



THE 'ETHICALIZATION' OF LAW

FUNDAMENTAL QUESTIONS, DANGERS AND OPPORTUNITIES FROM AN INTERDISCIPLINARY PERSPECTIVE



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THE FUNDAMENTAL QUESTIONS, DANGERS AND OPPORTUNITIES OF SUCH A DEVELOPMENT FROM AN INTERDISCIPLINARY PERSPECTIVE

(Abstract)

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The Ethicalization of Law – The Fundamental Questions, Dangers and Opportunities of such a Development from an Interdisciplinary Perspective

Abstract

A prevalent intuition holds that law without values is sterile and formalist. On this view, including ethical terms in law allows a judge to engage directly with the “real” moral issues of the situations before her, instead of being preoccupied with abstractions. In grander versions, the ethicalization of law empowers judges to act as the state’s conscience, as the final defender of great national and human values.

This idea is appealing. But its persuasiveness rests on a causal claim that judges, armed with ethical terms, can and will actually do this work. We seek to test that causal claim: does the evidence confirm that including ethical terms in law or interpretative rules will produce more moral outcomes and safeguard national values from political threats? The intuition is a broad, general idea, and we engage with it at the same general level. We examine two areas of work richly relevant to the practical effect of the ethicalization of law and conclude that the evidence casts doubt on the causal claim in the longer term: it exaggerates judge’s potential in relation to politics and neglects the risks inherent in the flexibility of ethical terms.

The first concerns ‘wicked’ legal systems. The intuition is strong that in a post-Nazi or post-Apartheid state, the law should be imbued with the ethics so recently ignored to prevent this from happening again. Indeed, in South Africa it is widely believed that the paucity of ethical terms in the law and the failure of judges to adopt an ethically-driven approach explains why judges did so little to resist Apartheid’s injustices (e.g. Dugard 2008; O’Regan 2006).

The second concerns the ethicalization observable in many constitutional systems. Constitutional texts increasingly include ethical and value terms. It is often argued that constitutional interpretation should be value-driven, as the global in-

fluence of ideas such as Dworkin’s theories (Dworkin 1977, 1985, 1986, 1996) or the German understanding of constitutional law as an ‘objective order of values’ testifies. This trend is partly a product of the past experience of ‘wicked’ systems and a response of the post-WW II international human rights movement to the failures of grand ideologies earlier in the century (Moyn 2010). Ethicalization is also driven in emerging states by the view that this is the way to get law to uplift the poor (e.g. Baxi 1985; Dugard 2008)

However, scholarship in these two areas questions the causal claim underpinning the intuition about the work ethical terms in law can or will do.

Studies of ‘wicked’ systems reveal judges simply sidelining ethical resources in the law (e.g. Apartheid South Africa, see Dugard 1978; Dyzenhaus 2010; Ellman 1992; Forsyth 1985) or interpreting broad value terms in line with the prevalent political ideology (e.g. Nazi Germany, see Lepsius 1994; Ruethers 1987, 1989; Stolleis 1998).

A growing body of work on the United States (e.g. Ackerman 1993, 1998, 2005; Dahl 1957; Eskridge & Ferejohn 2010; Friedman 2009; Whittington 2007) and increasingly on other countries as well (e.g. Elkins, Ginsburg & Mellon 2009; Ginsburg 2005; Taylor 2008) similarly suggests that judges do not adopt long-term positions in opposition to entrenched political majorities. They make unpopular decisions and find against the government, but mostly they stay within the mainstream of politics, and their ‘unpopular’ decisions are often decisions elected politicians were not necessarily opposed to but simply preferred the court to make. If courts find themselves on the politically weakening side of a great clash of social ideas, they tend to lose the fight. The switches of the New Deal US Supreme Court or the post-Emergency Indian Supreme Court are prominent examples. In emerging states and fragile democracies, courts may be even more institutionally vulnerable and their incentives to conform increased accordingly (e.g. Ginsburg 2005; Ginsburg & Moustapha, 2008; Roux 2009).

This analysis suggests that the way judges use value- or ethics-based terms in law is ultimately subject to politics. Courts are subject to long-term trends in politics directly, through strategic judicial appointments and pressure on their instituti-

onal authority, and also more subtly: judges are themselves part of a social milieu and tend to reinforce its ideas subconsciously, or because they feel it is not part of the judicial role to be ideologically radical, or because they seek approval from ‘audiences’ in that society (Baum 2008). The implication is that we should not expect the inclusion of ethical ideas in the law to protect morality against political trends in the longer term. It is only when ethical ideas are politically embedded that they become the powerful forces for good that are celebrated. *Brown v Board of Education* became what it did not because of the ethical concepts in the 14th Amendment (which had lain dormant for years), nor was it the eventual use of those concepts by judges that caused the social revolution of which *Brown* became the symbol (the decision was initially widely ignored and disobeyed). It became what it did because of the political support and ultimately the mass national allegiance the Civil Rights Movement created around its ideas. (Klarman 2006; Rosenberg 2008; Eskridge & Ferejohn 2010).

The analysis also suggests that ethical terms can in fact become a liability. The flexible nature of value terms can make them easier for judges to ignore or use as gateways for less morally admirable conclusions. Ethicalization can simply serve as an instrument to further the interests of those in power (Koskenniemi 2002). It may be that, contrary to the opening intuition, ethical values are better protected by dry rules that protect morally important things than by rules that actually make reference to the values at stake. The indeterminacy produced by understanding legal norms as ethical values has been criticized in states adopting value-driven approaches (Cockrell 1993; Davis 2003; Denninger 1990; Habermas 1992; Schmitt 1960; Woolman 2007).

Our tentative conclusion is that ethical values in law are no guarantee that good will not become bad; they may even facilitate the descent. Their long-term effect depends on how they are socially and politically embedded. Contrary to the opening intuition, our analysis implies that we should generally place long-term reliance on ethical terms in law only so long as we are willing to rely on the underlying politics of the effected society.