

## Introduction

This book is about the relationship between law and morality. Although the topic in itself is definitely not new, it receives especial importance and attention in contemporary societies, especially those characterized by a dominant commitment to what can be called a 'liberal democracy', where the law is supposed to regulate a highly pluralized and fragmented society. Under conditions of plurality of values, many social forces and legal theories require a certain kind of neutrality from the legal system, a means of compatibilization of the many 'world views' and 'moral systems' that are present within the same social space. Such a conciliating commitment sounds especially relevant in times of the doctrinal ubiquity of ideas such as 'peace based on human rights.' This was the title of the 28<sup>th</sup> World Congress of the IVR in Lisbon, which the special workshop 'Law and Morals' was part of and from which this book arose.

After the experience of the political regimes of the twentieth century that justified themselves by means of positive and non-positive claims about the nature of law but used positive law for diverse immoral actions, social movements and legal scholarship became moralized to a great extent. They required from the legal system the commitment to values such as human dignity, non-discrimination and many other precepts of political correctness. In this way, the normative tenet of legal scholarship at the beginning of the twenty-first century is ambiguous: on the one hand, law should be morally neutral in order to be able to compatibilize many individual and collective world views, but on the other hand it must be committed to the *right* values in order not to fall into the uneasiness of the past – values that only some individuals and groups agree upon.

This is the social and doctrinal context in which debates about the necessary, possible or desirable connection and separation of law and morality have taken place in the last decades. Can (or should) law be defined in exclusively non-moral terms? What does it mean to be a legal positivist in this context? More interestingly, what is the normative nature of the answers to these very questions: is the very definition of law a matter of practical or of theoretical reasoning? Can there be a definite answer to the question of whether law and morality are connected or separated? If law is at least not synonymous with morality, is there a moral obligation to obey the law? These are some of the many questions addressed by the contributors to this volume, which is divided into four chapters: part one is devoted to the discussions about the law and practical reason, part two covers some conceptual approaches to law and morals, the third part offers some thoughts on legal versus moral normativity, and the final part addresses the problem of morals and legal positivism.

The volume begins with a historical and conceptual account of the relationship between law and morality by André Ferreira Leite de Paula. In ‘On the Unities of Law, Practical Reason, and Right: Foundations of the Unity of Reason Beyond the Plurality of Knowledge and of Normative Orders’, the reader will be provided with an overview of the historical development of the increasing specialization of normative orders (law, morality, religion, politics) since pre-Hellenic times, passing through Roman law, the middle ages and modernity. The author presents the patterns of justification and critique of moral and legal claims related to the many epistemic paradigms adopted in each era. While in pre-modernity the metaphysical view of essentialism was dominant, early modernity substituted essentialism with voluntarism, which was in its turn moderated by many claims of the autonomy of fields of knowledge in the twentieth century, as morality and law began to be seen as ‘autonomous normative orders’ among others. The article shows how the very meaning of legal positivism changed in the transition from the nineteenth to the twentieth century. While until the nineteenth century most positivisms were moral and political defenses of a legal order considered to be just, the ‘delegitimation-positivisms’ of the twentieth century were theoretical attacks on the legal and political order of the nation state and its elites on the basis of liberal morality and politics. After laying the ground for a robust ontological realism for all kinds of things and facts, including normative ones, the author analyzes the many possible antinomies between law and morality, and holds that in each situation there is a right behavior to be carried out, even if different normative orders state diverging norms for the same behavior.

The paper by Bruce Anderson and Michael Shute tackles the question “Is There a Unity of Practical Reason that Embraces Law and Morals?” to which the authors deliver an affirmative answer by drawing on the work of two philosophers: Garret Barden and Bernard Lonergan. In agreement with Barden, they maintain that all practical decisions (including legal decisions) are moral decisions since they are the result of deliberation and choice. The unity of practical reason which embraces law and morals lies in the cognitive activities of deliberation and choice. With Lonergan the authors reinforce this idea, since Lonergan also sees deliberation and choice as the centre-piece of moral decision making, and reach further by claiming that practical reasoning is a distinct mode of reasoning that is different from the reasoning that is employed in science, history, art, religion, and philosophy. For Lonergan, the strength of practical reasoning is that it specializes in dealing with concrete and particular events, situations, and problems that call for immediate and practical solutions; in practical reasoning, knowing exists for the sake of doing something. Anderson and Shute argue that both the unity and the diversity of law and morality rest on the specialized aim, method, and cognitive operations that constitute practical reasoning and its limitations.

The challenges for practical reasoning arising from the pluralism of modern society make up the background of Gabriel Alejandro Encinas Duarte’s paper ‘Is Argumentation Theory Applicable for Legal Pluralism?’. Here the author not only explores many possibilities of compatibilization of legal pluralism and normative universalism, but makes the strong claim that pluralism even enhances the role of universalist morality in

---

law rather than diminishing it. Tensions between state law and law beyond the state are treated in an analytical and historical manner. Contemporary law works must be seen, according to the author, as a historic consequence of the Second World War and the subsequent focus on human rights and human dignity. The pluralism of answers of competing legal orders in the same space, which is often approached in a merely sociological way, is considered from a normative perspective that combines historical contextualization and universalism, and which includes necessarily assuming the challenge of incommensurability of values and solving it with a discursive approach to constitutionalism.

Morales Zúñiga's paper 'On the Moral Foundations of a Fair Trial' offers an approach to the discussions of fair trial and the moral background to this. The author departs from the debates concerning the concept of the rule of law, in which there is a revitalized interest in the place of fair trial, and his paper seeks to lay bare the moral foundations of this. In order to achieve his goal, Morales Zúñiga reconstructs the very social context in which a fair trial operates, which is characterized by legal adjudication. His arguments focus on legal disagreements as a hurdle for performing the judicial function. Two methods of settling legal disagreements are set out: the first of these is morally wrong, while second one is not. This latter method is that of a fair trial.

In her article 'The New Role of Extra Legal Principles: A Comparative Overview' Giulia Terlizzi discusses the way in which the role and content of morality and morality clauses are to be understood in our contemporary, secularized and pluralistic society. She analyzes the application of moral clauses by legal officials within legal systems in order to show the abandonment of a deontological conception of morality, which seems to be linked to the risk of an excessive subjectivism in the process of interpretation. Terlizzi argues that the task of applying these clauses becomes increasingly difficult in contemporary legal systems that are based on ethical and social pluralism on one hand, and on the increased power of individual autonomy on the other. She also addresses the ways in which legal systems are transforming morality clauses in order to restrain this subjectivism, a process of "juridicization" of morality through the incorporation of common moral standards in rules and principles formulated by the legal system by way of codes and constitutions.

In the second part of the volume, *Conceptual Approaches on Law and Morals*, we present the papers of Lorenz Kähler and Andrés Santacoloma Santacoloma. In his contribution 'What Constitutes the Concept of Law? Potentialism as a Position beyond Positivism and Natural Law Theory', Kähler argues that it is impossible to provide an a priori valid answer to the question of whether there is a necessary connection between law and morality, since the concept of law is totally fixed neither by linguistic conventions nor by social facts. In order to even address the question regarding what the law is, a variety of moral as well as empirical reasons becomes decisive, not only to define the law but also to determine its borders. Here Kähler introduces the theory of moral potentialism, which emphasises that the concept of law depends on moral reasons that vary with the empirical circumstances under which the concept is to be applied. Most important among these circumstances are the consequences that the concept of law brings about. The theory also emphasises that under certain circumstances it is possible to state

a connection between law and morality. Hence, all one can say a priori on a theoretical level is that there is a *potential* relationship between law and morality, i. e. a relationship that depends upon a variety of empirical as well as moral reasons. This explains, at least in part, why positivism and non-positivism have more in common than their opposition suggests. They both assume an essential nature of law which moral potentialism denies.

In this same fashion, in his contribution 'Rethinking the Practical: The Migration Background of Thick Concepts' Santacoloma Santacoloma argues against the idea of a general question regarding the nature of law and morality and an a priori answer to the connection between these orders. Since many legal scholars appear to have taken very complex matters for granted in addressing these questions and have thus embraced a kind of reductionism, Santacoloma proposes a different approach to the subject matter, utilizing the theory of thick concepts and explaining that because of the ubiquity of these concepts and their nature (descriptive/evaluative) and a migration phenomenon *inside* and *between* normative orders, a completely independent existence of one of these orders seems implausible. To rule out a possible counterargument emerging from a theory which holds that the law is a special case of the more general practical discourse, he introduces and explains the phenomenon of the *Migration Background* of Thick Concepts, stressing the importance of the independent but nevertheless overlapping nature of normative orders.

The volume continues with the topic of legal versus moral normativity, addressed by João Andrade Neto and João Maurício Adeodato. In 'On the (dis)Similar Properties of Legal and Moral Duties', João Andrade Neto addresses the question of whether the idea that there are prima facie and definite moral duties has its correspondent in law, which would result in the existence of prima facie and definite legal duties. More specifically, the author investigates whether this distinction in law would correspond to the distinction between rules and principles, or more broadly, between kinds of legal norms; for that, whether the idea of prima facie legal duties is at all tenable is discussed. Andrade Neto argues that although this distinction is conceptually possible, only definite duties are to be regarded as law, especially from a participant's point of view.

Arguing against a common morality and the very possibility of objective values, Adeodato begins his 'Law and Morals According to a Realistic and Rhetorical Philosophy: The Brazilian Case Revisited' with a reconstruction of some of the possible mental attitudes assumed by philosophers approaching the law/morals debate: the separation thesis, which he holds to be implausible. Taking an analytical/descriptive attitude, he discusses the rhetoric underlying the legal and moral discourses, explaining the differences between and the scope of utilizing rhetoric in a dynamic (material, existential), technical (practical, strategic) or epistemological (analytical, scientific) sense, in order to incorporate or to advance a certain moral perspective both inside and through the law. Adeodato shows the force of his argumentation in the light of some examples from the Brazilian political situation regarding the lack of legal controlling instances in the country and the consequences of this for democracy.

The final section of the volume, dedicated to the debates about Morals and Legal Positivism, begins with the contribution of Jing Zhao. Through a reinterpretation of

Radbruch's concept of justice, Zhao's paper 'On the Relation between Law and Morality: From the Separation to the Connection Thesis in Gustav Radbruch's Legal Philosophy' aims to provide stronger arguments for the thesis of a non-positivistic position within Radbruch's legal philosophy, arguing that while there are connections between law and morals, these however do not necessarily lead to a natural law position. On the one hand morality plays a role for the correctness of law, and on the other hand it supplies the reason for the validity of law. There is also a relationship between the concepts of law and of justice: justice is understood in an epistemological sense, but also as a regulative ideal. Only in this way can Radbruch's formula be understood as a further development of his early theory of justice. However, taking into account Radbruch's relativism and his exclusion of the internal point of view regarding legal validity, the connection between law and morals is weak. Zhao stresses that this implies neither an abandonment of Radbruch's basic methodological relativistic position, nor that the recognition of human rights would be a return to natural law.

In 'Non-Positivism and Encountering a Weakened Necessity of the Separation between Law and Morality – Reflections on the Debate between Robert Alexy and Joseph Raz', Wei Feng throws light on the debate between Alexy and Raz, and highlights the possible ways in which law can be connected with morality. By fulfilling one of the analytic tasks of philosophy, which consists of clarifying concepts and their logical relationships in order to clarify the points of a theoretical struggle, Wei Feng holds that there are only three possible relationships between law and morality: a necessary, an impossible or a contingent connection. In order to back up this claim, he analyzes a realm of modal notions of necessity that have long been neglected in legal theory. The very notion of necessity can vary considerably, and can mean for example 'natural necessity', 'analytical necessity', and 'coercive necessity' among others. Certainly, what it means for law to be or not to be 'necessarily' connected with morality depends on the clarification of these concepts. Wei Feng characterizes the possible positions with the help of modal logic and represents them with Venn diagrams, demarking in this way the set of argumentative strategies that positivists and non-positivists can follow.

In a more close regard to legal positivism, in his article 'The Separation Thesis and H. L. A. Hart's Legal Positivism' Yanxiang Zhang explores the meaning of positivism in general as well as its presuppositions and consequences for the specific kind of positivism that is held in law. He carries out an extended analysis of the naturalistic fallacy in G. E. Moore's sense, and its meanings within positivism in general, including positivism within natural sciences, and reflects about the consequences for legal positivism. According to Yanxiang Zhang, legal positivists attempt to cut passion away from experience; they attempt to hold a position that can be seen as a local version of the more general style of classical positivism. Concretely, Zhang explores H. L. A. Hart's positivist presuppositions from the point of view of scientific positivism in general, especially empirical and naturalist sciences of the 18<sup>th</sup> to 20<sup>th</sup> centuries in Great Britain. According to Zhang, at the end of the day Hart's theoretical enterprise aimed at standing positivist, but regarded morality as a necessary condition for the existence of a legal order. This led

to the collapse of his theory due to the internal tensions arising from its philosophical sources.

Still in regard to H.L.A. Hart's legal theory, in 'The Minimal Content of Natural Law: In What Sense is it Really Natural?' Henrique Neves presents the argument that the minimal content of natural law in Hart's account can be understood as (and is supported by) collective intentionality in the sense of John Searle's institutional theory of law. According to Neves, this opens the possibility of deriving the *ought* of natural law from the *is* of factuality, i. e. the *is* of collective intentionality. This is also why Hart's conception of the minimal content of natural law should not be understood as just 'one more theory' within the framework of traditional natural law theories, for it does not even raise a claim to justice. In this sense, according to Neves "the minimal content of Natural Law represents the basic institutional structure of a society" and this implies a necessary connection between law and morals.

The final contribution of this volume addresses conceptions of law and morality within Croatian legal theory, a region and style of legal scholarship that has not received the deserved attention in international debates. In 'Is there a Moral Obligation to Obey the Law? Separation Thesis and Legal Theory in Croatia', Marin Keršić shows the remarkable influences that Croatian legal theory received from the Austrian legal education system, and later from monarchist Yugoslavia with its analytical approaches and the Marxist approach of post-second world war Yugoslavia. Keršić focuses on the 'integral theory of law' advanced by Nikola Visković, which combines elements of social relations, values and norms, thus also combining sociological, axiological and normativist methodologies. Visković himself has been influenced, among others, by Miguel Reale's 'tridimensional theory of law', one of the most important contributions to legal philosophy in twentieth century Brazil. One of the tenets of this hybrid legal theory can be seen, as Keršić shows, in the conceptual separation of law and morals as the non-existence of an a priori moral obligation to obey the law.

With this volume we are pleased to present an extraordinarily competent analysis of the most central questions concerning this debate, as well as some solid results. In contrast to many companions on law and morality, this volume is not confined to the aspects of one legal tradition such as the Anglo-Saxon, but it rather integrates the richness of Continental European, Anglo-Saxon, Latin American and Asian experiences and reflections about the subject matter, as the variety of the scholars' backgrounds shows. Last but not least, we would like to express our gratitude to the authors of this volume and the participants in the workshop for their helpful feedback and wonderful discussions, which are now available as this ARSP Supplement.

André Ferreira Leite de Paula  
Andrés Santacoloma Santacoloma