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A Sociological Speculation about Law and Ethics*

Abstract: It is argued that ethics is undergoing a similar development in modern societies as law did in former times. If this development continues, it could be that in the future collective decisions in many areas will be justified by the application of ethical principles just as today judicial decisions are justified by the application of the rules of law. The paper describes some of the remarkable similarities between law and ethics in modern societies and considers possible causes of this development.

1. Introduction

The main thesis of this paper is that ethics in many aspects is undergoing a similar development in modern societies today as law did in former times: like law, ethics is also becoming more and more a decisive social force. Ethical arguments and ethical deliberations are playing a growing role in public discussions and are gaining increasing influence in political debates and decisions. The impact of ethical and moral considerations is created both in an informal and spontaneous way and through institutionalized procedures. If this development continues, it could be that some day collective decisions in many areas will be justified by the application of ethical principles and norms just as today judicial decisions are justified by the application of the rules of law. I will consider some possible causes of this development at the end of my paper. But first I will try to make my thesis more plausible by describing some of the remarkable similarities between law and ethics in modern society in various respects. I will start with a short summary of some of the main characteristics of law and its development and will then examine the extent of comparable features in the case of ethics.

2. Law in Modern Societies

From a sociological point of view the institution of law in modern societies represents an amazing phenomenon: it embodies a kind of social miracle. Modern law

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is independent, reliable, powerful and in some way irresistible—and it exhibits these qualities despite *prima facie* unfavourable preconditions:

- Law is not *political*, but *neutral*. Judicial decisions are not the result of the orders of a political authority, of majoritarian voting or of bargaining among different interest groups. Judicial decisions are neutral with regard to political power: nevertheless, they are effectively enforced—even against the explicitly stated will of politically powerful actors.
- Law is not *opportunistic*, but *normative*. Judicial decisions are not adapted strategically to meet the requirements of a certain situation and do not attempt to satisfy particularistic interests and claims. They are a result of the 'categorical' application of norms and rules: nevertheless, they are widely accepted—even if judicial decisions conflict with individual or collective interests and claims.
- Law is not *open*, but *dogmatic*. Judicial decisions are not open in the sense that the judicial decision-makers are allowed to decide according to their personal convictions and values. Judicial decisions are dogmatic in so far as they must be based on presupposed principles and given rules: nevertheless, they are reached in a reliable procedure—even if a prescribed legal decision contradicts the personal convictions and values of the judicial authority.

Which factors were important for the development of an institution of law with such distinctive and improbable characteristics?

3. Development of Modern Law

Max Weber's theory of law is still a powerful instrument to analyze significant properties of modern law and the forces behind its development (Weber 1921; Baurmann 1991). From the point of view of Weber's theory we can name at least three crucial factors which contribute to the emergence of the kind of law which is typical of modern societies:

- *Rationalization.*
- *Institutionalization.*
- *Authorization.*

I will scrutinize these factors in this order.

3.1 Rationalization of Law

Three aspects are relevant to the process of rationalization of law:

First, at some point in the history of law in Europe, the body of law—and especially Roman law—became a purely *intellectual subject* as a system of

norms, ideas and thoughts. A new class of scholars emerged who treated law as an intellectual challenge and concentrated on the genuine scientific aim to make it a *meaningful, consistent* and *complete* deontic system of principles and rules and to develop a comprehensive theory of law as well as a sound methodology for its application—irrespective of whether the examined system was law in practice or the law of historical societies.

Second, law scholars were doing their work in the *ivory towers* of universities without any pressure to produce tools for practical purposes or actual judicial decisions. They were detached from the real word of legal issues and could ignore the instrumental role of law. Therefore, they were free to work according to pure intellectual priorities.

Third, dealing with law intellectually became a *vocation* just as with other subjects of scientific and academic research. Scholars were intrinsically motivated to dedicate their intellectual life to the creation of a meaningful, consistent and complete system of legal principles and rules, to develop a theory of law and also methodological guidelines for its application.

The result of this process of rationalization was an ever-expanding corpus of systematized legal principles, norms and rules which were consistent with each other and applicable in a methodologically controllable way. The law as a rational and calculable system then left the ivory tower and was now ready to fulfil an important practical function in the emerging capitalist society. Through its success in this function it gained the degree of legitimation which was necessary to establish its predominance over political power and particularistic claims. The reputation of this kind of 'rational' law also created a certain dignity for those professional jurists who, by applying the rules of law, might subordinate their personal convictions to 'the majesty of law'.

3.2 Institutionalization of Law

To become a factual power in society the academically rationalized body of law had not only to leave the ivory tower but be integrated into a stable societal institution. This institution had, first and foremost, to provide a suitable habitat for a new type of academically educated jurist who came from university trained to interpret and apply law according to the internal standards of jurisprudence and thus uninfluenced by political or social issues:

First, *professional roles* for the law practitioners had to be created. These roles had to define the rights and duties of judges, prosecutors and lawyers and they had to promote a professional ethic in the field of judicial activity.

Second, *incentives* to fulfil the professional roles in the legal institutions had to be provided. This included 'hard' incentives such as material rewards in the form of a regular income as well as 'soft' incentives in the form of esteem, prestige and honour (Brennan/Pettit 2004)

Third, to enhance the probability of independent and impartial legal decisions the professional law practitioners had to be placed in *low cost situations* in which their decisions would have more or less severe consequences for others but not for themselves (Kliemt 1986).

A successful institutionalization of law in these respects provided a necessary mechanism to bring law from the intellectual agenda of universities back to real life. This in no way implies that the intellectual effort in the ivory tower was superfluous. As Weber points out, the great achievement of modern law is intrinsically connected to the fact that both things happened sequentially: an encompassing rationalization of the body of law would not have been possible if it had not been practised as an intellectual game and an academic end in itself, protected effectively from practical pressures. Likewise the law as it was enacted and applied in practice would not have had its powerful effects on the development of modern societies if it had not been intellectually rationalized in this theoretical and 'impractical' way. It is one of Max Weber's great insights that the purely intellectual development of thoughts and ideas guided only by the endogenous 'force' of rational deliberation and internal explication can have immense practical impact if proper conditions obtain. It is then that the results of these intellectual processes can become socially relevant forces—as in the case of modern law, or in the case of the secularization of religion or Calvinist ethics. It is my thesis that something similar might be happening in the realm of ethics.

3.3 Authorization of Law

Without an effective authorization of law, the processes of rationalization and institutionalization would not have been sufficient to establish modern law as one of the most important societal forces. To be able to override political power in all its variants and to successfully withstand the social pressure to decide according to particularistic demands, the judicial actors must be vested with considerable authority and autonomy. Again, three elements are relevant here:

First, the fundamental source of the power of law is explicit empowerment through *constitutional authorization*. The constitution—whether written or unwritten—transfers power to the judicial system and defines its competences and their limits. Seen from a sociological point of view, a constitution is not only a 'collection of words' but, due to its factual acceptance by a decisive fraction of the population, a social fact which creates real power structures. As Hans Kelsen said: the power of legal authority is the efficacy of the law (Kelsen 1960, 293; Hart 1961; Baurmann 2000).

Second, the constitutional empowerment of the legal system includes the right to enforce judicial decisions by the use of *coercive force* and to maintain the *monopoly of power*. By this, legal authority is backed by the possibility to use the entire state power to enforce its decisions. Legal authority is therefore not only normatively but also factually a supreme power based on the most effective resource to impose its will against resistance.

Third, the authority of law by constitutional empowerment is based on the principle that *legitimacy* can be created by *legality* (Baurmann 1998). The ascription of legitimacy to the outcomes of legal decisions is a necessary precondition for a commitment to those decisions and the willingness to act in conformity with them. But the acceptance of legal decisions cannot be based alone on a possible congruence with personal opinions and values. It must be grounded on

the conviction that judicial decisions should be judged as legitimate exclusively on the basis of having been reached in a legally correct procedure.

These three elements which together create the authority of law in modern societies reveal that this authority is based on a bundle of quite different but interrelated factors: the principle that legitimacy can be produced by legality is widely acclaimed, the judicial decisions are backed by an overwhelmingly coercive force, and the authority of law is built on constitutional empowerment which in turn derives it efficacy from the general acceptance of the 'rule of recognition' (Hart 1961).

To sum up our Weberian picture: the rationalization, institutionalization and authorization of law together contributed essentially to the development of modern law as a *politically independent*, *normative*, *dogmatic* and yet very *powerful institution*. The rationalization of law created a consistent system of legal rules which made it possible for legal cases to be decided objectively and predictably. The institutionalization of law provided the necessary institutional framework to implement an academically sophisticated law in social practice. The authorization of law provided the institution of law with the necessary power to remain independent and at the same time strong enough to overcome contravening powers.

My main question is: are there indeed indicators that ethics is undergoing a similar kind of development in modern societies? Is ethics also on the way to becoming an irresistible social force? I will try to deal with these questions by investigating whether and to what extent the relevant factors for the development of modern law can also be identified in the context of modern ethics.

4. Ethics in Modern Societies

If we begin by looking at ethics from the point of view of our little study on law, we notice that ethics as it is practised today indeed shares some important features with modern law, but also shows relevant differences:

- Ethics is not *political*, but *neutral*. Ethical judgements are not the result of the orders of a political authority, of majoritarian voting or of bargaining among different interest groups. Ethical judgements are neutral in regard to political power.

- Ethics is not *opportunistic*, but *normative*. Ethical judgements are a result of the application of moral principles and norms, they are not a result of a strategic adaptation to the restrictions of a certain situation or of a prudent attempt to pacify particularistic interests and claims.

- Ethics is not *dogmatic*, but *open*. In contrast to judicial decisions, ethical judgements are not based dogmatically on presupposed principles and given rules and insofar they are open. From a moral point of view, individuals are not only allowed to, but are obliged to judge on the basis of their personal convictions and values. Therefore, it is not possible for a

substantial conflict to arise between the ethical judgements of individuals and their personal convictions and values.[1]

From this preliminary comparison we can see that ethics shares two properties with law: it is both politically neutral and normative. Unlike law, however, it is not dogmatic but open. The question for further consideration is then: can ethics with these characteristics become similarly influential and stand successfully against powerful actors and even be accepted when its judgements conflict with individual or collective interests? What consequences will the open and non-dogmatic character of ethical judgements have being less predictable and less consensual than judicial decisions?

To give at least a provisional answer to these questions, I will continue by examining whether some or all of the factors which contribute to the success of law can also be identified in the case of modern ethics.

5. Development of Modern Ethics

For the development of modern law particular forms of rationalization, institutionalization and authorization were decisive. Can we observe similar phenomena in connection with the current development of ethics?

5.1 Rationalization of Ethics

As argued above, the rationalization of law was strongly promoted by the circumstance that law became a purely intellectual subject of genuine academic interest, that the new class of judicial scholars could realize their aspirations under the protection of the ivory towers of universities, and that the preoccupation with law became a true vocation. We can indeed establish that there are significant parallels to the situation of ethics today:

First, modern ethics—both in its theoretical as well as its applied version—has been established as an *intellectual subject* and is enjoying increasing attraction as an academic discipline. A growing number of academic scholars are trying to make ethics a meaningful, consistent, comprehensive *and* rationally justified system. They see this aim as a genuine intellectual challenge, irrespective of whether ethical considerations are factually of practical influence and importance or not.

Second, these academic scholars who deal with ethical issues are protected from non-academic external pressures by the *ivory tower* of universities. They can tackle ethical problems motivated solely by intellectual aims and guided by the internal principles of academic research. As members of the academic community they can ignore the need for practical decisions and the restrictions of the political arena.

[1] I will not discuss the problem whether people may accept ethical judgments because they are delivered by 'moral experts'. However, even in such cases, epistemic trust in ethical authorities would be rooted in the personal convictions and values of the recipients (Baurmann 2007).

Third, working as an academic scholar in ethics is a *vocation* just like that of a scholar of physics or law. The intrinsic motivation of scholars in ethics to create an academically sound system is the essential driving force behind the recent progress especially in the field of normative and applied ethics.

As a consequence of this process of rationalization, modern ethics is becoming a highly developed and professionalized academic discipline. Ethical judgements are increasingly controlled by rational standards of justification and argumentation and can be applied to all issues of practical and political importance. Therefore, important preconditions seem to have been fulfilled for ethics to leave the ivory tower and become an acknowledged instrument to deal successfully with real-life problems and to sustain the competition with political power and particularistic claims.

5.2 Institutionalization of Ethics

If ethical judgements should not only have a random influence in public debates and decisions but gain a weight which guarantees a continuous impact on societal and political affairs, then it is not enough for ethics to leave the ivory tower, but it must also be effectively institutionalized. As in the case of law, this institutionalization must create a suitable environment for the academically trained ethicists to apply their academic competences to solving real-world problems.

First, *professional roles* for the practical application of ethics which define the rights and duties of the actors must be established. This is a development which is already on its way: in today's democratic societies we can see an ever-growing number of ethics commissions and committees of all kinds. They range from government and parliamentary advisory boards to regularly working panels with fixed tasks in hospitals or research centres. Ethics committees are established by the legislative as part of the implementation of new laws, for example in the area of genetic engineering or organ transplantation. But the competence of ethical 'experts' and 'professionals' is also increasingly being demanded by private enterprises and nowadays plays an important role in the management of public relations and public affairs. As a result of this development, universities are beginning to introduce study programmes in applied ethics which aim at educating their students to deal with ethical issues and problems in the context of certain vocational fields.

Second, the *incentives* to adopt professional roles in the context of institutionalized ethics are at the moment more 'soft' incentives such as esteem and reputation than 'hard' incentives in the form of material and monetary rewards. However, this is changing and a type of professional role is evolving which makes it possible to make a living as a professional ethical adviser. This can be observed, for example, where companies or administrations are interested in communicating their strategies and decisions to the public by using ethical arguments and justifications and engage experts to do this job. In addition, academically trained ethicists are beginning to start up their own private advisory firms offering their expertise on the market for private and public clients.

Third, to secure independency and impartiality professional ethical advisers must be placed in *low cost situations* where their judgements and findings do not directly affect their personal interests. This is achieved by having commissions, committees or counselling bodies whose members do not have vested interests in the domain for which ethical advice is given. The demand for independent ethical advisers will, in turn, further strengthen the incentive to establish professional roles in which they can act on an economically autonomous basis. To secure and prove the independence of ethical advisers is also in the interest of their principals, as otherwise their arguments and judgements would lose credibility.

As in the case of law, a successful institutionalization of ethics is a necessary precondition to transfer it from seminars in universities to real life. And, as in the case of law, this does not imply that the intellectual effort in the ivory tower is superfluous. Overcoming solely intuitive or traditional points of view, arbitrary and ideological convictions or ad hoc statements, and developing ethical argumentation to a genuine rational enterprise is only possible in the context of autonomous academic research which sets its agenda according to its own standards. Without this rationalization, ethics would have no chance of gaining lasting relevance in public debates and decisions. As in the history of law, the purely intellectual development of ethical thinking guided only by the endogenous drive of rational deliberation and internal explication has the potential to create immense practical impact if the proper additional conditions obtain.

5.3 Authorization of Ethics

Authorization is the crucial element in law as well as in ethics. Without effective authorization, the processes of rationalization and institutionalization alone will not be sufficient to establish ethics as a lasting and influential societal force. If ethical points of view should be able to override political power or other forms of social pressure, ethical arguments and judgements must have independent authority and impact. But here the development of modern ethics differs essentially from the development of modern law—and it must differ, otherwise ethics would develop *into* law. Therefore the sources of the authority of ethics must be different from the sources of the authority of law. However, they still have to be powerful sources if our speculation about the new role of ethics is plausible. We can examine these sources by comparing them with the three factors we identified as the sources of the authority of law:

First, the authority of ethics is not based on constitutional authorization. In ethics there is no constitutionally empowered organ which has the competence to decide ethical questions finally and definitely. Constitutional principles cannot directly create the authority of ethics, they can only provide an elementary prerequisite for such an authority: the *constitutionally guaranteed freedom* to practise ethical reasoning in academic and non-academic contexts, debate in public about ethical issues and base political and non-political decisions explicitly on ethical justification. This means essentially that a constitution must secure freedom of speech, guarantee the autonomy of academic research and implement the separation between state and religion.

Second, the authority of ethical judgements cannot be guaranteed by the force of coercion but only by the *force of argument.*[2] In order to become a relevant factor and effectively influence public discussions and individual or collective decisions, ethical arguments must—under the protection of constitutional freedom—develop an endogenous dynamic to gain such an impact. Such an endogenous dynamic will be all the more forceful, the more (i) public debates about socially relevant individual and collective decisions present ethical arguments, (ii) socially relevant individual and collective decisions are justified explicitly with reference to ethical arguments, (iii) people expect that socially relevant individual and collective decisions should be debated and justified by means of ethical arguments. It seems obvious to me that we can indeed observe a development in this direction. But I will discuss the question whether it is plausible to expect further progress in this regard when I deal with some possible overall causes for the increasingly important role of ethics at the end of the paper.

Third, the authority of ethics is based on *legitimacy by reason.* As I mentioned before, ascribing legitimacy to a decision is a necessary prerequisite for commitment and compliance. But in the case of judicial decisions, acceptance cannot be based alone on their being congruent with personal convictions and values. Instead, it must be based on the willingness to recognize a decision as legitimate on the condition of it having been reached in a legally correct procedure. This kind of *legitimacy by legality* implants a certain fragility in the process of legitimatization of law and potentially weakens its acceptability. Ethical judgements do not have this type of indirect legitimization. This endows them with a special strength. Because ethics is not empowered through the constitution and is not enforced by coercion, its position seems to be weaker than the position of law. However, the opposite is true in regard to its legitimacy. Whereas the principle of legitimacy by legality demands a certain sacrifice in view of differing personal convictions and values, the principle of legitimacy by reason produces a straightforward commitment. Legitimacy will, in this case, only be ascribed if a judgement is in accordance with personal convictions and values, and if a judgement is in accordance with personal convictions and values then there is no room for disharmony or tension—as is possible in the case of legally produced judicial decisions. The force of argument cannot be backed by the force of coercion, rather the force of argument exhibits a certain quality of irresistibility which even the force of state power is lacking. If an argument is convincing for a person, then this person *must* agree to it. Therefore, once the moral point of view has been accepted, moral arguments can be stronger than weapons.

Can these three elements together generate a dominant authority of ethics? If ethical judgements can count on the force of argument, if ethical argumentation is part of public debate and public justification and if ethical deliberation is protected by constitutional rights, is it then plausible that we can expect ethics to become an influential institution with a comparable impact to modern law?

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[2] This does not exclude that the 'force of argument' convinces politicians or others in charge to establish ethical commitees or boards with power of decision, for example in hospitals or research institutes.

I will defer a tentative answer to these questions until I have discussed some possible causes behind such a development which maybe make it more plausible that the above observations are not purely coincidental but are indicators of a genuine tendency.

However, I first want to emphasize one obvious difference between ethics and law: because ethical judgements are 'open' and not derived from dogmatic premises, the possibility of lasting dissent about moral issues is much greater than in the case of law—even if ethical argumentation is in accordance with academic standards and by professionally trained scholars. To argue rationally on the basis of ethical principles and moral norms does not necessarily makes a consensus more probable. Social reality vindicates this assumption. And, of course, there is no empowered ethical authority which has the competence to make a final decision in the case of conflicting opinions and views.

Yet this fact does not disprove the thesis that ethical judgements are powerful and decisive. If we look at the history of the German laws on abortion, euthanasia or genetic research, for example, we will find that ethical arguments played an important role in the legislative process. This does not necessarily mean that there was a consensus in regard to these arguments and laws. The thesis put forward is not that the increasing impact of ethics will solve problems and conflicts more consensually. It is that ethical arguments and judgements strongly influence the outcomes of private and public decisions and that this influence is increasing—though in the case of dissent as well as in the case of consensus! However, the fact that many political and social issues are characterized by seemingly irresolvable ethical controversies and irreconcilable moral positions is also a genuine subject of ethical deliberation—especially in regard to the important question of the kind of legislative measures and laws which are legitimate in the face of such conflicting views (Huster 2001).

6. A Speculation about the Causes

It is one thing to observe certain similarities between the development of law and the development of ethics but another thing to establish that these similarities do not exist by accident. I cannot present a thorough analysis but will add some more or less speculative considerations on how to explain the growing importance of ethics in modern societies.

1. The process of secularization has increasingly destroyed the unquestioned status of a religious ethic which was interpreted and applied by clerical authority—in this respect similar to law. The de-legitimization of religious authority in moral questions left a vacuum and a new demand for secularized ethics.

2. The process of individualization in modern societies has loosened the bond between individuals and groups. As a result of this process individuals no longer define their moral identity as part of a collective identity but see themselves as autonomous in regard to their values, convictions and aims.

Thus, ethical principles which were handed down by the tradition of a community lost their grip. Instead, individuals have now to develop their own convictions in regard to moral questions. Modern ethics offers an instrument to meet this requirement by rational means.

3. The 'end of history' gave rise to a widespread consensus in many modern societies that democracy, rule of law and market economy are essentials of every well-ordered state. In such societies people share important normative premises which increases the chance that conflicts and problems are solved by rational argumentation on the basis of these common convictions.

4. In modern societies many of the old cleavages marked by the confines of stable social classes have disappeared. As a consequence, social groups with homogenous interests also dissolved and a person's interests could no longer be identified simply by group membership. Under these conditions pure 'politics by interest' become risky for all members of a society (Buchanan/Congleton 1998). Due to the heterogeneity of social groups everybody must reckon with the fact that they will not always belong to a stable majority which will secure their interests. But if winners and losers of collective decisions change regularly, it is better to have decisions which are based on ethical principles than on interest alone. So everybody is better off in the long run if political actors are forced to decide according to moral criteria rather than as representatives of the particularistic claims of their clients (Baurmann 2003).

5. Consequently, in modern democracies there is a widespread expectation that political decisions should be based on moral principles (Pettit 1997). As an effect of this expectation, political problems are discussed with ethical arguments. No politician or citizen in a modern democracy can simply put forward his personal or group interests in a public debate on political issues. Everybody is forced to argue with regard to an impartial consideration of the interests and needs of all members of a society. And even if the participants in public debates only use ethical arguments strategically, it will not be easy for them to decide or to act opportunistically later. *Arguing* publicly on moral principles creates an effective compulsion also to *act* morally in public.

6. However, in modern societies conformity to morality is not only a result of extrinsic motivation because of publicly expressed moral arguments. It is also a result of intrinsic motivation because people are actually committed to moral principles and norms. Ethical argumentation is not part of a strategy to realize their interests, but an instrument to reach an adequate decision in accordance with their personal preferences. For people with an intrinsically entrenched moral motivation, ethics is a genuine part of their personal decision-making and an essential part of their judgement of other people's behaviour. Contrary to a widely held prejudice, it is not the case that an intrinsic commitment to moral principles is in contradiction to the incentives in a liberal market-society. It can be argued that such a

society even has the potential to promote an especially demanding form of universalistic and impartial morality (Baurmann 2002; 2008).

7. Finally, ethical deliberation possesses the dynamics of a self-extending process. Max Weber ascribes this quality already to judicial reasoning. The main point is very simple: once it is accepted that a problem should be solved by ethical standards, then a solution of this problem which follows from a conclusive ethical argument must be accepted too. This kind of acceptance is not a possible subject of decision. If persons are convinced that a certain moral principle is valid, then they have no choice either in regard to this conviction itself or to the acceptance of its logical consequences. It is not possible to decide to keep the conviction that a premise is true and yet not to accept the truth of the consequences. Therefore, *if* certain persons exhibit an intrinsic commitment to some basic ethical principles and believe truly in their value, *then* these persons can be 'forced' by pure argument also to feel committed to those norms and judgements which can be deduced from the basic ones, even when this is against their incentives and interests. That means that ethical deliberation cannot be restricted artificially to certain areas and issues but has the inborn tendency to extend itself over *all* areas and issues—once the Pandora's box of ethical argumentation has been opened, it cannot be closed again so easily (Singer 1981).

As I said at the beginning, I could not present a complete and coherent analysis of the developmental paths of law and ethics. What I have offered here is a loose combination of observations, comparisons and a number of tentative explanations. But taken together the collected descriptive and explanatory evidence of a possible convergence of law and ethics makes this speculation at least worth a second thought.

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