ROCZNIKI FILOZOFICZNE
Tom LXXII, numer 3 – 2024
DOI: https://doi.org/10.18290/rf24723.12

JORGE SANCHEZ-PEREZ

TOLERATION OF EVIL AND THE FRAGILITY OF LAW

> Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all.
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> Adam Smith, *The Wealth of Nations*, bk. 5, chap. 1, "On the Expenses of the Sovereign or Commonwealth," sec. 2, "On the Expense of Justice"

INTRODUCTION

In this paper I argue that the connection between the toleration of evil and the fragility of law is not as direct as some might consider. Instead, I posit that perhaps we should look at the loss of faith in a legal order as a reason for its collapse. The paper has four sections. In section 1, I defend the view of law as a social phenomenon, through the lens of legal positivism. Here, I compare the two dominant strains of legal positivism, one proposed by Hans Kelsen and the other endorsed by Herbert Lionel Adolphus Hart. The section concludes by siding with the latter due to its capacity to explain better the phenomena known as the law within a social context. In section 2, I discuss the idea of political communities, their relationship with the institutions known as governments and moral commitments. I follow a view of

JORGE SANCHEZ-PEREZ, PhD, Assistant Professor at University of Alberta, Department of Philosophy; correspondence address: Department of Philosophy, University of Alberta, 2-46 Assiniboia Hall, University of Alberta, Edmonton, AB T6G 2E7, Canada; e-mail: jsanchezperez@ualberta.ca; ORCID: https://orcid.org/0000-0001-7990-1191.

moral commitment in line with Wil Waluchow's work, allowing further understanding of the connection between morality and law.

In section 3, my discussion focuses on the practical issue of the toleration of evil as a common practice in political communities. Considering a few theoretical and historical examples, the paper shows how the practice is not only possible but more recurrent than some might like to acknowledge. In the final, fourth section I discuss the idea that toleration of evil does not seem to be a problem for legal orders. Instead, one ought to consider the breaking of expectations as a possible better explanation for the collapse of a legal order. The paper concludes by providing a current example based on the threats faced by the current rules-based international legal order.

LAW AS A SOCIAL PHENOMENON

To talk about the relationship between the toleration of evil and the fragility of law demands the establishment of some parameters. The first one comes in the form of the most fundamental methodological question to address beforehand: *What notion of law does the author have in mind?* In this paper, as a way of methodology, I will work within the paradigm of legal positivism.[1] This approach to law embraces the thesis that law and morality can be conceptually and practically separable. The reader should not read from this claim that law and morality are necessarily separated but that "the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content, and meaning of valid laws."[2] In other words, just because one can claim to be able to conceptualize law separately from morality it does not follow that "law and morality are always separate" since "[s]eparability does not entail separateness."[3]

[1] By reducing my methodological scope to these elements, I am wilfully choosing not to engage in a debate with currents attempts to revive Dworkinian ideas of law, and some forms of natural law that mostly speak to US-based interpretations and experiences of the law. To see some of these ideas I recommend the recently published *Law is a Moral Practice* by Scott Hershovitz (Harvard University Press, 2023). In this sense, I am endorsing the view held by Matthew Kramer who claims that "[t]hough legality and morality are of course combinable, they are likewise disjoinable. Attempts to deny as much—attempts to establish the intrinsically moral import of law—will all turn out to have run aground"; see KRAMER, *In Defense of Legal Positivism* (Oxford: OUP, 1999, 1).

[2] W. J. WALUCHOW, *Inclusive Legal Positivism* (Oxford: OUP, 1994), 2.

[3] KRAMER, *In Defense of Legal Positivism*, 2.

Although the previous paragraph does reduce the scope of inquiry, there is more to be said about legal positivism and how is conceptualized within the tradition. Hans Kelsen and H. L. A. Hart are two key figures in the positivistic tradition who, although shared the view that, at its core, the separation between law and morality is fundamental, also held somehow competing understandings of law.[4] On the one hand, for Kelsen, law could be understood as a system of norms that allows us to interpret world facts under a particularly socially relevant scheme. When one studies law, for Kelsen, one studies the propositions "which make certain acts legal or illegal".[5] And if one looks for ways to assess the validity of a norm, then one ought to keep in mind that "the objective validity of a norm which is the subjective meaning of an act … does not follow from the factual act, that is to say from an is, but again from a norm authorizing this act, that is to say, from an ought."[6] Of course, this chain of norms being authorized by other norms could lead to an infinite regression. Kelsen solves this by reasoning that, eventually, one must accept the existence of the presupposed norm that grounds all the others.

This norm is what Kelsen calls *the basic norm* and is a logical assumption one must embrace when approaching law.[7] At its core, the positivism that Kelsen has in mind is one where the focus ought to be on meaning and connections between propositions. In other words, Kelsenian positivism deems the law to be a logical system of norms imposed on a world of facts and where validity is derived from theoretical assumptions.

On the other hand, Hart's view of law seems to go beyond logical internal restrictions and embrace a larger social perspective. Hart claims that in Kelsen's view, a proper study of law would demand to draw elements only from law itself. Defining or analyzing legal concepts in a way that avoids using moral, political, or psychological elements that are not part of the legal material is always part of the Kelsenian project.[8] As he mentions in his analysis of Kelsen's views, without referencing social goals and standards, a norm that creates a fine and another that establishes taxes would take the same

[4] It is worth mentioning that each of them held incredible influence in different realms of legal practice across the globe. Kelsen being the key figure of study in most places where Civil Law is practiced, while Hart being the one to largely influence those who are part of the Common Law world.

[5] Hans KELSEN, *Pure Theory of Law*, trans. Max Knight (Los Angeles: University of California Press, 1967), 4.

[6] KELSEN, 8–9.

[7] KELSEN, 195.

[8] Herbert L. HART, *Essays in Jurisprudence and Philosophy* (Oxford: OUP, 1983), 297.

logical structure and, therefore, be indistinguishable from each other.[9] For Hart, a legal order cannot be understood without other social elements from our larger social world. As Leslie Green notices,[10] this is the reason why Hart calls his seminal work *The Concept of Law* "an essay in descriptive sociology".[11]

This embeddedness of law in a larger social structure could help explain why, when faced with questions of validity, a Hartian analysis would push us towards acknowledging that the ultimate rule of the system is that of recognition. This rule of recognition is a shared practice among courts, officials, and private persons.[12] The Hartian version of positivism views law as a social system that deems the law to be part of a larger set of social systems in place and where validity is derived from social practices and community-accepted standards.

This distinction in approaches, in all fairness, was not foreign to Kelsen himself. For him, the goal of analytical jurisprudence was to develop a "juristic theory" meant to tell us how to approach law to make law a "system of valid norms".[13] On the other hand, the goal of the sociology of law—here Kelsen follows, even if partially, Max Weber—is to investigate what actually happens in a society whose members embrace a certain order.[14] Following Joseph W. Bingham, Kelsen considers that the study of law by teachers, students, investigators, and lawyers is the study of a phenomenon from the perspective of those not involved in the apparatus that creates such a phenomenon. In other words, since the only one that makes laws is the government, those outside the government study a phenomenon independent from everything else but itself. In other words, they do it from an outsider's perspective.[15] For Kelsen, then, what Hart does would be closer to sociology of law than it would be to analytical jurisprudence since it is not developing a full theory of how to separate law from the society, that Hart considers, it is a part of and, it is not necessarily telling us how to shape such law but explaining it as social practice.

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[9] HART, 299.

[10] I find Leslie Green's introduction to the third edition of *The Concept of Law* to be a great example of Hartian scholarship and would recommend anybody interested in Hart's views to take it as a point of departure.

[11] Herbert L. HART, *The Concept of Law* (Oxford: OUP, 2012), vi.

[12] HART, 107.

[13] Hans KELSEN, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1949), 162.

[14] KELSEN, 175.

[15] KELSEN, 164.

Although perhaps a long-winded introduction, this framework of reference to talk about positivism is important to make sense of the different elements of this paper. Fundamentally, by setting this paper within the Hartian tradition of legal positivism, I am embracing a view of law that, if analyzed separately from a larger context of social practices and expectations, would probably fail to give us proper answers when considering questions that involve things such as the use of moral labels like *evil*, and the relation of that label with questions about the fragility or instability of law itself. Those questions will be the focus of the following sections.

1. COMMUNITIES, GOVERNMENTS, AND MORAL COMMITMENTS

Suppose one embraces a Hartian view of law. In that case, one possibly accepts, by extension, the view that law occurs as a social practice and is not necessarily separated from other social practices, such as morality. But none of these practices occur in a vacuum. As it is obvious for many, they occur in what we commonly know as the state. The state, for Kelsen, is a kind of corporation—the latter understood as "a group of individuals treated by the law as a unity, namely as a person having rights and duties distinct from those of the individuals composing it".[16] But, unlike others, the state is a community created by a national legal order,[17] and the study of the limits of each legal order is precisely the problem that theory of the state, which Kelsen deems as a subset of the theory of law, must solve.[18] In Kelsen's view, to simplify debates about the state, one must embrace it from a "purely juristic point of view", thus understanding it "only as a legal phenomenon".[19]

As it was made clear in the previous section, the Kelsenian position is not favoured in this paper. Precisely because in cases dealing with entities like the state, the solution provided by Kelsen is to reduce many of its complexities away to make it another kind of legal phenomenon instead of understanding it as the sometimes perplexing social reality that it is. Instead, and following the Hartian approach previously stated, my preferred option is to consider the state as a political community. By political community, I mean *a set of practices among members where those practices are mediated by institutions that partake in the effort to implement some form of respect of*

[16] KELSEN, 98.
[17] KELSEN, 181.
[18] KELSEN, 182.
[19] KELSEN, 181.

social norms to regulate relevant moral and political affairs.[20] In this way, the law will play a role as a set of social norms within the political community, but it does not necessarily hold the political community together, nor does it necessarily create it. Alongside the law, two other elements need to be identified to support the analysis of this paper—these are government and moral commitments.

When talking about a government, and in accordance with my previously stated definition of a political community, I am referring to the institution created via social norms meant to implement some form of respect of social norms to regulate relevant moral and political affairs. Of course, such an institution does not need to be created by appeal to law. Both morality and religious claims could be the reason behind such creation. In this sense, governments can be understood beyond reducing them to legal phenomena. Furthermore, it becomes easier to understand such governments in connection with moral commitments. By moral commitments I understand, following Waluchow, those moral views that a moral agent, the political community via their government in this case, has truly committed themselves to follow.[21]

There is no particular set of moral commitments that one can claim are necessary for any society and, by extension, any government to embrace for them to exist. In that sense, I want to remind the reader that I am not giving a moral theory here. My goal here is to merely analyze the relationship between things such as moral commitments that one could label as evil and the fragility or instability of law itself. For that reason, I am simply stating that social institutions such as governments could, in light of their role as mediators between members and social norms, point towards things that we could call evil moral commitments.

Against this position one could claim that no government could exist without a clear commitment to things such as the rule of law. This position would not only be naïve but would go against some important and easily identifiable facts about things such as the rule of law. The rule of law, as a moral commitment, is understood here roughly as the existence of a system of rules that allow for the expectations of members of a political community when dealing with social institutions to be properly shaped. In this sense, this moral commitment is not a condition for the existence of a political

[20] For a full defense of this account, please see my "Global Justice, Indigenous Knowledge, and the Epistemic Merits of Institutionally Embodied Moral Intuitions," in *Law, Morality and Judicial Reasoning: Essays on W. J. Waluchow's Jurisprudence and Constitutional Theory* (Berlin: Springer, 2024).

[21] W. J. WALUCHOW, *A Common Law Theory of Judicial Review* (Cambridge: CUP, 2007), 224.

community or a government. According to Jeremy Waldron, the rule of law is "one of the most important political ideals of our time" alongside things such as "human rights, democracy, and perhaps the principles of free market economy".[22] But even if authors such as Waldron defend the value of moral commitments like the rule of law, it would be hard to find such a commitment as a pre-condition of the existence of the social phenomenon known as political communities.

The reason behind this assertion is simple: we have had, and still have, groups that have embraced heinous moral views and who, by all accounts of the previous definition I provided, qualify as political communities. When Waldron talks about "our time", it is clear that he is not embracing a naïve view that ignores that the large majority of political communities throughout history have not, in fact, endorsed such a moral commitment.

In the following section, I will provide a brief set of examples of political communities that have endorsed things that most people nowadays would deem evil moral commitments, alongside some critical considerations about those cases. The list is not exhaustive but will show how tolerating evil might be the rule rather than the exception when dealing with political communities.

1. TOLERATION OF EVIL AS COMMON PRACTICE

Let me go back to the initial Adam Smith's claim about government that precedes the text of this paper. In Book 5 of his classical work *The Wealth of Nations*, Smith provides a rational reconstruction of how civil governments came to be. Although interesting, my focus here is on the elements that, for him, are moral commitments that one could attribute to the societies he analyzes. A key element to consider here is that Smith does not assess the moral correctness or truth of the commitments he attributes to such societies's governments. He only describes what he thinks is sometimes implicit when approaching such cases. He states, "[w]herever there is great property there is great inequality," and based on this, rich people are not safe around poor people, whose poverty is a condition for the wealth of the former. In such a scenario, only the civil magistrate's protection as a government representative can guarantee the accumulated wealth to remain in the same hands. For

[22] Jeremy WALDRON, *Thoughtfulness and the Rule of Law* (Cambridge, MA: Harvard University Press, 2023), 35.

that reason, civil governments and their expansion are likely a consequence of the growth and accumulation of property.[23]

In the description provided by Smith, we have a government committed to some form of discriminatory view of society where some people could be deemed more deserving than others of the protections provided by the political community because of their wealth. In that case, it would be clear that on contemporary dominant understandings of our moral obligations, such a moral commitment would be deemed incorrect, and many societies could be deemed immoral for holding them. Yet, it would be hard to deny that many societies did seem to share, even if partially, the commitment described by Smith. Futhermore, they probably held such commitment for centuries.

Problematic moral commitments such as the previous one can be seen throughout history. Look, for example, at the explicit moral commitment to reduce the intrinsic value or humanity of black people in the United States of America. Not only did they, at the time of their founding as a republic, develop a large part of their system to promote and preserve slavery, but even allowed owners to count each enslaved person as three-fifths of a free person for the calculation of the number of seats in the House of Representatives. This rule was enshrined in their constitutional document, making this disgusting moral commitment even more blatantly obvious. This kind of moral commitment to racial discrimination did not, of course, die out in the twenty century.

A move into contemporary history provides us with perhaps the most classical case of abhorrent moral commitments adopted by a society. What I have in mind is the commitment to establish the superiority of the Aryan race by the government of Germany between the 1930s and 1940s. This moral commitment can be identified via two of the most famous laws passed by that government: the Reich Citizenship Law, which allowed only "pure Germans" to hold citizenship, and the Law for the Protection of German Blood and German Honor, which aimed at preventing "racial disgrace" by forbidding relations between Jewish people and Germans. The obscenity of these kinds of commitments is blatant, yet history is rife with them.

I think it is only proper now to go beyond Western history and provide a current example of problematic moral commitments of a government. In this case, I can mention the case of Peru, a country ravaged by an internal armed conflict between the 1980s and 1990s. During that time, the Peruvian army,

[23] Adam SMITH, *The Wealth of Nations: An Inquiry Into the Causes of the Wealth of Nations*, ed. Edwin Cannan (New York: The Modern Library, 1965), 670.

while fighting the Marxist guerrilla Shining Path, committed several atrocities against a mostly Indigenous civilian population. To prevent those who committed criminal acts from facing repercussions, the government of the then-dictator Alberto Fujimori passed Amnesty Laws No. 26479 and No. 26492. Both laws were meant to protect all members of the police and military forces from facing a criminal court for their acts during the internal armed conflict. These laws, meant to prevent prosecution of crimes against humanity, were deemed incompatible with international law by the Inter-American Court of Human Rights in 2001. However, by early July 2024, laws with the same goal were recently passed by the now extremist and right-wing-controlled parliament of the country with the support of the puppet executive branch. A moral commitment against what we would nowadays call basic human rights standards can be identified in this case.

What all the previous cases have in common is the existence of moral commitments that we should, rightly so, call despicable. Yet, their existence seems undeniable. Political communities from the present and the past, and from different parts of the world, have embraced positions that we would call evil. If that is accepted as a fact, it would be hard to deny that most of our social systems, of which governments are a manifestation, often coexist with evil. As per the Hartian view espoused in the introduction, this claim also includes the social system known as the law. What is, if any, the relationship between legal orders that not only tolerate evil but, in some cases, as the ones discussed in this section, are actively committed to it?

2. THE FRAGILITY OF LEGAL ORDERS IN THE FACE OF EVIL

As institutions within political communities, governments are part of a complex set of social relations involving legal orders. Suppose a government, commonly the institution in charge of producing and enforcing most regulations meant for community members, tolerates or even endorses some form of evil moral commitment. What impact does this have on a legal order? The relevance of this question resides in the possibility of understanding what could bring a collapse of a legal order and, thus, destabilize an entire political community. My previous statement should not be understood as a radical view about the connection between laws and political communities. Although legal orders cannot be understood without other social elements

from our larger social world, it would be too hard to defend the claim that the rest of the social world would not function without the law.

Joseph Raz stated that it is quite common to reference groups of rules. For example, one speaks of "the rules of cricket or tennis or chess, of the rules of the university dramatic or debating society, of the regulations and rules of British Rail or Barclays Bank, of the rules of etiquette or the code of chivalry, or of the rules of morality, of the morality of the British working class during the nineteenth century."[24] If one embraces the point of view of normative theory, then "groups of rules are of interest only if the fact that the rules form a group is normatively relevant, if it has normative consequences."[25] If we follow Raz, one can think of religious and moral rules as existing alongside legal ones. That is, we face a social complexity that must acknowledge the coexistence of different kinds of normative orders. Of course, he claims that what makes law special is that, in comparison to other systems of its kind, law is "the most important type of institutionalized systems in the modern world".[26]

If we follow Raz, and I think we should here, it can be granted that law is the most institutionalized entity of its kind. Yet, this still does not entail that law is a necessary condition for the existence of a political community. If that is the case, then it is possible to conceptualize a society where, even in modern times, if a legal order fails, other normative standards could take the role that the law holds. This thought experiment allows us to consider that legal orders can be fragile even though we are so used to living with them. This fragility needs to be considered and studied because, even if societies can exist without a legal order, the lack of such could still make the lives of many more complex than neccesity dictates. In the following paragraphs, I will provide some examples of the fragility of a legal order I have in mind.

There are at least two ways in which a legal order can be identified as broken. The most dramatic example of this rupture might be the changing of a rule of recognition altogether via things like a massive revolution or a conquest by a foreign power. Another, and perhaps more contentious, would be the change of the constitution. A constitution is perhaps the most agreed-upon cornerstone of the legal order of a political community. Constitutions usually hold some of the most basic normative commitments of political communities; in them, some of its most fundamental rules of organization

[24] Joseph RAZ, *Practical Reasons and Norms* (Oxford: OUP, 1999), 107.
[25] RAZ, 107.
[26] RAZ, 107.

are considered. Of course, constitutions needn't be written to be the kind of binding document that they are. The most clear case is the United Kingdom, a political community well-known for not having a written constitution. Yet, in whatever form they come, constitutions are well-regarded points of entrance to understanding legal orders and community commitments. To clarify what I have in mind as the breaking of a legal order, I will start with the radical case of change of rule of recognition via revolution or conquest and move towards change of constitutions.

What I consider a paradigmatic example of the radical change in legal orders that I have in mind is the one connected with the French Revolution. In the political community known as France, between 1789 and 1792, there was a dramatic shift in social standards. That community moved from what is known as the *Ancien Régime* towards what would eventually become the first French Republic. In Hartian terms, the radical change of legal orders came via the change of constitutions and the very switching of one rule of recognition for another. The system went from something like (a) Whatever the King, after being advised by his council, decided is the law; to something like (b) Whatever the National Convention decides is the law.[27] Although a perhaps old and radical example, it exemplifies that legal orders, even at the level of rules of recognition, can dramatically change in a rather short period of time. Another example of the fragility of legal orders I am trying to show is the collapse of the Nazi legal order in Germany. From the collapse of the regime known as the Third Reich, where Hitler's words were deemed as the ultimate test of validity for a law, we can clearly identify a move towards a system where Germany's legal order eventually depended entirely on the decisions made by the occupying powers after World War II. After providing these dramatic examples, I will address the perhaps not-so-clear case of breaking a legal order identifiable via the collapse of a constitution.

A common joke among legal theorists from the Global North was to falsely act surprised whenever a constitution was changed in different parts of Latin America. This attitude was informed by the fact that, from all regions of the world, Latin America does have the "most convoluted constitutional

[27] This follows Hart's analysis and his example of English law in his analysis of the foundations of a legal system: "Finally, when the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity." HART, *Concept of Law*, 107.

history".[28] As a scholar of Latin American origin, I found the jokes to point at something interesting about expectations of the law and the fragility of legal orders altogether. For example, according to the archives of its Congress, Peru has had sixteen constitutions since 1823. Ecuador, in the same vein, has had twenty constitutions. This number goes up to twenty-five if we consider the five constitutions designed and enacted during periods of wars of independence. In what could be considered an even more dramatic case, some authors attribute no less than thirty constitutions to the Dominican Republic.[29]

In the case of Peru, for example, the current constitution was designed under the rule of dictator Alberto Fujimori Fujimori. After some less-than-clear voting processes, it was enacted in 1993. This constitution was meant to replace the 1979 constitution, under which a lot of social turmoil occurred. A key component that ended up justifying this move was connected with the coup staged by Fujimori. The reasons for his coup were varied, but it is without a doubt that the 1993 constitution is still binding to this date, even though one could argue that it cannot be easily separated from the accusation of creating social conditions that are leading to social unrest, mirroring the conditions that justified the elimination of its predecessor.

Here, I will briefly mention that an important point of consideration is that Fujimori escaped Peru after his regime fell apart in the year 2000. At that point, he escaped to Japan, where, due to his Japanese citizenship, he avoided extradition to Peru. Eventually, he was arrested in Chile and later convicted of corruption and human rights abuses. He is considered one of the most corrupt presidents in the history of the world by some sources.[30] His corruption and human rights abuses still haunt Peruvian society to this date. Among the hideous crimes committed by his government was the forced sterilization of over 250,000 poor Indigenous women in the country.[31]

Going back to the point of the paper, the question I want to raise here is whether such a change of the constitution, as the one pushed by Fujimori, can be connected to the emergence of a different legal order. A key change between the two constitutions was how the laws were enacted. In the 1979

[28] Jose Luis CORDEIRO, "Constitutions around the World: A View from Latin America," *IDE Discussion Paper No. 164* (Institute of Developing Economies, July 2008).

[29] CORDEIRO, 6.

[30] "The World's All-Time Most Corrupt Leaders," *Forbes*, March 25, 2004, accessed July 3, 2024, https://www.forbes.com/2004/03/25/cx_vc_corruptslide.html.

[31] Thomas NICOLON, "Fight for Justice: Peruvian Women Sterilised Simply for Being 'Poor'," France 24, January 20, 2023, https://www.france24.com/en/tv-shows/revisited/20230120-victims-of-forced-sterilisation-in-peru-still-fighting-for-justice.

system, the legal order was subordinated to a bi-cameral structure where laws proposed by the lower chamber of Congress had to be approved by the higher one, the Senate. While according to the process established in the 1993 constitution, a single chamber passed whichever law it saw fit. The system's rule of recognition had changed, which can be inferred from the constitutional document. Although not every constitutional change necessarily leads to a change of the rule of recognition, it seems like in cases like the one of Peru, there was, in fact, a change of such a rule.

What the previous cases show is that legal orders can change. Evidence of this change seems easy to identify when discussing cases such as revolutions or conquests. However, even when the change comes from within, such as in a coup, there might be cases when new legal orders emerge due to the changing of the rule of recognition. Law is fragile, and most of the world, I dare say, has experienced this fragility. What is at stake here is the connection between such fragility and what we might call evil moral commitments and law.

What the *Ancien Régime*, the Nazi and the Fujimori regimes all have in common is that they embraced moral commitments we would probably call evil. The domination of people, the imposition of white supremacy, and the elimination of Indigenous people are all things we would call despicable and should, rightly so, be considered beyond acceptability in a decent society. Yet, none of those commitments seems directly connected with the collapse or fragility of the legal orders in question. Either the ones that were replaced, like in the case of the revolution, the conquest, or the system imposed like in the case of Fujimori's coup. The legal orders connected with those regimes seemed to provide means to deploy the morality of the pernicious commitments such governments had. Furthermore, even though a legal order can be fragile, there is little evidence that a legal order tolerating or promoting evil could lead to its demise.

Here is where a Hartian insight becomes a more useful tool for searching for an explanation of what leads a legal order to break. Hart, according to Shapiro, "showed that sanction-centered accounts of every stripe ignored an essential feature of law." This feature was the internal point of view of law and, from this perspective, "the law is not simply sanction-threatening, -directing, or -predicting, but rather obligation-imposing."[32] For Hart, many of the issues faced by those theorizing about the law arise from the fact that

[32] Scott J. SHAPIRO, "What Is the Internal Point of View?" *Fordham Law Review* 75, no. 3 (2006): 1157.

they are missing the perspective of the internal point of view. That is the position of those who "do not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and others' behaviour."[33]

It is here, I think, that we are in the face of better understanding the fragility of law. If legal orders can easily coexist with, if not expand on, evil moral commitments, then when approaching their collapse, perhaps we should ask, "Were there enough members of the community willing to *believe* the law was binding for their own and others's behaviour?" If the answer is no, then that might lead us to better understand the what is at stake. Perhaps it was not the immorality of the *Ancien Régime* that explains the collapse of the legal order of that time. Perhaps it was the realization of many that the social system under which they were living could no longer provide the certainties they were used to. In that line of thought, it seems like what might better explain what drives a legal order to the ground is that those who live under it no longer believe in it.

The reasons for this loss of faith in a legal order might be diverse. For example, the international legal order ensuing after World War II is often called the rules-based international order. This order, mostly imposed by the United States of America, has seen a large part of the Global South being dominated by rules that are aimed at protecting human rights and minorities insofar as that protection did not clash with the economic or geopolitical interests of the United States of America or its European allies. There is, without a doubt, a narrative about the nature of the order and what it means for many in the Global South.[34] However, the Western narrative about the current order's moral value remained stable for most of the last 70 years. During that time, if a conflict arose between the economic and geopolitical interests of the West and the moral commitment to human rights, the latter would be thrown out of the window. However, this would never happen openly, which is a key element.

Legal orders, even when intertwined with evil moral commitments, seem capable of enduring, but only when the expectations are not disrupted to the point when people lose *faith* in the system. This element might explain why the rules-based international order might be in peril. The expectations of a large part of the Global South are such that even when Western powers vio-

[33] HART, *Concept of Law*, 98.

[34] Gideon RACHMAN, "A 'Multipolar' World Defies the 'Rules-Based' Order," *Financial Times*, January 16, 2024, https://global-factiva-com.login.ezproxy.library.ualberta.ca/ha/default.aspx#./!?&_suid=172047492439504659779180388 1705.

late the rules of the order to favour their interests, they never do so openly. For that reason, the Global South is used to seeing countries like Israel ignore the more than 45 resolutions issued against it by the United Nations Human Rights Council since 2006.

However, things have changed since the invasion of Gaza in October 2023. According to Chris Gunnes, the former spokesman for the United Nations Agency for Palestinian Refugees (UNRWA), it is "the first time in human history that genocide has been broadcast live on television" ("Gaza War '1st Genocide Broadast Live,' Says Former UNRWA Official"). This situation, at least from my perspective, has led to a decline in confidence in the order. Not because the Global South is not used to evil coexisting with the rules-based international order but because the expectation has usually been that Western powers would not openly support those evil acts. Now that most Western powers have gone against the expectations of the order, the entire support, call it faith or inclination to believe, that was given to the order by the Global South faces tensions. It is possible to claim that given these radical changes in practice, openly supporting a blatant genocide, the rules-based international order went to Gaza to die at the hands of those who created it.

As a final question, a reader might ask how many community members must lose faith in the order before it collapses. When faced with the similar question of "how many of the group must in these various ways treat the regular mode of behaviour as a standard of criticism, and how often and for how long they must do so to warrant the statement that the group has a rule?" Hart claimed that these are not definite matters and that those issues should not "worry us more than the question as to the number of hairs a man may have and still be bald."[35] We know a bald man when we see them. In the same way, we will know when a legal order breaks because enough community members, whichever number fits the social account of the context, will stop regarding it as obligation imposing. Ideally, we would work towards preventing such collapse, but as current events seem to show, that seems to go against our instinctual belief that legal orders are strong and long-lasting.

[35] HART, *Concept of Law*, 56.

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TOLERATION OF EVIL AND THE FRAGILITY OF LAW

Summary

Given the reality of legal orders collapsing or breaking, this paper argues that a good explanation is needed to understand this phenomenon. It adopts a Hartian account of positivism and considers law as part of a larger set of social facts and orders. The paper analyzes the relationship between evil moral commitments and the law. It concludes by showing that it might be more conducive to analyzing the loss of faith in a legal system as an explanation for its collapse rather than thinking about problematic commitments to evil moral attitudes.

Keywords: toleration; evil; law; positivism; Hart; Kelsen; rules-based international order

TOLEROWANIE ZŁA I KRUCHOŚĆ PRAWA

Streszczenie

Biorąc pod uwagę rzeczywistość, w której porządki prawne upadają lub załamują się, przedstawiony artykuł dowodzi, że aby zrozumieć to zjawisko potrzebne jest dobre wyjaśnienie. Przyjmuje on ujęcie pozytywizmu w rozumieniu Herberta Harta i traktuje prawo jako część większego zbioru faktów i porządków społecznych. Autor analizuje związek między złymi zobowiązaniami moralnymi a prawem, konkludując, że bardziej korzystne może być analizowanie utraty wiary w system prawny jako wyjaśnienia jego upadku, niż myślenie o kłopotliwym przywiązaniu do złych postaw moralnych.

Słowa kluczowe: tolerancja; zło; prawo; pozytywizm; Hart; Kelsen; porządek międzynarodowy oparty na regułach