José Juan Moreso (Ed.)

Legal Theory / Teoría del derecho

Legal Positivism and Conceptual Analysis / Positivismo jurídico y análisis conceptual

Proceedings of the 22nd IVR World Congress
Granada 2005

Volume I
The recent discussion about legal positivism is whether or not a jurisprudential conception can explain two characteristics of contemporary legal systems that seem indisputable: that the existence of law is practice-dependent and that moral reasoning forms part of the processes of identification and application of contemporary legal systems. Those characteristics can be referred to as thesis of the social sources of law and the thesis of incorporationism.

The first part of this book centers on the question on the debate between exclusive and inclusive legal positivism and the moral argumentation of constitutional law.

The second part deals with methodology from the scope and limits of conceptual analysis to the valuable recovery of ideas such as those of Cassirer and von Hhering.
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Introduction

This volume presents twenty-four works from various Workshops of the XXII World Congress of Philosophy of Law and Social Philosophy held in Granada in May 2005. All of them bear some relation to relevant questions studied in the legal theory of today. These works are grouped in two sections; the first dedicated to legal positivism such as the conception of law and the second raises some methodological questions.

The recent discussion about legal positivism is whether or not a iuspositivist conception can explain two characteristics of contemporary legal systems that seem undisputable: on the one hand, that the existence of law depends on a certain social practice or, in other words, that the existence of law is practice-dependent and, on the other hand, that moral reasoning forms part of the processes of identification and application of contemporary legal systems. We can call the first characteristic the thesis of the social sources of law and the second the thesis of incorporationism. I shall mention both briefly.

The existence of law is not a natural phenomenon similar to the existence of the planets or stars. The planets and the stars exist independently of the beliefs and attitudes of people. That the Earth is not flat is a truth regardless of what human beings think about it. Equally, the existence of a queue to buy tickets for the theatre is not a natural phenomenon. In order to understand a row of people in a queue, a set of beliefs and attitudes that support this institutional phenomenon are necessary: the acceptance of certain constitutive rules, defining the queue, and the acceptance of certain rules that attribute rights and duties to the position that one has in the queue (shortly: that one has the duty of waiting until those who were first have bought their tickets before those who come later in the queue may buy theirs).

The existence of queues is, so to speak, practice-dependent. It exists, in the sense of Searle, as an institutional fact. Then, in a much more complex form, legal systems also have an institutional existence; they are similar to a queue and not to planets. It is for this reason that the weakest thesis of the social sources of law seems obvious: the existence and content of the law in a society depend on a set of complex social facts.

Nevertheless, it is also certain that law and legal texts often refer to morality. The civil codes, for example, usually describe immoral contracts as void and constitutional bill of rights prohibit cruel or degrading treatment. In doing so, it seems that they incorporate certain moral guidelines, that is to say, that in order to identify cruel and degrading treatments forbidden by the constitutional law has to go to moral argumentation.

The recent debate between exclusive and inclusive legal positivism, which many of the works of this volume talk about, is centered on this question. Also it is possible, obviously, as other works maintain, to argue that legal positivism cannot give an account of these characteristics and that some type of iusnaturalist doctrine is more acceptable. This is not the place to take part in this debate, but without doubt there are elements to build a more complete understanding of the nature and limits of law to be found there.

The second part is more heterogeneous. This part contains works dealing mainly with methodology, understood here as works that do not discuss substantive questions, but rather conceptual aspects that underlie those substantive questions, from the scope and limits of conceptual analysis to the valuable recovery of ideas such as
those of E. Cassirer or jurists like R. von Ihering that can illuminate our perspectives as philosophers.

I trust that this volume will give its readers an overview of the conceptual landscape of the theory of law in our times.

Barcelona, 30 March 2006.
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