

DISCUSIÓN:
HEIDI HURD, COMBATE
MORAL: EL DILEMA
DEL PERSPECTIVALISMO JURÍDICO

*DISCUSSION:
HEIDI HURD, MORAL
COMBAT: DILEMMA
OF LEGAL PERSPECTIVALISM*

INTRODUCTION*

INTRODUCCIÓN

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Heidi Hurd's *Moral Combat* provides a powerful and sophisticated challenge to the most important theories of authority in contemporary legal philosophy. Over the past two decades, the book ignited a critical reflection on a dilemma that seems to haunt philosophers, legal scholars and legal practitioners. The conventional knowledge on the moral obligations of institutions seems to be construed around three principles (perhaps among others): i. the principle of weak retributivism, which holds that “individuals who are morally justified in their actions ought not to be blamed or punished for those actions”; ii. the principle of the rule of law, which requires fidelity to the law and its basic formal values such as “generality” and “coherence”; and iii. the principles of democracy and separation of powers, which establish “the right of majorities to be self-governing by assigning policy-making powers to a democratic legislature and restricting the executive and judiciary to the secondary tasks of policy implementation and application”.¹

The problem that Hurd addresses in the book is that the first principle cannot easily be reconciled with the second and the third. These two principles seem to assume the existence of perspectival obligations that are attached to judicial roles, which are by nature distinct

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¹ Heidi Hurd, *Moral Combat* (Cambridge 1999) 1.

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from the general moral obligations of ordinary citizens. The “role-obligations”, if obtainable, create a real problem for criminal adjudication. Judges would be morally obligated to punish agents who acted morally. If, for instance, a mother kills her husband, who habitually and reiteratedly abuses and beats her and her children, it might be the case, under certain circumstances, that this turns out to be a morally acceptable form of action. If the violent husband keeps them under home arrest and there is little chance to protect her and her children’s lives, perhaps it might turn out that a homicide is morally justified (or even morally mandatory) even if the legal defense of “self-defense” is unavailable in the current case.

Suppose there are no controversies, in the example above, that the mother acted morally but against the unequivocal meaning of the law. Where should this example lead us? If a judge is bound by democracy and the rule of law to apply the law, she may well be *morally* required to punish the mother even though there is no dispute that she did the morally correct thing at the time. Morality would pit us against each other in a sort of ethical nightmare: the judge only fulfils a role-related moral obligation by preventing a morally justified mother to fulfill her equally valuable obligation to protect her children.

Even if you do not like the example above, I hope that Hurd’s point is sufficiently clear: if role-obligations of political authorities differ from general obligations, we are exposed to situations in which moral conflicts will erupt, and different agents will have moral reasons to prevent others to comply with their own moral duties. Morality becomes an incoherent and dangerous practice.

To dismantle the dilemma, Hurd carefully analyses different moral conceptions (both on the deontological and on the consequentialist traditions) and the most important account of political authority, and concludes with a defense of an argument that was labeled as the “correspondence thesis”: *if an action is morally justified, no one is morally justified in preventing this action*. The correspondence thesis should lead us —and probably this is the most ambitious argument in the book— to deny the existence of role-related or perspectival obligations. Morality should speak with a single voice, and judges

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are not supposed to rely on role-specific considerations to deflect from their ordinary moral duties.

In this symposium to celebrate the twentieth anniversary of the book, we present five critical essays to engage with some of the central aspects of the book. In the first, Michael Moore and Heidi Hurd present a robust analysis of moral disagreement in action, with a reconstruction of the most plausible arguments from Moral Combat, and a conceptual framework to analyze them on the basis of HN Hohfeld's logic of rights. The second essay, by Vinicius Faggion, sides with Hurd's criticism of role obligations. After scrutinizing the recent literature on the topic, which can be divided into three classes about the possibility of roles being the ground for specific moral obligations (a strong role-generating thesis, a weak-generating thesis and a no-generating thesis), the author defends a version of the last thesis, which leads to skeptical conclusions about perspectival obligations and provides evidence of the plausibility of Hurd's position. In the third essay, Ronaldo Porto Macedo Júnior replies to an important criticism that Hurd addresses to Bernard Williams in the book. After revisiting Hurd's argument against William's "appraisal relativism" or "relativism of distance", the author undertakes an effort to show that despite Hurd's criticism Williams' argument is still capable to provide a philosophical explanation for the emergence of role obligations and a correlated set of moral conflicts. The fourth essay, by Saulo de Matos, criticizes the conception about morality that underlies Hurd's argument in favor of the correspondence thesis. The problem of this conception, for Matos, is that it presupposes a form of robust realism which fails to account for the relative indeterminacy of moral facts. A more promising moral theory would depend on a Wittgensteinian explanation of moral facts, which does not admit the existence of brute moral facts that are regarded as final and uncontroversial. According to Matos, Dworkin's interpretive developments in moral philosophy constitute a reliable candidate for this task. Finally, the fifth essay, written by myself and Thiago Decat, suggests that Hurd's correspondence thesis is vulnerable to a criticism that she anticipated in the book but, according to our argument, failed to provide a satisfactory response. If we accept that moral values may generate incommensurable reasons for action,

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and that certain roles —specified by social practices— generate specific moral requirements, then the possibility of genuine moral conflicts should not be easily dismissed. Based on Raz’s account of incommensurability, we argue that the way to deal with moral combats is not to claim that substantive moral considerations always (or at least typically) override institutional and practice-related or role-relative considerations, but rather to depart from the positivist concept of legality implicit in Hurd’s book.

It is an honor and a pleasure to engage with Hurd’s argument in this special section of *Problema*, which ends with a careful and detailed answer to these criticisms by the author. In her response, Hurd revisits her challenging and influential book after two decades of its original publication. I personally thank the board of editors of *Problema*, in particular Drs. Juan Vega and Sandra Gómora-Juarez, for supporting the publication of this symposium. I am sure it has the potential to ignite more relevant contributions to the important moral controversy that Hurd’s insightful book proposes to address.