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THEORETICAL AND PRACTICAL CONVERGENCIES BETWEEN LAW AND MORALITY

Gabriela NEMȚOI[1], Oana NESTERIUC[2]

Abstract

There is a connection between law and morality as the one between a part and a whole because the study of law is based on finding out answers to less parctical questions which are more philosophical. The starting point when studying law is always morality as the two phenomenon are in a tight connection.

The present study represents in itself a challenge as the theme itself stood out as an issue that has been debated ever since the ancient time. Throughout time it has been proved that the evolution of both the state and the society has positioned the link between the law and the morality within a vast area of study.

In order to demonstrate the relationship that exists between the law and morality, we will revise the reference points that were established by the philosophy of the law, having thus the chance to further briefly discuss both the arguments and counterarguments regarding this point of view.

Our detailed analysis regarding the law – morality binomial will finally followed by the observation that there is no difference based on actual facts or reason bewteen law and morality, on the contrary, there is a close relationship between them which is proven by a series of examples from the civil law of this given principle.

Through this study we will attempt to demonstrate the fact that through its origin, evolution and its final goal, law is not only bound to but also is not capable of overlooking morality. Morality plays an important role in itself by being the foundation of law itself.

Keywords:

morality, law, code of conduct, laws, ethics.

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JEL Classification K10, K19

I. INTRODUCTION

The establishment of the code of social conduct does not always stand for a representation of law. Morality regulates and guides people's behavior in society, too. Ever since ancient times, the Romans, through Celsus, defined law as „ars boni et aequi" (the art of good and equity), the good and equity being considered as categories of morality. Roman law stands out through moral principles such as *honeste vivere* and *neminem laedere*, as well as the distributive law principle called *suumum cuique tribuere* that demonstrates the tangent relationship between law and morality.

By speculating the law's formation process, we notice the fact that it was shaped and acquired its status through its gradual detachment from the morality codes and customs. We can, thus, state the fact that morality precedes the law as well as the fact that both of them have developed in a tight connection with one another.

Another facet that needs to be highlighted refers to the fact that the study of law cannot be separated from certain aspects that pertain to its philosophy in order to clear out the mistery of this science. The establishment of a dialectal perspective on the phonomenon stands for a *sine qua non condition* for success.

The starting point of the evolution and development of the law is provided by morality itself that circulates within the Law as the blood circulates within the human body." [8: p. 11-60]

Using this reference point, the positive law does not have a consistent reference point in itself but, on the contrary, it needs to be related to the fundamental principles of the Law that, in their most part, derive from Morality [9: p. 171].[3]

Moreover, the same author. Giorgio del Vecchio, stated that: „the relationships that exist between morality and law are so thight that both categories possess essentially the same degree of truthfulness, the same value [7: p. 199], thus, the dissociation between the two phenomena is practically impossible.

But, yet, the author distinguishes two main entities, a subjective ethics that refers to Morality, and an objective one which is the Law. He states the fact that morality is subjective and unilateral, while the law is

[3] „The detailed knowledge of the rules of the law is not enough unless they are applied by having in view the spirit that makes them vivid and which stems from in our very souls."

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objective and plurilateral. The fact that is prescribed by morality as a duty is not penalised by the law, but, on the contrary, it is allowed as being illicit from a judicial point of view. Yet, he states, the law does not comprise less compared to morality as, in both cases, the action is both internal and external.

What does law stand for? It represents and instrument of moral discipline of the human beings that is based on the establishment of justice.

What does morality stand for? It represents a set of codes of conduct whose infringment results in the disapproval of the individual, of the group or even of an entire commnunity towards the one that breaks that particular code.

The two definitions are based on one single element – the code- that can be a rule of law or a rule of morality. We will briefly present, from a historical point of view, the evolution of the law- morality relationship.

II. THE EVOLUTIONARY COORDINATES OF THE LAW-MORALITY BINOMIAL

The ancient times is represented by the philosophical orientation which served as a guidance for the present issue.

Plato's philosophy is based on the idea of Good from the point of view of the sensitive and inteligible relationship, as well as the one one that manifests between the soul and the body. Plato translates the word Ideea as an ethical reality that is more important than the „facts" that are a result of the senses. The origin of the Law is a result of this ideea of the existence of the Good itself: „as far as the intelligible things are concerned, the idea of Good prevails that, once acknowledged, needs to be viwed as a result of everything that is right and beautiful [10].

Plato's view is based on a counteract of law and morality.

Thus, if in *The Republic* the author describes an ideal society that does not need laws because the virtues is part of everyone's soul, in his other work *The Laws*, the state needs clear and safe regulations, in other words law standards.

This time the law is based on reason as a result of the principle of Good and its consequence stands for the virtue. The laws need to take into account the superior considerations regarding the judicial order. Plato can be considered s one of the first philosophers who stated that the laws needed to be checked from the point of view of their concordance with the morality.

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Similar to Plato, Aristotle considered that the two concepts had to coexist in a relation of subordination. Thus, he thought that the moment the supreme goal of promoting the virtue dissapears, „*the law becomes a simple convention, a mere guarantee of the individual rights without any influence on the personal and morality and justice of the societies."* [2].

The Middle Ages stands for the moment when the law became one and the same thing as morality. The controversy is brought back into public attention in the 18th century. From this point of view Bentham's concept on law and morality which states that „there are two concentric circles, out of which morality stands for the big circle, the law stands for the small one" [1: p. 72] needs to be taken into consideration.

The period of the anticontractual doctrinarians refers to the relationship between law and morality, the boundaries of the human intelect that exceed the morality. David Hume (1711 – 1776) who is the author of „On Morality" and „Moral and Political Essays" (1741) sates the fact that the human reason is not able to construct moral precepts. Hume stated that „It is highly likely that the final sentence that establishes the hidous or friendly characters and actions worth of praising or sentencing, that makes an active principle out of the morality, our happiness, our despair out of our vice, depends on certain senses or intimate impressions that nature universally distributed to the entire species." [4: p. 78]

A clear distinction between the law and morality was established by the positivists. The philosophical positivism excludes the idea of aboslute will and of the moral freedom but accepts the selflessness. Kant's philosophy stood for a vast inspiration source for the judicial positivism. H.L.A. Hart, one of the representatives of the judicial positivism, is the author of five thesis that qualify a judicial doctrine as a positivist one. Four of them refer to the distinction between law and morality. A distinct aspect from this point of view relies on the fact that a valid norm from a formal point of view is still considered as a judicial norm even if if it is not a right one [6: p. 347].

There are some positivists that have contributed more to the relationship that exists between law and morality by putting the two side by side. **Carre de Malberg,** the main representative of the German positivists, asserted not only the dependency of the state law but also of the morality as such [3: p. 51]. This trend also promotes the *state's self limitation theory* as the only right thing to do regarding the entire state power.

Mircea Djuvara, a prominent representative of the neokantianism in Romania, opposed this trend by naming it „voluntarist". He especially

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criticizes Auguste Compte, the forerunner of the judicial pozitivism, that was focussed mainly on experience, on the exterior reality.

The Romanian philosopher emphasizes that the rational law is not to be mistaken for morality as there are moral rules that have penalties as well as there are rules of law without penalties. Moreover, the penalty does not pertain to law, but the law is the one that provides a judicial legitimacy to the penalty.

Kant's theory suggests the fact that morality is the boundary for the law that is likely to take action on the human being's moral competencies. As a result, the law results from morality as a moral action that is based on the idea of duty that is prescribed by the law [5: p. 26]. In spite of the fact that the goal is to correctly establish the boundary between them, both the law and the morality have something in common: they both have a rational foundation. Kant distinguishes between inborn rights and acquired rights, the former being natural, internal rights that refer to morality, whereas the acquired rightswill be viewed as a reflection of the exterior law.

Hegel considers morality as a motivation of the law: it is closely connected to it, yet it is considered as a foundation within the concept of law. Morality stands for an intermediate phase for the idea of law. Both the law, as well as the morality, need to be subordinate to the ethics. By embracing the neokantist trend, too, he tackled the *abstract law, morality* and *ethics.*

When defining the abstract law, Hegel referred to the rights and duties of the human being viewed as a simple person and not as a citizen. It comprises the illicit property, contract and actions. *Morality,* according to him, comprises the human will that is oriented inwards. *The Ethics* comprises both of them, in a synthesis, and it refers to family, society and the state, whereas the individual is in close relationship with the universal will [1: p. 75].

Kelsen, the founder of the normativism, criticised the science of law that developed between the 19th and 20th centuries. Without any form of criticism, he mixed the science of law with other sciences such as: psichology, ethics and the political theory, sociology. The kelsian normativism praises an autonomous judicial science. In his studies, Kelsen states that the common denomination between the law and morality is represented solely by the object of study, that is the human conduct.

In spite of the fact that he clearly disociates between the two notions, the author denies the existence of some absolute moral values as well the existence of an absolute type of justice. As a result, the law is not susceptible of approval or dissaproval. It can solely be known.

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Throughout time, the special judicial literature has evolved in two main directions from the point of view of the relationship that exists between the law and morality: one of the orientations highlights the fact that the law consists of a minimum morality – the morality orientation; from the point of view of the second orientation, the law is based solely on the state – the orientation of the the judicial positivism (the law order without morality)[8: p. 35]; [6: p. 137].

Even nowadays the above mentioned concepts are a source of debate regarding the law versus morality.

III. MORAL STIPULATIONS WHICH ARE TO BE FOUND IN THE PRESENT- DAY CIVIL LEGISLATION

In regards to the relationship that exists between the law and morality, one can notice throughout its evolution that it does not stand only for a theoretical aspect that presents itself solely in a general form, but rather the idea of morality is recognised in daily life in civil norms.

Thus, there is a legal provision that is applied in the execution of any obligation. From this point of view, according to provision no. 1170[4], the conventions must be put into practice in good – faith. The provision from the civil code is nothing else but a presentation of the principle *Honeste vivere* that was stated by Ulpian which, when it is applied to a provision, refers to the fact that its putting into practice must be done in good – faith.

The legal establishment of this moral principle has a formal value based on provision 1170 which states the existence of an imperative of a moral nature as any contractor that expects from his opponent this type of conduct. Moreover, the provision compels the contracting parties to have in view the good – faith not only during the time negociation time, when the will manifests itself, but also during the fulfilling of the obligations, a fact that clearly demonstrates the existence of a contracting ethics. In other words, this shows morality as a source of obligation even if it is only a subsidiary one.

As far as the validity of signing the contracts, one of its essential prerequisites is the existence of licit causes as showed by the *per a contrario*

[4] Art. 1170 Civil code:"Good – faith. The parts need to act in good – faith both during the negociation and when signing the contract as well as during its execution. They are not allowed to overlook or limit this provision".

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interpretation of the provision no. 1236 paragraph 1 of the Civil code[5]. By discussing in detail the same method of interpretation in regards to provision 1236 paragraph 1 from the Civil Code, we conclude that a cause is licit when it is not forbidden by the laws as well as when it is not in contradiction with the good manners and public order. We operate with a provision that confirms our thesis and make a correction of the positive law. As a result, that causa, that is not vetative by any legal text, is contrary to the „good manners" and will cause the nulity of the convention thus signed.

A similar situation that needs to be discussed refers to the type of vices of consent. In this situation, the most fequent justification thorugh which one can ask for the cancellation of the contract refers to the thesis of the autonomy of free will. The existence of a vice of consent results in the restriction of the free will itself. Yet, on a brief analysis, one can notice the fact that this opinion is debatable. A vicious free – will does not mean a lack of will. It is a free will though. In spite of this, it can bring about judicial effects. For example, in the case of violence, the Romans applied the *coacta voluntas sed tamen voluntas*[6] principle. From this point of view, one can notice that the reason of cancelling in the case of a vice of consent is the very principle of equity. From the point of view of the moral aspect, the incapable person can demand the cancellation of the contract that he/she had previously signed. In this circumstance, the principle of the autonomy of free – will is not enough in order to explain the reason why the law states the existence of such a possiblity even in the event when there is a free – will.

Even when when one can accept the possiblity that the legislator established a *juris et de jure*[7] assumption based on the fact that the free – will of the incapable one cannot be freely formed, one has to take into consideration this legislative option and to be sure of the fact that one can recognise the fact that the equity is the basis for cancelling such contracts.

Another aspect that was made known through acknowledging the special effects of the contracts such as the motion, the annulment and exception of non – execution which are also legal acceptances of the justice stipulated by the contract which have their origin in morality.

[5] Paragr. 1236 Civil code (1) The cause needs to exist, needs to be licit and moral; (2) The cause is licit when it is contrary to the law and public order;(3) The cause is immoral when it is contrary to good manners.

[6] Lat., a constrainted free – will is remains a free - will

[7] Lat., absolute assumption

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From this point of view the sintagm *exceptio non adimpleti contractus*[8] refers to a mechanism that was only incidentally known in the Roman law, yet, in spite of all this, the scholars gave the meaning a specific effect in comparison to all the sinalagmatic contracts. They used the *non servanti fidem non est fides servanda*[9] saying with moral connotations.

Thus, a new moral precept is translated in a judicial formula thus becoming an aspect of rule of law. This time the morale is the foundaton for the legal.

The civil tort liability is a transposition of Ulpian's *alterum non laedere* principle. Consequently, the tort liability is a consequance of the violation of this moral and law principle at the same time. The generalisation of this rule demostrates once again the fact that the law is required to ascertain and impose with its coercive force only those provisions that are in accordance with an objective morality.

Another case in point of the present thesis represents the legal fact, the enrichment without right reasons, the source of obligations prescribed by the civil code in provision 1345.

The name of this institution certifies its moral character. The principle is stated by Pomponius the advisor in *Digeste*: *Iure naturae aequum este neminem cum alterius detrimento et injuria fieri locupletionem.*[10]

An extensive analysis of all the situations that refer to the elements of moral origin demonstrates the fact that the legal component is not a top priority when the moral and the ethical elements allow the foundation of the law.

IV. CONCLUSIONS

The present study was meant to focus the attention on the fact that law is built on morality and can function solely as a moral consequence of the state's involvement.

Moreover, the law starts from the human reality from which it extracts the rational and the moral aspects in order to come back and impose the right aspects on them.

There is only an apparent contradiction between Law and Morality, the two notions being, in fact, complementary. The inclusion of the moral

[8] Lat., exception of non-execution

[9] Lat., Nobody is forced to keep up his/her word.

[10] Pomponius, D. 50. 17. 206. „Nobody can become richer detrimental to somebody else or by being unjust to somebody acoording to the natural law."

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principles in the civil norms emphasize the genesis character of the moral customs within the rules of law.

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