From ethical analysis to legal reform: Methodological reflections on translation and incorporation

Wibren van der Burg, Erasmus School of Law, Erasmus University Rotterdam.
vanderburg@law.eur.nl

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Ethicists frequently provide evaluations of law and recommendations on legal reform, based on their ethical analysis. For example: "The tax system is unjust, as it favours the rich." "The law with regard to euthanasia (or biotechnology, abortion etc.) should be changed." This is an important and legitimate role for ethicists.

However, in order to do so properly, they should be aware of the characteristics of the law they want to change and of the legal order in which this law is embedded. Ethical analysis needs to be translated and incorporated into a legal framework. This paper attempts to identify a number of issues that need to be addressed when an ethical analysis is the basis for legal reform. Its specific angle is that of analysing how these issues are made more complex by various forms of pluralism.

There are three major clusters of issues to be addressed: the institutional characteristics of a legal order, the question under which conditions morality can or should be translated into law, and the problem of ethical (as distinct from moral) pluralism.

First, law is a relatively autonomous practice with its own institutional characteristics (Taekema 2011). For example, law usually relies on general rules and thus cannot deal adequately with exceptional cases: hard cases often make bad law. Legal orders have specific rules of proof, as proof has to be assessed from a third person perspective, whereas ethical theories usually presuppose a first person perspective. Law is an institution in which often enforcement agencies with substantive powers play a role. Moreover, as Fuller has argued, law has its internal morality – or principles of legality – based on its institutional characteristics. As Selznick and Taekema (2003) have argued, law is oriented towards distinctly legal ideals such as legality and justice. If we want to translate our ethical analysis into suggestions for legal reform, we should take these institutional characteristics seriously. Moreover, we should take account of the differences between certain subfields of law (such as criminal law, administrative law, tort law and disciplinary law), each with their own institutional peculiarities.

This is made even more complex by the phenomenon of global legal pluralism (Berman). Whereas most studies of law and morality in the literature implicitly presuppose sovereign legal orders associated with the state apparatus, such a restricted view of law is no longer tenable. Global legal pluralism recognizes different types of law, such as international law, *lex mercatoria*, EU Law, Council of Europe law, but also contractual law and internal regulations of certain organizations

and groups. This leads to a pluralism of conceptions of law – each type having its own distinct institutional characteristics and its own internal morality.

Second, even if we accept that law and morality cannot be separated, they are at least distinct (Van der Burg). Not every moral norm can or should be translated into legal norms. There are sociological restraints: because of its own institutional characteristics, it is often not effectively possible to legislate morality, as both Prohibition and the war on drugs have shown (Cotterrell). Similar remarks can be made for actions that are effectively protected by privacy or professional confidentiality, such as consensual sexual acts and euthanasia. There are also straightforward normative restraints, discussed in the famous legal moralism debate. Here too, the issue has become more complex than was presupposed in the Hart-Devlin debate and the ensuing literature . Even if, *arguendo*, the thesis of a conceptual separation between law and morality could be defended – a thesis which the author has criticised recently – in modern societies law and morality are intertwined in many ways, e.g., through the use of open norms and vague clauses. More importantly, Devlin's presupposition that there is a shared social morality has become even much more problematic than in the early 1960s. Even if on many issues there is an overlapping consensus, in most of the debates to which ethicists contribute, there is not. Moral pluralism provides an important challenge.

Third, there is ethical pluralism. It is surprising how often in legal debates ethicists argue as if there is only one objective ethical analysis, namely, their own. Of course, in the academic debate, authors can consistently elaborate the implications of a Kantian, utilitarian or Thomist perspective. However, from the point of view of a legislator, there is no good reason to choose for one of those theories over the alternatives. That would be a partial and arbitrary choice. Therefore, ethicists, if giving advice on legal reform should address ethical pluralism. There are at least four possible strategies here: the search for an overlapping ethical consensus, ethical triangulation, restriction to prima facie, partial advice, or restriction to critical analysis rather than positive analysis.

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