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Geschäftsführender Redakteur: Prof. Dr. Dr. Dr. h. c. Werner Krawietz, Lehrstuhl für Rechtssoziologie, Rechts- und Sozialphilosophie, Universität Münster, Rechtswissenschaftliche Fakultät, Bispinghof 24/25, 48143 Münster

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LAW AND MORALITY
AN ANALYSIS OF THEIR POSSIBLE RELATIONS

Roberto J. Vernengo, Buenos Aires

I.

Many kinds of relationships are supposed to obtain between law and morality. On the one hand, it is often claimed that the connection between law and morality is necessary, although the nature of this necessary connection remains unclear. On the other hand, many have insisted that moral rules and legal norms are only contingently related, a thesis constituting the very backbone of legal positivism. As a political slogan, or as an ethical principle, it is sensible to affirm that law ought to be in some sense, moral; the converse thesis — that morality should be legalistic — is nowadays not so well received, although it is abundantly represented in traditional moral codes and ways of thinking.

Now, law is conceived of in many ways: in a very restricted way, law is defined as a distinctive set of norms. Within a larger conception, many other ingredients are acknowledged as belonging to it: principles, values, facts and so on. Morality is, in turn, envisaged as a rather complex set as well. For some thinkers, morality is defined by a normative code, even though its norms do differ somehow from legal rules. For others, morality embraces also principles, values and even events characterized as moral facts.

Now, if a relation is assumed to exist between law and morality, some notice should be taken of the composition of the related domains, because the presumed relation between legal facts and moral facts cannot be of the same type as that obtaining between legal or moral rules or principles. Relations between facts differ from relations between words or concepts, as logical relations do not impinge on facts. To believe that no society can have legal institutions if it lacks moral convictions, for instance, is a sociological opinion that may be true or not, but one that needs previously the acceptance of some criteria for distinguishing legal codes from moral ones. The empirical relation is not the matter under consideration. The dependence of law on morality is, then, not a sociological contingency. Nor are the beliefs that the members of a society can have about the moral connotations of their legal

rules, the so-called internal point of view, a sufficient reason for ascribing an analytical necessity to the relations envisaged between their law and some morality. It seems, hence, that to speak of a relation between moral and legal rules refers to something which concerns their content and not only to their conceivably common normative form. But, as in legal theory and in ethical doctrine, from Kant on, that formal aspect is an essential part of the conceptual definition of the fields of prescriptive morality and law, and it is proper to inquire into the nature of the relation postulated when law and morality are assumed to be normative sets.

Let us grant here, for argument's sake, that law and morals consist of sets of norms, of prescriptive sentences. We will not accept *a priori* Kelsen's thesis that, conceived as a set of norms, law is always moral: "... die Behauptung das Recht sei seinem Wesen nach moralisch bedeutet nicht dass es einen bestimmten Inhalt habe, sondern dass es Norm ... sei. Dann ist, in diesem relativen Sinne, jedes Recht moralisch, konstituirt jedes Recht einen relativen moralischen Wert" (*Kelsen* 1960). We will presume only that the ontological presuppositions concerning what morality is and what law is can here be restricted to the weakest possible, taking into account only those assumptions that somehow channel the type of relationship allowed between the two domains. From a purely formal point of view, that is, as plain sets of prescriptions, there is no need to distinguish between law and morality. Some further material consideration has to be taken into account as a basis for distinction, as, for instance, the ways that the subjects submitted to legal rules perceive them. It seems clear at once that, if law and morality are empirical data, the supposed relations between legal and moral facts have to be empirical also: temporal, causal or psychological, if law precedes, causes or motivates a moral phenomenon.

Moreover, restricting our considerations to law and morals as sets of norms requires us to stress that, here too, many different classes of relations can be postulated. To say, for instance, that there is a necessary relation between legal rules and moral norms implies, in principle, that such norms are analytically or conceptually related, as happens when it is assumed as a dogmatic truth that law is a subaltern of morality. But, once a relation is thus defined, all of its logical consequences have to be tallied as well.

II.

Our analysis shall start stressing a very simple viewpoint. From a normative point of view, the notion of duty — expressed by terms like "ought to", "sollen", etc. — is supposed to have a basic moral tinge. Thus, legal obligation derives, it is thought, from a deeper moral duty to obey the law. To define legal obligation solely by a legal ought would place us in a quandary. If the notion of duty is a moral one, because only by assuming it autonomously can a subject be under an obligation, morality, would be a presupposition of all meaningful legal discourse. However, moral duty, so to speak, is always thought of as subject related; hence, it makes no sense to speak of moral prescriptions not believed to be valid by the corresponding subject. That is certainly not the case with legal rules. Therefore, moral duty is always considered primordial with respect to legal obligations. On the other hand, to shrink legal obligations to mere moral duties would not provide a correct conceptual representation of what lawyers derive from the notion of legal duty.

What would it then mean to say that law should be moral, if both morality and law are understood as necessarily related sets of norms? The idea implies that all legal rules, i.e. their total set, must be included, at least as a proper part, in the set of moral norms: law, as the scholastics said, is thus subaltern to morality. Legal rules are thus a subset of the set of moral norms. For this conception, all law is moral, as the inclusion relation necessarily requires. Consequently, to admit immoral legal rules would be contradictory to the relation postulated between both sets: an immoral legal rule cannot exist, because there are no legal rules in the complement of the set of moral rules. So much for the traditional thesis concerning the invalidity of immoral legal rules.

What would be possible and suitable instead is the existence of valid moral rules (norms, principles, values) that do not have a corresponding legal existence. Morality is precisely the field of these autonomous norms, standards or principles, that control preeminently human behaviour in a wider domain than law; law concerns only those rules determining external social conduct and is, therefore, only a part of morality. This thesis, which I tried to analyze elsewhere (*Vernengo* 1989), in fact moralizes all law and, from a political point of view, has the very important function of giving an appearance of legitimacy to all legal enactments.

This way of thinking, although spposed to be moralistic, to uphold the moralization of the law, in fact thwarts all possible moral or political criticism of legal enactments. If immoral legal rules are non-existant by definition, there is no need to reject or destroy them for any reason whatever, and, hence, it makes no sense to condemn them from a moral point of view. Being valid legal norms makes them necessarily valid moral norms. Their moral validity is warranted *a priori* by the definition of the relations assumed to exist between the two domains.

Nevertheless, it is clearly misleading to maintain that every legal rule is also a moral one, or that every legal duty is backed by a corresponding moral one. Even the assumed equivalence or similarity between legal and moral

norms is puzzling. In the first place, it is a fact that in ordinary legal discourse and in moral matters, there are no obligatory injunctions concerning the grammatical or logical form of their sentences. Therefore, to postulate some relation between those sentences that are taken as moral or legal norms, is to admit as decisive some very special relation between two sets of sentences. At the level of ordinary language, there are no objective — generally accepted — criteria for distinguishing moral statements from legal prescriptions. At the level taken as relevant by legal experts or in ethical speculation, the trouble remains that there is not an unique recognized canonic form distinguishing moral sentences from legal ones. To what, then, would amount the tenet that legal discourse is a part, a proper subset, of moral discourse, or, what amounts to the same, that all law is moral?

Legal positivism has sustained, in its more discerning tendencies, the thesis that there may be contingent relations between the set of legal norms and the set of moral rules. That is: there are norms that are morally and legally valid or existent — those norms forming the intersection of both sets. Besides, there are moral rules without legal validity and, furthermore, legal rules lacking moral significance. Thus, it is at least analytically possible to differentiate pure moral principles from positive legal norms, even though reluctantly granting the existence of norms that claim both legal validity and untarnished moral value. The legal norms, morally valid or legitimate, are so according to their contents or subject matter, but their legal existence does not depend always on that concordance. Such legitimate or morally justified legal norms are perhaps convenient from an ethical point of view, but are not indispensable from a legal point of view.

III.

The analyticality of the relation between law and morality can derive also from some definitory quirk. Thus, if we define moral rules as beliefs nurtured by the members of human groups, or as the reasons summoned by them when making decisions; and, if on the other side, law is considered analogously as the rules they somehow obey, it is easy to claim inappropriately that morality and law do essentially match. If, furthermore, it is thought that moral reasons and beliefs display a general pretension of validity, as a universal code, it is not surprising if one is enticed to disregard mere positive law as not ontologically authentic: only those legal rules that are morally backed, i.e. that correspond to accepted universal moral principles, are real law, and not a feigned legal code or, as it has been said, incorrect or faulty legal rules.

Another way to make the relation between law and morality analytical flows from the old doctrine concerning the nature of norms as expressions of acts of will, a doctrine having a theological background. Will or intention is traditionally the proper ethical object; norms, as directives for action, are the linguistic surface structure of acts of will. The individual will, or the collective will, or — higher up on the metaphysical scale — the transcendental will, are thought of as the prime ethical material; it unfolds itself in every human action and in its linguistic expression, norms. It would be inconceivable, therefore, that legal norms, as expressions of the will, lack moral bearing. Consequently, it would be ontologically impossible to conceive of legal norms as alien to morality. Hence legal rules or law in general are considered, in recent natural law doctrines, as necessarily moral, for strictly ontological reasons (*Finnis* 1980). That thesis sometimes leads to paradoxical conclusions, contrary, it would seem, to the aims expressed by their supporters, as when it is said that "one of the forms of moral obligation is legal obligation", or "legal rules, like promises, can generate moral obligations" (Ibid, pp. 318 and 320).

However, I would like to show, once more (*Vernengo* 1992), that the definitional hoax referred to above is also present in some recent attempts to sustain the thesis of a necessary relation between law and morality. Thus, we find in some sponsors of the so-called procedural ethics or discourse ethics, the allegation that, at least partially, there is a necessary connection between law and a procedurally-determined morality. If law is a dynamic procedural system of rules, then for the members of the group affected, moral considerations (reasons, arguments, discoursive resources) are clearly necessary conditions for the validity of their law. That is, for the participants in a social system, their law must be created and enforced through correct procedures, being thus justified. Then, correctness, legitimacy or justifiability of the law is moral by definition; hence, law must partake of some of the ethical attributes that pertain essentially to morality, like the claims to equality, universality or generalizability of their norms. Thus it is claimed that, "a necessary connection could be established between law and a universalistic morality, which is directly valid for modern legal systems" (*Alexy* 1989). Disregarding this restriction, it has to be pointed out that the necessity of the connection or relation is thus defined *ad hoc*, making the truth of the thesis merely conventional. In effect, although the relation between law and morality is considered as a "conceptually necessary connection", the modality — necessity — is oddly defined: conceptual necessity is a "normative necessity" which, as Alexy takes the trouble to underline, is not equivalent to logical necessity. For him, "something being normatively necessary means no more than its being obligatory; ... thus it becomes obvious that normative necessity is only a necessity in a broader sense". One would say, instead, that being obligatory does not imply conceptual necessity at all, while logical necessity normally implies obligation. To understand the necessary connection between law and morality in this

sense, implies that law ought to be moral, whereas Habermas contends that morality ought to be legal. But those rules or principles, or meta-norms, if you like, to which these authors refer, are not material moral norms in any sense, as that would imply circularity or a *petitio principii*.

It seems therefore that the necessary relation or connection between law and morality can only be achieved taking into account the content of the norms belonging to both domains, and not merely of their purely formal aspects or of the procedures governing their creation and administration: the thesis of the necessary connection would amount accordingly to the quite reasonable desideratum that the material validity of the law be the result of a moral appraisal of the content of legal rules and of their empirical effects on the behaviour of men. No legal rule is itself intrinsically or necessarily valid. Their material validity or legitimacy derives from necessarily valid moral rules determining their correctness or justice, i.e. their positive moral value.

A moral rule contingently valid seems an absurdity for the traditional ways of envisaging morality and for recent procedural ethics. That they are necessarily valid means that it is not possible to accept a contrary norm as a reason for acting. That difficulty does not appear in law, where normally every norm is thought of as contingently enacted: that is, in principle the possibility of a norm contrary to the one considered valid is not excluded. This assumption, which is essential for positivist tendencies, rises clearly in view with the doctrine that legal norms can regulate any possible content with any deontic modality whatsoever. The material contents of legal norms do not determine their normative modality or sense, while the contents of moral norms thwart that deontic indeterminacy.

In this respect, it may be important to note that the commonly-advanced denunciation of positivism, according to which legal norms may accomodate any content whatsoever, does not (as affirmed by detractors of positivism) permit legislative licence or discretionality. It only means that, given the possible deontic modalities that a legal norm may adopt, the choice between those deontic alternatives is determined by the set of antecedent circumstances which legal norms define as sufficient conditions for the enforcement of the normative consequence. If, according to the classical notion of logical consequence, legal hypotheses are monotonic, then an extension of every conditional rule can be established with the desired or required spread, since the antecedents of a conditional expression can be expanded at will. Therefore it is not the contents of the normative consequent of a norm that determine its deontic character, but the set of antecedent circumstances which are, for pure logical reasons, monotonically extensible (*Vernengo* 1991).

Be that as it may, once a determining relation is assumed between law and morality, every legal rule that does not agree with the corresponding moral norm or principle would have its legal validity called into question. For extreme natural law positions, that inconsistency amounts to the lack of legal validity of the apparent legal rule. In general, jurists are more cautious, agreeing that the incompatability of some legal norms with moral principles does not affect the general obligatory standards of a legal system. Where moral legitimacy is a strict condition for legal validity, as some legal systems establish, inconsistency between moral norms and legal rules allows the annulment of legal rules. This implies that some moral code has become part of the legal order, contrary to the traditional ideal of law as a subset of morality.

IV.

The above-mentioned discussions resemble an attenuated version of natural law theses. For an external observer, a legal order can be acknowledged as valid without taking into account the moral merit of its norms. This is not possible in the case of an internal view taken by a member of the social group. Hence, from an external position, the moral requirements on the law are only a political aspiration, which does not limit in any way the legality or formal validity of the law.

As any norm whatsoever, including a legal norm, can be understood as an axiological preference-expression referring to any action or its omission — to make a duty out of an act is to establish a preference in favour of its performance and against its omission; to prohibit it is to agree that the omission is preferable to the performance of the act, and so on — the normative necessity mentioned above can be construed as the expression of a preference for those legal norms that agree with corresponding moral ones. Yet it happens frequently that the axiological preference that legal norms represent does not accord with current legal values. Often, acts morally forbidden are legally permitted, and not everything that is morally good is legally obligatory. If that is the case, the presupposed relations between law and morality become rather diffuse, and its logical properties very vague. The relation is thought of as a function, in the sense that the "ought" character of the moral norm is transmitted to its counterdomain, the corresponding legal norm. But the supposed function is taken as normatively modalized. Law is not only a part of the moral realm, but ought to be morally worthy. That law ought to be moral is not, moreover, the consequence of rules of the same level, as there is no legal or moral prescription of the same level imposing a moral condition for the existence of valid legal norms, without incurring circularity. Law should be moral, rather, according to meta-ethical rules establishing the relations between both domains, but those rules are not part of a positive moral code nor of an ideal morality.

Habermas states that law and morals are subject to internal relations that we can consider necessary or essential. Therefore when law lacks moral justification, when legal validity loses moral foundations, law itself disappears, or, as Habermas says, "the identity of law itself becomes diffuse". But if the morality taken into account is autonomous, the question of its law-grounding function becomes problematic. Thus, "autonomous morality only has fallibilistic procedures for the foundation of norms, as the procedural rationality of (moral discourse) is imperfect". Hence law, that would attain its ontological identity as a consequence of an internal relation with morality, cannot attain it because of an intrinsic deficiency of morality. And since, according to Habermas, the internal relation postulated is never defined, law remains indeterminate in itself and in its moral foundations. As a result, in opposition to classical doctrines, where "law threatens to dissolve into morality: law is reduced to a deficient mode of morality", morality instead becomes dependent on law. Not only because "morality from the very outset of its theorization appears with a legalistic bias", but also because of a supposed "mutual intertwining of law and morality" where they become "reciprocally complementary", i.e. equivalent. In this way, "morality migrates inside positive law, without exhausting itself in positive law". Thus the subalternation relation favoured by classical natural law doctrines is reversed: now morality is a proper part of legal systems (*Habermas* 1985).

The relation of reciprocal complementarity is not defined precisely. Consequently, nothing very definite can be gathered about the nature of the influence of morality on law. Furthermore, the morality defended by Habermas is of a "pure procedural nature ... that has been freed from all determined normative content". How morality can control law, or vice versa, thus remains an enigma. Perhaps one could admit that law, as a set of procedural rules, and the proceduralized morality summoned, are only a part of what elsewhere is understood by law and morality, viz. the intersection-set of moral and legal procedural norms. The proper subset constituted by moral norms would be, nevertheless, "deprived of every specific normative content and sublimated to a foundation procedure for possible normative contents" (Ibid).

Current positive moral codes, the so-called positive morality, and *a fortiori*, the set of rules of a postulated ideal morality, do not include such procedural norms. That is, morality is not, to adopt Kelsenian terminology, a dynamic system: traditional moral codes do not contain norms of the same level regulating the creation of moral norms. And if these moral procedural norms are the rules regulating moral argument or discourse, like the examples proposed by Alexy, for instance, it is clear that they are not moral norms in any sense. It is natural, then, to think that this formal procedural morality, lacking material contents and reduced to foundation or argumentative

procedures, consists of the set of meta-ethical rules that define the validity (criteria of identity) of material morality norms. Law, as the including set, enabling material moral norms to be effective, is certainly a dynamic system. If it embodies the intersection-set defined above, it turns out that the alleged moral rules, morality, are, strictly speaking, legal prescriptions. Morality comes badly out of this interaction with law; hence, Habermas concludes that "to compensate for the weaknesses of an autonomous morality", morals require a "legal institutionalization" for earning the necessary obligatory character that law has.

V.

The alleged necessary relation between law and morality depends, furthermore, on the logical attributes of the relation itself, and, naturally, on those required by the system of logic involved. Let us suppose that the most neutral and least ontologically compromised of the logical relations that might obtain between law and morality, as normative sets, is the one represented by inclusion or material implication. That was the relation taken into account when the scholastics spoke of the subalternation relation between law and morality. It may be interesting to point out that recently various logical systems have been examined with the purpose of investigating more precisely the relations between law and morality, or, more specifically the implication relations between morals and legal sentences. Not only the possible implication relations between legal and moral norms, but also possible axioms expressing axiological preferences between moral and legal sentences have been examined. For instance, it can be established, on the one hand, that every legal obligation is morally permitted (as in classical natural law doctrines), and, on the other hand, that, given certain legal and moral duties, the moral obligation is stronger than the legal one; or, if so wished by a legalistic mind, that legal obligations shall prevail on moral ones, according to the axiological weight bestowed on morality over legality.

What is interesting to emphasize here is that each set of postulates or axioms entails different consequences according to the logic wielded. As far as I know, no set of axioms has been entirely satisfactory, because they always allow counter-intuitive consequences. That is pre-eminently the case of the axiom sets intended to reconstruct the traditional ideas on the necessary connection or relation between law and morality, which give morality the role of an including set. In any case, it seems clear that the logics involved in the thesis should be explicit; the logical systems developed presuppose anyway that legal and moral norms are differentiated and that it is possible, without inconsistency, to assign them different preference values. In that

respect, it is now clear that the classical principle that law must be subaltern to morality, or that "positive law must acquiesce with moral principles" is not a necessary truth and that the relations between the two domains may be diverse. To choose one or another possible relation is not a pure moral issue, but is also a logical decision involving different sets of presupposed axioms or principles and different logical deductive tenets and consequences. Positive morality and ideal morality are not expedient for deciding those issues, because no one would accept that the logic admitted or presupposed is morally chosen. Thus, without going deeply into this controversial matter, to speak about necessary relations between law and morality, whatever they may be, seems somehow untimely or pretentious, when the previous rational questions concerning the nature of the relation itself and its logical consequences have yet to be defined.

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