Positive Law and Morality – Violence and Coercion[1]

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The paper focuses on the conceptual analysis of law and morality from the perspective of their relationship with the concept of violence and coercion. The author makes a phenomenological analysis of the concept of law and morality pointing out their ambiguity and difficulties in defining their mutual relation. This analysis leads to a conclusion that there is a necessity to take into consideration three phenomena (law, morality and positive law) to define this relation correctly. This allows protection of the content of the positive law against dogmatism and ideologies. The author also challenges a thesis on a special role of morality in social relationships and strongly emphasizes the essential and primary role of the positive law in these relations.

Keywords: morality, positive law, violence, coercion, inter-subjective morality.

Content

Introduction

I would like to outline and address an issue connected with the relationship between law and morality, namely, the legitimization of law as a mandate for the use of coercion or violence. The idea is not new – it has been subjected to classical analysis in the philosophy of law and discussed at least since the time of Immanuel Kant.

We tend to associate positive law with coercion or violence, but the same is not true of morality. In other words, we legitimize violence in the sphere of positive law, but moral norms do not possess such legitimacy.[2]

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[2] *Steinvorth, U*. Gerechtigket. In: *Martens, E.,* und *Schn*ädelbach, H. (Hrsg.). Philosophie: Ein Grundkurs. Reibek bei Hamburg: Rowohlt, 1991, ISBN 978-3499554087, pp. 306–308.

Coercion or violence usually is a clear factor enabling to distinguish moral norms from legal norms.

However, I am of the opinion that this distinction is sufficient for a certain understanding of morality, which I call subjective, but becomes insufficient when applied to the sphere I call the moral community. In my view, the coercion or violence associated with positive law must have its own moral legitimacy.

1. Subjective Morality and Moral Community (Inter-subjective Morality)

I shall begin by citing famous passages from Kant's "Die Metaphysik der Sitten" ("The Metaphysics of Morals"):

1. "[…] if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right […]. Right and authorization to use coercion therefore mean one and the same thing."[3]
2. "Right is connected with an authorization to use coercion."[4]
3. "Right and authorization to use coercion therefore mean one and the same thing."[5]

Why do we not associate morality with violence, arguing that adherence to moral norms cannot be compelled through the threat of force, while legal norms have a legitimate recourse to coercion (or violence)?

The answer to this question is inextricable from the need to differentiate and analyze the three normative spheres:

1. Morality (which I call subjective)
2. Universal law (referred to by Kant), which can be identified with the moral community
3. Positive law

As for the morality I call subjective, the lack of legitimacy for enforcing its norms can be based on two well-known justifications.

The first was provided by Kant himself, while the second belongs to phenomenological considerations and can be reconstructed from the writings of the eminent philosopher Ernst Tugendhat.

Kant justifies the sphere of morality with the distinction between the noumenon and phenomenon. A person belonging to the noumenal world holds that he or she is subject to laws that have their basis in reason alone, and that "[…] the idea of freedom makes me into a member of an intelligible world, through which, if I were that alone, all my actions *would* always be in accord with the autonomy of the will […]."[6]

Thus, according to Kant, in the sphere of moral law, a person is the absolute legislator of the principles determining their conduct, and only the moral subject makes subjective judgments of their own actions. The problem of the compatibility of human deeds with the moral law derived directly from the categorical imperative,

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[3]   *Kant, I.* Metaphysics of Morals. Transl. *Mary Gregor*, Cambridge University Press, 1991, ISBN 0-521-31657-X, pp. 57–58.
[4]   Ibid., p. 57.
[5]   Ibid., p. 58.
[6]   *Kant, I.* Groundwork for the Metaphysics of Morals. Transl. *Allen W. Wood.* New Haven and London: Yale University Press, 2002, ISBN 0-300-09487-6, p. 70.

and whether or not these actions can be regarded as having their source in goodwill falls under the domain of knowledge that Kant refers to as *Tugendlehre*[7], or the doctrine of virtue. However, evaluating actions from the point of view of the doctrine of virtue is by no means straightforward. Since the "thing-in-itself" is inaccessible to the subject, it follows by strict necessity that the subject cannot have a direct sense of their own noumenal self. This being the case, no external judgment can make that evaluation, and from the moral point of view cannot replace subjective judgment.

In the second justification (phenomenological), which can be reconstructed from the writings of Ernst Tugendhat[8], morality is related to such experiences as anger and indignation, or guilt and shame. First and foremost, it is important to emphasize this experience of guilt – a particular feeling of loss of self-worth – which is related to the feeling of anger with oneself or self-loathing. These are the phenomena that lie behind the notion of conscience. Of course, this does not exhaust the characteristics of conscience as a moral category – the issue is far more complicated. However, to characterise the concept of morality it is essential to grasp that the identification of guilt and anger can only occur – conceptually – in subjective experience (in conscience). Thus, the experience of guilt cannot be objectified, because no one can force me to feel guilty. Unless, that is, someone influences my will, but then we would lose a key 'component' of the notion of morality, namely, the will (autonomy), meaning the power to decide what to choose and how to create the future (in other words, the ability to say "I want" or "I do not want"). These analyses provide a confirmation of Kant's observations. Therefore, I treat morality as subjective: the lack of legitimacy for coercion is evident here.

Since guilt cannot be objectified, and the will should not be subject to interference (as that would mean its negation), then, in that case, what do we mean by the notion of morality in a given community? The justification of this morality is at issue here. We are not concerned with the subjective morality of every free subject, but rather with the inter-subjective morality. This issue has primarily been a challenge for philosophy and the philosophy of law, and this is evident from the historical development of the many concepts of natural law. It seems that such an understanding of morality (i.e., as inter-subjective) is what we normally have in mind when we invoke the concept of morality.

To make a clear distinction between subjective and inter-subjective morality, by inter-subjective morality I am referring to morality in the narrow sense (*sensu stricto*), because this is generally what is understood by morality in most philosophical and political discussions – the moral norms of a given community, conceived either as particularist (for any given community) or as universal (for any possible community).

The justification of inter-subjective morality is the most difficult from a philosophical point of view, as is evident from the struggles with this problem throughout the history of philosophy. For instance, the proof of such continual and concerted analysis is provided by two figures of modern social philosophy – Ernst Tugendhat and Jürgen Habermas.

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7   *Kant, I*. Metaphysics of Morals. Op. cit., pp. 181–280.
8   *Tugendhat, E*. Vorlesungen über Ethik. Berlin: Suhrkamp, 1993, ISBN 978-3-518-28700-2; Ibid. Dialog in Leticia. Berlin: Suhrkamp, 1997, ISBN 978-3-518-28902-0; Ibid. Aufsätze 1992–2000. Berlin: Suhrkamp, 2001, ISBN 978-3-518-29135-1.

Tugendhat was open about the fact that his attempts to solve ethical issues, particularly, the analysis of the concept of morality, continually ended in failure, and that every subsequent attempt resumed at the point where the former had become stuck[9] – and this included the issue of legitimizing violence.

I shall omit a description of Tugendhat's analysis and only outline the general conclusion arrived at from his critique of all kinds of justification of the moral community. After rejecting many transcendental assumptions, Tugendhat concludes that the moral community is based on mutual recognition, that it is the members of this community who establish the norms, and that the formation of the community results from the fact that a subject also belongs to the phenomenal realm. If they only belonged to the noumenal realm, they would be guided by Reason and the categorical imperative. But this is not the case. As subjects that also inhabit the phenomenal realm, we have to deal with situations, in which the norms of the community are not observed.[10]

Thus, the moral community is a kind of synthesis of the noumenal and phenomenal realms and now the issue is how to ensure that moral standards are obeyed. At this point, a conceptually paradoxical situation becomes apparent. On the one hand, we accept that moral norms cannot be imposed through the use of force, as this in itself it would be immoral – such coercion would violate the freedom of the subject. On the other hand, however, it is often the case that one subject infringes on the freedom of another subject. Therefore, it would seem that in order to talk sensibly about the existence of moral norms in a given community, the norms must also be realized.

Hence, there is a need for an organizational principle that could potentially contribute to the realization of these norms. On the one hand, we impose these norms upon ourselves in order to build communities, i.e. so as to live together, yet on the other hand, we do not respect them, because we seek to maximize our own vision of values, which are determined by various factors resulting from our human condition (as noumenon and phenomenon). In other words, the fact that there are norms that derive from the laws we impose upon ourselves – usually because of the common context of values that we prefer – does not necessarily entail that these norms will always determine our desire to follow them, because it is always possible that a person will no longer desire that which a person has desired previously. Thus, only if they were free from all empirical inclinations and governed exclusively by pure practical reason, would people always conduct themselves in accordance with the norms they imposed on each other. However, in that case, it could be said that they would thereby cease to be people, not only because we would have deprived them of such inclinations, but above all because we would have robbed them of their will. Kant did not take this dual human nature into account when considering the justification of morality. Tugendhat sums up Kant's attempted justification of morality, which only considers pure practical reason, with the relevant question: "So do we not lose this 'may', that freedom, which is the freedom to be moral or immoral?"[11] It could also be said that we would lose the whole notion of morality. Therefore, it follows that we also need to allow for the actual dimension of the laws that we have imposed on ourselves, and outline the idea of a certain organizational principle, which would take into account not only the normative dimension (the

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[9] *Tugendhat, E.* Vorlesungen über Ethik. Berlin: Suhrkamp, 1993, ISBN 978-3-518-28700-2, p. 9.
[10] Ibid., pp. 336–363.
[11] Ibid., pp. 129–131.

rule of law), but also the whole problem of realizing a legally binding state of affairs. Therefore, as a community, we must justify the admissibility of using coercion (violence).

2. Idea of Positive Law

Presently, it could be argued that the best candidate for an organizational principle – which would reconcile the issue of the normative realization of obligations arising from laws (which we have imposed upon ourselves as a form of objectified morality) with the issue of actually implementing them – is the idea of positive law. In his attempt to justify positive law, Jürgen Habermas shrewdly perceives this conceptual tension, as well as the essential function of abolishing it by means of the normative concept of positive law, calling it simply a category of social mediation between facticity and validity[12]. He also speaks of the Janus face of law, namely, the fact that positive law contains within itself "[…] a system of norms that are coercive, positive and – so it is claimed – freedom-guaranteeing. The formal properties of coercion and positivity are associated with the claim to legitimacy: the fact that norms backed by the threat of state sanction stem from the changeable decisions of a political lawgiver is linked with the expectation that these norms guarantee the autonomy of all legal persons equally".[13]

Thereby, if a given community is defined normatively as a certain axiological unity, meaning that its members accept and follow moral principles, something like a fusion of the private and public spheres occurs. If moral norms are not only to apply but also to be realized, then the only way is to abandon the symmetry of rights in favor of power and the possibility of employing coercion (legitimized violence). This element differentiates positive law from morality, i.e. whenever there is symmetry of rights and obligations. This symmetry cannot appear in the concept of positive law due to the need of separating the roles of the legislator and the recipient. If we agree that some laws like morality exist, apart from the idea of self-determination and recognizing it in the form of positive law, the law ceases to be positive and thus legitimized by its recipients, and, as a result, it begins to control them, which can have a risk in the ideology and violence – "[…] the impersonal rule of law is as fundamental as the violence of the Leviathan it is supposed to enchain".[14]

Habermas argues that positive law is a remedy for the complexity of social relationships in increasingly diverse and complex communities, where the processes of reaching agreement are very likely to end in divergence and disagreement. Positive law – according to Habermas – derives its justification from the "alliance" of two elements, i.e. the normative decision of the legislator and the expectations of the sovereign, meaning the addressee of this normativity. Hence, a perfect tension is found here that "[…] reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable"[15].

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[12] *Habermas, J.* Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Transl. *William Rehg.* Cambridge, Massachusetts: The MIT Press, 1996. ISBN 0-262-08243-8, p. 1.

[13] *Habermas, J.* Postscript to Between Facts and Norms. In: *Deflem, M.* (ed.). Habermas, Modernity and Law. London, Thousand Oaks, New Delhi: SAGE Publications, 1996. ISBN 0-7619-5137-7, p. 135.

[14] Ibid., p. 143.

[15] *Habermas, J.* Between Facts and Norms. Op. cit., p. 39.

There is nothing to stop this relationship being abandoned, or being terminated. Such an eventuality is not necessarily out of the question, and support for the law (power) – as Hannah Arendt writes – "[…] is never unquestioning, and, as far as reliability is concerned, it cannot match the indeed «unquestioning obedience» that an act of violence can exact […]. It is the support of the people that lends power to the institutions of a country, and this support is but the continuation of the consent, which brought the laws into existence to begin with".[16]

This explains why legitimacy is so easily lost, if the border dividing unacceptable moral norms from other organizational norms is crossed. Positive law – which is conceptually associated with the possibility of applying real coercion (legitimized empirical violence) – must therefore avoid those principles that are perceived as being morally ambiguous in the content of their norms, since this legitimized violence will lose its legitimacy. Therefore, we are justified in arguing that positive law should seek to avoid morality in its content, and to regulate only concerning values outside the moral sphere, or with regard to those which, although moral, do not 'undermine' its legitimacy. Positive law appears as the boundary (in the Greek sense of *nomos*) between the morality of the community (i.e. between the content of laws that are reciprocally imposed), and the morality of each subject (i.e., freedom of conscience). However, this is a boundary that must both divide and join. The fact that the content of moral norms is common to many subjects, primarily results from the mutual imposition of these norms, and only secondarily arises from the will of the legislator and the content of positive law. Since people can change their mind, due to their will (something, which is guaranteed by the idea of freedom), nobody can be coerced into – or prevented from – changing their mind. The one thing I cannot do is exert my own will in order to limit the freedom of other subjects. Thus, positive law will have its fullest legitimisation only if the content of its norms is mainly limited to broadly understood organizational rules that maximize the idea of freedom.[17] What is morally correct in a given case is so difficult and varied, and therefore complicated, that we often oversimplify when we try to class it under an (abstract) rule, and this applies not only to morality but also to positive law (we could even say: *especially* to positive law). The fact that some norms that are recognized by many subjects as moral norms are at the same time norms of positive law is a fact that can change at any moment, depending on many circumstances.

Conclusions

In the history of the philosophy of law, attempts at justification and reconciliation of two ideas: coercion (positive law) and freedom have engendered much struggle. Even if the norms of positive law held a content which the legislature would regard as moral (at the legislature's discretion), even in that case it would not be possible to make the norms morally obliging to an addressee without their prior approval, or without forcing the addressee to follow them, however, positive law would lose its legitimacy in that case.

Bearing the above in mind, we can assert that the phenomenon of positive law at the first sight appears to be something natural, necessary and immanent to social

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[16] *Arendt, H*. On Violence. San Diego, New York, London: A Harvest/HBJ Book, 1970, ISBN 0-15-669500-6, p. 41.

[17] See *Bekrycht, T*. Positive law and the idea of freedom. In: *Wojciechowski, B., Bekrycht, T., Cern, K.* (eds.). The Principle of Equality as a Fundamental Norm in Law and Political Philosophy. Łódź: Łódź University Press, Book Series "Jurysprudencja" 2017 (8), ISBN 978-83-8088-410-6, pp. 59–78.

reality, yet with the idea of power and coercion it turns out to be somewhat of a problem: something unwanted and treated slightly like a necessary evil. Habermas writes: "The paradoxical achievement of law thus consists in the fact that it reduces the conflict potential of unleashed individual liberties through norms that can coerce only so long as they are recognized as legitimate on the fragile basis of unleashed communicative liberties".[18]

The phenomenon of positive law is an attempted synthesis of that which cannot be reconciled, i.e., the idea of freedom with the idea of necessity. The appearance of positive law is – using Habermas' metaphor – a wedge of the exalted idea driven into social complexity, namely, the idea of self-restraint of liberty in the name of itself.[19]

Thus, the boundary between positive law and the morality of community for many norms cannot be pinpointed with precision. The criterion of coercion or violence is not always a good measure for distinguishing moral norms from legal norms.

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[18] *Habermas, J.* Postscript to Between Facts and Norms. Op. cit., p. 148.
[19] Ibid.