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## THE MORAL BASIS OF LAW

### ***Abstract:***

The paper analyzes the complex relationship between law and morality. The aim of the paper is to investigate, through a critical analysis of different positions, to what extent law must be morally grounded, that is, to what extent morality constitutes an integral or necessary element of law, as well as what consequences this relationship has for the legitimacy and validity of legal norms. The issue of the relationship between law and morality becomes relevant in the case of regulating morally controversial social phenomena, as well as in cases where positive law contradicts the prevailing moral understanding of the social community.

The authors point out that the moral component of law refers to the ethical principles and values that underlie legal norms and influence their creation, interpretation, and application. Not everything that is legal is moral. Morality serves as a criterion for reviewing legal norms and their fairness. When law is separated from morality, it can become a means of injustice.

***Keywords:*** *law, morality, legitimacy, justice, fairness.*

## 1. INTRODUCTORY CONSIDERATIONS

The relationship between law and morality is complex, multi-layered and dynamic. This relationship can be viewed from several aspects of legal theory and philosophy of law. Law is a concrete phenomenon, consisting of certain elements. It is not only a set of norms that regulate social relations, but also an expression of the moral principles of society, that is, it must be connected to the moral values that shape society, which provides it with an institutional framework that ensures their legitimacy and application.

Law should not be approached formally, focusing only on its legal and technical aspects, without a deeper understanding of its essence. It must also be understood from the aspect of its moral elements. Practitioners often ignore this ethical context when interpreting and applying laws. They lack awareness of how legal norms are shaped, among other things, and under the influence of moral principles.

In contrast to morality, law is a set of norms that are based on prescribing rules, and in the case of non-compliance, adequate sanctions. The legal order is based on the rules of behavior of people, their actions or inactions, while moral principles deal with the reason and justification of certain actions. The harmony of society in terms of legality and legitimacy, the regulation of legal norms and compliance with regulations directly depends on the harmony of the above factors. In the event that there is a discrepancy between legality and legitimacy, there is a fear of incompatibility of moral and legal norms in the social order.

Every legal norm, in essence, contains prescribed certain behavior. A norm that is considered valid is set as a standard for permissible behavior and can have positive and negative value. The question of morality is reflected in how to correctly define a norm depending on what is good and what is not. What is good for some, may be bad for others.

In order to understand a certain personal preference as morally and socially acceptable, inappropriate or morally neutral, a detailed understanding of morality is required, which would indicate whether a certain behavior is commendable, impermissible or similar.<sup>1</sup> In this regard, the binding of legal norms to individual behaviors in society, prescribed sanctions and proclaimed moral values is observed. Moral values oblige people who independently accept them, while the correlation of prescribed norms and moral values is based on generally accepted postulates.

The issue of the relationship between law and morality gains particular relevance in the context of legal regulation of morally controversial social phenomena, as well as in cases where positive law openly contradicts the moral intuition of the community. The aim of this paper is to investigate, through a critical analysis of key legal and philosophical positions, the extent to which morality constitutes an integral or necessary element of law, and what consequences this relationship has for the legitimacy and validity of legal norms.

## 2. THE RELATIONSHIP BETWEEN LAW AND MORALITY

There is considerable debate in legal scholarship about the extent to which morality is present in law, the various ways in which morality influences the normative content of law, and its significance in individual branches of law. The complex relationship between law and morality is one of the key themes in legal philosophy. Different legal schools and theories have different views on how law and morality relate to each other.

Supporters of the natural law theory believe that law and morality are inextricably linked. They believe that there are universal moral principles that precede positive (enacted) rules and that law must be in accordance with morality in order to be valid. If a law is deeply immoral (e.g., legalizing slavery), then it is not, by its very nature, valid law. Representatives of this school include Thomas Aquinas, John Locke, Lon Fuller, and Ronald Dworkin.

Gustav Radbruch, one of the most important legal philosophers of the 20th century, was a legal positivist at the beginning of his career, but after World War II and the horrors of the Nazi regime, he became a supporter of natural law. That is why many today consider him a bridge between legal positivism and natural law. One could say that he is a neo-natural law theorist, i.e. a neo-positivist who respects the moral limits of law.

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1 Peger, K. (2005). Pravo, moral i vrlina [Law, morality and virtue]. *Analitičko-pravna fakulteta u Beogradu*, 53(2), 59–78.

Defining the relationship between law and morality, Radbruch states that if “law and ethical good are placed side by side, it means that incommensurable magnitudes are compared”. Law is a cultural concept, an ethical good, or a value concept. Just as the idea of justice becomes a cultural value in law, so the idea of ethical good becomes one in morality, i.e. in the psychological fact of conscience. Either two value concepts can be compared: justice and ethical good, or two cultural concepts: law and morality.<sup>2</sup>

Radbruch argues that law must be viewed through three basic values: justice, legal certainty, and the purposefulness (usefulness) of law. Justice represents equality, i.e. equal treatment of equals and, consequently, unequal treatment of different people and relationships. However, this concept does not make it clear how something should be characterized as equal or unequal, nor does it show the way in which equals or unequals should be treated. These two questions can only be answered by starting from the purpose of law. Thus, purposefulness appears as another integral part of the idea of law. It denotes the social utility of law and its adaptation to specific circumstances. Laws need to be stable, predictable, and applicable in practice, which represents legal certainty.<sup>3</sup>

Only morality can explain the binding force of law. Law does not serve morality by means of the legal obligations it imposes, but by means of the subjective rights it grants. It is not turned to morality by its side on which obligations are, but by its side on which subjective rights are. Law is precisely the possibility of morality, and therefore also the possibility of immorality. Law can only enable morality, not force it, because a moral act, conceptually, can only necessarily be an act of freedom; but since law can only enable morality, it must inevitably also make immorality impossible.<sup>4</sup>

Radbruch believes that above positive law there is a universal moral order, the so-called *supralegal law*, by which he means a set of basic moral principles (e.g. dignity, freedom, equality). If positive law grossly violates these principles, morality has precedence. The law is valid only until it exceeds the limits of elementary justice. The moral order stands above positive law in extreme cases. He argues that a law that is “unbearably unjust” has no binding force. This became known as the Radbruch formula, which arose in response to Nazi laws and abuses, whose wrongdoings were “legal” under the law in force at the time.<sup>5</sup>

According to the view of supporters of legal positivism, law and morality are separate systems. The validity of a legal regulation depends only on whether it was adopted in accordance with a formally prescribed procedure and whether it provides for a sanction for its non-compliance, while it does not depend on whether it is morally correct. Many positivists believe that morality can influence the content of law, but is not necessary for its validity. Representatives of legal positivism are John Austin, Hans Kelsen, Herbert Hart and Joseph Raz.

Hans Kelsen introduces and develops the thesis of separating law from ethics. In his opinion, law should be the subject of a pure science, which is not a mixture of moral, political or sociological categories. A legal norm is a norm about what should be done, regardless of moral correctness. Legal science must be normative, but not moral, i.e. ethics

2 G. Radbruch, *Filozofija prava* [Philosophy of law]. Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu, 2006, p. 44.

3 G. Radbruch, op. cit., pp. 77-82.

4 G. Radbruch, op. cit., pp. 50-53.

5 G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* [Statutory injustice and supra-statutory law], *Süddeutsche Juristen-Zeitung*, Heidelberg, Year 1, No. 5, 1946, pp. 105-108.

and law are separate spheres. Kelsen considers it impossible to assume that morality and positive law, which are in fact completely independent of it, coexist.<sup>6</sup> “This, of course, in no way rejects the claim that the law be moral, i.e. good. This claim is self-evident; what it actually means is another question. What is rejected is only the view that law as such is a component of morality, that therefore every law, as law, is moral in some sense and to some extent.”<sup>7</sup>

Representatives of the sociological school of law believe that law and morality are closely related in social practice. Law cannot be understood without understanding social values and morality. Law is closely related to social morality, but does not necessarily coincide with it. Representatives of this school are Eugene Ehrlich and Roscoe Pound.

Theorists of legal realism believe that morality influences the application of law. The practical application of law is more important than the formal structure. Legal realists believe that in practice law is often applied subjectively and that the morality of lawyers is an important factor. They are not so much interested in what the law is formally, but in how it works in reality. Supporters of legal realism are Jerome Frank and Karl Llewellyn.

Representatives of critical legal theory do not deny that there is a connection between law and morality, but they reject the idea that this connection is stable, universal or neutral. They believe that morality in law is politically, ideologically and historically conditioned. The morality that dominates society is not necessarily just. Law often supports the interests of certain groups. Among the prominent representatives of critical legal theory, who have dealt with the relationship between law and morality, are Roberto Unger, Duncan Kennedy, Mark Tushnet, Peter Gabel and Karl Klare.

When it comes to the relationship between law and morality, our opinion is that we should strive for an integrative approach that recognizes the moral aspects of law, but retains the formal structure of the legal system. Law and morality have, in essence, a common goal, which is the regulation of social relations between people. Law and morality cannot be completely separated, since law is increasingly taking on moral values. However, morality and law remain distinct categories, since not every moral norm is necessarily legal, nor is every legal norm moral. In other words, law and morality are two different but closely related systems of norms. A law is valid if it is formally correct, not necessarily moral. Law derives its force from the state, while morality derives its force from the inner convictions of individuals and general public opinion. Morality may influence the content of law, but it is not a condition for something to be law.

Although law and morality differ as separate normative systems, there is a close connection between them. Morality plays an important role in the evolution of law. It can be a precursor to law, that is, certain moral norms eventually become part of positive law. Law often takes over moral norms and turns them into legally binding ones. The moral beliefs of a community influence the content of law. As social morality changes, so does law. For example, under the influence of changing morality, same-sex marriages were legalized in many countries. In other words, under the influence of criticism of legal norms that are unjust because they are not based on morality, they are changed in order to bring them into line with morality.

The legislator cannot help but respect morality, as a set of social norms that regulate the behavior of people in society based on the criteria of good and evil, that is, what is

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6 H. Kelsen, *Reine Rechtslehre* [Pure Theory of Law], F. Deuticke, 1934, p. 147.

7 H. Kelsen, cit. work, p. 25.

considered morally acceptable or unacceptable. Academician Radomir Lukić, one of the most important Serbian legal and philosophical thinkers, considers good to be “what contributes to the maintenance and development of man. And since man does not exist in isolation, that means – what contributes to the survival and development of society. And since again, there is no society at all, but only concrete, given, historical societies, that means – what contributes to the survival of a concrete society, that is, a concrete social community. Evil is what is the opposite of that, what undermines and destroys a concrete society”.<sup>8</sup>

Law differs from morality on the basis of origin, obligation and sanctions, content and sphere of validity. When it comes to origin, law differs from morality in that it is created by the state, that is, it is institutionalized and formally prescribed. On the other hand, morality is a form of social consciousness, and it consists of unwritten rules of behavior. In terms of obligation and sanctions, the difference is reflected in the fact that legal norms are formally binding, bearing in mind that their implementation is ensured by the state through coercion, while moral norms are not formally binding, since their implementation is not sanctioned by the state, but their respect is ensured by the action of conscience and public opinion. Starting from its content, the difference is reflected in the fact that law mainly relates to external behavior, and moral norms – mainly to internal attitudes and intentions. When it comes to the sphere of validity, law regulates certain, legally relevant relationships, often only those important for maintaining public order, while morality has general importance, as it relates to the overall behavior of individuals in society.

### 3. THE MORAL COMPONENT OF LAW

The moral component of law refers to the ethical principles and values that underlie legal norms and influence their creation, interpretation, and application. It is the link between what is “legal” and what is “right” or “just.”

The fact that law has a moral component does not mean that everything that is legal is also moral, but it serves as a criterion for reviewing legal norms and their justice. When law is separated from morality, it can become a means of injustice (e.g., apartheid laws). The moral component of law appears most clearly in borderline situations - when formal law conflicts with what we understand as morally right. It is precisely these cases that show why an ethical analysis of law is needed, and not just a technical interpretation.

Morality distinguishes good from evil, and law often incorporates this division in determining what is permissible and what is not. Thus, for example, murder is prohibited not only as a legal act but also as morally unacceptable. Legal systems often aim to protect human dignity, which is a moral value.

Understanding the moral component of law is essential for anyone involved in law, politics, philosophy, or other related fields. It is especially important for those who apply the law, whose work should be imbued with moral responsibility, to understand these relationships. They need to perceive the broader context of legal norms and their application, as well as to develop an ethical relationship to law. This will help them to understand how legal norms arise, how they are applied, and how they may evolve.

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8 R. Lukić, *Teorija države i prava: Teorija prava*, [Theory of state and law: Theory of law], Zavod za udzbenike i nastavna sredstva; Beogradski izdavacko-graficki zavod, 1995, p. 31.

Discussing the moral character of law, Kelsen states: "By presenting law as a sub-field of morality and leaving it unclear whether this simply means the obvious requirement that law should be morally shaped, or whether it means that law, as a component of morality, actually has a moral character, one attempts to give law the absolute value that morality demands."<sup>9</sup>

Every law is related to morality in some sense, which indicates the need for moral justification of norms. First of all, the reasons for moral justification of legal norms depend on several factors. In certain social circumstances, in which morality cannot fully ensure a just and stable social order, the establishment of an adequate legal system is a moral imperative. The ultimate goal of law is to ensure a just and prosperous society. Then, every legal order must take into account moral convictions in order to be accepted and effective. Although every legal system strives for moral obligation and has a need for moral justification, the legitimacy of law nevertheless differs from the rational justification of moral norms. Also, the legitimacy of legal norms is not based only on moral arguments, but also takes into account the criteria of efficiency and practicality.<sup>10</sup>

Moral practice cannot rely only on moral norms, but also requires adequate human activities and actions that motivate people to behave in accordance with the stated norms. The goal of achieving a just and functional social life requires the ability to connect moral and legal norms into a single whole.<sup>11</sup>

A society based on justice is possible only when a relationship of interdependence between legal norms and morality is established. Morality fulfills its role by strengthening the application of legal norms while preventing abuse. However, the risk of abuse of legal norms through the prism of "moral justification" is always present.

A moral position differs from an immoral one in the level and degree of foundation, argumentation, principle, and consistency of the position being advocated. It follows from this that disrespect for deeply rooted moral principles can threaten the survival of society as a whole.<sup>12</sup>

The problem of the stability of the legal order is simultaneously a problem of morality and different understandings of virtue. The instability of the legal order is very often caused by a conflict of moral values. In developing awareness with the aim of maintaining the stability of the legal order, it is clear that there is a moral obligation to obey values, but not a moral obligation to obey laws regardless of their content. Therefore, it is precisely this content that governs us, and not the proclaimed sanction highlighted in the legal norm.<sup>13</sup>

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9 H. Kelsen, cit. work, p. 25-26

10 Peger, K., cit. work, p. 59-78.

11 Pavićević, O., & Bulatović, A. (2015). Moralne osnove društvenog poretka i kriminal [Moral foundations of social order and crime]. *Zbornik Instituta za kriminološka i sociološka istraživanja*, 34(1), p. 25.

12 Trajković, M. (2011). Moralna komponenta ljudskih prava [The Moral Component of Human Rights], *Zbornik radova Pravnog fakulteta Novi Sad*, 45(1), pp. 257–269.

13 Trajković, M. (2018). Vrednosti koje utiču na stabilnost pravnog poretka [Values that influence the stability of the legal order]. *Vojno delo*, 70(7), 80-90.

#### 4. THE MORAL ASPECT OF JUSTICE AND FAIRNESS

Morality is an instrument for ensuring justice and fairness. Justice is an ethical principle that implies fairness and equality in treating everyone. It denotes the aspiration to create a state in which everyone's rights are respected and protected. It is a moral ideal that refers to the fair distribution of rights and obligations in society. Justice is a goal that the creators of legal norms should strive for, but which is rarely fully achieved. It manifests itself through fair treatment of all subjects and ensuring that everyone is given what is due to them according to regulations and moral norms.

Law is considered morally justified if it serves to achieve justice. This implies: equality before the law, a fair distribution of goods and obligations, as well as the protection of the fundamental rights of individuals. Many legal systems are based on the idea that every person has innate dignity and moral value. This results in the protection of human rights, as well as the prohibition of torture, discrimination, slavery, etc.

Speaking of justice, Kelsen states: "As a moral category, law means justice. It is the expression of an absolutely correct social order; an order that perfectly achieves its goal by satisfying everyone. The desire for justice is – psychologically speaking – the eternal human desire for happiness, which they cannot find as individuals and therefore seek in society. Social happiness is called *justice*."<sup>14</sup> Kelsen further states: "If justice existed in the sense in which its existence is usually invoked when one wants to assert certain interests over others, then positive law would be completely superfluous, and its existence completely incomprehensible."<sup>15</sup>

Equity is a specific aspect of justice that applies to individual cases. If the ultimate goal sought is that justice be done to all, then equity is a means to that end. Equity refers to the application of justice to specific situations, taking into account the specific circumstances of each case. It involves striking a balance between the rigid application of the law and the need to adapt legal norms to specific situations in order to take into account moral principles. Fair treatment within the legal system helps to achieve justice for all. In legal terms, equity refers to the fair and impartial application of the law. Equity requires the adaptation of general legal norms to the specific circumstances of each case in order to achieve a just end. This means that the application of the law takes into account the specific characteristics and context of each case, ensuring that the rules are not applied rigidly, but with understanding and a sense of justice. Fairness in the application of law is essential for building citizens' trust in state institutions.

Justice and fairness are closely related concepts, often used interchangeably and with similar meanings, although there is a certain difference between them. This difference is subtle but significant, and often depends on the context in which they are used. Emphasizing justice aims for formal equality before the law, while fairness implies striving for ethical fairness, taking into account the different circumstances and needs of individual subjects. Thus, both concepts are based on issues of morality and on the respect for equality and impartiality. Justice and fairness imply that all people are treated equally and that decisions are made without bias. Both justice and fairness are essential for maintaining social order. Justice involves the application of the law in a way that is equal for everyone, regardless of personal circumstances. In practical terms, fairness involves treating people in a way that is

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14 H. Kelsen, cit. work, p. 26.

15 H. Kelsen, cit. work, p. 28.

fair given their specific circumstances and needs, which may mean treating different people differently. For example, from the perspective of justice, all lawbreakers should be treated equally, while equity requires that all circumstances that influence whether a sentence is lighter or heavier (mitigating and aggravating circumstances) be taken into account, in particular: the degree of guilt, the motives for the crime, the circumstances under which the crime was committed, the perpetrator's previous life, etc.

The relationship between morality, justice, and fairness is dynamic and interactive. Law should be based on morality and principles of justice, while fairness encourages the flexible application of those principles in specific cases. This relationship ensures that the legal system is not just a set of inflexible rules, but a living structure that can adequately respond to the diverse challenges and needs of society. For the well-functioning of the state, it is important to establish a balance between legal norms and individual circumstances, as well as between legal justice and moral fairness.

Understanding the moral aspect of justice and fairness helps to develop a sense of what is morally right and encourages individuals to be active participants in creating more just relations in society. This knowledge leads to critical thinking and to more easily distinguish when something is just and fair, and when it is not. Respect for the principles of justice and fairness is crucial for public trust in the legal system.

## 5. CONCLUDING CONSIDERATIONS

When we talk about the moral basis of law, we mean a set of ethical principles that justify the existence of legal norms, their validity and application. The moral basis of law refers to everything that makes law legitimate, that is, what makes a system of rules of conduct in a society justified.

The moral basis of law is based on the idea that law must not be just a system of formal rules but must serve justice, dignity, freedom and the common good. This basis is based on the view that people should be treated as rational and morally responsible beings. This means that people should have freedom of choice, but also be responsible for their actions. Law that contradicts these moral values, no matter how modern, can be unethical and illegitimate.

Law is not neutral, but often reflects the interests of certain groups. Therefore, the moral basis of law must be critically examined in the context of social justice and real equality. A law that formally offers equal rights but in practice favors certain groups of people cannot be morally justified, even if it is legitimate.

Law has a moral dimension, but it is not its necessary basis - but one of its elements. Law is not necessarily the same as morality. Positive law can be in accordance with morality, but this is not mandatory. It gains legal force through legal form and legal procedure, not through moral content. Although the law is valid independently of morality, law should strive for moral values, especially justice.

Morality appears as a measure of value and as the goal of law, but not as a condition for its validity. Morality serves as a criterion for reviewing the expediency of legal norms and their justice. The ultimate goal of law is to ensure a just and prosperous society. The creators of the legal order must respect moral convictions in order for it to be accepted and effective.



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## МОРАЛНИ ОСНОВ ПРАВА

### Апстракт:

У раду се анализира сложени однос између права и морала. Циљ рада је да се кроз критичку анализу различитих ставова истражи у којој мери право мора бити морално утемељено, односно у којој мери морал чини саставни или нужни елеменат права, као и какве последице тај однос има по легитимитет и ваљаност правних норми. Питање односа права и морала постаје актуелно у случају регулисања морално спорних друштвених појава, као и у случајевима када позитивно право противуречи владајућем моралном схватању друштвене заједнице.

Аутори указују да се морална компонента права односи на етичке принципе и вредности који стоје у основи правних норми и утичу на њихово стварање, тумачење и примену. Све што је правно, не значи и да је морално. Морал служи као критеријум за преиспитивање правних норми и њихову праведност. Када се право одвоји од морала, може постати средство неправде.

**Кључне речи:** право, морал, легитимитет, правда, правичност.

### REFERENCES

1. Kelsen, H. (1934). *Reine Rechtslehre* [Pure theory of law]. F. Deuticke.
2. Lukić, R. (1995). *Teorija drzave i prava: Teorija prava* [Theory of state and law: Theory of law]. Zavod za udzbenike i nastavna sredstva; Beogradski izdavacko-graficki zavod.
3. Pavićević, O., & Bulatović, A. (2015). Moralne osnove društvenog poretka i kriminal [Moral foundations of social order and crime]. *Zbornik Instituta za kriminoloska i socioloska istrazivanja*, 34(1), 23–41.
4. Peger, K. (2005). Pravo, moral i vrlina [Law, morality and virtue]. *Anali Pravnog fakulteta u Beogradu*, 53(2), 59–78.
5. Radbruch, G. (1946). Gesetzliches Unrecht und übergesetzliches Recht [Statutory injustice and supra-statutory law]. *Süddeutsche Juristen-Zeitung*, 1(5), 105–108.
6. Radbruch, G. (2006). *Filozofija prava* [Philosophy of law]. Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu.

7. Trajković, M. (2011). Moralna komponenta ljudskih prava [The moral component of human rights]. *Zbornik radova Pravnog fakulteta, Novi Sad*, 45(1), 257–269. <https://doi.org/10.5937/zrpfns45-0012>
8. Trajković, M. (2018). Vrednosti koje utiču na stabilnost pravnog poretka [Values that influence the stability of the legal order]. *Vojno delo*, 70(7), 80–90. <https://doi.org/10.5937/vojdela1807080T>