NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 9–16
DOI: https://doi.org/10.71042/CJL01202401

Maciej ANDRZEJEWSKI
University of Siedlce, Poland*

Does Convergence of Law and Morality Exist? Polemics of H. L. A. Hart with R. Dworkin

• **Abstract** •

This article addresses the relationship between law and morality, questioning whether there is a convergence of the two. An analysis of H. L. A. Hart's critical positivism in the context of the neoliberal philosophy of law R. Dworkin was made, in view of the possibility someone has to live in complete separation of law from morality. The above considerations must be accompanied by reflection on the so-called hard cases, as well as reflections on the contemporary implications of law and morality.

Keywords: H. L. A. Hart, R. Dworkin, Law, Morality, Philosophy.

Introduction

The significance and complexity of mutual relations between law and morality was called once, in the philosophical-legal literature, the "Cape Horn" issue (Sobański, 1999). The fact that, until today, heated disputes, not only among lawyers, but, above all, among society are stirred up by the issues on the bounds between law and morality, shows that this problem is very important, these issues include: death phenomena (abortion, euthanasia, death penalty), the issue of human procreation (*in vitro*, cloning), the issues on the bounds between law and medicine (conscience clause, patient's approval), sexual minorities (legalization of homosexual marriage), institutions of criminal law (rule of material truth, torturing during interrogation, right to self-defence), educational (sexual education of children at school), family (marital infidelity, divorce, concubinages) (Bunikowski, 2023).

* ORCID ID: 0000-0001-8440-2426; address: Żytnia 39, 08-110 Siedlce, Poland; e-mail: maciej.andrzejewski@uws.edu.pl

The best method, to find an answer for a question of convergence between law and morality, seems to be a comparison of opposing arguments, however, in order to reach a goal, we should remember that argumentation must be intelligible, that is, understood for others and not only for a person expressing a given view, contradictory, based on the dispute of two equal sides, leading, as a consequence, to revealing the truth, and also logically correct. The analysis of critical positivism of H. L. A. Hart in a context of neoliberal philosophy of law by R. Dworkin seems to be justifiable in the context of above requirements, in other words, the subject of considerations mentioned below will be a reflection about the possibility of existence of the law in a complete separation from morality. Analysis of this issue becomes deeper, if we pay attention to the fact that this year, we have a thirtieth anniversary of publication of famous *Postcriptum* to the Hart's Concept of law, being one of the main point of a dispute between Hart-Dworkin. This work presents conciliatory view, typical for the so-called soft positivism, it gained as many supporters as opponents, for whom on the one side, the point of reference remained 'integrarism' Dworkin, on the other hand the so-called hard positivism (Dyrda, 2014).

The above considerations must also be accompanied by the reflection on the so-called *hard cases*, in which the conflict of positivists with naturalists about the law and morality is reflected in the best way. Is it really true that only one of these paths is a proper one, and as a consequence *tertium non datur*?

Law and morality according to H. L. A. Hart

Looking for an answer for ontological question intrigued philosophers since the beginning of the world. It is such a basic question that it is a starting point, a base for different law theories. Hart doesn't answer the question openly, but J. Woleński claims that: "he describes (…) the law as a particular connection between primary and secondary rules, gradually revealing its aspects" (Kołtun, 2023).

The starting point of Hart's considerations is a theory of the division of rules into the so-called *primary rules* and *secondary rules*, the coexistence of primary and secondary rules. Primary rules are directed to the members of society, indicate them a specific behaviour, while secondary rules are the instruments of a procedural character, oriented towards elimination of disadvantages of the secondary rules, having menial form towards them, subsidiary and non-independent (Stelmach, Sarkowicz, 1999). In addition, it divides secondary rules into 3 types: change, settlement and key rules of recognition. Only such a coexistence of rules, mutually complementing, allows, according to Hart, to create a legal system, identified here with a concept of law, while, on the one side primary rules must be respected by the society as well

as secondary rules addressed to the clerks. Such understanding of law reverberated, and particular opponent of such understanding has become R. Dworkin.

Legal positivism in its assumptions did not create one coherent definition, Hart, referring to this concept, indicated the following statements: 1) human laws are orders, 2) system of law is "closed logical system", 3) we should distinguish sociological, historical research, and also critical assessment of law from moral perspective from research on meaning of legal concepts, 4) the basis for ethical judgments can't be rational argumentation, testimony or proof, 5) there is no necessary connection between morality and law, and between law *lex lata* and *lex ferenda* (Stelmach, Sarkowicz, 1999).

We can find, in Hart's conception, the so-called social thesis, saying about taking root of the law in social conventions, what eventually causes a thesis about separation of law from morality, referring to the lack of definitional connection between law and morality. The effect of this assumption is a supposition that the law, which is incompatible with morality, is still the law (Załuski, 2009). However, we should remember that Hart formulated the so-called *minimum content of natural law*, emphasizing that they are the rules necessary for a proper functioning of each, among others: human weakness, approximate equality, limited altruism, limited amount of goods and natural reserves and imperfect will power and ability of reasoning (Stelmach, Sarkowicz, 1999). So, isn't it a contradiction, and maybe it is a beginning of a new paradigm, new way, which, from different perspective, tries to solve a dispute between positivists with naturalists about mutual relations between law and morality?

Focusing on hard cases from the perspective of conception of Hart's rules, we should look for a solution of *hard cases* beyond the system, through using the so-called open concepts, what makes it difficult to give a judicial decision to a law-making character. The solution to this problem, in Hart's opinion, is to regard this decision as being within the standard of correctness of this decision. This standard was defined through scope of meaning of the rules, which contain *open texture* expressions. It leads to a conclusion that crossing the borders of this scope is to go out beyond the standard of correctness (Zajadło, 2024).

To sum up, Hart rejected the implications of the natural law school, what led to antinomy between law and morality. In other words, their convergence is not possible, despite the indication of the minimum content of natural law in legal application. A very interesting interpretation of *hard cases* leads inevitably to a conclusion that positivism, sometimes called sophisticated in Hart's conception, tries to find a solution, in these matters, beyond normative system.

Law and morality according to R. Dworkin

The positive conception of separation of law from morality has been criticized by Dworkin. It is worth noting that there is no reference to a legal-natural argument in Dworkin's considerations, because it is incompatible with a conception of legality, that is why he expands the bounds of a conception of a norm and, what is more important, he questions the bounds separating law from morality (Zirk-Sadowki, 2022).

In Dworkin's conception, apart from *rules,* there are *principle*s and *policies* in the system of law. Hart's systematics is not sufficient enough for him, because in the positivistic spirit, it refers only to the legal rules, and they don't exhaust application for hard cases. In this sense, Dworkin claims that it is impossible to separate law from morality. For Hart's apologists, it is possible to adopt Dworkin's system, based on rules and principles, deriving principles – from a legal text – on the basis of rules of inference (Stelmach, Sarkowicz, 1999). From this counter-argument, Dworkin determines the fact that in a of process law application, the judge can't separate legal rules from principles, which in a very important process of interpretation are discovered in a global "normative structure of a society".

The considerations concerning hard cases, also in case of Dworkin, are presented differently from Hart's conception. Using conceptions of *rules*, *principles* and *policies,* Dworkin proves that the judge who, in a given case, doesn't have a clear, explicit rule, he/she can't, just like Hart, go beyond law system, but he/ /she should look for a solution on the ground of principles and clues. Fundamental assumption, on which Dworkin based his statement about convergence of law and morality concerns the so-called *hard cases*, in a situation, in which it is possible to make a few settlements, in the same way justified and reasonable, so if the judge bases only on rules, it is insufficient (Stelmach, Sarkowicz, 1999).

The essence of the issue of hard cases in a dispute between Hart with Dworkin, is not a relic of the past, but it is still relevant today, although it is often viewed from a completely different perspective. As an example, we can give a conception of Professor J. Zajadło, who thinks that *hard cases* emerge not only on the stage of law application, but also in the process of its creation, interpretation, validity and also obeying, while its solution is not only making one right decision. Moreover, the Professor indicates that hard case doesn't have to be connected with the law in force, however, if there is a "conflict of law with itself, it is important what is an indirect source of conflict – if it is a structure of the very law or external factors, such as morality, tradition, economy, politics, religion, etc." (Zajadło, 2024).

Interesting issue is an interpretation of the law as a mechanism allowing to negotiate between politics and morality, because in Dworkin's opinion, morality gathers basic rights of the individual and political procedures, while the role of the court is integration of morality and politics (Zirk-Sadowki, 2022). This assumption leads to conclusion that the judge is not independent, but he/she is subordinate to 'unavoidable dependency', what is a consequence of two theses: meta-ethical and political, formulated by this philosopher. It leads to a "specific conception of social morality as decisive in law affairs; this conception says that social law and morality is (…) political morality inscribed in laws and institutions of a given society" (Dybowski, 2001).

Analysis of Dworkin's conception clearly shows that unsolvable antinomy, between legal positivism and natural law, where it was always told *tertio non datur,* can be solved through the choice of indirect way between the legal-natural and positivistic conceptions (Morawski, 1999). Analysing deeper different approaches to hard cases, we undoubtedly come to a paradox. Hart tries to solve *hard cases* on the ground of non-legal norms, while Dworkin on principles and clues, being a part of law system (Zajadło, 2024).

The essence of the dispute between H. L. A. Hart and R. Dworkin

Analysing the opinions of Hart and Dworkin on relations between law and morality, we should look for fundaments of this dispute directly in the assumptions, which refer both to the essence and nature of law. Hart's theory of law is general, in a sense that it doesn't refer to any specific legal system or culture, is descriptive, morally neutral, and doesn't try to justify itself. While, Dworkin's conception is applicable to the marked system of law, and partially also fulfils assessing and justifying functions (Kondela, Smolat, 1995). According to A. Dyrda, the axis of the dispute between Hart and Dworkin never concerned the issue that the law, beyond the rules also contains principles, because no one questioned that. The crux of polemics was a positivistic statement that binding legal standards, both rules and principles, are always based on specific social facts. Roland Dworkin questioned this thesis, indicating that there are legal rules, which are binding only due to their moral character, the so-called rules of political morality makes it binding despite the fact that they have never been institutionalized before. The effect of this debate was overcoming dichotomous division between descriptively explaining and normatively justifying theory of law (Dyrda, 2014). To sum up, the effect of introducing axiologically justified legal rules into the legal system was a necessity of binding the conceptual connection between law and morality. We should

remember that positivism, in a version proposed by Hart, allowed to identify legal rules only by reference to social sources of law, without reference to assessment criteria, definitely determining the separation of law and morality, at least on the validation level (Kondela, Smolat, 1995).

The legacy, that these great philosophers has left to us, has also impact on contemporary world, for example, we can refer to criminal trial, where specific principles of criminal trial have fundamental meaning, i.e. rule of material truth, adversarial rule, immediacy, presumption of innocence etc. Division into rules-directives and rules-principles, is nothing more than, made by R. Alexy, modification of legal rules and principles originating from dispute between Hart-Dworkin (Waltoś, Hofmański, 2023). Stopping at this vague statement is insufficient, therefore, we should consider the issue of adequacy of, developed by Dworkin and partially modified and expanded by R. Alexy, conceptions of rules to Polish legal culture.

It is justified to accept as a turning point the year 1988 an publication in the monthly magazine "Państwo i Prawo", the article written by Professor Tomasz Gizbert-Studnicki entitled "Legal rules and principles", because from this moment, in Polish legal culture, people began to be interested in a way of comprehension of the principles, what was originated by Dworkin (Bogucki, Zieliński, 2014).

Transposition of understanding the rules by Dworkin or Alexy to Polish legal culture somehow forces to change of, consolidated in the Polish jurisprudence, vision of legal system, what leads to recognition of its fundamental heterogeneity. Another consequence of accepting the way of comprehension of the rules proposed by Dworkin, and particularly by Alexy's conception, was a necessity of developing different methods of interpretation – different for rules and different for principles. We should also remember that Polish jurisprudence made only partial reception of Alexy's views, and as a consequence adopted hybrid form of rules (Bogucki, Zieliński, 2014). This short characteristic shows that conception proposed by R. Dworkin, adopted and modified by Alexy is inadequate to Polish legal culture.

When we refer to these rules to criminal trial, we must state that they are some kind of a phenomenon, because they have the highest meaning in relation to criminal trial. The doctrine emphasizes that the rules form a particular system of mutual relations and references. Repeatedly, these trial rules become a fundament, on which rulings, not only common courts of law, but also Supreme Court and Constitutional Court are based (Wiliński, 2014). It is worth citing the words of Professor W. Daszkiewicz, who claimed that the trial rules are "points of references in axiological assessment of trial norms and institutions" (Wiliński,

2014). Taking into consideration that all phases of criminal trial, and in particular preparatory proceedings and application of preventive measures in a form of detention before trial, cause severe consequences towards suspect and his/her family, we shouldn't be surprised by the fact that trial rules in a system of trial criminal law have a particular position.

Conclusion

We can conclude that the different views of H. L. A. Hart and R. Dworkin led many generations to become interested in law, paying attention to important issues which have a direct impact on the life of every human being. Experiences of the twentieth century, with all its atrocities, showed what happens in a situation when laws and morality don't go hand in hand, because it leads to distortion of law. The evolution of attitude towards law and morality in the context of *hard cases* and the dispute between Hart with Dworkin and its consequences lead us to conviction that the law is still improving. Different conceptions are a basis to deeper search and different attitude in relation to the passage of time and change of economical-social – political-legal conditions. The proof of this is Hart's conception, which was criticized by Dworkin, and this philosophical reflection is improved by J. Zajadło.

Relation between law and morality, at the beginning called "Cape Horn", really deserved to be called like that because they "sail across the sea" of different, often extreme conceptions of law, they can easily "sink", what history taught us many times. In this sense, it is worth knowing different philosophical-legal conceptions but also returning multiple times to the sources of these discussions, which address the most important disputes, from antiquity to our times. The body of rulings of our negative legislator – the Constitutional Court – seems to tell us about an undisputed thesis of penetration of the normative environment into the content of the law, not only positive but also applied in a way of a deepened interpretation, and this Court in one of its last rulings, allowed to express a thesis of understanding of the law: "(...) not only as a set of, passed according to formally determined procedure, regulations, but as a set of axiologically related norms, being a cultural, rooted in historical experiences of the community and built on the basis of common, for a given circle of entities, system of values",[1] what is a *signum temporis* of the above study.

[1] Judgment of the Constitutional Tribunal of September 30, 2008, K 44/07, OTK-A, No. 7, item 126.

References

Bogucki, O., Zieliński, M. (2014). Koncepcja zasad i reguł R. Alexy'ego jako koncepcja nieadekwatna do polskiej kultury prawnej (The concept of R. Alexy's rules and principles as a concept inadequate to Polish legal culture). In: P. Wiliński (ed.). *System Prawa Karnego Procesowego. Tom III. Cz. I. Zasady procesu karnego*, Warszawa: Wolter Kluwer, pp. 60–80.

Bunikowski, D. (2006). *Ingerencja prawa w sferę moralności w trudnych przypadkach* (Interference of law in the sphere of morality in difficult cases). Retrieved May 25, 2023, from http://www.ipsir.uw.edu.pl/UserFiles/File/Katedra_Socjologii_Norm/TEKSTY/kk4621%281%29.pdf

Dybowski, M. (2001). Ronalda Dworkina koncepcja zasad prawa (Ronald Dworkin's principles of the law). *Ruch Prawniczy Ekonomiczny i Socjologiczny, 3*, pp. 99–115.

Dyrda, A. (2014). Spór o pojęcie prawa – debaty Hart-Dworkin ciąg dalszy? (Contention over the conception of law – continuation of Hart-Dworkin debate?). *Państwo i Prawo, 4*, pp. 3–18.

Kołtun, M. (2007). *Teoria prawa i legitymizacji prawa według H. L. A. Harta* (Theory of law and legitimization of law according to H. L. A. Hart). Retrieved May 25, 2023, from http://www.sknp.umcs.lublin.pl/materialy/zn/studenckie_zeszyty_naukowe15.pdf

Kondela, M., Smolat, M. (1995). Postscriptum H. L. A. Harta (H. L. A. Hart's Postscript). *Państwo i Prawo, 1*, pp. 52–57.

Morawski, L. (1999). *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* (The main problems related to the contemporary philosophy of law. Law in the course of transition). Warszawa: LexisNexis.

Stelmach, J., Sarkowicz, R. (1999). *Filozofia prawa XIX i XX wieku* (Philosophy of law in the 19th and 20th Centuries). Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Sobański, R. (1999). Prawo i Moralność (Law and Morality). *Śląskie Studia Historyczno-Teologiczne, 32*, pp. 159–170.

Wiliński, P. (2014). Fenomem zasad procesu karnego (The Phenomenon of Criminal Proceedings Rules). In: P. Wiliński (ed.). *System Prawa Karnego Procesowego. Tom III. Cz. I. Zasady procesu karnego*, pp. 89–92. Warszawa: Wolters Kluwer.

Waltoś, S., Hofmański, P. (2023). *Proces karny. Zarys systemu* (Criminal Procedure: An Outline of the System). Warszawa: Wolters Kluwer.

Zajadło, J. (2024). *Po co prawnikom filozofia prawa?* (Why Do Lawyers Need the Philosophy of Law?). Warszawa: Wolters Kluwer.

Załuski, W. (2009). *Ewolucyjna filozofia prawa* (Evolutionary philosophy of law). Warszawa: Wolters Kluwer.

Zirk-Sadowki, M. (2022). Wprowadzenie (Introduction). In: R. Dworkin, J. Winczorek (eds.), *Imperium Prawa*. Warszawa: Wolters Kluwer.