

## **Kamil Jesiolowski – Legal moralism and liberal democracy**

The label „legal moralism” seems to be problematic. Undoubtedly, one may be tempted to eschew moralistic laws due to their historical mistakes, especially in the area of sexuality and minorities rights. Moreover, legal moralism might be seen as not compatible with the pluralistic character of our modern societies and liberal democracy. The danger of moralism is to be defeated by the alliance of the neutrality and harm principles.

Nevertheless, nowadays it is possible to notice the revival of legal moralism. After the unanimous victory of the liberal side in the Devlin-Hart debate, scholars started to redefine the meaning of legal moralism. *Prima facie* implausibility of legal moralism has been seriously challenged. Furthermore, the ongoing communitarian-liberal debate undermined, at least to some extent, liberal fundamental principles, such as the alleged state’s neutrality between conceptions of the good life, the idea of public reason, or atomistic individualism. All these factors present good reasons to take legal moralism into deeper consideration in a not biased manner.

Therefore, I divided the analysis of legal moralism into five steps. First of all, I invoked philosophical approaches to the idea of enforcing morality by the law. The first chapter was devoted to the comparison of the classical thesis, represented by Plato, Aristotle, and Thomas Aquinas, to the variety of liberal ideas proposed by Hobbes, Bentham, Locke, Kant, and Mill. It was argued that the classical thesis defends the perfectionist aspects of the state and its right to legislate morals. It was shown that the classical view is deeply rooted in the idea that the real mores – not just the conventional ones – should be governing. Analytically, I separated the question of whether the state should enforce morality and the ontological question of whether unjust or immoral laws are law indeed.

The second chapter opens the deliberation upon the legal moralism properly understood. I used the dialectical method to analyse the moralism of J.F. Stephen and P. Devlin. I followed the arguments that were raised during the legal debates between Stephen and Mill and later on – Devlin and Hart. This chapter contains the critique of the conventional and emotivist morality which was the basis of Devlin’s concept. On the other hand, I did not entirely approve the liberal paternalism of Hart as well.

The third chapter finally presents the new legal moralism – the most plausible version of this view. Once again, I proposed the careful reading of the works of new legal moralists (R.P. George, M.S. Moore, R.A. Duff) in a dialectical way. The new approach to the idea of enforcing morality was introduced as a voice in the debate between anti-perfectionist liberalism and the perfectionist or somewhat communitarian one. It was emphasised that the new legal moralism, despite its heterogeneity, refers to the idea of critical, not just conventional, morality. The real immorality behind one's act is, according to legal moralists, *pro tanto* a good reason to criminalize this act. The chapter ends up with the taxonomy of legal moralisms. I also utilized the arguments of moralists and communitarians in my subtle critique of the neutral principle advocated by W. Ciszewski in Polish literature.

The fourth chapter is a practical one. It casts doubts on the approach chosen by the courts in the cases where the moralistic element appears. To be precise, I tried to contest the neutral and majoritarian justifications given in some rulings of the European Court of Human Rights, the Court of Justice of the European Union, the Polish Constitutional Tribunal and the Supreme Court of the United States. Using M.J. Sandel's terminology, I claimed that sometimes the judges are obliged to involve in the moral and philosophical debate to rule correctly. I doubt that neutrality is always possible but even if it is – it is not always desirable to be truly neutral among different conceptions.

The aim of the last chapter is to construe the most plausible variation of legal moralism. It was argued that legal moralism should be built upon principles such as pluralistic perfectionism, critical morality, the idea of public wrongs and exclusionary reasons, the limited scope of the criminal law, and communitarianism – understood as the correction of the liberalism. In the summary, it was stated that this approach may be attractive as not hostile to the idea of *pro tanto* neutrality defended by some scholars. Moreover, legal moralism, seen as the communitarian theory of legislation, is not to be regarded as incompatible with the requirements of modern liberal democracies. On the contrary, the proposed approach seems to be more coherent with our moral intuitions, at least in some cases, than liberalism based upon the neutral or harm principle.

In any event, the book is not designed to be the answer to all complex legal, moral, liberal, or communitarian issues. It is rather an attempt to solve some of them but first of all –

to rationally discuss them and to invite a reader to engage in a deliberative process about the common good of our liberal and pluralistic communities.