grounds and should be prohibited from representing clients "with whom they fundamentally disagree on moral grounds".[85] Kruse does not provide a theory that attempts to resolve conflicts of role on theoretical grounds; she rather accepts their inevitability. In this respect her theory does not fit in with the other theories mentioned. Nevertheless, a "moral conflict of interest analysis" is a way of dealing with the underlying problem.

Despite the fact that most authors dealing with professional ethics and role morality concentrate on legal ethics, other systems of professional ethics, such as medical ethics, appear to pose similar questions. Before turning to the individual theories and comparing them, the following paragraphs will provide a brief overview over the theories provided by authors in regard to other systems of professional ethics, corporate ethics and role morality in general.

ii. *Medical Ethics and other Systems of Professional Ethics*

The legal profession is not the only profession faced with the challenge of opposing moral obligations. By definition all professions are governed by a code of conduct concerned with the individual professional's behaviour towards other members and members of society. Professionals are required to adhere to higher standards of morals than lay people. This rule accounts for legal professionals as well but is much more obvious for members of other professions.

The professions, that are regularly thought to have the highest moral standards, are the medical professions governed by the Hippocratic Oath as principle and code of conduct.[86] Regularly, the obligations that medical professionals are subject to under their oath are understood to outweigh those that medical professionals are subject to under other norms.[87] However, the ethical questions that medical professionals encounter are regularly considered to be questions of ordinary morality and the need for role differentiation in the medical professions appears to be lower than in the legal profession. Medical practitioners rarely experience conflicts of the sort that legal practitioners do; conflicts of role are less an issue. Some issues that do, however, touch upon the aspect of conflicting role obligations include questions of confidentiality and paternalism towards patients.[88] Michael Gottlieb analysed cases

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[84]Katherine Kruse, above n 43, at 393.

[85]Ibid, at 458.

[86]For the wording of the Hippocratic Oath see "The Hippocratic Oath" <www.nzma.org.nz>.

[87]Compare Judith Andre "Role Morality as a Complex Instance of Ordinary Morality" (1991) 28 Am Phil Q 73 at 74.

[88]Benjamin Freedman examines the problem of confidentiality in the practice of medicine and psy-

in which professional obligations that medical practitioners are subject to conflict with obligations that soldiers and other members of the executive branch are subject to referring to physicians assisting in military interrogations and executions.[89] Gottlieb argues in favour of a primacy of the obligations of role as medical practitioner over obligations of competing roles. His arguments are based on a consequentialist account of ethics.[90] None of the authors concerned with the according issues, however, appear to offer viable solutions that may be generalised to the problem of conflicting moralities.

Other professions similarly have high standards in regard to professional morality. However, literature on accounting and nursing ethics, for example, is limited to descriptive accounts of the applicable standards.[91]

The major difference between legal ethics and other forms of professional ethics appears to be the degree of role differentiation that may become necessary. This is described by Alan Goldman. He analyses different professions in regard to the ethics their members are required to subscribe to.[92] According to him, certain professions require a higher degree of role differentiation than others. Members of such professions only have a very limited authority to act on their personal moral perceptions.[93] It appears, the degree of role differentiation required is related to the likelihood of conflict. Further, it appears that the reason for strong role differentiation lies within the nature of the respective professionals duties: Unlike other professionals, lawyers *represent* and thereby act and speak on behalf of their clients as party they are primarily obliged to. In doing so lawyers are required to promote their clients means and ends. Accordingly, the more a role requires acting and speaking on behalf of others the higher the potential for conflict.

An area closely related to professional ethics that increasingly comes to the fore is the area of corporate ethics. Business corporations share a great deal of similarities

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chotherapy; Benjamin Freedman "A Meta-Ethics for Professional Morality" (1978) 89 Ethics 1. Freedman finds the concept of confidentiality to be more stringent in professional than in ordinary morality. This would lead to inconsistencies.

[89] Michael Gottlieb "Executions and Torture: The Consequences of Overriding Professional Ethics" (2006) 6 Yale J Health Pol'y L & Ethics 351.

[90] Ibid, at 357.

[91] Numerous authors have dealt with the ethical questions involved in accounting. Jack Maurice *Accounting Ethics* (Pitman, London, 1996) and Ronald Duska and Brenda Shay Duska *Accounting Ethics* (Blackwell, Malden (MA), 2003). In regard to nursing ethics see Sara Fry and Megan-Jane Johnstone *Ethics in Nursing Practice: A Guide to Ethical Decision Making* (3rd ed, Wiley-Blackwell, Chichester (UK), 2008) and Anne Bishop and John Scudder *The Practical, Moral, and Personal Sense of Nursing: A Phenomenological Philosophy of Practice* (State University of New York Press, Albany (NY), 1990).

[92] Alan Goldman *The Moral Foundation of Professional Ethics* (Rowman and Littlefield, Totowa (NJ), 1980) at 2.

[93] Ibid, at 283.

to the professions as previously defined.

d. Corporate Ethics

The number of international corporations is growing and so is their influence on global economy. Large corporations will employ tens of thousands of people and conduct business operations worldwide. Business operations on such scale require a highly skilled workforce. Regularly, highly educated individuals will be employed only after rigorous testing and subsequently undergo further training. The movement towards social responsibility suggests that business organisations are understood to have a responsibility towards society similar to professionals. Also, business corporations increasingly tend to implement codes of conduct or ethics for their employees in regards to their behaviour amongst each other and towards members of society. Many corporations have already implemented according codes and the trend is ongoing.

Codes of ethics are instruments in countering white collar crime. Stakeholders and legislators alike promote the implementation of such codes.[94] The gap between the professions and business organisations that reach a certain size has become narrow. Professional and corporate contexts are increasingly comparable.[95] Effectively, working in a corporate context is to accept a particular set of obligations.[96]

The rules and principles of corporate ethics may not necessarily be aligned with ordinary morality. This is pointed out by Milton Regan. While professional ethics tend to promote special obligations towards patients and clients, corporate ethics have a tendency to promote special ethical obligations towards the corporation itself. Regan finds that companies may develop very "firm-specific fairness norms".[97]

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[94]For an example of a legislative attempt to promote the implementation of such rules compare the United States Sentencing Commission's Federal Sentencing Guidelines. The Guidelines can be accessed via <www.ussc.gov>. The Guidelines establish rules for assessing relevant factors and concern sentences against individuals and organisations that committed federal crimes. With regard to organizations § 8 B 2.1 of the Federal Sentencing Guidelines establishes that promoting an organisational culture that encourages ethical behaviour will be considered as mitigating circumstance. The Guidelines state that "*to have an effective compliance and ethics program* [...] *an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.*" [...]. The United States Federal Sentencing Guidelines describe the characteristics of an effective compliance and ethics program. See also John Copeland "The Tyson Story: Building an Effective Ethics and Compliance Program" (2000) 5 Drake J Agric L 305.

[95]Robert Solomon "Corporate Roles, Personal Virtues: An Aristotelean Approach to Business Ethics" (1992) 2 Business Ethics Quarterly 317 at 328.

[96]Ibid, at 327.

[97]Milton Regan "Moral Intuitions and Organizational Culture" (2007) 51 St Louis U LJ 941 at 981.

A cooperation will promote the "agent character" of its employees. Behaviour and attitudes that benefit the company, however, do not necessarily also benefit parties outside. A good "agent character" may go along with a not so good "general character".

Two main aspects distinguish corporate and professional contexts in regard to conflicts of roles and moralities: Similar to lawyers and opposed to other professionals, employees of corporations *represent* their corporations. By according to corporate policies they speak and act on behalf of their employers. Prima facie this would suggest a high degree of role differentiation may be required as well. However, the corporate policies, that would correspond to a clients means and ends in lawyering, are regularly maintained over time. It is unlikely that a company that produces children's toys and subscribes to principles of fair trade on one day will start producing weaponry in low wage countries the next. Therefore, a moral agent may well enter into a context where corporate and personal morality conflict when taking up employment. It is less likely, however, that a context within which corporate and personal morality do not conflict will change and the agent thereby be exposed to conflicting moralities.

The second aspect that distinguishes corporate and professional contexts concerns the growing numbers of corporations that operate across international borders. Accordingly, Marissa Pagnattaro and Ellen Peirce distinguish between corporate codes of conduct and codes of conduct for multinational corporations.[98] While corporate codes address only standards and requirements of one state, codes for multinational corporations refer to standards and requirements of a greater number of states. Considering that common morality may differ between Saudi Arabia and the United States, for example, and that common morality may not be fully aligned with personal morality but that common and personal morality show certain interdependencies, it is more likely that employees knowingly or unknowingly enter into a context that is inconsistent in terms of personal and corporate morality. Conflicts of role will grow more likely as corporations go international.

Considering the aforesaid, being an employee in a large - possibly international - corporation equals being a professional in many ways. Especially international corporations will find that their employees will experience conflicts of role similar to the conflicts encountered by legal professionals. There is little to suggest that the theories developed within legal ethics may not well be applied to corporate ethics

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[98] Marisa Anne Pagnattaro and Ellen Peirce "Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws" (2007) 28 Berkeley J Emp & Lab L 375 at 378.

as well.

e.   *Role Morality in General*

So far, it appears, professional and corporate morality may demand different than ordinary morality. In regard to conflicts that occur, authors have suggested various theories and approaches. Authors suggested (1) that professional morality creates a sphere of autonomy, (2) that professional morality may be justified due to the system that it serves, (3) that professional morality grants special prominence to client's interests and this is consistent with ordinary morality, and (4) that the gap is altogether over determined.

Much has been said regarding role morality of legal professionals and comparatively little has been said on the morality of roles apart from what has been said in regard to legal ethics. Several authors, however, have offered a more general approach to the underlying questions without referring to a specific profession:

Similar to Luban, Alan Gewirth, for example, finds that professional morals that are meant to override other moral rights can only then be justified if the institution which these professional morals serve is itself justified.[99] On the other hand and further to Luban, Gewirth finds that not every form taken by an institution, that is morally justified, is justified automatically.[100] Hence and picking up on the example of legal ethics, while a particular legal system may be institutionally justified, not every form of lawyering is necessarily justified, as well.

Obligations of role, however, need not necessarily be justified by referring to a particular institution such as the legal system. Judith Andre argues that obligations of role have moral value based on the expectations that they generate. Expectations are of value in ordinary morality due to the fact that "predictability is a necessary condition of human social life."[101] Fulfilling expectations, therefore, is good. The notion, so suggested, is similar to a *promise* generating expectations in that a person will adhere to the rules of the game.[102] It is further - and quite similarly to the aforementioned notion of *promise* - argued that roles may be considered *contracts* binding the bearer of the role in exchange for consideration by others.[103]

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[99] Alan Gewirth "Professional Ethics: The Separatist Thesis" (1986) 96 Ethics 282 at 290.

[100] Ibid, at 299.

[101] Judith Andre, above n 87, at 75.

[102] Ibid. The idea that role morality is similar to keeping promises was inspired by John Rawls; W Bradley Wendel "Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection", above n 23, at 990.

[103] Judith Andre, above n 87, at 77; on the other hand, not every person assuming a certain role will find that he receives consideration.

Finally, there are also authors that deny that role morality is capable of providing exceptions to ordinary moral convictions. Arthur Applbaum analyses conflicts between personal morality and professional ethics in general and their resolution. According to him, professional "roles do not overwrite moral prohibitions with moral permissions" but they "*can* overwrite personal moral permissions with moral obligations".[104] Accordingly, Applbaum finds that the notion of role cannot provide justification to breach ordinary morality.

The range of theories provided is similar to the range of theories provided in the area of legal ethics. Authors consider that morality of role may justify exceptions from ordinary morality to the fullest, to a limited extent or not at all. In addition, however, authors that are concerned with morality of role on a more general level consider the distinct concepts of *promise* and *contract* for justifying exemptions to otherwise strict moral rules.

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[104] Arthur Isaak Applbaum *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton University Press, Princeton (NJ), 1999) at 109.

IV Conflicts of Role on the Level of the Individual Agent

There are numerous theories and approaches to the idea of role morality and the question of conflict between role morality and personal ordinary morality. Most authors find that role morality and ordinary morality may conflict in certain situations. Conflict is undesirable. For the individual moral agent conflict results in frustration; for the institution issuing role morality conflict bears the risk that ordinary moral obligations may override obligations of role. On the other hand, conflict indicates that the moral obligation under role morality are considered relevant. The primary question is what conflict ultimately depends upon. The secondary question then will be, how conflict can be resolved or prevented.

As described, any person has certain moral convictions and will hold his or her personal morals to be universal and applicable in general. A moral agent will not accept a moral rule or principle that contradicts his or her own moral convictions. A person, for example, who accepts the moral rule that one ought not to kill an innocent person will expect that this rule be universally accepted and generally applied. That same person will not accept a rule that permits killing innocent people. The demand for universality, however, will never fully be met. Diversity in regard to the concepts of personal morality seems to be a fact at least to a certain degree.[1] While one person will find that abortion is morally acceptable, another person will strictly oppose abortion. Even if one found that there is one highest end and one method for determining right and wrong alone, it is highly likely that there will be disagreement on the interpretation of certain situations and in the judgment of certain acts. Personal morality, therefore, is not a definite position. Role morality, however, is an absolute position. A code of medical ethics, for example, may state that abortion is acceptable in terms of medical ethics (or not). Given the aforesaid and considering that conflict of personal morality and morality of role depends on the relation of the two to one another, conflict ultimately depends on the individual agent. To stick with the proposed example, a medical practitioner who finds abortion to be morally acceptable will not experience conflict in case the applicable code of medical ethics

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[1]Personal morality, as stated above, is influenced by numerous factors and in morally diverse societies common morality is not a sustainable stabilizing factor.

provides for abortion to be considered acceptable. A medical practitioner practicing under the same code but opposed to abortion will experience conflict.

In regard to the resolution of such conflict, it was suggested that role morality is apt to create a sphere within which ordinary morality is limited in applicability. Such was suggested by Freedman and Pepper and further elaborated by Luban. If professional morality were incapable of creating such sphere, professional moral obligations could justify exceptions to ordinary moral obligations in individual cases and based on concepts such as *friendship, promise* or *contract*. Finally, Schneyer, Postema, Wasserstrom, Simon and Wendel are concerned with the question of how differences between ordinary moral obligations and obligations of role can be mitigated or bridged or how the gap between them may be closed.

Luban suggested that the adversary system as practiced in the United States is not capable of creating a sphere within which ordinary morality is limited in applicability for civil litigation. However, he suggested that in the case of criminal defence a sphere of limited moral accountability in regard to standards of ordinary morality may be justified. Accordingly, other systems that benefitted the overall good could justify such exceptions as well. The institutional excuse, as previously discovered, requires the acceptance of the utilitarian principle. Consequently, a person, who does not hold that the promotion of *the greatest good for the greatest number* is the ultimate moral end, will not rely on the institutional excuse. A sphere within which ordinary morality is inapplicable, therefore, will not be held justified by all.

Other authors considered whether role morality could justify exceptions to ordinary morality based on the notions of *friendship*, *promise* or *contract*. Fried, in the area of legal ethics, considered the concept of friendship as justification for disregarding personal moral convictions for the benefit of the lawyer's client. He considered the lawyer to be bound to his client by a special form of friendship. Other authors suggested that accepting a particular role includes accepting the obligations that come with that role. Similar to a person entering into a contract or giving a promise, the person holding that role would be bound by the obligations associated with that role. Certainly, a person holding a role could feel bound by the concepts mentioned. This would be the case if the according concepts were laid out in his or her respective personal morality. In some systems of personal morality such concepts would be considered constituting reasons to deviate from ordinary morality more strongly than in others, however. A person, who accepts the utilitarian principle, will consider breaking a contract or promise in case it serves *the greatest good for the greatest number* while a person who subscribes to a deontological form of justification may not. The said concepts, therefore, will hardly be capable

of justifying obligations under role morality on a general level. When suggesting to mitigate or bridge differences or close the gap between ordinary moral obligations and obligations of role Schneyer, Postema, Wasserstrom, Simon and Wendel effectively accept that obligations of role will not be capable of justifying exceptions to ordinary moral obligations on a general level. Rather, conflicts ought to be avoided by reinterpreting or adjusting obligations of role.

Summarising the aforesaid, as the question of moral conflict depends on the individual agent and his personal morality, so does the resolution of moral conflict. Moral obligations under morality of role will hold moral weight only if they are justified along the same lines as personal morality. In regard to the basic differentiation between deontological and teleological ethics, a person will either consider the result of an action or the act as decisive. A person adhering to a deontological method of justification will not accept an obligation as having moral weight in case said obligation is based on teleological considerations. Conflicts of role in regard to moral obligations are conflicts between obligations of role and obligations under ordinary morality. Effectively, however, conflicts of role are conflicts within personal morality. Attempts to justify role morality and the according obligations that rely on concepts that do not consider the fact of moral diversity are likely to fail.

The conclusion must therefore be, that the theories presented especially by authors from the field of legal ethics all have their merits. A person holding a particular role may, for example, well consider that obligations of role justify exceptions from ordinary moral obligations based on that the system the role serves benefits the overall good. The necessary precondition for an according understanding would, however, be that that person held that promoting *the greatest good of the greatest number* is the ultimate moral end. On the other hand, all theories presented are defective insofar as the normative theories individuals use to justify personal morality are defective. The aforementioned institutional excuse, for example, relies on the utilitarian principle. This principle is subject to criticism by those that consider the act itself and not the result of the action to be decisive in determining whether the act is right or wrong.

Basically, a monistic theory of ethics that can be justified to all relevant moral agents is the primary precondition for a monistic theory to professional and corporate ethics. Such a monistic theory, however, is not within reach. It is unlikely that the conflict between teleological and deontological ethics, for example, will be resolved in the near future. This situation is not satisfactory considering that professional and corporate moralities serve to prevent professionals and employees from

abusing their "societally mandated power".[2] Professional associations and business corporations need to find a way to accommodate the fact of moral diversity in order to render professional and corporate morality as effective as possible and *effective* in this case means justifying role morality to as many moral agents as possible.

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[2]Kevin Gibson "Contrasting Role Morality and Professional Morality: Implications for Practice" (2003) 20 J Appl Philos 17 at 22.

V Professional Associations and Business Corporations

a. Introduction

Personal moralities differ. While one person may hold a certain act morally permissible another person may hold the opposite. Accordingly, acts considered permissible under role morality by some may be personally inacceptable to others. The question is, how this fact and the possibility and probability of conflict are and ought to be accommodated by professional associations and business corporations as the institutions that coin role morality and considering that their main interest is to render professional and corporate morality as effective as possible. Answering this question requires a basic idea of why these institutions employ role morality, the exact means by which role morality is employed and the functionality of these means.

i. Reasons for Employing Role Morality

Professional associations and business corporations - being the most prominent examples of institutions that subject their members and employees to particular moralities of role - do so to influence the behaviour of individuals holding respective roles.

In the example from the beginning of the first chapter, Rudy, the lawyer representing the insurance company, would probably have turned to the respective code of legal ethics for guidance in case he felt in a dilemma faced with fighting Dotty's claim against his personal convictions. And so would other professionals in similar situations where personal convictions may influence the way professional skills are employed. Effectively, professional moralities arise as measure to prevent professionals from "abusing the societally mandated power".[1] Corporate moralities, on the other hand, serve two distinct purposes. The first purpose of any corporate morality is to present the respective company in a specific way which is beneficial to its marketing efforts. This is the reason why corporate codes of ethics are often

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[1] Kevin Gibson "Contrasting Role Morality and Professional Morality: Implications for Practice" (2003) 20 J Appl Philos 17 at 22.

perceived as "window dressing" or "public relations gimmicks".[2] However, corporate moralities serve a second important purpose. They are instruments to prevent the company from damage. Employees' unethical or even criminal behaviour will affect not only a company's reputation. The company may even be subject to significant fines. Corporate moralities arise as measure to prevent the company from such damages and numerous empirical studies have shown that corporate codes of ethics have at least a limited impact on the behaviour of employees.[3]

Regardless of an obvious marketing effect of any professional or corporate morality, one main reason to establish any such morality is to guide the behaviour of individuals within a certain group.

ii. Means

Professional associations and business corporations establish codes of professional and corporate ethics in order to accomplish the aforementioned objectives. These codes are are the *prime ingredients* to professional and corporate ethics.[4] The *secondary ingredients* are uncodified rules and principles that lack formal sanctions in case of breach and were developed over time and handed down from one generation of professionals and employees to the next. These rules and principles are essential to a company's culture, difficult to grasp and therefore difficult to alter.[5]

iii. Functionality

Regularly, codes of professional and corporate morality comprise norms - being rules and principles - and establish obligations for the individuals that are subject to them. In particular, addressees may be obliged to act or refrain from acting in particular ways.[6] Addressees will follow these norms in case they find them to be

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[2] Alex Wellington "Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism" (1999) 12 Can J L & Jurisprudence 297 at 317.

[3] See for example Einar Marnburg "The Behavioural Effects of Corporate Ethical Codes: Empirical Findings and Discussion" (2000) 9 Business Ethics 200. It is suggested that the limited effects are mainly due to a lack of education on the respective codes; John Lere and Bruce Gaumnitz "Changing Behavior by Improving Codes of Ethics" (2007) 22 American Journal of Business 7.

[4] The term was used by Patricia Rizzo "Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator" (1991-1994) 35 Cath Law 79 at 91.

[5] Studies show that "the informal systems within organisations are the dominant influence on behaviour when ethical issues are resolved." Loren Falkenberg and Irene Herremans "Ethical Behaviours in Organizations:; Directed by the Formal or Informal Systems?" (1995) 14 Journal of Business Ethics 133 at 140. Codes of ethics and conduct that are implemented and internalized or accepted have a significant impact on the corporate culture, which these informal systems are part of.

[6] Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford University Press, Oxford, 2002) at 7. Behaviour, as Schauer

justified and, therefore, accept them; at least, it is more likely that they will follow them.

Compared to the acceptance of a norm, sanctions appear insufficient to ensure the empirical effectiveness of a norm.[7] It is highly unlikely, for example, that a person would steal in case he or she accepts that *one ought not to steal* even in case the chances of being caught and punished were minimal. A person who does not accept this rule, however, may very well resort to stealing in case the chances of being caught and punished were minimal. Therefore, if codes of ethics and role morality itself are to be effective in guiding behaviour the respective rules, principles and according obligations need to be accepted by as many addressees as possible.

Ideally, obligations under role morality would be accepted by all those that are subject to the respective code of ethics. However, as previously described, professional and corporate moral norms address an increasing number of individuals. With the number of addressees growing, so is the degree of diversity within the respective groups. With the degree of diversity growing, so are the chances that obligations under role morality conflict with obligations under personal morality.

iv. *Preventing and Resolving Conflict*

Conflicts between obligations under personal morality and morality of role, as previously described, will regularly be undesirable as they bear the risk that ordinary moral obligations may override obligations of role. On the other hand, conflicts will only occur in case obligations of role are at all considered relevant. Conflict appears acceptable only in case the relevant institutions are capable of conferring that codified rules and principles either are regarded exclusionary or as bearing at least such moral weight that they regularly outweigh conflicting moral obligations. The question is, how professional associations and business corporations can ensure that the professionals and employees they address accept the rules and principles provided. The question of how associations and corporations should go about issuing rules and principles as part of professional and corporate codes of ethics accepted by as many addressees as possible is a question of how to deal with moral diversity.

Little has been said about how professional institutions and business corporations ought to deal with the challenge of moral diversity in regard to professional and corporate codes of ethics. Authors including Joseph Raz, Isaiah Berlin, John Rawls and Cass Sunstein, however, are concerned with how states deal with the challenge

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states, can either be prohibited or required.

[7] See Robert Alexy *Begriff und Geltung des Rechts* (Alber, Freibung (Breisgau), 1992) at 80.

of moral diversity.[8] Quite similarly to professional associations and business corporations, states employ norms to guide the behaviour of citizens and residents. The standard instrument used by states to do so has always been the legal system. To a certain degree legal systems appear comparable to systems of role morality. Systems of role morality are coined by institutions and the majority of rules and principles of any morality of role are codified.[9] However, the solutions suggested in regard to states and the way they deal with the challenge of moral diversity could only be applied to professional associations and business corporations in case the institutions, their objectives and the means employed to achieve these objectives were sufficiently comparable.

The following section will provide an analysis of the differences and similarities of professional associations and business corporations on the one hand and states on the other in order to determine whether solutions suggested by authors concerned with states and the question of cultural and moral diversity may well be applied to professional associations and business corporations.

b.   *Professional Associations and Business Corporations and the State*

i.   *Basic Differences and Similarities*

States, professional associations and business corporations and the means they employ to guide behaviour differ in a number of ways; on the other hand they show certain similarities. A brief analysis of the basic differences and similarities of states, professional associations and business corporations in regard to their nature, their objectives and the means employed will allow identifying features that may be crucial and require further analysis.

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[8]Moral diversity refers to the view that people hold a variety of different and sometimes opposing moral values; see Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>. Cultural diversity on the other hand refers to the existence of many different cultural groups within a society; Paul Conn "Social Pluralism and Democracy" (1973) 17 A J P S 237 at 238. Cultural and moral diversity are interrelated. Culture influences individual moral development. Cultural diversity is therefore likely to result in moral diversity.

[9]The fact that a significant part of any role morality is issued by an institution is an obvious difference that distinguishes role morality from other moralities.

(a) Institutions Issuing and Applying Norms

States, professional associations and business corporations all issue and apply norms.[10] While law is the standard instrument used by states, role morality is one of the standard instruments of professional associations and business corporations.[11] The most obvious similarity is the fact that both sets of norms are issued by institutions in order to guide the behaviour of those addressed. The particular institutions differ in a number of way, however.

States are regularly perceived as legally constituted communities with an executable system of norms and organs of a state are equipped with executive powers.[12] This monopoly of power is linked to a certain people living within a certain territory.[13] A state, therefore, is understood to be defined by three constituting elements: A state has a territory, a people and a monopoly of power.[14] States employ a legislative process to issue norms that are exclusionary and applicable to all citizens and residents within a certain community, whereas the most important element defining such community is the territory held by it.

Professional associations are regularly linked to a state on the basis of its people and its territory. They govern the professional societies within the jurisdiction of a certain state. Some associations act as "state proxies".[15] Regularly, professional associations account for all members of a profession practicing within a certain state and a professional association's power to issue rules and principles is regularly conferred from the respective state upon the professional association.

Business corporations, on the other hand, regularly do not issue norms on behalf of the states they operate in. The power of business corporations to issue norms is seldom conferred. Such could be assumed only in case a business corporation (1) operated under direct instructions by a state, or (2) was owned by a state. Regularly, business corporations are independent from the state(s) they operate in. Corporations may, for example, relocate and leave the jurisdiction of a certain state.

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[10]Raz differentiates between norm applying and norm creating institutions. He describes how normative systems regularly contain norm-creating and/or norm-applying institutions; Joseph Raz *Practical Reason and Norms* (Hutchinson, London, 1975) at 123.

[11]Other instruments include company policies, for example.

[12]Reinhold Zippelius *Allgemeine Staatslehre* (16th ed, Beck, München, 2010) at 45.

[13]Ibid, at 63.

[14]Referring to the three main aspects of state provided for by Georg Jellinek Burkhard Schöbener *Allgemeine Staatslehre* (Beck, München, 2009) at 78.

[15]See above p 10.

(b) Objectives

The common objective of any of the above mentioned institutions in issuing and applying norms as part of an institutionalised system is to govern and governing effectively means guiding behaviour. Associations, corporations and states have in common that they implement rules that are meant to guide the behaviour of a specific social group.

The primary reason for which states, professional associations and business corporations wish to guide the behaviour of their citizens, members and employees is similar.[16] As norm issuing institutions states, professional associations and business corporations alike benefit from the social function of the law and of related systems.[17] Law and systems of role morality regularly include rules and principles concerned with the adequate behaviour of professionals and employees towards each other and towards society and stakeholders.

The secondary reasons for which states, professional associations and business corporations guide behaviour differ, however. States regularly guide their citizens behaviour for reasons such as to ensure the wellbeing of the greatest number of citizens' possible, to prevent breaches of rights that are regarded as basic and common to all citizens and more generally, because they are mandated to do so by the majority of their citizens. Professional associations, on the other hand, regularly guide behaviour not for the sake of their members but in the interest of the rest of society that their members are to serve.[18] Business corporations guide behaviour of their employees to fulfill legal obligations and in order to benefit from their employees behaviour. Therefore, corporate codes of ethics will regularly include provisions in regard to respectful behaviour towards other employees in order to minimise friction within the company but also to prevent law suits by employees based on discrimination and harassment.[19]

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[16]See above p 31. Behaviour is prescribed by law for numerous reasons and law accordingly serves numerous functions. Raz considers four primary and several secondary social functions of the law. According to him, law primarily and most importantly serves to prevent undesirable and to secure desirable behaviour, provides facilities for private arrangements, provides for services and the redistribution of goods and serves to settle unregulated disputes; Joseph Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) at 169.

[17]Compare Lutz Simon *Theorie der Normen - Normentheorien* (Lang, Frankfurt am Main, 1987) at 47 and 52.

[18]The Hippocratic Oath, for example, provides that medical professionals shall not "fail to call in [...] colleagues when the skills of another are needed for a patient's recovery." See "The Hippocratic Oath" <www.nzma.org.nz>.

[19]See, for example, the ANZ Employee Code of Conduct and Ethics Principle No 3: "We treat others with respect, value difference and maintain a safe working environment." ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 8.

(c)   Means

Professional associations implement professional and business corporations corporate morality primarily through the means of professional and corporate codes of ethics. Norms issued by states, professional associations and business corporations become part of what Raz calls an *institutionalised system* of law, professional or corporate morality respectively.[20]

Rules and principles that become part of such an institutionalised system regularly require a certain procedure. Even though the procedures employed by professional associations and business corporations for issuing norms may differ from the procedures employed by states for doing so, all three institutions do employ procedure.

Similarly, law and role morality differ in scope: Professional associations issue norms applicable to the respective professional community in regard to their members' behaviour in their capacity as professionals and business corporations do the same in regard to their employees' behaviour. States issue norms that are applicable to a much larger and more complex community and govern any form of behaviour within that community.[21]   However, even though law and role morality differ in scope neither law nor role morality are unlimited in this respect.

Based on the aforementioned differences, law and institutionalised systems of role morality are regularly easy to distinguish.[22] The distinctive feature of rules or principles of role morality that sets them apart from legal rules and principles is the

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[20]Institutionalised systems, as defined by Raz, *"consist of norms surrounded by a parameter of exclusionary reasons excluding the application of all reasons other than norms of the system and at their core are authoritative applicative determinations excluding all other reasons including other norms of the system."* Joseph Raz *Practical Reason and Norms*, above n 10, at 146.

[21]Raz found that the "authority which all legal systems claim is authority to regulate any form of behaviour of a certain community. They need not claim authority to regulate the behaviour of everybody." Joseph Raz *The Authority of Law: Essays on Law and Morality*, above n 16, at 117.

[22]However, professional associations and business corporations may establish normative systems that in some cases are difficult to distinguish from law. Regularly, codes issued by professional associations and business corporations will not qualify as hard law. They may, however, qualify as *soft law*. The term can refer to normative systems issued by institutions completely independent from the state. Even though *soft law* was developed and is mainly used in the context of international law its flexibility and the fact that it is regularly non-binding has made it attractive for use in other contexts as well. Compare also Deirdre Ahern "Replacing "Comply or Explain" with Legally Binding Corporate Governance Codes: An Appropriate Response?" (2010) ECPR Standing Group on Regulatory Governance <www.regulation.upf.edu> at 18 and Jean Jacques Du Plessis, James McConvill, Mirko Bagaric *Principles of Contemporary Corporate Governance* (Cambridge University Press, Port Melbourne, 2005) at 120. Hard law may require that individuals or entities comply with such normative system or explain their non-compliance. Obligations under hard law to *comply or explain* may qualify a code of conduct as soft law. Even though most current codes that do qualify as soft law are concerned with issues of corporate governance legislators may decide to adapt a comply or explain approach in regard to professional and corporate ethics; compare e.g. UK Corporate Governance Code. The code can be accessed via <www.frc.org.uk>.

fact that the former expressly claim to be directly relevant in terms of specifying or altering obligations under personal morality. Most states do not claim the like for their legal systems. Law, as previously defined, is meant to provide a *system of norms constituting an institutionalised social order* rather than with prescribing *how we ought to live* in the sense of being a standard of *right* and *wrong*.

Summing up the aforesaid, law and role morality alike qualify as institutionalised systems of norms. States, professional associations and business corporations issue and apply norms in order to guide the behaviour of individuals within a particular community. These norms differ in terms of the specific content, the ways they are issued, whom they address and by whom they are issued. The differences in procedure and the fact that addressees and scope differ set law, professional morality and corporate morality apart. However, all three systems do apply procedure and are limited in terms of their addressees and their scope. The significant difference is that professional associations and business corporations issue and apply norms that expressly claim direct relevance in terms of personal morality.

The next question, therefore, is whether the authority claimed by states, professional associations and business corporations to issue norms differs in nature.

ii.   *The Question of Authority*

Applying theories concerned with the way states deal with the challenge of moral diversity to professional associations and business corporations requires a sufficient degree of similarity between these three institutions. The greatest difference between states on the one hand and professional associations and business corporations on the other appears to be the aspect of authority to issue and apply norms relevant in terms of personal morality.

(a)   The Notion of Authority

The following subsection will try to shed light on the issue of authority and the question of whether the authority of states differs from the authority claimed by professional associations and business corporations. Adapting theories developed in regard to the way states deal with the issue of moral diversity to the way professional associations and business corporations approach the similar problem requires that the aforementioned institutions justifiably claim a similar form of authority. Yet, considering the aforesaid, it appears that professional associations and business corporations claim moral and not legal authority.

The general understanding is that authority corresponds to the "power to require action".[23] Schauer elaborated the definition to hold that authority "exists when and only when the source of a directive provides a reason for the addressee to follow it independent of the content of that directive."[24] Accordingly, norms that are issued by an institution equipped with authority to issue norms provide reasons for action regardless of their particular content. In case a norm issuing institution is not equipped with authority, its rules and principles may still be considered reasons for action. This, however, requires that these rules and principles are either internalised or accepted by the respective agent.[25]

For an institution to have effective authority, its authority needs to be considered legitimate.[26] In order to ensure that norms issued are regarded as reasons for action regardless of their specific content, institutions will regularly claim to be equipped with legitimate authority.[27]

The legitimacy of authority is regularly held to depend on consent and the fact that the majority of those addressed agree to subject themselves to the authority in question.[28] On the basis of this consent theory, professional associations and business corporations can enjoy similar authority as states. Corporations legitimise their authority to issue norms by referring to the relationship between themselves and their employees. Professional associations legitimise their authority by referring to the requirements of the profession and the fact that the members of the respective associations were either employed by the state or elected by those addressed

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[23] Joseph Raz *The Morality of Freedom* (Oxford University Press, Oxford, 1988) at 38.

[24] Frederick Schauer, above n 6, at 129.

[25] Internalising a norm means treating it as reason for action. Schauer explains the concept of internalisation by describing that "*a rule is for some agent applicable to some situation when the situation is within the extension of some rule the fact of whose existence (whether social or individual) the agent treats as a reason for action*"; Frederick Schauer, above n 6, at 121. An agent may internalise a norm that he or she does not agree with. Potential sanctions are the main reason for an agent to internalise a norm that he or she does not agree with. Frederick Schauer, above, at 122 and 124. Accepting a norm, on the other hand, implies agreeing with the prescriptive content of the particular norm. If an agent agrees with and accepts a norm, this norm will be regarded as reason for action by him as well.

[26] Joseph Raz *The Authority of Law: Essays on Law and Morality*, above n 16, at 28.

[27] Law, Raz found, claims legitimate authority. Ibid, at 30.

[28] However, other forms of legitimisation are possible. A state's authority may stem from the reference to some form of metaphysical entity or, on an instrumentalist account, authority could be legitimate, in case complying with it would allow individuals to better comply with duties they had than if they tried to fulfill these duties on their own. See also Thomas Hobbes *Leviathan; edited and abridged with an introduction by John Plamenatz* (Fount, London, 1983) at 173; John Locke *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government; and, A Letter Concerning Toleration; edited with a revised introduction by JW Gough* (Blackwell, Oxford, 1976) at 49 and HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1994) at 203 and Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, Oxford, 1994) at 198 and Joseph Raz *The Morality of Freedom*, above n 23, at 38.

through rules and principles contained in codes of ethics. Based on the according account and given the required consent, states, professional associations and business corporations alike can claim legitimate authority over their subjects, members and employees respectively.

Still, states claim authority to issue legal norms while professional associations and business corporations expressly claim to be equipped with the authority to issue norms directly relevant in terms of personal morality. The question is, whether and if so, how the authority to issue legal norms is distinct from the authority to issue norms being part of roe morality and whether the authority of states does in fact differ from the authority that professional associations and business corporations can legitimately claim.

(b)   Legal and Moral Authority

Morality is defined as system of rules and principles concerned with *how we ought to live* and law is defined as *system of rules and principles constituting an institutionalised social order.*[29] Considering the distinct definitions, authority to issue moral norms does not necessarily entail authority to issue legal norms and vice versa.

Legal rules are regularly issued and applied by institutions that consist of one or more individuals. These institutions apply procedure in issuing and applying norms.[30] Moral norms, on the other hand, are usually not issued by institutions of the said sort in the said way. People allot moral authority to metaphysical entities. Institutions such as states, professional associations and business corporations regularly lack authority to *issue* moral norms. The people they address do not accept such authority to be legitimate. These institutions may, however, hold a weaker form of moral authority. Particular institutions hold limited moral authority and influence the way moral norms are *applied*.[31] Panels of experts, for example, claim expertise in interpreting moral norms and thereby influence the way these norms are understood and applied. Similarly, states are regularly perceived to hold limited moral authority: The authority claimed by a state regularly depends on the consent of the majority its citizens. The majority of citizens, however, will only consent to the state's authority to issue legal rules in case these legal rules reflect their views in regard to

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[29] See above p 4.

[30] Lutz Simon, above n 17, at 56 and 82.

[31] Compare Joseph Raz *The Morality of Freedom*, above n 23, at 39 and, in detail, Richard Friedman "On the Concept of Authority in Political Philosophy" in Richard Flathman (ed) *Concepts in Social and Political Philosophy* (Macmillan, New York, 1973) 129.

morality. Common morality, being the set of morals the majority of the members of a specific society subscribes to, is regularly relevant in terms of personal morality. Moral agents compare their own moral convictions to common morality and often adapt. States, therefore, influence the way individuals perceive moral obligations and apply moral norms.[32]

Similar to states, professional associations and business corporations could hold legitimate authority to *interpret* particular moral rules and influence the way they are *applied*. This would, however, require that any relation between law and morality similarly existed between role morality and morality. If a norm qualified as legal rule only in case it were aligned with morality then a norm would qualify as being part of role morality only if it were aligned with morality, as well.

The possibility of the existence of a relation between law, role morality and morality that is more than simply coincidental would require that moral and legal rules were structurally similar to a degree that would allow deriving one from the other.

(c)   Some Thoughts on Norms

A relation between legal and moral norms could only be assumed in case legal and moral norms were structurally similar.

Norms are regularly perceived as "*(1) standards of evaluation, (2) guiding human behaviour, (3) supported by standard reasons for compliance, in the form of the prospect of some evil ensuing upon disobedience, and (4) created by human acts intended to create norms* [...]."[33] Norms guide behaviour by providing reasons for action.[34] Structurally, both legal and moral norms explicitly or implicitly comprise an *ought* and thereby prescribe decisions between different alternative actions.[35] This notion of *ought* is regularly conveyed by linking an *in case X, then Y* to an *if not Y, then Z* whereas *Z* is undesirable to the addressee of the norm.[36]

Quite commonly, rules of thumb are distinguished from mandatory rules. "Rules of thumb, *which are useful guides but do not, even when accepted, provide reasons for*

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[32]However, under certain circumstances, following rules and principles set by the state, i.e. following the law, may be considered a moral obligation itself; compare Kimberley Brownlee "Legal Obligation as a Duty of Deference" (2008) 27 Law and Philosophy 583 and Leslie Green "Law and Obligations" in Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002) 514 at 514-547.

[33]Joseph Raz *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed, Clarendon Press, Oxford, 1980) at 122.

[34]Ibid, at 156; Frederick Schauer, above n 6, at 112.

[35]Stephan Kirste *Einführung in die Rechtsphilosophie* (Wissenschaftliche Buchgesellschaft, Darmstadt, 2010) at 87.

[36]On the elements of a norm compare Joseph Raz *The Concept of a Legal System: An Introduction to the Theory of Legal System*, above n 33, at 44.

action in themselves, can be distinguished from mandatory rules. *Mandatory rules, when accepted, furnish reasons for action simply be virtue of their existence* qua *rules, and thus generate normative pressure even in those cases in which the justifications (rationales) underlying the rules indicate the contrary result.*"[37] Mandatory norms are such norms that give a person valid reason to act in the prescribed way.[38]

Regularly, authors further distinguish between rules and principles.[39] Even though both terms are often used interchangeably, "the word "principles" usually carries and implication of greater generality and importance than the word "rules"."[40] Rules leave less space for interpretation, are more effective in guiding behaviour in a particular direction and are more common than principles.[41] Principles allow for interpretation and may be applied to situations that rules were not foreseen for. Principles can easily accommodate changing circumstances while rules regularly need to be amended in order to do so. In legal systems principles are regularly used to make law adaptable to change.

An example for a principle common to many different legal systems is the principle of *bona fide.* The principle of bona fide or good faith is understood to require "honesty in belief or purpose", "faithfulness to one's duty or obligations" as well as "absence of intent to defraud or to seek unconscionable advantage" .[42]

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[37] Frederick Schauer, above n 6, at 5.

[38] Joseph Raz *Practical Reason and Norms*, above n 16, at 72. Mandatory norms are exclusionary reasons; Joseph Raz *Practical Reason and Norms*, above n 10, at 58. According to Raz, an "exclusionary reason may exclude a reason which would have been overridden anyway, but it may also exclude a reason which would have tipped the balance of reasons." Joseph Raz *Practical Reason and Norms*, above, at 41.

[39] Ibid, at 49. So do other authors. Compare Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978) at 24 and 25: "*The difference between legal principles and legal rules is a logical distinction. [...]. Rules are applicable in an all-or-nothing fashion. [...]. Even those* [principles] *which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met.*"

[40] Joseph Raz *Practical Reason and Norms*, above n 10, at 49.

[41] Burgemeestre, Hulstijn and Tan find that in legal theory there are "*three dimensions to localize a regulative system on the continuum: temporal, conceptual and functional. 1. The* temporal dimension *indicates when the content of a regulation is provided: rules define boundaries* ex ante, *i.e., before adoption and implementation, whereas principle is settled* ex post, *when compliance is being audited. Rules provide certainty: when you follow a rule, you know that you will be compliant. A rule-based system initially requires more effort from the regulator, because details need to be fixed in advance; a principle-based system requires more effort from the subject. 2. The* conceptual dimension *distinguishes between principles and rules by the properties of being general versus specific, abstract versus concrete and universal versus particular. The number of clarifications, details, exceptions or limitations may serve as an indicator. The properties generality, abstractness and universality may be combined under the label of "relative vagueness". 3. The* functional dimension *considers the relative discretionary power of the participants in the regulative process. Rules are defined by the regulator. Principles tend to give more space for interpretation to both subjects and auditors.*" Brigitte Burgemeestre, Joris Hulstijn and Yao-Hua Tan "Rule-based versus Principle-based Regulatory Compliance" (2009) 205 Frontiers in Artificial Intelligence and Applications 37.

[42] Bryan Garner (ed) *Black's Law Dictionary* (9th ed, West, St Paul (MN), 2009) Good Faith at 762.

Professional associations employ principles, as well.[43] The New Zealand Code of Legal Ethics, for example, provides for rules and principles in regard to lawyers' conduct.[44] In Chapter 2 the New Zealand Code of Legal Ethics provides that a lawyer "is obliged to uphold the rule of law and to facilitate the administration of justice". This principle is accompanied by numerous rules such as that a "lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose." The rules are not exhaustive in regard to the conduct expected of lawyers.

In corporate codes of ethics, principles are even more widespread. The ANZ Code of Conduct & Ethics, for example, provides for eight central principles.[45] These principles include the principle to "act with honesty and integrity" and not to "make or receive improper payments, benefits or gains".[46] Each principle is explained and specific rules are provided for. One of the rules associated with the principle of honesty and integrity provides never to "help a customer or anyone else break or evade the law."[47] In regard to the principle not to receive improper payments, the ANZ Code of Conduct & Ethics provides for the rule never to "try to improperly influence the outcome of an official decision, for example by offering a payment or benefit that is not legitimately due. These payments or benefits are unacceptable."[48]

In the following the term *rule* shall be defined as norm that provides for a specific consequence in case a specific situation is encountered. A *principle* has a broader scope of applicability and does not specify consequences for example by providing for sanctions and shall be defined as norm that requires consideration in regard to the way certain rules are applied and in situations where no specific rule applies at all.

Based on an evaluation of the structure of both legal and moral rules and principles, it has been argued that there are no such structural differences that would justify understanding them as different matter altogether.[49] The fact that legal norms regularly provide for sanctions while moral norms do not is not sufficient to assume that they are structurally different. Breaches of moral norms may result in sanctions even

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[43]Pepper, for example, describes a section of the ABA code that provides for an individual lawyers discretion. Pepper finds that there is a tension between binding rules and discretion. Enforceable rules - unlike discretion - provide for a greater degree of client protection. Compare Stephen Pepper "A Rejoinder to Professors Kaufman and Luban" (1986) 4 Am B Found Res J 657 at 662.

[44]Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (SR 2008/214).

[45]ANZ "Employee Code of Conduct and Ethics" <www.anz.com>.

[46]Principles 2 and 6 ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 3.

[47]ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 7.

[48]ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 11.

[49]Compare Lutz Simon, above n 17, at 116 and 196.

though the respective action may not directly be linked to a sanction.[50] Breaching the moral rule that one ought not to lie, for example, may result in social contempt. Also, even though some legal norms provide for sanctions, not every legal norm does. Power conferring norms are legal rules that do not provide for sanctions.[51] The same accounts for norms that describe how other norms are issued.[52] Advocates of legal positivism suggest that moral and legal norms are structurally different based on the observation that law depends on a specific procedure.[53] However, this is clearly not the case for rules based on precedent.[54] Another feature thought to structurally set legal and moral rules apart is the fact that legal rules are codified while moral rules are not. However, law comprises not only written norms but also rules and principles that are based on custom and accepted by courts like the aforementioned rules of precedent.[55] It can, therefore, hardly be argued that legal and moral norms differ in structure.

(d)   Morality, Role Morality and Law and the According Relations

It has been established that different institutions issue different forms of norms that have particular fields of applications, yet, a similar structure. The following subsection is concerned with the nature of any connection between morality, role morality and law. In this context, the term morality does not refer to a specific system of morality but to the general notion of morality as being the determinant of right and wrong.

It is clear that moral considerations influence law. In particular cases, common moral norms are recognised by law. The principle of *aequitas* being the basis for the widely accepted principle of *bona fide* is one gateway through which moral considerations are regularly taken into account in law. Generally, however, law is thought to be "an exclusionary systems and it excludes the application of extra-legal reasons."[56]

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[50]Ibid, at 197.

[51]The term "power conferring norms" was introduced by Raz. Normative power - meaning the power to influence norms - may be conferred by this special form of norms; Joseph Raz *Practical Reason and Norms*, above n 10, at 104.

[52]Stephan Kirste *Einführung in die Rechtsphilosophie* (Wissenschaftliche Buchgesellschaft, Darmstadt, 2010) at 95.

[53]This procedure is employed to derive a specific legal rule from a basic 'Grundnorm'; Hans Kelsen *Pure Theory of Law. Translation from the 2nd rev and enl German ed by Max Knight* (University of California Press, Berkeley, 1967) at 193.

[54]Lutz Simon, above n 17, at 193.

[55]Ibid, at 189.

[56]Joseph Raz *Practical Reason and Norms*, above n 10, at 145. Extra-legal reasons, such as moral rules, are regularly thought to be irrelevant within the law. Unless specifically provided for, personal moral convictions will not justify deviating from legal obligations.

Basically, there are two positions one can assume in regard to the relation of law and morality.[57] Advocates of positivism claim that there is no necessary or logical connection between law and morality.[58] Law must depend on social facts alone and cannot rely on morality. Accordingly, legal rights and duties are distinct from moral rights and duties.[59] Advocates of the opposing position argue that law and morality are necessarily or logically connected. Legal rights and duties would depend on moral rights and duties. Advocates of the position that morality and law are connected and positivists alike have developed numerous highly sophisticated arguments in order to support their respective theories.[60] The debate is ongoing and providing even the briefest overview would lead too far. Effectively, the question whether there is a necessary and inherent connection between law and morality is irrelevant for the question of whether institutions issuing law and role morality legitimately claim the same sort of authority. It is, however, essential that any relationship between law and morality would be likely to exist between institutionalised role morality and morality, as well.

There is little to suggest that the connection of morality and law will differ from the way morality and institutionalised systems of role morality are connected:

Institutionalised systems of role morality are established in a similar fashion and for similar reasons as law. The only significant difference between law and role morality is that role morality expressly claims direct relevance within personal morality of those that hold respective roles whereas such a claim is not a distinctive feature of law.[61] In addition, institutionalised systems of role morality are inherently connected to law. Rules and principles of role morality regularly reinforce legal provisions. Professional associations are often bound by law to implement norms that ensure, for example, a functioning legal system or a sufficient degree of client protection. On the other hand, rules and principles of professional morality may not violate rights members of the profession are legally entitled to. Basically, the same accounts for business corporations.

Considering the close relationship to and the similarities with law, institutionalised

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[57] Overview in Brian Bix "On the Dividing Line between Natural Law Theory and Legal Positivism" (2000) 75 Notre Dame L Rev 1613; John Finnis "Natural Law: The Classical Tradition" in Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002) 1 at 1-15; see also HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1994) at 155 and Hans Kelsen *General Theory of Law and State / Translated by Anders Wedberg* (Harvard University Press, Cambridge (Mass), 1946) at 5-13.

[58] Compare John Finnis, above n 57, at 15.

[59] Joseph Raz *The Authority of Law: Essays on Law and Morality*, above n 16, at 37 and 38.

[60] John Finnis, above n 57, at 1-15; HLA Hart *The Concept of Law*, above n 57, at 156.

[61] Law merely claims legitimate authority and that legal rules are reasons that exclude non-legal reasons; Joseph Raz *The Authority of Law: Essays on Law and Morality*, above n 16, at 30. See above p 37.

systems of role morality are likely to be bound to morality in a similar fashion as law. This suggests that professional associations and business corporations can legitimately claim the authority to interpret particular moral rules and influence the way these norms are applied. Effectively, states, professional associations and business corporations are comparable in terms of the authority the can legitimately claim.

c.   *Legal Ethics and the Fact of Cultural and Moral Diversity*

Role morality and law alike are means of guiding behaviour. Hence, moral diversity is a challenge both for role morality and law. Numerous authors in legal ethics have addressed this problem. Their theories may only be applied to role morality in case role morality is similar to a certain degree to law. It has been established that (1) states, professional associations and business associations lack the authority to issue moral norms, that (2) moral and legal norms are structurally similar, that (3) law and institutionalised role morality are likely to be bound in a similar fashion to morality, and that (4) states, professional associations and business corporations alike would be considered legitimate authorities in applying and interpreting moral norms. This suggests that the theories developed may well be applied to law and role morality alike.

After having established that theories provided by authors in regard to the way states deal with cultural and moral diversity may be applied to the way professional associations and business corporations deal with the similar challenges of cultural and moral diversity, the following section will provide an overview over the different theories that authors in legal ethics have developed.

Authors in legal ethics are primarily concerned with two questions. Firstly, they are concerned with whether moral diversity is at all possible on a theoretical level or not. The latter would deem moral diversity the result of logical error and differing interpretation of similar values. Secondly, should moral diversity be possible, how ought states to deal with this fact. The next few paragraphs will be concerned with the answer authors suggested in regard to the first of these two questions. The subsequent section will then expand on the second question.

i.   *The Theoretical Possibility of Moral Diversity*

In regard to the first question of whether moral diversity is at all theoretically possible there are three possible answers. Advocates of a monistic approach hold that

there can be only one applicable normative theory.[62] The respective other normative theories are mistaken. Accordingly, moral diversity would be nothing but the result of logical errors on behalf of those that hold alternative normative theories. This is the standard perception.

Advocates of a relativist approach, on the other hand, hold that morality is completely dependent on social circumstances and may vary over time.[63] There is no such thing as objective moral truth. Accordingly, each normative theory may be correct in one place and at one time and mistaken in a different context.

Advocates of moral pluralism hold a middle position.[64] They acknowledge that there are numerous values that moral agents may hold. Accordingly, both monism and relativism would be mistaken. Yet, reasoning and resolving conflicts between values would remain possible. Some moral values could be excluded from the set of those that may be accepted as possibly justified.

Effectively, the question whether moral diversity is theoretically possible depends on whether there is *right* and *wrong* in morality, meaning objective moral truth. Metaethics is the subdiscipline of ethics concerned with the question of whether there is objective moral truth and there is little to no consensus on whether objective moral truth does exist and can be determined.[65] Advocates of moral realism argue that moral truth exists, while advocates of anti-realism argue the contrary.[66] Both theories are reinforced by a great variety of arguments. Regardless of the theoretical merits of either approach, most people intuitively believe that objective moral truth exists and that moral judgments can be right or wrong. Also and regardless of its theoretical possibility, moral diversity seems to be an empirical fact.

A good example for moral diversity and the troubles that multinational corporations

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[62]The term "monism" was coined by Isaiah Berlin and is also referred to as "absolutism". On monism in ethics Isaiah Berlin *Four Essays on Liberty* (Oxford University Press, London, 1969) at 170 and, in more detail, George Crowder *Isaiah Berlin: Liberty and Pluralism* (Polity, Oxford, 2004) at 1, 2 and 72-76.

[63]Lawrence Becker and Charlotte Becker (eds) *The Encyclopedia of Ethics* (Garland, New York 1992) vol 2 Moral Relativism at 856. See below at p 54.

[64]Ibid, vol 2 Moral Pluralism at 839. See below at p 58.

[65]Among metaethics' *"central questions are the questions whether any moral claims are true, and whether it is rational to commit oneself to acting morally. One cannot answer such questions without taking a position on the correctness or cogency of people's moral convictions.* Moral realism *takes an optimistic view on the issue of whether moral convictions can be correct or cogent."* David Copp (ed) *The Oxford Handbook of Ethical Theory* (Oxford University Press, New York, 2006) at 5. Metaethical theories are understood to be logical preconditions to normative theories. In any case, metaethical theories indicate and limit particular normative theories. A normative theory that held that certain virtues are morally relevant would not be compatible with a metaethical theory that held that there is no objective moral truth, for example. A certain metaethical position, however, does not necessarily imply a certain system of normative ethics.

[66]Further Geoffrey Sayre-McCord (ed) *Essays on Moral Realism* (Cornell University Press, New York, 1988).

encounter is the Walmart.[67] Walmart, a US American company, had a corporate code of ethics in place that was compliant with the requirements of US American employment law. Walmart expanded into the European market. The corporate code of ethics became applicable to Walmart's European employees. German courts found that the provisions of the respective corporate code of ethics violated German law. Most significantly, Walmart's code prohibited certain forms of fraternisation amongst Walmart's employees. The according provisions were found to be void on the basis that they infringed basic civil rights. Considering that law is regularly and at least to a certain degree representative of common morality, Walmart encountered a situation were common morality differed between countries and jurisdictions to an extent that the application of a universal code of ethics seemed difficult to impossible.[68]

A more common example for moral diversity and a more pressing legal issue for companies conducting international business operations is that of private procurement.[69] Most countries in the world acknowledge that payments and gifts of any sort in connection with public procurement are not only harmful to competition and ultimately to economy. There is also a growing consensus that bribery of public officials is contrary to good business ethics.[70] This consensus, however, does not include bribery of individuals who are not employed by the government. Bribery in the private procurement sector is still widespread and an accepted practice in many countries in the world. Yet, there is a tendency towards outlawing such practices and a growing number of countries have implemented according laws.[71] A company conducting business operations in countries where bribery in private procurement is outlawed will need to promote refraining from such behaviour amongst its employees. Implementing an according code of ethics for business operations in developing countries, however, would likely result in significant disadvantages in competition. These disadvantages again would result in the company failing in the respective markets.

Moral pluralism may or may not be a fact in theory. Moral diversity, however, ap-

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[67]Marisa Anne Pagnattaro and Ellen Peirce "Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws" (2007) 28 Berkeley J Emp & Lab L 375 at 384.

[68]The reason why codes of ethics are troubled in dealing with such differing situations appears to be the fact that moral rules and principles demand universality. Codes of ethics that apply only to certain parts of an organisation, will hardly be accepted as comprising moral rules and principles as these rules and principles are not universal.

[69]Compare Arnold Berleant "Multinationals, Local Practice, and the Problem of Ethical Consistency" (1982) 1 Journal of Business Ethics 185.

[70]OECD "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" OECD Directorate for Financial and Enterprise Affairs (2009) <www.oecd.org>.

[71]See for example § 299 of the German Criminal Code (Strafgesetzbuch).

pears to be a fact in practice that professional associations and business corporations face.[72] It further appears that professional associations and business corporations need to accommodate cultural and moral diversity to the greatest degree possible in order to achieve their goals most effectively.

The subsequent question, that authors in legal ethics have discussed and that is of practical relevance, is how professional associations and business corporations should deal with cultural and moral diversity and transform obligations under role morality into reasons to act for those addressed.

ii.   Ways of Dealing with Cultural and Moral Diversity

Obligations under role morality would be accepted by addressees of professional and corporate codes of ethics as reasons to act in the prescribed way in case they were accepted by them as being ethical. Mark Schwartz posed the interesting question of how to establish whether a "corporate code of ethics is ethical in terms of its content".[73] This question may be rephrased to include professional codes, as well, and it is an important question considering that the fact that a person accepts a rule or principle to be ethical transforms this same rule or principle in a reason for him to act. But can a system of rules and principles be ethical at all?

There are two possible ways of answering this question. The first way of answering the question refers to the theoretical possibility of a certain set of rules and principles of being ethical in content and the answer depends on the ethical theory held applicable: A particular code of ethics may be ethical based on its accordance with a specific normative theory or it may be ethical to some, based on the fact that it accords with their moral values, while unethical to others or it may be ethical in relation to certain social facts.

The second way of answering the question refers to the practical possibility of ensuring that as many addressees as possible consider a system of rules and principles to be ethical. In order to reduce the probability of conflict, institutions need to find ways to ensure that corporate and professional codes are considered ethical by as many addressees as possible.[74] In doing so, they make assumptions in regard to

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[72] Pluralism, in John Rawls words, is a fact; William Galston "Moral Pluralism and Liberal Democracy: Isaiah Berlin's Heterodox Liberalism" (2009) 71 Review of Politics 85 at 85. The terms pluralism and diversity are often used interchangeably. However, diversity shall refer to empirical facts while pluralism shall refer to theory.

[73] Mark Schwartz "Universal Moral Values for Corporate Codes of Ethics" (2005) 59 Journal of Business Ethics 27 at 27.

[74] Conflicts between norms, so suggested, may be resolved along the lines of impartiality and discourse; Eva Erman "Conflict and Universal Moral Theory: From Reasonableness to Reason-

those they address. The answer to the question as to whether those addressed share common values is one that underlies any attempt to reduce conflict on an institutional level.[75] Effectively, there are three distinct ways of dealing with cultural and moral diversity when it comes to guiding behaviour and implicitly assuming that maximum acceptance is a decisive feature of any institutionalised normative system capable of effectively doing so. As norm issuing institutions, professional associations and business corporations can follow an approach that relies on gaining a minimum consensus. Alternatively, they can follow an approach that relies on relativism or pluralism. The following subsections will consider the possibilities of minimum consensus, moral relativism and moral pluralism. The theories will be briefly outlined. The main question, however, does not involve their theoretical merits but their merits in accommodating the accepted fact of moral diversity.

iii.   Minimum Consensus

The first option that professional associations and business corporations may consider is the option of minimum consensus. After establishing the underlying metaethical assumptions, the following subsection will briefly outline the according theory before assessing the arguments for and against such approach.

(a)   Minimum Consensus Theory

An approach involving a minimum consensus means resorting to ethical rules and principles that the majority if not all addressees can agree upon. In implementing such an approach institutions resort to rules and principles that would be expected to be part of any normative theory. Normative differences between personal and role morality are erased as is the potential for conflict.[76] An approach of minimum consensus is closely linked to the insight that most people hold ethical monism to be accurate. An institution that finds that (most of) its addressees are ethical monists, yet, attempts to address all alike will resort to a minimalist approach.[77]

Giving" (2007) 35 Political Theory 598. Impartiality and discourse, however, are not sufficient in guiding behaviour. They solely provide mechanisms to resolve conflicts. As previously stated, conflicts should be avoided or would need to be resolved in favour of the organisations interests. In finding rules and principles, impartiality and discourse may serve as corrective. Considering that these rules and principles are, however, intended to guide behaviour in a specific manner and in order to achieve certain objectives impartiality and discourse are insufficient means.

[75]Effectively, a theory on how a certain institution ought to deal with moral diversity is a political theory. Any political theory, however, relies on a certain theory of ethics.

[76]Compare also Paul Shiff Berman "Global Legal Pluralism" (2007) 80 S Cal L Rev 1155 at 1199.

[77]Implementing an institutionalised normative system based on a specific normative theory was excluded as option by introducing the requirement of maximum acceptance. If an institution

Advocates of ethical monism find that there is only one accurate account of norma-tive ethics and accordingly only one true normative theory.[78] Their assumption is based on the (metaethical) premises that moral truth (1) does exist and (2) can be determined. Normative theories that offer alternative accounts of normative ethics are considered logically mistaken. And, while moral agents may appear to hold differing and opposing values, moral diversity is understood to be the result of logi-cal error and differing interpretations of similar values by these moral agents. Even though there is little consensus on normative ethics, most people intuitively find that ethical monism itself is accurate while both moral relativism and moral pluralism are not.

An approach of minimum consensus accommodates both the fact that ethical monism is considered accurate by those addressed and the empirical fact of moral diversity. Effectively, there are two ways to achieve a minimum consensus.

The first option was described by John Rawls. In regard to the way states are ruled and according to Rawls' understanding, a comprehensive theory of ethics is not necessary as long as there is a sufficiently overlapping consensus on certain basic principles.[79] Rawls is particularly concerned with a political conception of justice and how such a conception of justice could "gain the support of an overlapping consensus".[80] In regard to the overlapping consensus, Rawls finds that such "*a con-sensus consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself.*"[81]

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decided in favour of utilitarianism, for example, members or employees that rejected utilitarian-ism would not accept rules and principles based on a utilitarian account of ethics. Professional associations and business corporations that issued rules and principles of role morality that first and foremost served the *greatest good for the greatest number* without regard for the issues of minorities would suffer the consequences of ideological conflicts with a number of their mem-bers and employees that opposed an according approach. Issuing rules and principles based on a minimum consensus does provide a way to cope with the fact that different moral agents sub-scribe to different normative theories. Yet, a set of rules and principles based on a minimum consensus corresponds far better to a society of ethical monists than it does to a society of ethical pluralists. According to ethical pluralism, there are certain moral truths that apply to all moral agents alike. Some moral conflicts, therefore, may be resolved and discourse on moral issues is vital. Hence, ethical pluralism is not compatible with an attempt to reduce normative distance and the potential for conflict and discourse.

[78]See above n 62. David Hume and Immanuel Kant are only two philosophers that find that agents will not encounter irresolvable moral dilemmas but have sufficient means to resolve such con-flicts; Judith Wagner DeCew "Moral Conflicts and Ethical Relativism" (1990) 101 Ethics 27 at 29.

[79]John Rawls *Political Liberalism* (Columbia University Press, New York, 2005) at 184.

[80]Michael Barnhart "An Overlapping Consensus: A Crititique of Two Approaches" (2004) 66 Re-view of Politics 257 at 257 and John Rawls, above n 79, at 15 and further at 144.

[81]John Rawls, above n 70, at 15.

Rawls is concerned with certain common beliefs without being concerned with their justification. Raz refers to this characteristic of Rawls' approach as "shallow foundations".[82] Principles of justice that prevail regardless of "*religious, philosophical and moral doctrines*" and constitute such common beliefs may provide a sufficient basis for a stable society. One necessary feature of an according society would be a great degree of liberty.[83]

On the other hand, a minimalistic approach does not necessarily require common beliefs in basic principles of justice. Cass Sunstein described a way of achieving minimum consensus without resorting to basic principles. According to Sunstein, the degree of generalisation or abstraction chosen by Rawls is problematic. Sunstein finds that often "*people can agree on a rationale offering low-level or midlevel principles. They may agree that a rule - protecting political dissenters, allowing workers to practice their religion - makes sense without entirely agreeing on the foundations of their belief. They may accept an outcome - perhaps affirming the right to marry or protecting sexually explicit art - without understanding or converging on an ultimate ground for their acceptance. What accounts for the outcome, in terms of a full-scale theory of the right or the good, is left unexplained.*"[84] Sunstein rather advocates *incompletely theorized agreements*, which serve the same purpose as Rawls' overlapping consensus without the degree of abstraction, yet, by focusing on particulars.[85] *Incompletely theorized agreements* allow people to develop "frameworks for decisions and judgment despite large-scale disagreement"[86] and are a "response to divisions on basic principles."[87] Sunstein finds that people need not agree on fundamental principles or offer abstract explanations. When people disagree on an abstraction, they might well converge on a particular outcome.[88] This is not to say that people do not agree on basic principles. They do.[89] Yet, Sunstein emphasises the importance of *incompletely theorized agreements* on particular outcomes in case such an agreement on a basic principle cannot be reached.[90]

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[82] Joseph Raz, above n 29, at 45 and 47.

[83] See also John Rawls "The Idea of an Overlapping Consensus" (1987) 7 Oxford J Legal Stud 1; Samuel Freeman "Political Liberalism and the Possibility of a Just Democratic Constitution" (1994) 69 Chi Kent L Rev 619.

[84] Cass Sunstein *Designing Democracy* (Oxford University Press, New York, 2001) at 51.

[85] Cass Sunstein *Legal Reasoning and Political Conflict* (Oxford University Press, New York, 1996) at 46.

[86] Ibid, at 36.

[87] Ibid, at 67.

[88] Cass Sunstein "Incompletely Theorized Agreements" (1995) 108 Harv L Rev 1733 at 1736.

[89] Ibid, at 1739.

[90] By definition, "such [incompletely theorized] agreements have the large advantage of allowing a convergence on particular outcomes by people unable to reach an accord on general principles." Cass Sunstein *Legal Reasoning and Political Conflict*, above n 85, at 39.

In regard to the relation of his approach to Rawls', Sunstein explains that the *"distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles, or who disagree on them, can agree on individual cases. When we disagree on the relatively abstract, we can often find agreement by moving to lower levels of generality. Rawls is more interested in the opposite possibility - that people who disagree on much else can agree on political abstractions and use that agreement for political purposes."*[91]

Sunstein's and Rawls' approaches are not exclusive to one another. Sunstein advocates the use of rules and low-level principles in case disagreement on high-level principles is fundamental. Rawls advocates the use of basic principles where disagreement on a general doctrines is fundamental. Effectively, Sunstein argues for agreeing on particular outcomes while Rawls argues for agreeing on basic principles.

(b) (Counter)Arguments and Consequences

An important argument in favour of ethical minimalism is that its basic notion, that - despite all apparent moral diversity - certain values are shared by all, is aligned with common intuition. Also, applied ethical minimalism both requires and grants a great degree of autonomy to the individual moral agents. An according approach in regard to professional and corporate ethics would have the benefit of granting professionals and employees a great degree of liberty thereby minimising the risk of conflict.

There are several arguments against ethical minimalism, one being that an according approach does not take moral diversity seriously. Ethical minimalism constitutes an attempt to avoid dealing with differing moral beliefs.[92] Conflicts and discourse are categorically avoided. Discourse, however, is a way of development and historical growth in the sense of an ongoing "sophistication of reason" and, therefore, regularly regarded as desirable.[93]

A more practical counterargument is that the exact scope of the common values

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[91] Ibid, at 47. Further on the notion of incompletely theorized agreements Cass Sunstein "Incompletely Theorized Agreements in Constitutional Law" (2007) 74 Social Research 1 and also Cass Sunstein "Correspondence: Testing Minimalism: A Reply" (2005) 104 Michigan Law Review 123-129.

[92] Ana Marta Gonzaléz "Ethics in Global Business and in a Plurals Society" (2003) 44 Journal of Business Ethics 23 at 24.

[93] J Baird Callicott "The Conceptual Foundation of Land Ethics" in Craig Hanks (ed) *Technology and Values: Essential Readings* (Wiley-Blackwell, Malden (MA), 2010) at 440.

thought to be shared by all is difficult to determine. Intuitively, many people feel that there are certain common moral values. This intuition is regularly reinforced by empirical studies that suggest that there are certain moral values that people share regardless of their cultural and religious background.[94] However, authors find it difficult to assess exactly what these values are and whether there are certain principles that would be accepted by everyone.[95] Even if one could determine certain common values, these values would be basic at best.[96] Principles that could be deferred from such common values would remain crude. Crude but common principles would be accepted by most addressees. They would, however, be rather incapable of effectively guiding behaviour.

Rules, on the other hand, that moral agents could agree upon would provide guidance but they would not be capable of granting institutionalised systems of morality the concision, comprehensiveness and flexibility required to effectively address all aspects of professional or corporate life. In addition, a rule or deterrence based program implies that not cooperation between individuals but self interest is considered the driving force of the institution implementing the compliance program.[97] The institution is considered an external force rather that a scheme of cooperation. A multitude of rules implies disrespect and distrust in the individual moral agent and in connection with sanctions rules are often less effective than principles promoting values.[98] This, however, is a valid counterargument only insofar as the rules do not fully gain consensus.

Professional associations and business corporations could (and in practice do) rely on both rules and principles to guide behaviour. An approach combining basic common principles and rules that the addressees can agree upon has limits, though. It is

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[94] The most extensive empirical study conducted appears to be Shalom Schwartz and Warren Bilsky "Toward a Universal Psychological Structure of Human Values" (1987) 53 Journal of Personality and Social Psychology 550.

[95] See, for example, F E Snare "The Diversity of Morals" (1980) 89 Mind 353.

[96] Shalom Schwartz, who has conducted extensive research in this area, for example, finds that benevolence and hedonism are such universal values; Shalom Schwartz "Universalism Values and the Inclusiveness of Our Moral Universe" (2007) 38 Journal of Cross-Cultural Psychology 711 at 712.

[97] Milton Regan "Moral Intuitions and Organizational Culture" (2007) 51 St Louis U LJ 941 at 986. Codes of professional or corporate ethics are regularly classified as being rules or value based. Rule based codes focus more strongly on sanctions and deterrence than value based codes. Value based codes, on the other hand, focus more strongly on procedural justice. Studies, show that procedural justice triggers moral intuitions and results in a value based culture; compare Milton Regan, above, at 970 and 975. See also Kevin Mossholder, Nathan Bennett and Christopher Martin "A Multilevel Analysis of Procedural Justice Context" (1998) 19 J Organiz Behav 131. Further Michael Bayles *Procedural Justice: Allocating to Individuals* (Kluwer, Dordrecht, 1990) and Kjell Törnblom and Riël Vermunt (eds) *Distributive and Procedural Justice: Research and Social Applications* (Ashgate, Aldershot, 2007).

[98] Deborah Rhode (ed) *Moral Leadership: The Theory and Practice of Power, Judgment, and Policy* (Jossey-Bass, Hoboken, 2006) at 34 and at footnote 173.

highly likely that not all forms of behaviour that need to be addressed actually are in case an institution limits the rules and principles issued to those that enjoy common consensus. Including rules and principles that do not enjoy full consensus, however, would mean giving up on the initial attempt to categorically avoid conflict.[99]

iv. Ethical Relativism

The second option that professional associations and business corporations may consider relies on moral relativism. The following subsection will establish the underlying metaethical assumptions before briefly outlining the according theory and assessing the arguments for and against such approach.

(a) Theory

Advocates of ethical relativism find that there is no absolute right and wrong in terms of morality. Rather, right and wrong depend on the social framework and what "is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework."[100] Justifying moral norms effectively amounts to a valuation and this valuation is not subject to rational assessment.[101] Accordingly, relativists argue that there may be moral disagreements where both sides have equally good arguments.[102]

David Wong and Gilbert Harman are considered the main advocates of relativism.[103]

According to Harman, moral relativism is committed to three major claims:[104]

> *"(a) There are no universal principles.*
>
> *(b) One ought to act in accordance with the principles of one's own group.*

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[99]One could consider that it would be sufficient to issue rules and principles only in regard to those issues that need to be addressed in order for the institution to function. The functioning of the respective institution could be considered a value that one can assume is shared by all members or employees of the respective institution. An according approach would, however, amount to instrumental as opposed to ethical minimalism. An institutionalised system of role morality would be downgraded to a simple code of conduct.

[100]Gilbert Harman and Judith Jarvis Thomson *Moral Relativism and Moral Objectivity* (Blackwell, Cambridge (Mass), 1996) at 3.

[101]Kurt Seelmann *Rechtsphilosophie* (4th ed, Beck, München, 2007) at 148.

[102]Judith Wagner DeCew, above n 78, at 27.

[103]Cole describes Harman and Wong as the main advocates of relativism; Damien Anthony Cole *Moral Relativism and Moral Universalism: A Coherentist Approach* (Doctoral Thesis, Wellington (NZ), 2004) at 32.

[104]Gilbert Harman *Explaining Value and Other Essays in Moral Philosophy* (Oxford University Press, Oxford, 2000) at 3.

> *(c) Principle (b) is a universal moral principle.*"

The principles of one's own group mentioned by Harman are based on an implicit agreement and "morality derives from [...] [this] implicit agreement and moral judgements are true or false only in relation to such an agreement."[105]

Relativism can be argued as metaethical and as normative theory.[106] Advocates of metaethical relativism argue that "*there can be conflicting moral judgements about a particular case that are both fully correct. The idea is that two people with different moralities might reach conflicting moral judgments concerning a particular case - for example, one saying the agent was morally right, the other saying the agent was morally wrong - where both opinions are correct*".[107] According to "*normative moral relativism, different people, as agents, can be subject to different ultimate moral demands.*"[108] The latter theory entails that passing judgments on others that are subject to different ultimate demands is morally wrong. Metaethical and normative relativism are logically independent. However, metaethical relativism implies normative relativism and effectively both Harman and Wong argue in support of both.

Wong defends relativism accepting that there are significant cultural differences which relativism is capable of explaining.[109] Yet, he finds limits to what may be considered true in morality. Wong follows what he calls a *pluralistic relativism*. Pluralistic relativism, according to Wong "*accounts for the plurality of values and for moral ambivalence by holding that the universal limits on adequate moralities do not narrow the range of such moralities to just one. The possibility of setting different priorities among values corresponds to different ways of regulating interper-*

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[105] Ibid, at 19.

[106] Regularly, relativism is also argued as descriptive theory. "*In ethics relativism is a cluster of doctrines arising from reflection on differences in ethical belief across time and between individuals, groups, and societies. [...] DR* [Descriptive Relativism]*, as it shall be called here, is an assertion about the existence of fundamental differences in ethical belief, where such differences are not explicable as resulting from different applications of common values or principles. [...] Another doctrine, that shall be called here ER* [Epistemological Relativism]*, presupposes that there are at least some fundamental ethical differences, and addresses those differences in terms of epistemic values as truth and justifiability. Its strongest form holds that all ethical codes are true or justified. A more modest version holds that there is no single true or most justified ethical code, and this is consistent with there being a limited plurality of true or most justified codes. [...] The final doctrine, called here NR* [Normative Relativism]*, holds that it is ethically wrong to pass ethical judgment on the behavior and practices of another individual, group or society with an substantially different ethical code; or that it is wrong to intervene in the affairs of that other individual, group or society on the basis of such ethical judgment.*" Lawrence Becker and Charlotte Becker (eds), above n 65, at 856.

[107] Gilbert Harman, above n 104, at 24.

[108] Ibid, at 20.

[109] David Wong *Natural Moralities: A Defense of Pluralistic Relativism* (Oxford University Press, Oxford, 2006) at 20.

sonal conflict of interest and providing direction to the individual. [...] My version of pluralistic relativism implies that there will be such commonalities and differences in moralities across societies and within them. Much of what is moral will be the same for, say, Asian and Western societies, because of the common functions of moralities, human nature, and similar conditions across human societies."[110]

(b)   (Counter)Arguments and Consequences

A relativist approach benefits from the fact that relativism is capable of explaining and accommodating moral diversity.[111] The main argument against relativism, however, is that it is counterintuitive and, therefore, rejected by the great majority of people. Most people intuitively feel that objective moral truth does exist.[112] Establishing moral truth and distinguishing between moral right and wrong is considered the actual problem. Accordingly, moral agents argue about morality. Advocates of relativism counterargue that these intuitions are mistaken and the idea of objective moral truth is a mere illusion. They support their argument by pointing out that moral agents experience moral conflict. However, it has been argued that "admitting the existence of single-agent moral conflicts need not commit one to relativism".[113] A rational method could support conflicting ethical statements based on the fact that the relevant data differs depending on the cultural background of the moral agents. Many of the moral disagreements experienced are due to disagreements on facts.[114] Harman counterargues that moral diversity results not only from different social situations but from different irreducible values and outlooks.[115]

In practice, following a relativist approach would mean accepting that individuals may subscribe to completely different and opposing values. Different from an

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[110]Ibid, at 65.

[111]Moral diversity is not to be confused with descriptive moral relativism. One argument against descriptive moral relativism is the significant amount of moral agreement. Also, it is argued that moral terms are often simply interpreted differently in different cultures. Moral diversity, as accepted, is not concerned with the significance of moral disagreement but solely with the fact that moral disagreement exists and that such disagreement poses a challenge for institutions issuing normative systems.

[112]Wong realises this and finds that it "*is not obvious that we need any moral absolutes by which to live. It is not obvious that instead of being depressed by our inability to say who is absolutely right and wrong in every moral disagreement, we cannot instead be exhilarated by the wide range of human possibility to live in different ways and to become different people. And it is not obvious that we cannot learn to accept that what is morally true for us is in part determined by our specific historical and cultural environment.*" David Wong *Moral Relativity* (University of California Press, Berkeley, 1984) at 175.

[113]Judith Wagner DeCew, above n 78, at 40.

[114]Susan Wolf "Two Levels of Pluralism" (1992) 102 Ethics 785 at 787.

[115]Harman distinguishes between cross-cultural and intra-cultural moral diversity and describes the phenomenon that moral diversity is intractable; David Drebushenko and Stephen Sullivan "Harman on Relativism and Moral Diversity" (1998) 30 Critica 95 at 97.

approach of minimum consensus as described above, however, relativism means accepting that values necessarily depend on a social framework. Within such framework there is no need to accept differing and opposing values. In coping with moral diversity, institutions could consider establishing a framework of their own relative to which moral right and wrong exist.[116] Ensuring that the addressees subscribe to the values and follow the rules would essentially require justifying them as essential to the institution and ultimately providing for sanctions.

Such framework could in theory be achieved by means of employing discursive methods allowing for agents to agree on certain rules and principles that are then accepted as providing intersubjective moral truth.[117] The main argument against the application of an approach based on intersubjective morality by the way of discourse is that it is highly impractical and could hardly be conducted. Also, an according approach would hardly be effective in guiding behaviour in the interest of the relevant institution.

Considering the main argument against moral relativism, that most people intuitively find that moral truth does exist, and, regardless of the question of whether relativism is in fact a correct account of moral truth, it appears that a theory that allows for the existence of moral truth and suggests that moral values are advanced through the rules and principles of the system is more likely to find acceptance. As a consequence of relativism being intuitively rejected, an institutionalised system of norms is likely to be rejected as well in case it does not at least appear to refer to some form of objective moral truth. Professional associations and business corporations could rely on arguing that rules and principles of role morality have moral value based on the professional or corporate society they serve and it is probable that professionals and employees will follow these rules. Similarly, however, professionals and employees may not accept these rules and principles as having moral value. They will be followed due to the sanctions the respective institutionalised system provides for. A system that relies on the notion that the moral value of its rules and principles depend on external factors such as the functioning of the system alone will not be able to achieve a degree of acceptance comparable to the degree of acceptance a system that depends on the intrinsic value of its rules and principles

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[116]Wong describes that one "*consequence* [of relativity] *is a new perspective on moral reform and revolution. If we view morality as something that evolves in response to human need, we can allow for further evolution in response to changing need or to greater awareness of certain needs. This change may go beyond the type of change that absolutists would allow: changing the rules to come closer to the truth. We may change the moral truth itself in response to human need.*" David Wong *Moral Relativity*, above n 116, at 175.

[117]See, for example, Karl-Otto Apel *Diskurs und Verantwortung* (2nd ed, Suhrkamp, Frankfurt am Main, 1992) and Jürgen Habermas *Moralbewußtsein und kommunikatives Handeln* (6th ed, Suhrkamp, Frankfurt am Main, 1996).

can achieve.

v. Ethical Pluralism

The third option that professional associations and business corporations may consider relies on moral pluralism. Again, after establishing the underlying metaethical assumptions, the following subsection will briefly outline the according theory before assessing the arguments for and against such approach.

(a) Theory

In plain words, moral pluralism "is the view that there are various forms and styles of life which exemplify different virtues and which are incompatible"[118] Basically, moral pluralism is a middle theory in between monism and relativism. Monism holds that there is objective moral truth while relativism holds that there is not. Moral pluralism holds that there is *some* moral truth without amounting to relativism.[119] Accordingly, pluralism as opposed to relativism allows for people to settle conflicts at least about some values.[120] Both relativism and monism are considered to be essentially impossible in practice.[121] Relativism does not allow for criticising a society and its prevailing moral norms. Monism, on the other hand, is not capable of adequately explaining a morally diverse society.

Two prominent advocates of pluralism are Isaiah Berlin and Josef Raz.

Berlin advocated value pluralism and rejected both monism and relativism.[122] According to Berlin there are multiple good ends and multiple admirable ways of life. These good ends and admirable ways of life may conflict and be incompatible.

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[118] Joseph Raz *The Morality of Freedom*, above n 23, at 395; Moral pluralism *"is the view that values, obligations, virtues, ideals, or fundamental moral principles are inherently diverse and cannot be reconciled into one harmonious scheme of morality.* [...] *Moral pluralism is not equivalent to relativism, however, since it rejects the view that values are merely subjective, or only matters of taste or cultural belief. Moral pluralism usually holds, with moral realism, that there are objective values; its claim is that such values are not all compatible."* Lawrence Becker and Charlotte Becker (eds), above n 63, vol 2 at 839.

[119] Claude Galipeau *Isaiah Berlin's Liberalism* (Oxford University Press, Oxford, 1999) at 58, 62 and 67.

[120] John Kekes *The Morality of Pluralism* (Princeton University Press, Princeton (NJ), 1993) at 48. Pluralism does not entail an approach of minimum consensus. It rather requires an approach that accommodates discourse on moral issues and allows for solving some of the conflicts between values. Compare above n 77.

[121] Brian Burton, Craig Dunn and Michael Goldsby "Moral Pluralism in Business Ethics Education: It is About Time" (2006) 30 Journal of Management Education 1; Manuel Velazquez "Globalization and the Failure of Ethics" (2000) 10 Business Ethics Quarterly 343 at 345.

[122] William Galston, above n 72, at 95.

Some of these good ends and admirable ways of life cannot be measured according to one universal standard and not all good ends and admirable ways can be realised.[123] Berlin, however, was no subjectivist in moral matters.[124] He found that all humans have certain values in common and in certain they differ.[125]

Berlin argued a connection between pluralism and liberalism.[126] Pluralism, according to Berlin, entails liberty to choose between multiple ends and admirable ways of life.[127] Liberty, as advocated by Berlin, means negative liberty in the sense of freedom from coercion.

Raz goes a step further. According to him, pluralism is linked to individual autonomy and autonomy presupposes the existence of an "adequate range of options".[128] Raz found that "people should have available to them many forms and styles of life incorporating incompatible virtues, which not only cannot all be realized in one life but tend to generate mutual intolerance."[129] Raz argued that in certain areas values are incommensurable.[130] An according morality would generate an "autonomy-based doctrine of freedom".[131] States would be obliged not only to prevent denial of freedom but to promote it.

Both Raz and Berlin find that pluralism and liberty of some kind are effectively connected. They both are primarily concerned with political contexts. Similar to states, professional associations and business corporations subscribing to a pluralist approach, however, would need to consider the like. Pluralism minimally entails that an institution takes the moral beliefs of those it addresses seriously, weighs them against and balances them with the moral beliefs of others and the requirements of the institution.

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[123]Claude Galipeau, above n 119, at 58, 62 and 67. According to Berlin, there is no single highest virtue by which all others can be ranked. Berlin found that life requires a plurality of values that cannot be ordered in hierarchy or judged based on a common standard; Hans van Oosterhout, Ben Wempe and Theo van Willigenburg "Rethinking Organizational Ethics: A Plea for Pluralism" (2004) 55 Journal of Business Ethics 387 at 392.

[124]William Galston, above n 72.

[125]Jason Ferrell "Isaiah Berlin: Liberalism and Pluralism in Theory and Practice" (2009) 8 Contemporary Political Theory 295 at 299.

[126]Ibid, at 309.

[127]Isaiah Berlin *Liberty* (Oxford University Press, Oxford, 2002) at 166 for a definition of positive and negative liberty and at 216.

[128]Joseph Raz *The Morality of Freedom*, above n 23, at 418.

[129]Ibid, at 424.

[130]Ibid, at 357.

[131]Ibid, at 424.

(b) (Counter)Arguments and Consequences

Advocates of monism regularly argue that the plural values assumed by advocates of pluralism may be reduced to happiness.[132] This argument, however, fails to acknowledge that pluralism is concerned with intrinsic values and not with values instrumental to happiness. Pluralists argue that agents experience choices between values as complex and this experience suggests that they cannot simply be reduced to one single highest value of happiness to which all other values are but instrumental.[133]

An argument against pluralism is the argument of consistency in ethics. Moral agents cannot be morally obliged to do impossible. Therefore, they cannot be subject to opposing moral obligations. Advocates of pluralism reject this argument by pointing out that consistency in the sense of harmony is not a necessary condition of moral theory.[134]

On the other hand, there are numerous arguments in favour of pluralism. Pluralism mitigates the extremes of monism and relativism and is consistent with the intuition that moral truths exist. Also, pluralism aligns itself with the empirical fact of moral diversity. Authors regularly explain moral pluralism by referring to the fact that people live by different cultures, make different experiences or hold different values; people may apply different weight to similar considerations or they may interpret evidence differently.[135]

Pluralism accepts moral diversity not only as empirical fact but as theoretically accurate account of morality and pluralism thereby takes moral diversity seriously. Institutions subscribing to moral pluralism benefit from the fact that it allows to explain moral diversity and will have a broader basis of acceptance than monism on the one hand or relativism on the other. Pluralism primarily, however, means providing ways of mitigating moral conflict. The fact that pluralism allows some values to be excluded from the set of those that may be accepted as possibly justified implies that moral reasoning and the resolution of moral conflict are essential parts to be recognised by any set of rules and principles based on the acceptance of pluralism as theoretical foundation. In practice, institutions following a pluralist approach will provide for a system of rules and principles that allows for the existence

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[132] Jonathan Riley "Utilitarian Liberalism: Between Gray and Mill" (2006) 9 Critical Review of International Social and Political Philosophy 117 at 130-134.

[133] See, for example, Peter Schaber "Value Pluralism: Some Problems" (1999) 33 Journal of Value Inquiry 71.

[134] Lawrence Becker and Charlotte Becker (eds), above n 63, vol 2 at 839.

[135] Katherine Kruse "Lawyers, Justice, and the Challenge of Moral Pluralism" (2005) 90 Minn L Rev 389 at 402.

of values that may contradict each other. Such system will require that a process is in place that allows for solving moral conflicts by providing for some form of procedural justice. Systems of procedural justice allow excluding certain values as not being justifiable while other values - even such that may contradict each other - will be acceptable; conflicts can be resolved or mitigated, at least.[136]

For professional associations and business corporations, relying on moral pluralism would effectively allow for deviating from the requirement of maximum acceptance of rules and principles issued. An approach relying on moral pluralism would allow weighing values against each other and accommodating a degree of conflict.

vi. *Summary*

Summing up the aforesaid, there are three possibilities for an institution to cope with the challenge of moral diversity. The three options rely on the theoretical answer to the question of whether moral diversity is fact or mere illusion. Effectively, moral diversity may be nothing but a fallacy in case one accepted monism. Moral diversity would be a fact to its fullest extent if one accepted relativism. Or moral diversity would be a fact to a limited extent if one accepted pluralism. There are arguments pro and contra ethical monism, relativism and pluralism and the debate is ongoing. The debate on the theoretical basis of moral diversity, however, is not one in which professional associations or business corporations need to show great interest. Naturally, professional associations and business corporations will be concerned with the practical implications of moral diversity rather than with the underlying theoretical questions.

There are three ways of addressing the challenge of moral diversity in practice. The concept of gaining a minimum consensus on both rules and principles compliments a monistic approach and grants individual actors a great deal of autonomy while reducing potential for conflict. An according approach, however, is incapable of providing for situations where such conflict does occur. Considering that professional associations and business corporations follow clear objectives in issuing rules it is likely that some of these rules and principles necessary to achieve the envisaged objectives will not be acceptable to all. There is a clear tension between minimum consensus and the objectives followed by professional associations and business corporations. A relativist approach, on the other hand, would allow for emphasizing the profession or corporation as framework relative to which rules and principles

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[136]States, for example, provide for a judicial system. One objective of any judicial system is to mitigate conflict and restore peace under the law. Similarly, other institutions provide for processes to resolve disputes.

provide measures of assessing moral right and moral wrong. An according approach would, however, have to rely on sanctions. A pluralist approach, finally, would not necessarily entail minimum consensus. It would allow for rules and principles that are not fully acceptable to every single agent. A pluralist approach would, however, require a process for mitigating conflicts that do arise.

d. Associations and Corporations, Diversity and Role Morality

After having considered the different options, the following section will try to establish the theoretical basis to measures on how professional associations and business corporations can optimally implement institutionalised systems of role morality in practice considering that the rules and principles these systems consist of primarily serve certain objectives, require acceptance in order to be effective and that factors such as compliance with basic intuitions affect acceptance.[137]

Considering the fact that people hold relativism counterintuitive, institutions would need to attempt establishing rules and principles of role morality that refer to a broader basis rather than to a limited framework. This leaves mainly two options: Professional associations and business corporations can rely on a system of procedural justice in order to deal with conflicts that arise. An according approach would be impracticable. On the other hand, they can rely on a minimum consensus in order to reduce the probability of conflict. Fully relying on a minimum consensus would reduce the potential for conflict and make a system capable of dealing with conflict obsolete. However, professional associations need to ensure that their members fulfill their duties to society and business corporations need to ensure that their employees behave in a way expected by the business corporation itself. The degree of liberalism entailed by an approach characterised by a minimum consensus is only partly sustainable. Certain rules and principles may not gain a minimum consensus but they may be necessary in the light of the objectives followed. A minimum consensus on rules and principles of professional and corporate conduct will not be comprehensive. Hence, there will be potential for conflict and the necessity to mitigate and resolve such conflict. A minimum consensus and a system capable of mitigating conflict between plural values can well coexist in professional and corporate ethics.

Continually considering that professional associations and business corporations

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[137]Professional associations and business corporations are not subject to theoretical restraints. They do not need to decide for one and against another approach as long as their chosen approach is consistent. Professional associations and business corporations may, therefore, combine different theoretical approaches to achieve optimal outcomes.

follow certain objectives, issuing precise rules will be inevitable. On the other hand, only basic principles will grant an institutionalised normative system the flexibility required. In practice there is "a tendency to classify legislative systems as either principle- or rule-based."[138] Yet, "most regulatory systems contain a mixture of rules and principles."[139] Both rules and principles, however, may well be designed to gain a minimum consensus. While an institution may rely on basic principles that gain an overlapping consensus, in the manner described by Rawls, that same institution may issue precise rules ensuring particular outcomes, in the manner described by Sunstein. Effectively, an institution needs to find a way to combine rules and principles whereby both rules and principles are designed in a fashion that they (1) optimally fulfill their objectives to guide behaviour while (2) gaining a minimum consensus to the greatest degree possible.

Even if such an institutionalised system were optimally constructed some norms necessary to fulfill the objectives followed would not gain the consensus of all professionals or employees. A minimum consensus both on rules and principles governing professional and corporate societies will necessarily carry a potential for conflict.

In dealing with conflicts, a system capable of mitigating conflicts between plural values and conflicting moralities, solving some issues and easing others, will further the acceptance of an institutionalised system of role morality. Due to the ongoing process of uncovering and debating moral issues whenever and wherever they arise, the institution itself will be in the advantageous position of having the ability to reconstruct and develop its institutionalised system of role morality, optimising it to the greatest degree possible. There are different ways of establishing a system capable of mitigating conflict. Yet, most agents more readily accept decisions based on procedure by an impartial institution as being *just*.[140] An according system of procedural justice requires (1) an impartial decision maker, (2) an opportunity to be heard and (3) that the procedure is based on consistency, adherence to precedent and conformity to rules.[141] In case a system of procedural justice provides these basic requirements, its decisions will more readily be accepted by an agent.[142]

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[138]Brigitte Burgemeestre, Joris Hulstijn and Yao-Hua Tan, above n 41, at 37.

[139]"Rules may become more principle-like through the addition of qualifications and exceptions, whereas principles may become more rule-like by the addition of best-practices and requirements." Further, it appears that one "reason why relatively younger standard setting regimes [...] appear more principles-based is that they have not had as much time to accrete rules." Ibid, at 38.

[140]Compare Milton Regan, above n 97, at 975; Celia Gonzalez and Tom Tyler "Who do People Care about Procedural Fairness? The Importance of Membership Monitoring" in Kjell Törnblom and Riël Vermunt (eds), above n 97, at 20.

[141]See Michael Bayles, above n 97, at 20, 39 and 87.

[142]More on procedural justice and its benefits Kevin Mossholder, Nathan Bennett and Christopher

A combination of minimum consensus on different levels and a system of procedural justice logically appears to maximise acceptance of an according set of rules and principles of role morality by the respective agents. The next chapter will be concerned with the question of whether there are indications from practice that an according approach is not only theoretically but also practically viable.

Martin, above n 97.

VI The Case of New Zealand

This next chapter is concerned with the question of whether the previously described approach is capable of dealing with the challenges of moral diversity in practice. Convincing empirical evidence is hard, if not impossible, to come by. Showing that a highly diverse society successfully applies measures, similar to the ones described in the previous chapter, would provide a strong indication for the merits of the suggested approach.

New Zealand is an example for such a diverse society. The upcoming chapter will concentrate on professional and corporate ethics in New Zealand with a strong emphasis on legal ethics. The first section will analyse the situation in New Zealand in general and in professional and corporate societies in particular. The subsequent section will provide a detailed analysis of the New Zealand Code of Legal Ethics and the way it deals with the challenges of cultural and moral diversity.[1] Finally, the last section will briefly consider other chosen codes of professional and corporate ethics.

a. *Professional and Corporate Ethics in New Zealand*

i. *Cultural and Moral Diversity*

Social and moral diversity are facts of life - in New Zealand more than in other countries in the world. New Zealand is populated by 4.33 million people. 67.6% consider themselves to be ethnically European, 14.6% Māori, 9.2% Asian and 6.9% other Polynesian Pacific.[2] In regard to its colonisation, New Zealand is a relatively young country and those New Zealanders that consider themselves to be European in terms of ethnicity do not share a common cultural background. Most Europeans that settled in New Zealand came from Great Britain, Ireland and Germany.[3] In

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[1]Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (SR 2008/214).

[2]11.6% of New Zealand's population are other (people can choose to identify with more than one ethnic group); United States Department of State <www.state.gov>. In terms of religion 50% of New Zealanders are Christian, 32.3% have no religion while small percentages of the population are Hindu, Buddhist/Muslim and Jews.

[3]The Encyclopedia of New Zealand <www.teara.govt.nz>.

recent years, a significant number of US Americans and South Africans emigrated to New Zealand. Compared to many other countries in the world New Zealand has particularly large ethnic minorities and its society is culturally highly diverse.[4]

New Zealand's ethnic and cultural diversity contributes to its moral diversity. Even though most New Zealanders of European ethnicity are likely to have a fairly large set of moral values in common, the Māori of New Zealand, being the second largest ethnic group, have a set of common values that are not fully aligned with those common among Europeans.

Some of the differences are easy to grasp and regularly openly addressed. The Māori custom of koha or reciprocal gifting, for example, may collide with the predominantly European understanding that especially people holding public offices may not receive special benefits from third parties as reward for the performance of their duties.[5] In a European understanding a gift given in exchange or as reward for the performance of duties may be considered a bribe. In Māori understanding, rejecting koha is considered highly impolite. The tradition of reciprocal gifting, however, is fairly easy to accommodate if openly addressed.[6] Conflicts are easily avoided if office holders declare and donate gifts received.

Other cultural differences, however, are much deeper rooted and raise more complex issues. Māori customs or tikanga Māori, for example, have certain underlying principles and values.[7] One component of these values is whanaungatanga which is concerned with the relationship between kin persons.[8] In Māori understanding, individuals "expect to be supported by their relatives near and distant, but the collective group also expects the support and help of its individuals. This is a fundamen-

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[4]In Great Britain, for example, the 2001 Census found 92.1% of the population to be "white". The largest minority were the Indians with 1.8%; UK National Statistics <www.statistics.gov.uk>. In Germany 91.5% of the population are German. The largest minority were the Turkish with 2.4% <www.cia.gov>. For information on other countries see Central Intelligence Agency <www.cia.gov>.

[5]The tradition of reciprocal gifting is not unique to Māori culture. In Samoan culture the tradition of reciprocal gifting is referred to as *lafo*. See also NW Ingram "Report to the Prime Minister upon Inquiry into Matters Relating to Taito Phillip Field" <www.beehive.govt.nz>.

[6]Department of the Prime Minister and Cabinet "Cabinet Manual" (2008) <www.cabinetmanual.cabinetofice.govt.nz> at 2.78 - 2.86.

[7]New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (Wellington, 2001) at 15; see also Hirini Moko Mead *Tikanga Māori: Living by Māori values* (Huia, Wellington (NZ), 2003).

[8]Ibid, at 28; *"Of all the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking relationships are everything - between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa or genealogy identifying the nature of relationships between all things. That remains the position today. In traditional Māori society, the individual was important as a member of a collective. The individual identity was defined through that individual's relationship with others. If follows that tikanga Māori emphasised the responsibility owed by the individual to the collective."* New Zealand Law Commission, above n 7, at 30.

tal principle."[9] To the present day, a majority of Māori are aware of their cultural heritage and live by the customs of tikanga Māori handed down over generations identity depends greatly upon his whakapapa, meaning genealogy. Even though the interests of the group are understood to be supreme, Māori - to an increasing degree - are individuals within a whanau or hapū.[10] Accordingly, many Māori feel morally obliged towards members of their own whanau, hapū and iwi.[11] These moral obligations weigh stronger than moral obligations felt towards non-kin persons. The according understanding is derived from the strong role that communities such as the (sub)tribe and the extended family play in Māori culture. Common morality among Europeans on the other hand tends to be that special moral obligations that depend on relationship are considered to include only direct relatives, children and partners. Close friends or distant relatives are regularly not considered part of the group.[12] Accordingly, situations may arise where a Māori will feel morally obliged towards a third party in a situation where a European would not.

Conflicts of interest, such as the one suggested, are regularly a central issue in any professional and corporate environment. The way these issues are and may be addressed, however, also depends on the diversity within the professional and corporate environment.

ii. *Professional and Corporate Environment*

Despite its small economy, New Zealand is regularly rated among the most business friendly and least corrupt countries in the world.[13] Accordingly, there is a significant number of international - especially Australian, European and US American - companies that operate in New Zealand. Historically, New Zealand's economy is based on exports from its agricultural system. New Zealand has only small

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[9] Hirini Moko Mead, above n 8, at 25.

[10] Ibid, at 37.

[11] The term whanau refers to the extended family. The hapū, meaning subtribe, consists of several whanau. An iwi, meaning a tribe, consists of several hapū; see Robert Merrill "Some Social and Cultural Influences on Economic Growth: The Case of the Maori" (1954) 14 Journal of Economic History 401 at 402.

[12] Accordingly, the German Code of Criminal Justice (Strafgesetzbuch) in Sec 52(1), for example, provides that apart from fiancé(e), spouse and civil partner only a person who is or was lineally related or related by marriage, collaterally related to the third degree, or related by marriage to the second degree may refuse testimony.

[13] See The World Bank Group "Doing Business 2010" (2010) Doing Business <www.doingbusiness.org> and Belinda Goldsmith "New Zealand tops Denmark as world's least corrupt nation" (2009) Reuters Life <www.reuters.com>. The fact that the smallness and remoteness of the New Zealand economy will allow for social normalisation and repercussions will have a positive effect on the way professionals and corporate employees behave. These factors may provide a stimulus to conform with prescribed rules and principles. They will, however, not affect disruptive effects caused by conflicts experienced by individuals.

high-tech and manufacturing sectors. The primary industries make up for 7.1% of New Zealand's GDP. The manufacturing sector made up for 12.4% and the services sector for 71% of real GDP.[14] After several years of recession, the economy in New Zealand is currently improving. This and the free trade agreements that New Zealand signed with numerous countries benefitted the professional sector in New Zealand. Similarly to the business related professions, the medical and educational professions in New Zealand are highly developed, contributing to the high standard of living enjoyed by New Zealanders. Effectively, there are more than 10,500 legal professionals, nearly 29,000 accountants and approximately 13,000 medical professionals in New Zealand.[15]

Businesses and the professions in New Zealand are not quite as diverse as New Zealand society itself. In terms of diversity, in New Zealand economy, Māori make up for just about 10% of the workforce as opposed to 14.6% of the population.[16] The unemployment rate among Māori is approximately double as high as for non-Māori. In the legal profession approximately 71% of the professionals consider themselves New Zealand Europeans, 3% other Europeans, 1,8% Māori, 1,6% Chinese.[17] According to the Medical Council of New Zealand, New Zealand Europeans make up for 55,3%, other Europeans for 15,8%, Chinese for 5,9%, Indians for 5,3%, Māori for 3,2% and Pacific Islanders for 1,7% of medical professionals.[18] It may be assumed that the situation is quite similar in other professions and not entirely different in large corporations. Professional and corporate New Zealand is clearly dominated by New Zealand and other Europeans.

Considering the fact that Māori are underrepresented in a system dominated by New Zealand and other Europeans and that values common to Māori are not fully aligned with those common to Europeans, it is likely that the Māori minority will experience conflict between personal morality and morality of role more often than employees and professionals that are of European ethnicity.

Compared to other countries in the world, New Zealand provides for very few "formal institutional mechanisms to develop and maintain ethical standards" within its

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[14]Compare the economic overview for 2009 provided by the New Zealand Treasury; <www.treasury.govt.nz>.

[15]Compare the numbers provided by the New Zealand Law Society <www.lawsociety.org.nz>; the New Zealand Institute of Chartered Accountants <www.nzica.com> and the Medical Council of New Zealand <www.mcnz.org.nz>.

[16]Rob McLeod "Māori in the New Zealand Economy" (2009) New Zealand Business Roundtable <www.nzbr.org.nz>.

[17]20% either did not disclose or considered themselves to be of a different ethnicity; compare "Our Changing Profession - A Look at Statistics" (2002) 538 LawTalk 18.

[18]Compare Medical Council of New Zealand <www.mcnz.org.nz>.

professional and corporate environment.[19] It is likely that this will change in the future. New Zealand will hardly be able to ignore the international tendency to emphasise the importance of business ethics, develop standards and require their maintenance. Despite the lack of formal institutional mechanisms, it appears that ethical standards in corporate and professional New Zealand are high. This is confirmed by recent studies.[20] This situation suggests that professional associations and business corporations in New Zealand employ methods that allow for successfully dealing with the specific challenges. The methods employed include the wide spread use of codes of ethics and conduct.

b. Codes of Ethics in New Zealand

i. Introduction

This chapter will analyse the way different professional and corporate codes of ethics and conduct in New Zealand deal with moral diversity. The main question is whether the theoretical approach suggested in the last chapter is employed in practice. As the legal profession is particularly prone to moral conflict, this chapter will concentrate on the New Zealand Code of Legal Ethics. The first section of this chapter will provide an overview over the provisions of the New Zealand Code of Legal Ethics. The following section will provide an example and evaluate how the moral conflict described is dealt with in theory and practice. The final section will then compare the New Zealand Code of Legal Ethics to other corporate and professional codes of ethics in New Zealand and establish whether the rules and principles provided by them could cope with the according problem more or less effectively.

The solution suggested in the previous chapters includes combining rules and principles complementing each other and both based on a minimum consensus amongst the addressees and implementing a system of procedural justice that moral conflicts of role are subjected to.

Effectively, whether or not rules and principles are based on a minimum consensus is a sociological rather than a philosophical question and requires empirical data. Hence, it is difficult if not impossible to determine whether rules and principles

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[19]John Milton-Smith "Business Ethics in Australia and New Zealand" (1997) 16 Journal of Business Ethics 1485 at 1488. A recent development is the Code of Ethics for financial advisers; Committee for Financial Advisors "Code of Professional Conduct for Authorised Financial Advisers" <www.financialadvisercode.govt.nz>.

[20]Compare St James Ethics Centre and Beaton Consulting "The 2009 Annual Business and Professions Study" St James Ethics Centre <www.ethics.org.au>.

are actually based, and if so, to what degree on a minimum consensus. There are, however, a number of indications that a set of rules and principles is capable of gaining a minimum consensus. Firstly, rules and principles based on a minimum consensus will be characterised by evident restraint, meaning they will refrain from touching upon moral issues if possible. Secondly, they will provide only minimum requirements and, thirdly, a minimum consensus of the sort suggested in the previous chapter will include both basic principles and precise rules that compliment each other. An indicator for the fact that a specific code is based on a minimum consensus is the number of conflicts that do occur and an indicator therefore is the number of conflicts decided through a system of procedural justice established.[21] Conversely, if a certain code provides rules and principles, observes restraint in regard to moral issues and systems of procedural justice seldom deal with moral conflicts, one may prima facie assume that rules and principles issued by a professional association or business corporation are comprehensive, technically flawless and capable of gaining a minimum consensus to the highest degree possible.

The second aspect defining a code that follows the suggested approach is the incorporation of a system of procedural justice capable of effectively resolving or mitigating moral conflicts. Any such system will need to provide for (1) an impartial decision maker, (2) an opportunity to be heard and (3) that the procedure is based on consistency, adherence to precedent and conformity to rules. Most importantly the relevant code will need to provide that conflicts of role may be subjected to the decision of the according institution. Again, one can favourably assume that, if such an institution is provided for, it will be equipped with the means to impartially decide on the basis of rules and principles acceptable to the majority on the basis of a minimum consensus.

Summing that up, in evaluating a certain professional or corporate code of ethics the facts that the respective code (1) uses precise rules and basic principles, (2) is characterised by evident restraint, (3) provides only minimum requirements, (4) provides for an institution that decides conflict on the basis of procedure and (5) conflicts of role are subjected to this institution, indicate that the code follows an approach similar to the one suggested in previous chapters.

The following subsections will analyse the New Zealand Code of Legal Ethics and other chosen codes of professional and corporate ethics as to whether the respective codes reflect the above mentioned features and in respect to the way they deal with conflicts of role.

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[21]An example for such a system of procedural justice would be the New Zealand Law Society's Ethics Committee. See further below.

ii.   New Zealand Code of Legal Ethics

The New Zealand Code of Legal Ethics, which is laid down in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (SR 2008/214) (the "Code"), is an example for a system of rules that meets the requirements of a combined approach of precise rules and basic principles in regard to lawyers' obligations in general and in particular.[22] Chapter 2, for example, provides for the principle that a *lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.* This principle is complemented by a number of precise rules such as the rule that a "*lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.*" The rules provided for under the heading of the governing principle are not exhaustive to the principle.[23]

The Code is characterised by restraint and, as Webb points out, the Code provides mere minimum standards.[24] Even though Webb seems to advocate a more comprehensive approach his criticism does confirm the Code's minimalistic approach. This approach may be problematic from a regulatory point of view that Webb seems to hold. On the other hand, a minimalistic approach will have the benefit of reducing the potential for conflict.

In order to fulfill the above mentioned requirements, the Code would further need to provide a system of procedural justice. Such a system would require (a) an impartial decision maker, (b) an opportunity to be heard and (c) that the procedure is based on consistency, adherence to precedent and conformity to rules. As set out in the notes about the rules in the preface of the Code lawyers *may seek guidance on the application or interpretation of these rules from the Law Society's Ethics Committee* while complaints are handled by the *Disciplinary Tribunal*. These institutions, as decision makers, are impartial in relation to the professional concerned and any complainant. Even though the Disciplinary Tribunal has the power to determine its own procedure, this procedure will satisfy the requirement of providing the parties with the opportunity to be heard and be based on consistency, adherence

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[22]Duncan Webb finds that the Code consists of rules with an added commentary; Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis NZ, Wellington, 2006) at 114. He concludes so by applying a more narrow understanding of the terms rules and principles. Effectively and regardless of terminology, both the present analysis and Webb's findings coincide in the fact that the Code consists of general norms that are complemented by more particular ones. The Code can be accessed over New Zealand Legislation <www.legislation.govt.nz>.

[23]Webb points out that the rules have gaps and are too vague in certain respects; Duncan Webb, above n 22, at 123.

[24]Ibid.

to precedent and conformity to rules.[25]

Further, the potential for conflicts of role is recognised by the Code. The Code expects lawyers in New Zealand to keep their roles separate.[26] In its preface the Code provides:

> "*Whatever legal services your lawyer is providing, he or she must* [...] *protect and promote your interests and act for you free from compromising influences or loyalties* [...]. [...] *The obligations lawyers owe to clients are described in the rules of conduct and client care for lawyers* [...]. *Those obligations are subject to other overriding duties, including duties to the courts and to the justice system.*"

The priorities expected from a lawyer are reinforced in Chapter 13 which provides that the "*overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.*"

Conflicts between obligations under role morality and personal convictions in regard to ordinary morality that do occur may not be resolved in favour of the latter in every instance. The Code provides for the so called *cab rank rule*.[27] According to Chapter 4 of the Code, a "*lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.*" Hence and similar to cab drivers who are expected to drive any oncoming client, lawyers are obliged to accept clients regardless of whether they find the clients' interests objectionable.[28] The Code does provide for exceptions to the *cab rank rule*. Particularly, certain conflicts of interest justify exceptions from the *cab rank rule*.

Generally, the question whether a certain conflict is subject to such an exception is a question that the institutions provided for by the Code may be called upon to decide. It is debatable, though, whether these institutions do at all have the option to recognise a conflict of role as exception to the *cab rank rule*. Only then would conflicts of role actually be subject to procedural justice.

Even though this is not explicitly provided for by the Code, a lawyer could consider arguing a moral conflict of interest if he or she feels that such conflict of interest

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[25] Sec 236-252 Lawyers and Conveyancers Act 2006 No 1 (as at 7 July 2010).

[26] *Greenmount Manufacturing v Southbourne Investments* HC Auckland CIV 2005-404-6675 2 Oct 2008 at [27].

[27] More on the cab rank rule W Bradley Wendel "Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection" (2006) 34 Hofstra L Rev 987.

[28] Compare also Duncan Webb, above n 22, at 185.

will impair his or her ability to fulfill his or her obligations as lawyer. The next subsection will be concerned with an example in order to assess the sustainability of an according interpretation of the relevant provisions of the Code.

iii. Legal Ethics Applied

In order to assess whether, and if so, how the Code can resolve the stress pattern between common European and common Māori values the following subsection will consider a fictitious example:

> *Aata is Māori. He is member of the Te Ati Awa. Aata is an active member of his community, was brought up in the tribal area, raised traditionally and educated in the ways and values of his iwi. Aata studied law and joined a large and well known law firm in Wellington. The law firm was regularly mandated by the Crown to assist in proceedings of the Waitangi Tribunal on behalf of the Crown.*
>
> *Years ago, Te Ati Awa land owners had established the Wellington Tenths Trust. The Trust lodged several claims with the Waitangi Tribunal. The objective of these claims was to reclaim ownership over disputed land.*[29]
>
> *Shortly after Aata was admitted to the Bar, he was asked to assist one of the partners of the law firm he worked for. The partner was assisting the Crown in regard to land claims brought forward by Māori. One of the cases the partner was handling involved the Wellington Tenths Trust and a claim the Trust had brought forward in regard to Crown land. The partner asked Aata to prepare a statement rejecting the according claim by the Wellington Tenths Trust.*
>
> *Aata felt morally conflicted. In his understanding, he was morally obliged first and foremost to the members of his iwi and the land owners that brought forward the claim and whom he distantly knew. However, he also knew, that as a lawyer he was foremost obliged to his client. Aata felt that having chosen to be a lawyer and assist others in legal issues, he was obliged to* "uphold the rule of law and to facilitate the administration of justice. The overriding duty of a lawyer is as an officer of

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[29]The Māori value of tikanga whenua is concerned with land. According to Māori understanding land "was and remains integral to group identity and wellbeing. Māori descended from the land and the stories of the ancestors are carved in it." New Zealand Law Commission, above n 7, at 47.

the court."[30] *However, he was unsure what precisely his duties were and whether they could at all be reconciled with his personal ordinary moral convictions. He turned to the Code for guidance.*

The Code provides for a number of rules and principles that Aata would have to consider. In regard to the availability of lawyers to public and retainers, Chapter 4 provides the previously mentioned *cab rank rule* and offers guidance in regard to what is considered good cause to refuse instructions and what does not:

> "*A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.* [...].
>
> *4.1 Good cause to refuse to accept instructions includes a lack of available time, the instructions falling outside the lawyer's normal field of practice, instructions that could require the lawyer to breach any professional obligation, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for the relevant work.*
>
> *4.1.1 The following are not good cause to refuse to accept instructions:*
>
> *(a) any grounds of discrimination prohibited by law including those set out in section 21 of the Human Rights Act 1993;*
>
> *(b) any personal attributes of the prospective client;* [...]."

In case a lawyer has already accepted the retainer and felt conflicted, Chapter 4 a provides a duty to complete the retainer:

> "*4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless*
>
> *(a) the lawyer is discharged from the engagement by the client; or*
>
> *(b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or*
>
> *(c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.*
>
> *4.2.1 Good cause includes*
>
> *(a) instructions that require the lawyer to breach any professional obligation;* [...]."

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[30]Chapter 2 of the Code.

Considering Chapter 4, Aata would be obliged to accept instructions from his client and complete the retainer. None of the exceptions provided for applies. In particular, Aata would not consider rejecting his client due to the clients personal attributes and the client's instructions do not violate legal or professional rules. Effectively, Aata would rather find himself in a situation of conflict of interest.

In regard to conflicts of interest, the Code provides the general rule that a lawyer ought to be independent. Chapter 5 is concerned with a lawyer's independence:

> "*5 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.* [...]
>
> *5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.*
>
> *5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.*
>
> *5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.*"

This independence may be compromised by conflicting interests. The Code differentiates between interests of the lawyer and interests of a third party. In regard to direct interests, the Code provides:

> "*5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.*
>
> *5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.*
>
> *5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.* [...]"

While Aata might *feel* directly conflicted, the interests that are in question are in fact those of some of the members of his iwi and not his own. In regard to third party conflicts of interest the Code provides:

> "*5.6 A lawyer must ensure that the existence of a close personal relationship with a third party does not compromise the discharge of the*

> *duties owed to a client.*
>
> *5.6.1 A lawyer must not act if there is a conflict of interest or an appearance of a conflict of interest between a client and a third party with whom the lawyer has a close personal relationship.*
>
> *5.6.2 Where a person with whom the lawyer has a close personal relationship has an interest in the matter being dealt with or proposed to be dealt with on behalf of the client, the existence of that close personal relationship and the nature of the interest must be disclosed to the client or prospective client irrespective of whether an actual conflict of interest exists. [...].*"

Aata would need to assess whether the relationship between himself and the members of his iwi could be considered a *close personal relationship*. In regard to the interpretation of the term, Section 1.2 of the Code provides:

> "*In these rules, unless the context otherwise requires, [...] close personal relationship includes, but is not limited to, the relationships of parents and children, siblings, spouses, civil union partners, and the relationship between persons living together as partners on a domestic basis [...].*"

The relationships enumerated are too narrow to include all members of Aata's iwi. Kinship in Māori understanding is broader and can include individuals that are only very distantly related.

Even though the Code defines those relationships that minimally constitute a *close personal relationship*, it expressly states that other relationships may qualify, as well. Other relationships must include all those that may give rise to conflicts of interest similar to the conflict of interest a person is deemed to be subject to when the interests concerned are those of a member of the explicitly enumerated category of persons. Whether this is the case must ultimately depend on the views of the people involved and cannot be determined on the basis of objective criteria. A person may well feel obliged towards a distant relative similar to the way he or she feels obliged to his or her parents or children. Such relationship would need to be relevant if the rule is meant to effectively protect the client and his or her interests.[31]

Hence, Aata would need to and could argue that he feels closely personally related to the members of his own iwi similar in fashion to the way a European would feel closely personally related to his parents and children. The argument would have to

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[31] Webb finds that other relationships may render it *unwise* to act; Duncan Webb, above n 22, at 232.

take the form that (1) he feels morally obliged towards the members of his tribe or subtribe, (2) that these moral obligations are due to the close personal relationships based on kinship, (3) he fears that this might impair his judgment to the detriment of his client and (4) he, therefore, considers himself to be at risk not to fulfill his obligations under the Code to the fullest extent. Aata would argue that, even though the relationship with the opposing party was not of a kind enumerated by the Code as close personal, he felt similarly due to his upbringing and the values that he holds true. Under these circumstances, Aata would be obliged to refuse to accept instructions or terminate the retainer respectively.

The fact that Aata could resign from the case would pose a threat to the system of justice relying on the *cab rank rule* in case there was no other lawyer that could fulfill the legally permissive intentions of his client. If all or nearly all lawyers within a particular jurisdiction had close personal relations with one another and a client could not find a lawyer to fulfill his legally permissive intentions, this would endanger the system of justice. In a society as diverse as the society of New Zealand, however, a client will easily find a lawyer not morally obliged to the opposing party. The fact that an individual lawyer could resign from a certain case on the basis of conflicting moral obligations is balanced through the fact that the *cab rank rule* applies to all lawyers alike and, according to rule 4.1.3 of the Code a "*lawyer who declines instructions must give reasonable assistance to the person concerned to find another lawyer.*"[32]

The example shows that the Code provides for effective ways in which lawyers that feel morally conflicted may act in order to reconcile personal ordinary obligations and particular obligations under role morality. Conflicts of interest based on personal relationships with third parties, however, are but one form of moral conflicts. Other moral conflicts will include those where a lawyer - based on his or her personal convictions - finds the client's objectives inacceptable. Webb describes that matters of *personal belief* are not considered relevant exceptions to the *cab rank rule* and there are no reported cases in which the a lawyer rejected a client because he or she felt the client's cause to be immoral.[33] The latter may be due to the fact that it is neither in the lawyer's nor the client's interest that a lawyer represent a client against his personal beliefs. The question of how such conflicts would be resolved is, therefore, rather academic in nature.

Nevertheless, the Code provides for all relevant "building blocks" to a pragmatic

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[32]The same accounts for a lawyer who terminates a retainer; compare rule 4.2.4 of the Code.
[33]Duncan Webb, above n 22, at 189.

approach to resolving moral conflicts.[34] One particular tool that can be applied to resolve moral conflicts and that allows subjecting such conflicts to a procedural system of justice where necessary is the "moral conflict of interest analysis" suggested by Katherine Kruse.[35] Kruse proposed applying traditional principles used to resolve conflicts of interest to moral conflicts, as well. A lawyer feeling conflicted would need to declare that conflict to his or her client if he or she nonetheless feels capable of adequately representing the client. In case the client refused to consent to the representation or the lawyer felt that he or she could not adequately represent the client, the lawyer would need to refuse to accept the clients instructions.[36]

The Code allows for an according approach to the question of moral conflict. The Code specifically defines what is not to be considered good cause to refuse to accept instructions or to terminate a retainer. On the other hand, the Code defines what good cause *includes*.[37] If these inclusions were meant to be exhaustive, the Code would logically not need to define what is not to be considered good cause. By implication other circumstances may constitute good cause. Clearly, only such circumstances can constitute good cause that would involve a lawyer breaching a paramount principle of the Code to the detriment of the client. According to Chapter 5 and as stated above a "*lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients*" while according to Chapter 13 "*the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.*" While the Code does require a degree of role differentiation to ensure the functioning of the legal system, it is clear that the overriding objective is client protection. Therefore, in extraordinary circumstances, where a lawyer can demonstrate that he finds himself in a grave moral conflict, this moral conflict may well constitute good cause to refuse to accept instructions or to terminate a retainer.

In summary, the Code - as interpreted here - does provide for conflicts of role to be recognised as exceptions to the *cab rank rule*. Within the legal system of New Zealand conflicts of role are subject to procedural justice in accordance with the requirements established in the previous chapter.

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[34] Katherine Kruse "Lawyers, Justice, and the Challenge of Moral Pluralism" (2005) 90 Minn L Rev 389.

[35] See above p 21.

[36] Compare Katherine Kruse, above n 33, at 443. Kruse considers several counterarguments. She believes that the benefits of an according approach would outweigh its costs. The costs that are regularly argued are those of limited universal legal representation. Kruse calls this the *last lawyer in town* problem. Kruse explains that the bar in the United States, for example, is reluctant to embrace an according approach.

[37] Compare rules 4.1 and 4.2.1 of the Code.

iv. Other Codes of Professional and Corporate Ethics

Most professional associations in New Zealand have issued codes of ethics or conduct.[38] The same accounts for numerous business corporations operating in New Zealand.[39] The following subsection will take a brief look at the New Zealand Medical Association's Code of Ethics and few chosen corporate codes of ethics focussing on how these codes deal with moral conflicts of interest.

The medical profession, as previously mentioned, is particularly sensitive to ethical issues. Some medical treatments available - such as abortion - are debated on moral grounds and there will be medical professionals that refuse to offer such treatments to patients requesting them. Medical professionals, however, are first and foremost obliged to their patients' wellbeing and are generally required to subject their own interests to those of their patients.

In New Zealand, the medical profession is regulated by the Medical Council of New Zealand (the "MCNZ"). In a recently published (draft) statement the MCNZ elaborates on the way medical professional are expected to align their own beliefs with the requirements of medical practice.[40] The New Zealand Medical Association (the "NZMA") as professional organisation provides the relevant code of ethics applicable to medical professionals in New Zealand.

Generally, the MCNZ expects "*doctors to be prepared to set aside their own beliefs where this is necessary in order to provide care in line with the principles outlined in* Good medical practice."[41] The MCNZ further expects doctors to advise patients about treatments or procedures they choose not to provide because of personal beliefs, but which are not otherwise prohibited, and advise patients on how to access the treatments or procedures. Doctors are expected to tell patients about their right to consult with another doctor and to make referrals where necessary. And while a medical professional may refuse to conduct a certain treatment he or she may not refuse to assist in medical emergencies or in case no other medical professional is available.[42]

The situation is different from the one of a legal professional. Medical professionals are not subject to a strict *cab rank rule*. Medical professionals are, therefore, at greater liberty to refuse care. This freedom has its limits. Medical professionals

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[38] New Zealand Teachers Council Code of Ethics <www.teacherscouncil.govt.nz> and New Zealand Institute for Chartered Accountants Code of Ethics <www.nzica.com>, for example.

[39] The Westpac Group and the Telecom, for example.

[40] Medical Council of New Zealand "Beliefs and Medical Practice" <www.mcnz.org>.

[41] See Medical Council of New Zealand <www.mcnz.org>.

[42] Ian St George (ed) *Cole's Medical practice in New Zealand* (10th ed, Medical Council of New Zealand, Wellington, 2011) at 161.

must refer patients to doctors that do conduct the objected treatments and medical professionals need to conduct a certain treatment in case of emergency. However, medical professionals are at much greater liberty to act in accordance with their own moral convictions than legal professionals are.

Turning to corporate codes of ethics, it appears that the financial sector is particularly sensitive to ethical issues.[43] A major bank operating in New Zealand is ANZ New Zealand belonging to the ANZ Group of Companies located in Melbourne, Australia. ANZ issues the ANZ Code of Conduct and Ethics (the "ANZ Code").[44] The ANZ Code applies to all of ANZ's employees worldwide.

Corporate employees in general and bank employees in particular will not encounter a situation of the sort Aata, from the previous example, was in. This is due to the fact that as a lawyer, Aata represented clients. Doing so a lawyer is regularly expected to differentiate his behaviour in accordance with his roles. Corporate employees are not likely to experience according conflicts with such regularity and such intensity. However, there are numerous situations in which corporate employees in general and bank employees in particular may experience moral conflict:

> *Aata now works in the credit department of ANZ. He is responsible for processing loan applications and ultimately decides on whether a loan is granted or refused. Aata may process loans under a certain limit without supervision. A member of Aata's subtribe applies for a loan to buy a plot of land. The applicant can not provide the required sureties. Aata, however, has not doubt that he will be able to repay the loan.*

Again, Aata finds himself in a situation of conflict and turns to the relevant code. Similar to the above mentioned codes, the ANZ Code provides minimum requirements and exercises moral restraint.[45] Also, the ANZ Code provides both basic principles and precise rules. Basic principles such as *honesty* and *integrity* are supposed to cover all relevant aspects. Rules such as the rule never to help a customer or anyone else break or evade the law specify these principles where needed.[46] On a third level, the ANZ code is supplemented by *a number of more detailed policies that form part of the ANZ Conduct and Ethics Policy Framework*. These policies are not publically available.[47]

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[43] See also Committee for Financial Advisors "Code of Professional Conduct for Authorised Financial Advisers" <www.financialadvisercode.govt.nz>.

[44] ANZ "Employee Code of Conduct and Ethics" <www.anz.com>.

[45] The ANZ Code of Conduct and Ethics specifically states that it provides minimum requirements only; ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 4.

[46] ANZ itself seems to understand the ANZ Code to provide principles and a commentary. The commentary, however, provides clear and highly particular rules.

[47] According to the preface to the ANZ Code, the "*Code of Conduct and Ethics sets standards for*

Unlike the New Zealand Code of Legal Ethics, the ANZ Code does not provide a system of strict but comparatively precise principles supplemented by even more particular rules that include exemptions. Rather, the ANZ Code provides concise yet comprehensive principles such as *honesty, integrity, quality and trust* that are particular (and enforceable) only in connection with the interpretative rules provided for.

In regard to the specific case at hand, the ANZ Code in its No 4 provides that employees "*identify conflicts of interest and manage them responsibly.*" This principle is then further interpreted. The ANZ Code provides:

> "*Acting honestly and with integrity also means managing conflicts of interest and never putting yourself in a situation that puts, or appears to put, your own personal interests before those of ANZ or our customers. The perception of a conflict of interest can do as much damage to ANZ's reputation as an actual conflict of interest. You must be mindful of when a conflict may be perceived by others, and take action to avoid or address this risk.*"

Subsequently, the ANZ Code provides detailed instructions on what employees are expected to do. These rules include:

> "*Be alert to actual or potential conflicts of interest and disclose them to your line manager, human resources representative or your operating risk and compliance representative.* [...]
>
> *Never provide or maintain products or services for, or complete or approve transactions on behalf of, immediate family members or relatives in the course of your work.*
>
> *Disclose to your line manager any personal associations with a third party that you are involved in evaluating or negotiating with for ANZ, whether for employment, as a customer or supplier or any other reason.* [...]"

Hence, Aata would be required to determine whether the applicant was an immediate family member or relative. Assuming that he was not, Aata would need to consider whether he had any personal associations with the applicant. Even if Aata

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the way we work at ANZ. The Code provides a practical set of guiding principles to help you make decisions in your day to day work, whatever you do and wherever you do it. The Code is supported by a number of more detailed policies that form part of the ANZ Conduct and Ethics Policy Framework. These are mentioned in this document and can be found on the ANZ intranet [...]"; compare ANZ "Employee Code of Conduct and Ethics" <www.anz.com> at 3.

found that he did not, the situation would still fall under the general *conflict of interest* clause and Aata would need to disclose such situation to his line manager, human resources representative or operating risk and compliance representatives. The ANZ Code clearly covers the complete array of possible moral conflicts of interest based on family ties, relations and personal associations. The general *conflict of interest* clause, however, also allows for subjecting other forms of conflict of interest to supervision by ANZ.

Other business corporations operating in New Zealand apply similarly broad conflict of interest clauses, that require the declaration of conflicts and can and will include moral conflicts of interest.[48] Considering, however, that business corporations are not obliged to society in a way professional associations are, the *last professional in town* problem does not pose itself. There is no downside for business corporations to require their employees to declare actual and potential moral conflicts of interest.

c. Conclusion

The preceding chapter suggested that an optimal institutionalised normative system ought to include both rules and principles. These rules and principles need to compliment each other in a way that allows for effectively guiding behaviour to the greatest extent possible. While rules need to be precise to be effective, principles need to be flexible and basic. Both rules and principles need to gain a minimum consensus to the greatest degree possible. Also, an effective code would need to provide for a system of procedural justice and subject moral conflicts to such system.

This chapter analysed different codes of ethics and conduct used in professional and corporate environments in New Zealand. New Zealand society is highly diverse and both professional and corporate communities are faced with the challenges of cultural and moral diversity. Judging from the results, professional associations and business corporations in New Zealand appear to fare well in managing diversity. In case professional associations and business corporations employed measures similar to the ones suggested, this would provide a strong indication for the merits of the approach suggested.

The codes were evaluated in regard to whether they (1) make use of precise rules

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[48]Compare, for example, Westpac Group Code of Conduct <www.wetpac.com.au> and Telecom Code of Ethics <www.telecom.co.nz> and, in the public sector, compare, for example, the Securities Commission New Zealand Code of Ethics <www.sec-com.govt.nz>.

and basic principles, (2) are characterised by evident restraint, (3) provide only minimum requirements, (4) provide for an institution that decides conflict on the basis of procedure and (5) subject conflicts of role to this institution. These factors would indicate that the codes would follow an approach similar to the one suggested in previous chapters.

All professional and corporate codes analysed comprise both precise rules and basic principles. While rules cover particularly vital aspects of professional and corporate behaviour, principles provided allow for flexibly applying general standards of behaviour. Also, the codes analysed exercise moral restraint and provide minimum standards only which suggests that they rely on a minimum consensus.

The emphasis of evaluation, however, lay on the question of how the different codes manage to resolve or mitigate moral conflict. Examples were provided for conflicts specific to New Zealand. The professional and corporate codes applicable to professionals and corporate employees in New Zealand were then analysed in regard to the fashion in which they deal with such conflicts.

The so called *cab rank rule*, meaning the principle that certain professionals are required to serve all oncoming clients, makes it difficult to freely accept that a professional may withdraw from a particular client or case for moral reasons. The *cab rank rule* is considered vital for the functioning of the legal system, yet, so is the principle that a lawyer needs to promote his or her client's interests first and foremost and to his or her best abilities. Following both principles would require that a lawyer generally prioritised his professional obligations over his personal convictions. Even though some will, not all lawyers will accept that professional morality is capable of justifying the breach of ordinary moral obligations. In case a code of legal ethics does not provide for an exemption in regard to the *cab rank rule*, that code implicitly accepts that lawyers may prioritise their personal convictions over their obligations to promote their client's first and foremost and to his or her best abilities. One way of resolving moral conflict is by providing exemptions within the applicable code of legal ethics similar to those that apply to conflicts of interest and subjecting these conflicts to the jurisdiction of a specialised institution within the professional association itself.

The New Zealand Code of Legal Ethics does so and allows for effectively mitigating moral conflicts of interest. Conflicts that particularly involve third parties a professional may feel morally obliged to on specifically cultural grounds may be dealt with in accordance with the same principles that all other third party conflicts of interest are dealt with. Other moral conflicts of interest may be resolved in a fashion similar to the way individual conflicts of interest are dealt with. The Code is worded

in a fashion that allows for an according interpretation and the prior findings require such interpretation.

In the long run, an approach recognising moral conflicts of interest appears to be a way to ensure the functioning of the legal system in a highly diverse society whereas the idea of allowing for moral conflicts of interest to affect the way lawyers are expected to represent a client may well endanger the legal system in countries that are less diverse than New Zealand is.

Other codes including the New Zealand Code of Medical Ethics and the ANZ Code of Conduct and Ethics similarly provided for the opportunity and the duty to declare moral conflicts of interest. These codes, however, do not struggle as much as the New Zealand Code of Legal Ethics in recognising moral conflicts of interest due to the fact that the functioning of the profession or the corporation respectively is not compromised by professionals or employees that withdraw from a certain client or case.

All in all, the need for effective ways to mitigate conflicts of interest is recognised by all codes analysed and the theoretical underpinning established in the previous chapter appears in practice to provide an effective way of dealing with the challenge of cultural and moral diversity.

VII Final Conclusion

This paper was concerned with the notion of role morality and conflicting moral obligations. The initial question was, how individuals deal with conflicts. Secondly, this paper was concerned with the question of how professional associations and business corporations should deal with the fact that conflicts can and do occur. Finally, this paper meant to analyse the situation of professional associations and business corporations in New Zealand; special emphasis lay on the legal profession.

In analysing conflicts of role and ordinary morality, it could be established that both the question if conflicts occur and how they are resolved depends on the particularities of personal morality. Authors that try to establish that role morality creates a sphere in which ordinary morality is not applicable or that role morality justifies deviating from standards of ordinary morality on the basis of concepts such as *contract*, *promise* or *friendship* assume that all individuals holding certain roles subscribe to a similar system of normative ethics that would allow for such justified exemptions. Considering, however, that the debate on normative ethics is ongoing and that factually individuals seem to subscribe to differing normative approaches to personal ethics, a general theory on role morality and the possibility of exempting certain areas from personal conviction in regard to ordinary morality, is impossible to establish. Evidence is negative for findings that conflicts of role may be resolved in a straightforward manner and on the level of the individual agent. Conflicts will occur regardless of how role morality and its existence are justified to the individual agent due to the fact that individual agents differ in so far as they hold different justificatory methods valid.

Considering that conflicts of role will occur, professional associations and business corporations need to be concerned with the question of how such conflicts can be minimised. Professional associations and business corporations issue rules and principles as being part of institutionalised systems of role morality in order to guide the behaviour of their members and employees. This objective will only then be achieved to the fullest possible extent if all or at least the majority of addressees accept the respective rules and principles. Regularly, conflicts will not be desirable

as they bear the risk that the individual moral agents experiencing such conflict will deviate from the rules and principles of role morality.

Whether moral agents are justified or logically mistaken in assuming certain moral positions is irrelevant from the perspective of the institution. It is an empirical fact that moral agents argue a great array of different and sometimes opposing values. It further appears to be a general characteristic of personal morality that a moral agent will hold his personal moral convictions to be true and those of others to be mistaken. Considering that professional associations and business corporations address a great number of professionals and employees in issuing rules and principles they must embrace the empirical facts of cultural and moral diversity.

Professional associations and business corporations alike are concerned with how to ensure that the rules and principles issued are actually followed. Many have found ways to achieve just that and there are a number of studies concerned with the relevant technicalities. These studies have in common, that they evaluate the topic from a sociological perspective. Different approaches are compared on account of their respective results. These studies provide guidance based on empirical findings. They do not provide for a theoretical basis explaining why a certain approach is accurate while another is not. Authors concerned with rules and principles and the functioning of institutionalised normative systems provide theories that allow theoretically underpinning empirical findings and accurately explaining why a certain approach will be effective whereas another will not. Regularly, these authors are concerned with states and the way they deal with the according challenges. States, professional associations and business corporations, however, show a degree of similarity. This degree of similarity allows applying solutions provided to all three institutions alike.

Analysing these theories, it appears that there are effectively three options available for professional associations and business corporations to deal with cultural and moral diversity when issuing rules and principles being part of institutionalised systems of role morality. As norm issuing institutions, professional associations and business corporations can follow an approach designed to gain a minimum consensus. Alternatively, they can accept moral relativism or try to institute a pluralistic approach. After evaluating the different options in terms of their practical merits and not so much in regard to their theoretical validity, it appears that an institution will benefit from issuing rules and principles that combine an overlapping consensus in regard to basic principles with incompletely theorised agreements on low-level principles and rules and include a system of procedural justice capable of mitigating conflicts between plural values, resolving some and easing others. This allows

coping with the challenges of cultural and moral diversity most effectively when guiding behaviour.

The final chapter of this paper intended to provide limited indications that the theoretical approach is effective in practice. New Zealand is a culturally and morally highly diverse society. It is highly likely that individuals engaged in professional and corporate careers experience moral conflict at some stage of their careers. Professional associations and business corporations in New Zealand are faced with the challenge of dealing with this situation. Professional associations and business corporations guide the behaviour of members and employees for the same reasons as elsewhere in the world and similarly effectiveness depends on ensuring that as many addressees as possible accept the obligations provided for by institutionalised systems of role morality.

Considering a (fictitious) example from professional New Zealand and evaluating how the respective New Zealand Code of Legal Ethics deals with situations of moral conflict, it appears that the responsible institutions have found effective ways of dealing with such situations. In accordance with the here suggested approach the New Zealand Code of Legal Ethics provides precise rules and basic principles exercising moral restraint which suggests that they are designed to gain a minimum consensus. Also, the New Zealand Code of Legal Ethics provides professionals with the opportunity to resolve moral conflicts of interest by means of a system of procedural justice. Other professional associations and business corporations alike employ similar methods.

Summing up the aforesaid, moral pluralism may be debateable but moral diversity appears to be a fact. Institutions concerned with guiding the behaviour of individuals need to acknowledge this fact and issue rules and principles that gain a minimum consensus on as many levels as possible and a system of effectively dealing with moral conflict. Moral conflict needs to be addressed and not avoided.

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