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Tamara Butter

Assistant Professor, Amsterdam Law School, University of Amsterdam, The Netherlands

t.t.butter@uva.nl

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Moral Diversity in Corporate Lawyering? The Need for a Civil Law Perspective

After the financial crisis and a range of corporate scandals, the question was frequently raised: 'Where were the lawyers?' The standard conception of lawyering (or: adversarial advocacy) has been under attack and it has been suggested that other approaches to lawyering are more suitable in the context of corporate law and possibly even necessary in order to avoid 'unethical' behaviour (Parker and Evans 2018). But is, what I would call, 'moral diversity' actually feasible in corporate practice? Answering this question requires empirical research. There have been studies on corporate lawyering in the common law world, but in this paper I argue that, in order to obtain a better understanding of its nature and the possibilities for going beyond adversarial advocacy, research in civil law jurisdictions is needed. Exploring this question in the civil law context of the Netherlands would be a good place to start.

Keywords: lawyers' ethics, professionalism, moral reasoning in legal practice, corporate lawyers, moral diversity, corporate practice.

Introduction

After the financial crisis and a range of corporate scandals, the question was frequently raised: 'Where were the lawyers?' (Kershaw and Richard Moorhead 2013; Benedetto Neitz 2015). There has been critique on the ways corporate lawyers fulfill their role and this led to questions about their professional ethics. The standard conception of lawyering (or: adversarial advocacy), based on the principles of partisanship, neutrality and non-accountability has been under attack in corporate practice (Gordon 2003; 2017). Even though the question where the lawyers were is important, it is, as Woolley (2015) rightly pointed out, an insufficient one because: 'It focuses on individuals and their professional obligations, rather than on the circumstances in which those individuals acted as they did. And that limited focus will never fully explain the failure of those individuals to meet their obligations. We have to ask tougher and more intractable questions' regarding matters such as 'the power structure of the lawyer-client relationship' and 'the nature of corporate decision-making and its potential to encourage or discourage moral conduct'. This requires empirical research. There have been studies on this topic in the common law world, but in this paper I argue that in order to obtain a

better understanding of the nature of corporate lawyering and the possibilities for going beyond adversarial advocacy, research in civil law jurisdictions is needed.

In the following, I will first set out the main criticisms on corporate lawyering and discuss how this is seen as exemplary of (extreme) adversarial advocacy. Second, I will discuss alternative approaches to lawyering that have been suggested and raise the question whether, what I would call, 'moral diversity' is actually feasible in corporate practice. Third, I make the argument that in order to further explore this question, research in the civil law context of the Netherlands would be good place to start. I end with a conclusion including questions for further research.

Criticism on Corporate Lawyering

In the literature one can distinguish roughly four points of criticism on the ways in which corporate lawyers act for their business clients. Parker and Evans (2018, p. 294 ff) present an overview of thereof – making no strict distinction between in-house lawyers and lawyers working at law firms – on which this section is largely based.

The first point of critique is labelled *reactive corporate lawyering*, consisting of narrow legalism that ignores ethical issues. Lawyers are described as legal technicians using their legal skills uncritically and closing their eyes to the discussion of non-legal factors that might raise questions (Rosen 2001; Simon 2005). This has also been referred to as 'ethical minimalism' (Moorhead and Hinchley 2015) or 'apathy' regarding ethics (Vaughan and Oakley 2016).

Second, is the reproach of *pro-active corporate lawyering*. Business clients expect lawyers to understand their business goals and advise on how to use the law to achieve those goals. This entails taking into account the broader commercial, social and political context. Lawyers may be expected to help with corporate social responsibility (CSR) obligations in order to increase the company's credibility and their 'brand value' (Parker and Evans 2018, p. 296). Here lawyers' assistance in 'creative compliance' or the creating of legal techniques to achieve the client's goals without regard to the real purpose or spirit of the law and the community's ethical expectations, for example in tax planning, is disapproved of (Rostain 2014; McBarnet 1994; 2010; Powell 1993).

A third criticism is that lawyers, at times, have a *mistaken interpretation of who the client is* (Parker and Evans 2018, p. 308). Corporate lawyers owe their obligations to the corporation as a whole, not to management or individuals within the organisation

(Jonas 1988). Yet, what this entails exactly is not always easy to establish, especially in the international context (Flood 2012). Much of lawyers' involvement in corporate misconduct comes down to conflicts of interests, where lawyers followed the wishes and instructions of individual officers, rather than looking at the interests of the corporation as a whole, including shareholders and other stakeholders (Parker and Evans 2018, p. 308).

A fourth, and most serious, critique is based on examples of lawyers aiding business clients to obstruct justice by (ab)*using lawyer-client confidentiality and legal privilege* to protect corporate activities from scrutiny (Parker and Evans 2018, p. 298). Illustrations thereof are the so-called tobacco cases in which lawyers devised schemes to try and claim client legal privilege over reports that showed smoking was dangerous (Camille 2002).

Parker and Evans (2018, p. 300 ff) claim that these issues are not so much a problem of a lack of professional conduct, civil procedure rules or non-compliance, but rather of rationalising away the need to consider broader ethical concerns – which they consider typical for adversarial advocacy. I would argue that the labeling of these criticisms as characteristic of adversarial advocacy – as they do – requires some nuance. Especially the last two points can be seen as an extreme version of adversarial advocacy. I believe there is also a more moderate version possible ('mere-zeal' rather than 'hyper-zeal') and that, as Dare (2014) points out, adversarial advocacy is not amoral in and of itself. It is grounded in fundamental moral concerns, making this approach to lawyering less obviously 'wrong' – or amoral – than Parker and Evans appear to see it. They argue (2018, p. 304 ff), along with others (Pepper 2015; Gordon 2003), that adversarial advocacy may be suitable and justified in contexts where there is a power imbalance, for example, in criminal law where zealous advocacy would protect the client against the state. In the corporate context, however, this is generally not the case. Also, most matters on which corporate lawyers advise will never end up in court. An important part of lawyering in this context consists of advising: lawyers are helping clients to decide whether and how to comply with the law. They argue that, if unexplored and unchallenged, adversarial advocacy is harmful in corporate practice and suggest that other approaches to lawyering are more suitable (2018, p. 328; compare Gordon 2003; 2017).

Approaches to Lawyering: Four Lines of Moral Reasoning in Legal Practice

Parker and Evans (2018), and Parker before that (2004), distinguish four approaches to lawyering. Here I discuss the slightly adjusted, fine-tuned version of these I used in my earlier research: adversarial advocacy, dutiful lawyering, moral activism and relational lawyering (Butter 2022). Even though – for practical reasons as this is shorter – I also speak of *approaches*, I see them as ideal typical *lines of moral reasoning* in legal practice, rather than *approaches* with clear descriptions of how these 'types' would act: one particular action might be informed by two different lines of moral reasoning and it is the reasoning which I believe to be most insightful. Also, I refer to these as lines of *moral* reasoning indicating that I believe all of them to be 'moral' (in the normative sense). Most professional rules have features of all four approaches. And, even though these rules intend to prescribe the appropriate conduct and to guide lawyers in how to deal with the ethical problems they encounter, they allow for different visions on what lawyers' professional obligations entail and leave room for different interpretations according to the situation one is confronted with (Wilkins 1990). Depending on the circumstances, one approach may be considered more appropriate than another, but this is a topic for discussion.

Adversarial Advocacy

The adversarial advocate approach derives lawyers' morality from the role that the lawyer is supposed to play in an adversarial legal process and complex legal system (role morality). This approach is generally considered the standard conception of the lawyer's role in most common law countries. It is based on the principles of partisanship, neutrality and non-accountability. Partisanship demands strict partiality: the lawyer may do all that they can, within the bounds of the law, to achieve the client's objectives. Neutrality means that it is not for the lawyer to be the judge of the client. Non-accountability entails that the lawyer is not responsible for the client's decisions. The rationale behind this approach is that the individual lawyer and client do not have to concern themselves *directly* with the public interest in the administration of justice; this is justified because as long as the lawyers for all parties act as adversarial advocates in the narrow interest of their clients, the legal system will produce the right outcome. The starting point in this approach is thus the client's interest and this is interpreted in a legal, narrow sense – as opposed to a wider sense in the relational lawyer approach (see below). It focusses on the clients' views of their interests as it is the lawyer's task to

ensure client autonomy in a complex legal system. Taken to its logical extreme, this approach requires lawyers to look for loopholes and resolve any ambiguity in the law and their own professional duties in favour of the client.

Dutiful Lawyering (Responsible Lawyering)

Like adversarial advocacy, the dutiful lawyer approach derives lawyers' morality from the lawyer's role in the legal system and in society (role morality), but defines that role differently. In contrast to the adversarial advocate, the dutiful lawyer sees the lawyer's role as a guardian of the legal system and an officer of the court. Even though the dutiful lawyer is an advocate for the client, s/he has an overriding duty to the legal system and the focus is on having the client comply with the law. The lawyer's advocacy duties are tempered by the duty to ensure the integrity of and compliance with the spirit of the law; s/he counsels against behaviour at the margins of legality and may act as a gatekeeper if necessary. The dutiful lawyer facilitates the public administration of justice *according to the law* in the public interest in order to preserve the social good that the legal system seeks to serve. This can be considered a narrow interpretation of the public interest in the administration of *justice* – as opposed to the wider interpretation of justice by the moral activist.

Moral Activism

This approach is based on personal morality, rather than role morality. It entails that lawyers should focus on doing justice as this is what the legal system essentially is concerned with. It focusses on the public interest in the administration of *justice* in a wider sense. Whereas dutiful lawyering is about preserving the justice of the law as it stands, moral activism considers what justice concerns the law *should* encompass. This is based on the general moral theory that appeals to the lawyer; it does not have to be a formal philosophical theory, it may just be one's personal ethics and philosophy of life. If the law and legal processes as they stand do not coincide with the lawyer's ideals of justice, the moral activist will not necessarily see herself/himself confined by a duty to the law. Rather, s/he would feel obliged to do justice, even if that involves changing or challenging the law. The moral activist will not vigorously represent clients whose causes s/he believes are not just. S/he counsels clients to seek to persuade them of the moral thing to do and withdraws if the client disagrees. This approach contains a tendency to place the lawyer's commitment to an ideal of justice above the client.

Note: For Parker and Evans moral activism is the preferred approach in corporate law (2018, p. 308 ff). They state that the moral activist explicitly considers the duty to the corporation as a whole and that this does not mean that: "corporate lawyers need to substitute their own moral judgement for that of the corporation [but that they] take their share of the responsibility to make sure that the broad interests of the company as a whole are pursued (including the corporation's interest in behaving legally and ethically)." I do however, not entirely agree with this framing as it is not fully consistent with moral activism as a type of lawyering earlier described by Parker (2004). It is clear that Parker and Evans want to argue for moral activism in corporate lawyering, but in doing so the boundary with dutiful (responsible) lawyering becomes somewhat blurry. I would argue that the moral activist would, in the end, substitute her/his moral judgment for that of the *individual officers*; in corporate law *the corporation* is the client and is not capable of moral judgement.

Relational Lawyering (Ethics of Care)

Like moral activism, relational lawyering involves the integration of personal morality with legal practice: it is based on personal rather than role morality. Yet, whereas the moral activist is principally committed to the cause of justice and social change, the relational lawyer is interested in personal rather than social change. Relational lawyering is concerned with avoiding harm and concentrates on 'trying to serve the best interests of both clients and others in a holistic way that incorporates the moral, emotional, and relational dimensions of a problem into the legal solution' (Parker 2004, p. 70). Compared to adversarial advocacy, this approach has a wider interpretation of the client's interest: it is seen within the context of relationships. Problems can be best resolved in a preventive, problem solving (non-adversarial) way. The relational lawyer has a substantive view on the problem s/he is advising on and raises moral issues with the client. This as opposed to the adversarial advocate who believes it does not matter whether the lawyer approves of the client's wishes, as long as these are not *contra legem* (or the lawyers does not know them to be): s/he is neutral and not accountable.

Moral Diversity in Corporate Lawyering? The Need for a Civil Law Perspective

Parker and Evans (2018) suggest and discuss ways in which corporate lawyers will need to go beyond adversarial advocacy, and even dutiful (responsible) lawyering, to elements of moral activism in order to avoid 'unethical' conduct. This, what I would call, 'moral diversity' is widely advocated for (Dinovitzer *et al.* 2014a; Huising and Silbey 2011), but is it also actually feasible in the context of corporate lawyering? Empirical studies on this topic in the Anglo-Saxon world speak of 'ethical minimalism' (Moorhead and Hinchley 2015) and 'apathy' about ethics amongst corporate lawyers (Vaughan and Oakley 2016). The scholarship suggests that the contextual circumstances – that is: the commercial environment of corporate practice with its business logic (Moorhead and Hinchley 2015; Vaughan and Oakley 2016), the power structure of the lawyer-client relationship (Dinovitzer *et al.* 2014b), peer pressure and the (lack of) ethical infrastructure within firms (Kirkland 2005) – might make it very difficult for lawyers to adopt approaches to lawyering other than (extreme forms of) adversarial advocacy. Or as Flood (2012, p. 193) puts it:

> Corporate practice is intensifying the moral anxieties of professionalism […]. What these instances tell us is that socialization, conformity, and ethical fading are so prevalent, so deeply embedded into professionals' lives, that there is no escape. These ways are the norm. Is it feasible to conceive of an alternative that could exist in the pressured world of the corporate law firm?

There are indications that, on an individual level, this might be the case (Kuhn 2009), but in order to further explore this question an examination of the topic beyond the common law context would be helpful. Historically, a distinction in legal 'families' is made between countries belonging to the common law (adversarial) and the civil law (inquisitorial) tradition and the role of the lawyer within these legal systems (Abel and Lewis 1988, p. 11 ff; Sherr 1998, p. 342). The so-called 'standard conception' of the lawyer's role (or: adversarial advocacy), has typically been associated with the adversarial legal systems of common law countries (Luban 1988; however, see Boon 2014 on the attenuated version thereof in England and Wales). Would there be more (room for) moral diversity in corporate lawyering in a civil country? I would like to make the argument that studying corporate lawyering within the civil law context of the

Netherlands provides more insight into the (im)possibility of moral diversity in this practice area. The Netherlands has a business district, comparable to 'The City', in London where most of the large internationally operating corporate law firms are situated: the 'Zuidas'. These firms consist of the global law firms with Anglo-Saxon roots and the large firms of Dutch origin that also have offices abroad (Doornbos and De Groot-van Leeuwen 2020, p. 260).

The case of the Netherlands

Lawyers and the Professional Framework

Bar-registered lawyers (*advocaten*, hereafter: lawyers) have two main tasks: provide legal advice and represents clients in district and higher courts (Doornbos and De Groot-van Leeuwen 2020). In order to enjoy the privileges endowed to the profession, one must complete the Bar's professional education and be a member of the Dutch Bar Association. In addition to the professional education of the Bar, a number of large law firms have established their own education, the Law Firm School, tailored to specificities of international corporate practice (www.thelawfirmschool.nl). Lawyers are bound by the Act on Advocates and the professional practice rules and regulations drawn up by the Bar (www.advocatenorde.nl/english). The Act on Advocates contains five core values for lawyers: independence, partisanship, expertise, integrity and confidentiality. In the run up to the revision of the Act there has been much discussion as to whether public responsibility for ensuring the proper administration of justice had to be the sixth core value, as the committee established to advise on the revision of the Act proposed (De Wolff 2020, p. 191-196). The Bar insisted that this was not a core value, but rather a general obligation which should defer to the core value of partisanship in specific cases; this is how it ended up in Article 10a (1) of the Act on Advocates. The discussion on the core values put the topic of ethics on the agenda. Questions have been raised as to whether an interpretation of the lawyer's role as being founded on the standard conception should be the leading interpretation (Loth 2003; Van Domselaar 2020). There has been debate as to whether this, referred to by some as 'ethical minimalism' in the context of corporate law (Van Domselaar 2017), is a justifiable approach in all areas of law (Spronken 2020; Silvis 2020).

The importance of partisanship over the public interest in the proper administration of justice seen in the Act on Advocates is not what one might expect in a civil law country, since the standard conception – to which partisanship is central – is historically associated with common law systems. Both an overview of cases in professional disciplinary cases and the Code of Conduct – intended to give further guidance on how to interpret and apply the core values in practice – do, however, nuance the overriding importance of partisanship somewhat. The disciplinary judge is clear on the limits to partisanship: the lawyer may not fully identify herself/himself with the client and must take the legitimate interests of others into account (Soeharno 2021). The editorial to the Code of Conduct 2018 reads:

> Advocates will be partial to looking after the legitimate interests of the client. As a result, the advocate – as an academically qualified legal expert – is a special mediator between the litigant and the court. This is seen particularly in procedural practice. However, the advocate is also a special mediator between the litigant and the law. This is particularly apparent in advisory practice. Seen in this light, the advocate is 'the guide in the jungle of the law'.

Here we see the lawyer's mediating role being emphasised; characteristic not so much of the adversarial advocate but of the dutiful lawyer line of reasoning. I would argue that the Dutch professional rules, like the professional rules in most other countries, leave some room for manoeuvre and to some extent allow lawyers to adhere to the approach to lawyering that most appeals to them. But is such diversity seen in practice?

Lawyers' Ethics in Practice

The influence of the core principles on lawyer conduct in the Netherlands is unknown (Doornbos and De Groot-van Leeuwen 2020, p. 263). Apart from my research (Butter 2018; 2021; 2022), there is hardly any research on Dutch lawyers' ethics in practice (Van Domselaar 2020; Louwerse 2013; some exceptions of older research: De Groot van Leeuwen 1998). In my study on the professional decision making of asylum lawyers, I found that, even though the adversarial advocacy line of reasoning was prevalent in the accounts of the lawyers I interviewed, there was moral diversity: all four lines of moral reasoning where seen and, depending on the circumstances of the

case, one approach or the other was given more weight (Butter 2022). Hence, in this practice area it has been proven possible. In the areas of labour law, family law and even criminal law, several lawyers initiated a shift in their practices from an adversarial to more relational lawyer approach (Boontje 2019; Freeke 2016). Also, the (criminal) lawyers behind the foundation 'Lawyers as changemakers' advocate approaches to lawyering based on personal morality rather than role morality (www.lawyersaschangemakers.org). These are indications that there is, within the larger Dutch context, room for moral diversity, but what is this like in corporate practice?

Corporate Legal Practice in the Netherlands

In recent years, ethics in corporate practice has become a topic of public debate (*NRC Handelsblad* 2019; Fogteloo and Smolders 2021). In particular, the allegedly too zealous representation of clients has been a point of critique and the lack of reflection on the lawyer's role in that regard: rather than hiding behind a minimalist interpretation of the professional rules, it has been maintained that one's personal morality should be made part of the equation (Jensma 2022). This is exemplary of Wendel's argument for the need for the profession to build a bridge between ordinary morality and professional ethics: 'The bridge ensures that the principles of ethics by which professionals conduct themselves are acceptable to the wider society of which the profession is a part. […] If there were no bridge, then these two worlds would be totally separated, normatively speaking. In that case, there would be no reason why society as a whole would tolerate the profession.' (Wendel 2014, p. 10).

There has been, and still is, discussion as to whether there is also 'ethical minimalism' amongst Dutch corporate lawyers and whether there is actually something wrong with adversarial advocacy in corporate practice (Advocatie.nl 2017; Van Domselaar 2017; Van Zelst 2020; Kaptein 2020). Opinions seem to differ, but there are voices advocating for other approaches to lawyering. As, for example, a senior associate of an international corporate firm put it: 'we should be bringing parties together instead of adding to polarisation; not only shouting the client's interests from the rooftops, but also look at the bigger picture'(Dentons Podcast 2021a). In the meantime, the Law Firm School (LFS), as well as other large firms not affiliated with the LFS, strengthened their professional ethical education. The current LFS education is not restricted to the professional rules, but rather focusses on the room there is within the rules to make

choices. Its aim is to make lawyers aware of this room and to have them reflect on their choices; not by excluding their personal morality and broader ethical concerns, but by integrating this into the decision making process (LFS Opleiding – The Law Firm School - Interview with the instructor responsible for the Law Firm School's ethics education, 7 June 2022). Professional ethics has also received extra attention through the introduction of ethics awards for the legal profession (www.goudenzandlopers.nl/de-awards/). This prize will be awarded in September 2022; at the time of writing it not yet clear *whom* or *what* behaviour is considered ethical.

Another relevant development in this regard is the growing importance of corporate social responsibility (CSR) and, in particular within the Netherlands, the call for 'responsible corporate citizenship' for the company's management and its board of directors from 25 corporate law professors (Winter *et al.* 2020). This has implications for lawyers: if the corporation needs to consider wider societal interests, the lawyer will also need to take that into account when advising the client. Also, law firms themselves qualify as 'enterprises' for the purpose of CSR norms (Spiesshofer 2021). Companies start to take this topic very seriously and increasingly expect and demand this from their lawyers as well (Dentons Podcast 2021b). Besides clients' demands, new generations of law students expect their future employers to give heed to their position in society and wider societal obligation, making this important for firms in order to be able to attract new talent for corporate practice (Dentons Podcast 2021b; De Zwijger 2022).

Conclusion and Further Research

(Extreme) adversarial advocacy has been under attack in corporate practice and it has been argued that other approaches to lawyering are more appropriate in this context. Empirical studies on this topic stemming from the common law world suggest that, what I would call, 'moral diversity' (a variety in approaches to lawyering) is not actually feasible in corporate practice. In order to further explore this question research in civil law jurisdictions is needed. The so-called standard conception of the lawyer's role (adversarial advocacy) has typically been associated with the adversarial legal systems of common law countries; studying corporate lawyering within the civil law context of the Netherlands can provide more insight into the (im)possibility of moral diversity in this practice area. Within the professional framework and wider developments in the Netherlands, there seems to be room for approaches to lawyering

that go beyond adversarial advocacy: moral diversity is seen in several areas of law and reflection on the limits of zealous advocacy is present in corporate law. However, further research is needed. The remaining questions are: how do Dutch corporate lawyers view and fulfill their role? Do they go beyond 'ethical minimalism'? Do we see lines of moral reasoning other than adversarial advocacy in their accounts? If so, what factors help understand what makes alternative lines of reasoning possible? And if not, what hampers it? Can this be understood in relation to the civil law context in which they operate? This needs to be further explored and I hope to do so in the coming years.

Disclosure Statement

The author reports there are no competing interests to declare.

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