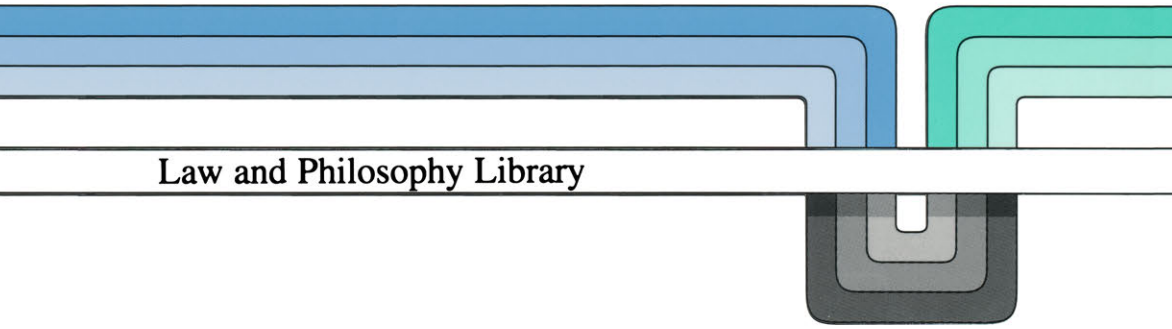

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José Juan Moreso

Legal Indeterminacy and Constitutional Interpretation

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dicial activity) or unnecessary (because if there is agreement, then no control is needed) (Tushnet 1988), and so on.[39]

Unfortunately, the *Vigil* is not a *normative* theory of the application of the constitution, and still less a normative theory of democracy. In fact, the explanation of constitutional primacy given in the present study is compatible with the absence of mechanisms for the control of constitutionality. It could well be that the legislator has the last word about whether or not some law is in accordance with the constitution. According to the *Vigil*, the legislator too could err, even if his word is decisive. Some advanced democracies have lived, and go on living, without a control of the constitutionality of their laws. This is a contingent characteristic of legal orders, and the *Vigil* is supposed to be a conceptual analysis of a more general kind, such that it gives account of all legal orders molded by the idea of the primacy of the constitution. Also, besides the control of the constitutionality of the laws by some judicial organ, there could be another means for trying to guarantee the constitutionality of the laws, namely, the personal responsibility of the organ that enacted an inconstitutional norm (Kelsen 1942, 194). The two most common systems in current democracies, however, are *(a)* diffuse control of constitutionality, as it has been established in the United States, since the famous *Marbury v. Madison* case, as well as in many other countries; and *(b)* concentrated control of constitutionality, as inaugurated by the Austrian Constitution of 1920 and instituted in many countries in Continental Europe. Despite the differences between the two models (cf. Kelsen 1942), it is important to note that both prescribe that some jurisdictional organ is competent to declare laws unconstitutional.

For the *Noble Dream*, this is no problem, because there is always a right answer, and the jurisdictional organ only faces the epistemic difficulty of finding it. In the case of the *Nightmare*, in contrast, jurisdictional organs determine the content of the constitution, which is nothing but the set of their particular decisions. I have tried to show, however, that both conceptions are inadequate. So now we must look at the position of the *Vigil* on this point.

For the *Vigil*, jurisdictional organs will sometimes confront cases that are *clear*, because there is no indeterminacy once meaning has been assigned and because conventions for the attribution of meaning are sufficiently solid not to throw doubts on the meaning of the constitutional text (as in the example of the expression of a 'crime in the act of being committed'). Thus, in such cases there is a right answer for the courts, although they offer a wrong one. If the foundation of constitutional primacy is considered normatively adequate, then judicial review in those cases will be normatively justified.

But they may also be confronted with cases that are *hard*, because they are particular instances of hard *generic* cases (due to *lacunae*, *antinomia*, generic subsumption, or what in Chapter IV I have called problems concerning the thesis of constitutional accessibility) (cf. Navarro 1993), or because they are hard individual cases (because of problems of individual subsumption), or because there are difficulties in determining

[39] For an excellent overview over the controversy in North American theory, and an attempt to apply these conceptions to the Spanish case, cf. Ferreres (1996); cf. also Alonso García 1984.

the meaning of the norm under scrutiny or of the applicable constitutional norm (perhaps there are several meanings in the admissible set and it is difficult to know which one is the most adequate). In these cases, according to the *Vigil*, jurisdictional organs have discretion. Their decision cannot be qualified as right or wrong in accordance with the constitution. This does not mean that judicial organs in that case act illegitimately; instead, what they do is create rather than apply law (cf. Prieto Sanchís 1987, 118-127). As Hart writes:

„That judges should be entrusted with law-making powers to deal with disputes which the law fails to regulate may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature; and the price may seem small if judges are constrained in the exercise of these powers and cannot fashion codes or wide reforms but only rule to deal with the specifics thrown up by particular cases." (Hart 1994, 275)

In the case of the control of constitutionality, the courts' decisions can have especially serious consequences and can affect far-reaching reforms of legislation; but it seems that the idea of constitutional primacy is important enough to make up for this price.

It must be underscored that the *Vigil* should not be regarded as a *normative* theory of the application of the constitution. It says nothing about what judges should do, *all things considered.* Should they in some cases depart from the applicable norms, all things considered (cf. Schauer 1991, Bayón 1994)? The *Vigil* doesn't say anything about it. Thus, it only offers a conceptual analysis of what judges *legally* ought to do. But not even for easy cases does it offer a theory of what judges should do, all things considered. That depends on an ethical-political theory in which questions like the justification of representative democracy, the obligation of loyalty arising from the acceptance of an office, and the construction of a set of principles of public morality must play a central role. I am thinking here of theories like, e. g., those of Rawls (1971, 1993) or Habermas (1996). The *Vigil* cannot provide any of that. But to know what judges should do, according to the law, and when their obligations seem determined by the law (clear cases) and when they have discretion (hard cases) is relevant for any legal theory and also, I think, for any normative theory of how and when the law ought to be applied. Unfortunately, however, legal theory cannot ease the burden of anyone who must take decisions of moral relevance.[40]

7. Conclusions: Modest Objectivity and Limited Indeterminacy

We have, in the end, not made much progress from our starting point. Hart has left us in a vigil, beleaguered by two dreams of great explicatory force. Extremes are always attractive. If the *Noble Dream*, if metaphysical realism were true, we would not only have

[40] Similarly, unfortunately, for those of us who are non-cognitivists in moral matters, that fact does not ease our burden when we must take decisions of moral relevance. As Leff (1979, 1249) said, perhaps ethics is an „unspeakable" notion: „Nevertheless: / Napalming babies is bad. / Starving the poor is wicked. / Buying and selling each other is depraved. / Those who stood up and died resisting Hitler, Stalin, Amin, and / Pol Pot — and general Custer too — have earned salvation. / Those who acquiesced deserve to be damned. / There is in the world such a thing as evil. / [All together now:] Sez who? / God help us."

an elegant legal theory but also an answer to our normative questions. What judges should do, all things considered, would coincide with what they should do from the legal point of view. Knowledge of moral reality would also be part of our legal knowledge. Skepticism about that strong vision of the law leads us to the *Nightmare* in which judges must always decide without any help of previously existing rules, day after day they must invent the law they apply to their cases. If the existence of meaningful rules were a myth, skeptics would be right. In both cases, legal reasoning — and interpretation, as part of it — becomes a matter of moral decision. The attempt of the law to insulate a zone of reasoning fails.

Unfortunately, both conceptions are inadequate. The *Vigil* teaches us that legal reasoning is partly insulated (Raz 1993) and that we can, as legal positivism has always maintained, conceptually isolate the law from morality; and thus, that our moral duties may not coincide with our legal duties. This does not mean that legal reasoning does not sometimes lead us to moral reasoning, e. g., because the law decided to adopt certain moral standards (Laporta 1993, 60-63), and still less that it exempts us from moral reasoning in our practical tasks as jurists. Where the law is not enough, jurists should show the ultimate foundations of their proposals of application, in order to allow open discussion, in order not to disguise moral decisions under a legal cloak. Now, the modest objectivity of the *Vigil* can perhaps serve to avoid useless controversy. Perhaps it can also help that the objectives stipulated in democratic constitutions and which many of us consider valuable can be achieved, through the relative insularity, in the more or less extensive zone, immune to indeterminacy, that is provided by the instrument we know by the name of 'law'.

The theses of the *Vigil* are compatible with the three theses Hart (1980) attributes to legal positivism; and insofar, they can be seen as a conception of interpretation in accord with Hart's legal positivism.

(1) The conceptual separation of law and morality: Despite the many contingent connections between law and morality, the *Vigil* does not establish a conceptual connection between them. As I said, it is possible that a court *morally* ought to do something that does not coincide with what it *legally* ought to do. The *semantic* thesis of the *Vigil*, which says that constitutional propositions are true if, and only if, it can be shown that certain consequences derive from the constitution makes it possible that some of these consequences conflict with the requirements of morality. That possibility of conflict cannot be eliminated.

(2) The thesis of the social sources of the law: According to that thesis, the existence of the law depends exclusively on the existence of certain social practices which determine the ultimate criteria of membership in the law. This thesis is equivalent to the *metaphysical* thesis of the *Vigil* according to which there is no law other than the set of social practices that can make our constitutional propositions true.

(3) The thesis of judicial discretion: „[I]n any legal system there will always be certain unregulated cases in which on some point no decision either way is dictated by law and the law is accordingly partly indeterminate or incomplete" (Hart 1994, 272). This thesis is compatible with the *logical* thesis — the rejection of bivalence — and with the legal thesis — the assertion that sometimes judges create and sometimes they

only apply law, and that in the latter case, they are fallible (theses 3b and 4b) — of the *Vigil*.

The *Vigil* is, thus, a reconstruction of that moderately objective conception of legal and, more specifically, constitutional interpretation which assumes a limited dose of indeterminacy.

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