

MORAL COGNITIVISM AND LEGAL POSITIVISM IN HABERMA'S AND KANT'S PHILOSOPHY OF LAW

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ABSTRACT:

The hypothesis of this paper is that legal positivism depends on the non plausibility of strong moral cognitivism because of the non necessary connection thesis between law and morality that legal positivism is supposed to acknowledge. The paper concludes that only when based on strong moral cognitivism is it consistent to sustain the typical non-positivistic thesis of the necessary connection between law and morality. Habermas's Philosophy of law is confronted with both positions.

Keywords: Habermas; positivism; moral cognitivism

Moral cognitivism and the foundation of morality and law

According to Habermas, a first type of cognitivism is *strong moral cognitivism* which aims to support the validity of moral norms; that is, it “seeks [...] to take account of the categorical validity claim of moral obligations” (Habermas 1998, 6). The main aim of a moral theory is to ground, or justify, moral principles. The following position, though it is not Habermas's, could be considered a radical formulation of strong moral cognitivism: it is the commitment to the fact that moral truths “are independent of our moral thinking, a foundationalist epistemology according to which our moral knowledge is based ultimately on self-evident moral truths” (Brink 1989, 3). Kant's Moral Theory could be taken as an exemplar of a strong moral cognitivist position. Obviously, Habermas himself claims that his own moral theory is one of strong moral cognitivism, despite it being a processual one.

As a second type of cognitivism, *weak moral cognitivism*, “opens up a form of rational assessment of evaluative orientations” (Habermas 1998, 6). It is weak because it depends on

some specifics and circumstances, like the aim of happiness. As such, Aristotelian ethics would exemplify this position.

Concerning noncognitivism, Habermas presents two types. The first is *Weak moral noncognitivism*: “On such accounts, the supposedly objectively grounded positions and judgments of morally judging subjects in fact merely express rational motives, be they feelings or interests, justified in a purposive-rational manner (Habermas 1998, 6). An example of this type would be Hobbes’s contractual model, and certain forms of utilitarianism.

Finally, *strong moral noncognitivism*, in turn, aims to unmask strong moral cognitivism as an illusion: “*Strong noncognitivism* tries to unmask the presumed cognitive content of moral language in general as an illusion” (Habermas 1998, 5)³. Stevenson’s emotivism, in which he says there is no rational or empirical method to treat ethics, would be a model for this last type. In ethics there is only persuasion, but it is not rational (Stevenson 1937, 29). According to Stevenson, the only intelligible part of all philosophical ethical theories, from Plato to Kant, it is their power to influence attitudes (Stevenson 1937, 31).⁴

The following table summarizes the topic:

	Strong	Weak
Moral cognitivism	Kant	Aristotle
Moral noncognitivism	Stevenson	Hobbes

Moral cognitivism and the application of morality and law

The above typology can be used in order to build a model for another typology, namely one concerning the application of norms in morality and law. Habermas’s definitions presented above have taken into account the foundation or justification of moral norms, their cognitive content. As can be seen in his typology, Habermas did not consider the problem of the application of norms (Alexy 1993, 157-170; Günther 1993). This paper sustains that the consideration of problems related to the application of norms results in a typology in an analogous sense of the classification concerning the foundation of moral theories. At least, it

will be necessary to create an equivalent typology for the application of moral and legal concepts.

Application issues are highly important for moral and legal theories. Rawls, for example, distinguished between concept and conceptions that recall grounded moral principles being applied in different ways: “Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice” (Rawls 1999, 5)⁵. The problem can be measured by Habermas's assertion that “[...] no rule is able to regulate its own application” (Habermas 1996, 199). Interestingly, the same phrase is found in the chapter where Hart deals with skepticism concerning rules “They [canons of interpretation] cannot, any more than other rules, provide for their own interpretations” (Hart 1994, 126) A new typology adapted to this issue is justified by the problems involved in the application of norms, especially those of vagueness and indeterminacy. In fact, the sources of indeterminacy are: vagueness, imprecision, open texture, incompleteness, incommensurability, immensurability, contestability, family resemblance, dummy standards, pragmatic vagueness, ambiguity (Endicott 2000, chap. 3). Indeed, in chapter VII of his book, Hart refers to the open texture of law. An author such as Habermas takes the indeterminacy of norms as granted.⁶

The conclusion from the above argument is that problems with the application of moral principles mean that such principles do not fulfill the epistemological function of saying clearly and precisely what to do. For instance, if morality doesn't say with certainty if euthanasia and abortion are correct, how is it possible to connect law and morality? In this case, legal precepts should provide the knowledge of what to do. If rules were not capable of this determination, all of them would merely be broad duties of virtue as they were thought of by Kant in his *Doctrine of Virtue*. However, the legal system does not, by definition, survive through virtue.⁷

One of legal positivism's most central objections to morality is its cognitive indeterminacy. In fact, Kelsen,⁸ Hart (1994, 164), Raz (2010, 326), and even Weber (Weber n. d., chap. VII) sustain this position. In this vein, Habermas himself admits that his advocated communicative rationality does not provide substantive guidance for action.⁹

The main subject regarding the application of morality and law can be summarized as follows:

Strong cognitivism	Either it does not recognize the problem of indeterminacy in the application of norms, or recognizes it but sustains the possibility of offering a theory able to present the right answer to a case without discretion and arbitrariness in the decision. The application, in general, is a special case of moral discourse.
Weak cognitivism	It recognizes the problem of indeterminacy, but aims to offer some sort of justification for decisions, although not based solely on moral grounds. Limited discretion and no arbitrariness.
Weak noncognitivism	Recognizes the problem of indeterminacy, but offers circumstantial justifications for the decision. Limited discretion and limited arbitrariness.
Strong noncognitivism	Norms are indeterminate and require an authority that applies them with full discretion and arbitrariness.

If the criterion for weakening cognitivism were indeterminacy, few cognitive theories would be considered strong. The criterion of discretion and arbitrariness for the typology presented above was then taken as follows: first, because they are explicitly mentioned by Hart (Hart 1994, p. 273); second, because Dworkin characterizes positivism through the discretion thesis, alongside the pedigree thesis, and the obligation thesis (Dworkin 1977, p. 17).¹⁰ Thus, what disqualifies a theory as *strong* cognitivism is *discretion*. The *arbitrariness*, in turn, disqualifies a theory as cognitive, whether it is strong or weak.

The two kinds of typologies, concerning foundation and application, can be intertwined. Thus, Habermas, for example, assigns indeterminacy to application, but not to justification, or attaches more indeterminacy to application than to justification.¹¹ Even Kant, according to some scholars, is dubious in relation to this point (Waldron 1995-1996, 1535-1566). Moreover, it will be necessary to ask if the recognition of indeterminacy problems in the application dimension does not imply a weakening of the cognitive aspect of the foundation dimension. For instance, Bobbio supported the view that it is an illusion to want to establish an absolute foundation for human rights, with the first of four reasons for such an illusion being precisely the practical vagueness of human rights (Bobbio 1992, 17).

Law and morality

Legal positivism can be defined by the separation thesis between law and morals (Volpato Dutra 2013, 141-158): “All positivistic theories defend the *separation thesis*, which says that the concept of Law is to be defined such that no moral elements are included. The separation thesis presupposes that there is no conceptually necessary connection between law and morality” (Alexy 2002, 3)¹² Accordingly, the analysis of the content of the laws is irrelevant to its legal validity, as Kelsen says: “Therefore any kind of content might be law” (Kelsen 2005, 198). On the other hand, non-positivist theories sustain the connection thesis between law and morality: “By contrast to the positivistic theories, all non-positivistic theories defend the *connection thesis*, which says that the concept of law is to be defined such that moral elements are included” (Alexy 2002, 4). Because of these theses, it’s possible to understand why Shapiro argues that the essence of the debate that took place between Hart and Dworkin has as its key issue precisely the relationship between law and morality. According to him, the focal point of contention between Hart and Dworkin was neither the discretion thesis nor the model of rules (Shapiro 2007).

In fact, the separation thesis was clearly advocated by Kelsen.¹³ Associated with the separation thesis, it is possible to acknowledge his noncognitivist view of morality.¹⁴ Kelsen is aware that a different answer for the problem would require us “to determine what must be considered good and evil, just and unjust, under all circumstances” (Kelsen 2005, 65). Therefore, only a strong moral cognitivist theory could support a necessary connection between law and morality. In fact, it is possible find such a theory in Aquinas and Augustine: “Nam mihi lex esse non videtur, quae iusta non fuerit” (Saint Augustin 1952, v. 11);¹⁵ “non lex sed legis corruption” (Aquino n. d.)¹⁶; “lex tyrannica [. . .] non est simpliciter lex (Aquino n. d.)”¹⁷

A connection between moral cognitivism and the positivist theories of law was suggested by Hart.¹⁸ According to this framework, the hypothesis is that the affirmation or denial of moral cognitivism, either within the justification aspect or within the application aspect, is of capital importance to understand legal positivism. Alexy seems to have realized clearly that the non-cognitivist thesis is at the very basis of the separation thesis, or at least constitutes a strong argument in favor of that thesis (Alexy 2002, 52-55; Alexy 2012, 2-14). It is also important to stress, for the present research, that Alexy establishes a clear connection between morality and human rights. For him, if human rights could be justified in an absolute way, then legal positivism would be refuted.

It is possible summarize the main points made so far as follows:

- It is consistent to support (a) strong moral cognitivism, (b) problems in application, and advocate the non-necessary connection between law and morality;
- It is consistent to support strong moral cognitivism in foundation and application, and sustain the necessary connection between law and morality;
- It is inconsistent to sustain weak moral cognitivism or strong moral non-cognitivism, whether in foundation or in application, and the necessary connection between law and morality.

In his debate with Rawls, Habermas addressed a criticism to Rawls's *overlapping consensus*. According to Habermas, a strong moral foundation of tolerance was important to bring to an end to religious wars: "But could the religious conflicts have been brought to an end if the principle of tolerance and freedom of belief and conscience had not been able to appeal, with good reasons, to a moral validity *independent* of religion and metaphysics?" (Habermas 1998, 67)¹⁹. Habermas seems to support that a strong foundation of human rights is crucial to account for the motivation to comply with them. He explains this thesis in a footnote to the *Theory of Communicative Action* as a conceptual need involved in acting according to rules:

[...] but when we use the concept of normatively regulated action we have to describe the actors *as if* they consider the legitimacy of action norms to be basically open to objective appraisal [...]. Otherwise they would not take the concept of a world of legitimately regulated interpersonal relations as the basis of their action and could not orient themselves to valid norms but only to social facts. Acting in a norm-conformative attitude requires an intuitive understanding of normative validity; and this concept presupposes *some* possibility or other of normative grounding (Habermas 1984, 420 fn)

He recognizes that this conceptual necessity could be the result of a linguistic misunderstanding, illustrated by emotivism and decisionism. This conceptual necessity led Habermas to link the stability of a social order to the recognition of its righteousness. Without conviction regarding the validity of fair rules, social order would become unstable. Although the last note to the preface of the 1984 3rd. edition of *Theory of Communicative Action* reduces the conceptual necessity into a merely gradual difference between power accepted as fact and power accepted based on a normative validity, he never broke completely with the aforementioned conceptual necessity. This is what clearly appears in his dialogue with Rawls and his treatment of the *free-rider* problem (Habermas 1996, 166; Habermas 1998, 15).

Raz, in turn, expresses a similar point. According to him, despite the apparent modesty of Rawls's theory as *A Theory of Justice* apparent in terms such as *overlapping consensus*, in

fact, he is arguing for *The Theory of Justice*, in other words, he is sustaining his *Theory* as the true one, at least for us nowadays (Raz 1990, 15).

The point is that today moral rights have a great impact, not only in law in general, but especially in jurisdiction, in the application of the law in almost every constitutional state. Because of this, the role of supreme courts has been redesigned and has even been criticized by many scholars (Ely 1980). In this sense, the Hart/Dworkin debate makes a good case for studying the implication of moral rights on jurisdiction.

Is Habermas's theory of law a kind of *sui generis* legal positivism?

In *Between Facts and Norms* Habermas made very clear the neutrality of D, the Discourse principle, in relation to law and morality (Habermas 1996, 107). The consequence of this thesis is that the two principles that follow from D are distinct: the moral principle and the principle of democracy. This distinction entails another—between morality (or justice) and legitimacy. It is supposed that legitimacy applies directly to law. In this regard, despite Habermas's own advice that the kinds of issues, contributions, and reasons in each of the two principles should not be limited a fortiori (Habermas 1996, 108), suggesting a possible overlap between both principles, critical questions have been raised against this neutrality thesis of D.

Apel has criticized the lack of moral justification of legal coercion (Apel 2004, 224; Volpato Dutra 2010, 103-116); some have even accused Habermas of a kind of *sui generis positivism*: “Habermas defends a novel version of legal positivism” (Mahoney 2001, 25). Hedrick is emphatic in suggesting a kind of relation between Habermas' philosophy of law and the legal positivism of Hart and even Kelsen:

Moreover, a major concern of *Between Facts and Norms* is to distinguish moral norms from legal norms without subordinating the latter to the former, as is standard practice in natural law approaches up through Dworkin. The similarity here between Habermas's position and that of modern legal positivism—in particular the work of Hans Kelsen and H. L. A. Hart—is notable, complete with their collective insistence that a failure to distinguish clearly between moral questions and questions of legal validity leads to ‘confusion’ or ‘muddled analyses.’ And as with the legal positivists, the point of this move is not to insulate law from moral criticism, but to insist on the value, for the purposes of theoretical clarity, of distinguishing between different kinds of validity (Hedrick 2010, 86-7).

Others, like Heck (2006, 19-30) and Kettner (2002, p. 201-218) have seen in Habermas' thesis a kind of eclipse of discursive ethics in the domain of law and politics.

Faced with these reactions, it is convenient to scrutinize why Habermas neutralized D, and the consequent distinction between morality (justice) and legitimacy. The hypothesis of this paper is that such a view has strict connections with the above discussion concerning the cognitivist and non-cognitivist aspects of discursive ethics. To be sure, discourse ethics is a universalistic and cognitivist ethics, but it is also formal, that is, processual. The processual accent of discursive ethics implies some deficits concerning the contents of norms, as Habermas himself highlights. One of these aspects is justly the cognitive one (Habermas 1996, 114). So, Habermas sustains a kind of division of labor, a kind of complementarity between law and morals. Legitimacy is a less normatively exigent justification of norms than the justification under the moral point of view or the point of view of justice, and legitimacy is the kind of justification appropriate to law, according to Habermas. So, under pragmatic aspects, it is possible to say that it is better to comply with legitimate juridical norms issued by authorities, despite the fact that they can carry some degree of injustice.

In this way then his theory of law could be characterized as a kind of *sui generis* positivism. As suggested by Hedrick, there are similarities between Hart's positivism and Habermas's legal philosophy. Hart called attention to the defects of a system of primary rules of obligations; that is, its uncertainty concerning "to what the rules are or as to the precise scope of some given rule," the static character of the rules, and the "inefficiency of the diffuse social pressure by which the rules are maintained (Hart 1994, 93)". The remedy to these defects is provided by a legal system, especially by its authoritative character. Of course, Hart is aware of the possible problems of a legal system "[...] run in the interests of the dominant group [...]" (Hart 1994, 202)".

So a positive legal system has clear advantages compared to a pre-legal form of life. The first defect pointed out by Hart could be appreciated also as moral disagreement, just as in Waldron's position (Waldron 1999, 187). In this regard, Waldron quotes chapter V of Hobbes's *Leviathan* to make very clear the point in question:

and when men that think themselves wiser than all others, clamour and demand right reason for judge; yet seek no more, but that things should be determined, by no other men's reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand."

According to Waldron:

it is clear that no one can believe his view of justice is *right reason* (and hence appropriately *ours*) merely because he is convinced (even if rightly) that his view is really correct. [...] Indeed, every democratic system embodies to some

degree the principle that certain officials are empowered to take decision in the name of the whole society on the basis of their own views about justice. This is how most political system actually solve the problem of settling on social choices in the face o justice-disagreements: we designate one of the contestant views as the one to govern us for time being (Waldron 1999, 203).

When Habermas comments on Waldron's ideas, he says that Waldron has doubts to embrace the "[...] non-cognitivist foundation of classical legal positivism [...]" (Habermas 2003, 189), but instead embraces what he calls epistemic pluralism, meaning: "epistemic indeterminacy of interpretation as it is perceived also from a participant's point of view" (Habermas 2003, 189). The persistence of actual moral disagreement is taken by Waldron as indicative that an impartial view is not available. Because of that "the epistemic pluralist, like the positivist, must look to find a source that confers legitimacy upon law apart from its content" (Habermas 2003, 190). This is precisely the kind of remedy proposed by Hart's secondary rules, which are more processual than substantive. Of course, Habermas has his own processual conception of law's legitimacy, but his definition of law very much resembles the one proposed by Hart as system of primary and secondary rules: "By 'law' I understand modern enacted law, which claims to be legitimate in terms of its possible justification as well as binding in its interpretation and enforcement" (Habermas 1996, 79).

As a conclusion, it is consistent to support strong moral cognitivism and advocate the non-necessary connection between law and morality. It is also consistent to support strong moral cognitivism, and sustain the necessary connection between law and morality. But it seems inconsistent to sustain weak moral cognitivism or strong moral non-cognitivism and the necessary connection between law and morality.

Concerning Habermas and Kant remains an open question how they understand the relation between Law and morality, because both of them sustain strong moral cognitivism, but also considerable independence of Law concerning morality.

Notes

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³ “The noncognitivist position relies primarily on two arguments: first, the fact that disputes about basic moral principles ordinarily do not issue in agreement, and second, the failure, discussed above, of all attempts to explain what it might mean for normative propositions to be true, whether such attempts be along intuitionist lines or in terms of either the classical idea of natural law (which I will not go into here) or an ethics of material value à la Scheler and Hartmann.” (Habermas 2007, p. 56).

⁴ He sustains: “I may add that if ‘X is good’ is essentially a vehicle for suggestion, it is scarcely a statement which philosophers, any more than many other men, are called upon to make. [...] Ethical statements are social instruments. They are used in a cooperative enterprise in which we are mutually adjusting ourselves to the interests of others. Philosophers have a part in this, as do all men, but not the major part.” (Stevenson 1937, 31).

⁵ Rawls refers to Hart as the origin of the distinction. According to Hart a precept such as “treat like cases alike” is an “empty form” that “cannot afford any determinate guide to conduct” (Hart 1994, 159). He says that “there is much room for doubt and dispute. Fundamental differences, in general moral and political outlook, may lead to irreconcilable differences and disagreement as to what characteristics of human beings are to be taken as relevant for the criticism of law as unjust” (Hart 1994, 161)

⁶ Chapter 5 of *Between Facts and Norms* is entitled ‘The Indeterminacy of Law and the Rationality of Adjudication.’

⁷ “Right and authorization to use coercion therefore mean one and the same thing.” (Kant 1996, 389; [6: 232]).

⁸ Kelsen advocates relativism (Kelsen 1991, 53, 69), and also the indeterminacy of justice (Kelsen 2000, 14-15).

⁹ “Communicative reason thus makes an orientation to validity claims possible, but it does not itself supply any substantive orientation for managing practical tasks—it is neither informative nor immediately practical.” (Habermas 1996, 115).

¹⁰ Shapiro maintains that the obligation thesis “is the counterpart of the Discretion Thesis for ‘legal obligation’ ” (Shapiro 2007, 8).

¹¹ “Problems of norm justification do not present the real difficulties. Normally, the basic principles themselves—entailing such duties as equal respect for each person, distributive justice, benevolence toward the needy, loyalty, and sincerity—are not disputed. Rather, the abstractness of these highly generalized norms leads to problems of application as soon as a conflict reaches beyond the routine interactions in familiar contexts. Complex operations are required to reach a decision in cases of this sort.” (Habermas 1996, 115).

¹² Kelsen, on this matter, explicitly denies the Augustinian thesis concerning the relation between law and morals (KELSEN 1991, 52).

¹³ “The thesis, widely accepted by traditional science of Law but rejected by the Pure Theory of Law, that the Law by its nature must be moral and that an immoral social order is not a legal order, presupposes an absolute moral order, that is, one valid at all times and places. Otherwise it would not be possible to evaluate a positive social order by a fixed standard of right and wrong, independent of time and place.” (Kelsen 2005, 68)

¹⁴ “Moral values are only relative [...]. In view of the extraordinary heterogeneity, however, of what men in fact have considered as good or evil, just or unjust, at different times and in different places, no element common to the contents of the various moral orders is detectable.” (Kelsen 2005, 64)

¹⁵ “A law that is not just would not seem to me to be a law”.

¹⁶ *Summa Theologiae*. I-II, q. 95, r. 4.

¹⁷ Summa Theologiae. I-II, q. 92 art. 1, 4.

¹⁸ “The expression 'positivism' is used in contemporary Anglo-American literature to designate one or more of the following contentions: (1) that laws are commands of human beings; (2) that there is no necessary connection between law and morals, or law as it is and law as it ought to be; (3) that the analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, &c.; (4) that a legal system is a 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof ('non cognitivism in ethics'). Bentham and Austin held the views expressed in (1), (2), and (3) but not those in (4) and (5); Kelsen holds those expressed in (2), (3), and (5) but not those in (1) or (4). Contention (4) is often ascribed to 'analytical jurists' but apparently without good reason” (Hart 1994, 302) [It is a note to the p. 185 of the chap. IX].

¹⁹ In this respect, Habermas advocates a relative justification of social rights: “the category of social and ecological rights [...] can be justified only in relative terms.” (Habermas 1996, 123).

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