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THE RELEVANCE OF THE LAW AND THE RELATIONSHIP BETWEEN LAW AND POLITICS

An Approach from the perspective of Carlos Nino*

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I. Introduction: The Dual Paradox

After determining the existence of a justifying and interpretive relationship between law and morality, the Argentine philosopher Carlos Nino detected two "apparent paradoxes that were derived from this link and that produced, as he explained, "the risk of converting law into something irrelevant in practical reasoning".[1] Both problems will be analyzed in this paper. Nino dealt with these problems on two occasions with arguments that did not coincide although they were not contradictory. The first of these two papers where he deals with them I have featured in a recent paper.[2] I will now, therefore, deal with the second one.[3]

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1 *C. Nino,* Derecho, Moral y Política. Una revisión de la teoría general del Derecho, Barcelona 1994, p. 130.

2 See *J. Cianciardo,* The Paradox of the Moral Irrelevance of the Government and the Law. A Critique of Carlos Nino's Approach, in: Ratio Iuris 25 (2012), pp. 368–380 (DOI: 10.1111/j.1467-9337.2012.00518.x). The first approach, in *C. Nino,* La paradoja de la irrelevancia moral del gobierno y el valor epistemológico de la democracia, in: Análisis Filosófico VI-1,1986. This paper was published again in *C. Nino,* El constructivismo ético, Madrid 1989, pp. 111–133. There is an english version with little changes: The Epistemological Moral Relevance of Democracy, in: Ratio Iuris 4 (1991), pp. 36–51.

3 Related with the expression "The Paradox of the Irrelevance", see *Á. Ródenas,* Sobre la justificación de la democracia en la obra de Carlos S. Nino, in: Doxa 10 (1991), pp. 279–293 and *id.,* Sobre la justificación de la autoridad, Madrid 1996, p. 226 and seq. See also *A. Greppi,* Consenso e imparcialidad. Sobre la justificación moral de la democracia en el pensamiento de C. S. Nino, in: C. Rosenkratz/R. Vigo (comps.), Razonamiento jurídico, ciencia del derecho y democracia en Carlos S. Nino, México 2008, pp. 221–259, specially pp. 232–238; *J. Raz,* Practical Reason and Norms, Oxford 1999, pp. 149–178 and *id.,* About Morality and the Nature of Law, in: American Journal of Jurisprudence 48 (2003), p. 1, and, finally, *id.,* Respect, Authority & Neutrality, in: Oxford Legal Studies Research Paper No. 30/2010.

The first paradox is that of the superfluous nature of law which Nino chooses to describe in these words: "If we must inevitably demonstrate that a legal regulation is founded on moral principles conceived as valid, why can we not also find the justification of that action or decision based directly on those same principles? Why is a government, with its laws, necessary when these same laws do not allow for the justification of an action or decision by appealing to moral principles?"[4] In fact, if laws coincide with these principles they are redundant, and if they do not, they are not worthy of examination.[5]

Nino believes that two unsatisfactory responses exist for this first problem. It could be sustained, as he indicates, that law resolves those cases possessing an indecisive nature due to their underlying morality and thus proves its relevance. "Yet it is not easy to see how the lapses of moral principles can be salvaged without turning to other moral principles."[6] That is to say, law, when attempting to resolve moral indecisiveness, cannot disregard morality because, as such, it would not be able to contribute to such a deliberation. The thesis expounded, therefore, would not allow for surpassing the irrelevance paradox previously formulated. On the other hand, according to a second possible response, the justification of laws "does not generally include substantial moral considerations but instead those of a procedural nature;[7] it is a justification that is limited to determining the conditions for the selection of political authorities and procedure under which these should act so that when these are satisfied, the resulting laws are justified."[8] Being thus so, the relevance of law, would reside in its capacity to resolve conflicts once this threshold is overcome under minimum conditions. Nonetheless, Nino sustains that "it is not easy to detect moral principles that take as an ultimate justification the adoption of certain procedures. First of all, the majority of democratic justifications are only procedural but later on do account for relevant procedures in the light of a fundamental asset like autonomy or utility, the materialization of which could occur independently of the procedure in question".[9] To sum up, the two most habitual

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See for a different approach, from the perspective of the "Incorporation Thesis", *K. Himma,* H. L. A. Hart and the Practical Difference Thesis, in: Legal Theory 6 (2000), pp. 1–43. See, from the perspective of Natural Law Theory, *M. Murphy,* Natural Law Jurisprudence, in: Legal Theory 9 (2003), pp. 241–267.

4 *Nino* (note 1), p. 130 f.

5 Ibid., p. 131.

6 Ibid., p. 132.

7 Ibid., p. 131 f.

8 Ibid., p. 132.

9 Ibid.

and immediate responses to the superfluous paradox do not surpass objection.

The second paradox also consists of a questioning of the importance of government and its laws. This has to do with a paradox caused by the "extreme indecisiveness" of law. Nino explains that if all the evaluative steps of interpretation are abstracted, the only "solid piece of information" that could condition the interpretive process consists of texts and behaviors, that is to say, graphics and body movement. "Given the general criteria options for interpretation used to provide such entities and events with meaning, the alternatives for overcoming the inexactitude or vagueness of these meanings, the variations for overcoming logical indecisiveness, the tests and behaviors in question can be associated with any propositional content , according to the evaluative principles taken in each step."[10] Without turning to extra-normative considerations (called "extralegal" by Nino) it does not seem possible to overcome the opacity of the texts which drives our author to question, once again, the relevance of Positive Law, "understood as linguistic acts, texts or practice, given that the proposals that we designate to them as meanings are going to depend on the evaluative principles we adopt. Why can we not directly turn to these evaluative principles in order to obtain the desired solutions, instead of making them appear as if they rise from the text?"[11] The interpreter could not do anything with law unless this interpretation was nurtured by the moral component. Indeed, the really significant aspect of this task ultimately lies here.

To conclude, if law possesses a justifiable relationship with morality then it is superfluous; and if it possesses an interpretive relationship, then it is irrelevant. The first of the paradoxes arises in the area of regulations and in the second one in the interpretation of these. It is actually a question of two manners of approaching the same problem or of two ways of questioning the contributions made by law to practical reasoning. Nino asserts that the existence of the aforementioned dual relationship (justifiable and interpretive) should resolve one or the other of the difficulties. It should ultimately attempt to provide support for the practical differentiating factor that law provides to morality. In its second approximation to the problem, which I will deal with in this paper, this Argentine author maintains that the solution lies in the acceptance of the existence of a direct relationship between law and politics.

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10 Ibid., p. 133.

11 Ibid., p. 133 f. See also *C. Nino*, Consideraciones sobre la dogmática jurídica (con referencia particular a la dogmática penal), México 1989, passim.

II. A Way Out of the Paradoxes

According to Nino, the two paradoxes previously described disappear if law is conceived as a collective practice (specifically, as a political practice). We will now see in what this conception consists of so that we can later examine its feasibility as an explanation of the importance of law.

1. Law as a Political Practice

In Nino's opinion, law is only truly understood as a collective act. Only from this viewpoint can its importance be explained. In order to develop this notion he proposes various analogies. Above all, he makes use of the comparison between the work of a legal operator and the participation of a musician in an orchestra. Nino sustains that a good musician obviously possesses his/her own criterion about how a quartet or symphony should be interpreted. "On the basis of this evaluation, the musician will judge the merit of the joint performance and if this evaluation differs from those of the other members there will be an attempt to convince them to adjust each contribution to the collective work, defending the original criterion."[12] If the musician were not to convince colleagues two things could occur: the decision not to participate in the work, or on the contrary, the decision to participate on the basis that its performance does have some value although not completely coinciding with personal taste. Nino continues by saying that "by saying this, it would be absurd that the musician in our example contributed solely on a personal appraisal".[13] In other words, if the musician was interested in achieving an effective contribution it would have to be adjusted to the aesthetic conceptions of the rest.[14] For this reason, Nino maintains "it is necessary for the musician to keep in mind the styles of the other musicians which are stamped on the performance and that will continue to be so throughout the performance. It may be that the work allows for some space whereby there exists the possibility of expressing one's personal vision thus bringing the joint performance closer to one's musical ideals. Nonetheless, one's personal conception will be limited by the necessities of a harmonious performance to the extent that he/she perceives its value and the impossibility of realistically participating in a collective performance that is as close as possible to one's personal aesthetics."[15]

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12 Ibid., p. 135.
13 Ibid.
14 See ibid.
15 Ibid.

From this example one sees, according to Nino, "that there is a specific rationality to participating in collective works. No matter the criterion or models defining what is ideal in the type of things or phenomena to which the work belongs, those models or criterion are modified when they are applied to an action contributing to a work without having an absolute control over it."[16] In these types of actions a new way of reasoning arises "since just as our contribution to a collective work is limited and we do not control the final product, the reasonable thing to do is to not choose the most justifiable model but instead another less worthy one. This type of reasoning, constrained in collective works by others' choices, could also be called 'second best' since quite often it leads us to progressive distancing from the ideal model, catering to its effects on the global work."[17]

Starting from this example and this conclusion, our author proposes the conception of the work of a legal operator as participation in a collective work.[18] The objective of that collective work – in which constituents, legislators, judges and administrators participate – "is the development of law that is in force as part of an even broader process, as found in the complex made up of practices, institutions, customs, cultural attitudes, and basic beliefs that define a society".[19]

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16 Ibid., p. 136.

17 Ibid., p. 137.

18 The connection between this idea and the well-known image of a "novel in chain sequence" proposed by Ronald Dworkin is evident. Although the study of this point exceeds my objectives in this paper, it is worth noting Nino's observations. According to what he says, his focus differs from Dworkin and the other authors in that "only part of the recognition of the fact of the legislators and judges' actions as deeds that are performed within a collective work whose other contributions cannot be controlled by them. This approach is perfectly compatible with the conclusion made by a judge or legislator on law already in force but precariously so and well worth revising. When all else fails it even justifies a situation of anarchy or of the disintegration of the existing legal order. What it basically takes into account is circumstances where what was previously in force is no longer an acceptable alternative and the need to conceive of the judge's decision as an integral part of a legal order, founded on a constitutional factor" (ibid., p. 138 f.). See *Ronald Dworkin*'s proposal in A Matter of Principle, Oxford 1986, pp. 146–166, and *id.,* Law's Empire, Cambridge (Mass.) 1986, pp. 228–238. In the first of these works Dworkin specifically states that his conception of the legal system as an interpretive exercise is "profoundly and completely political" (p. 146). The existing bibliography on this proposal is overwhelming. See *P. Zambrano,* Objetividad en la interpretación judicial y objetividad en la moral. Una reflexión a partir de las luces y sombras en la propuesta de Ronald Dworkin, in: Persona y Derecho 56 (2007), pp. 281–326.

19 See *Nino* (note 1), p. 137.

2. Legal Reasoning at Two Levels

Nino proposes acknowledging "the fact that legislators and judges' acts are performed within the context of a collective work in which the remaining contributions cannot be controlled".[20] This fact is independent of a legislator or judge's own opinion on the deficient nature of existing laws and the need to change or, if necessary, to disobey them. "What it simply takes into account is the circumstances by which if what previously exists is not an acceptable alternative, then the judge's decision must be considered within an integral part of a legal order, founded on a certain constitutional factor."[21] Said in a different way, what should be recognized is that "if the only way to make morally justified decisions is within the existing social practices, it becomes necessary to preserve the existing legal order, unless it is so unjust that it cannot be improved and the only morally justified decision leads to ignoring it even at the risk of not being able to successfully establish another one".[22] The author maintains, based on the preceding ideas that his proposed approach "reveals that legal reasoning has a phased structure at two levels":[23]

a) A primary or basic level, in which "the reasons that legitimize, or not, the social practice constituted by Positive Law are articulated".[24] At play here are "substantial and procedural reasons that allow situating that legal system in perpetual legitimacy".[25]

Returning to the analogy employed earlier on, at this level it would be a case of establishing whether the aesthetic criterion of the orchestra as a whole are reconcilable in general terms with those of the musician, going beyond the fact that they may not coincide entirely.

b) Once transcended this first level of legal reasoning (that is to say, once it has been concluded that the legal order is a legitimate one, despite not being perfect) one proceeds to a second level where there is "an attempt to apply the legal system in order to justify actions or decisions".[26] This second level is carried out within the context provided by the first level: "Justifiable reasons are excluded (...) incompatible with the preservation of positive law if that reasoning has revealed that it is

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[20] Ibid., p. 138.
[21] Ibid., p. 139.
[22] Ibid., p. 140.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid., p. 141.

more legitimate than any other realistic alternative."[27] For this reason, "a principle which has faultless credentials from the perspective of validation criterion implicit in our moral discourse can be, nonetheless, disqualified or excluded if it is necessary to preserve the enforcement of the legal system."[28] Once again, returning to the analogy, if the musician has found in that first phase of reasoning sufficient reasons to play in that specific orchestra it is possible that in the second phase it will be necessary to leave aside, at least to a certain extent, personal aesthetic criterion in the specifics of the piece being played. Moral principles influence on both levels. In the first level they act as a "final tribunal of appeals". In the second they acquire a decisive importance "in the measure that they are not incompatible with the conclusions reached in the first level".[29] They would otherwise, notes Nino, "be self-frustrating, since they neutralize the conclusions reached through their very own employment".[30]

Approaching this same theme from a different angle, it could be interpreted that Nino poses two fundamental questions: a) What is law for, in general? b) Why and for what does this law exist for this specific behavior or decision? The answer to the first question from this perspective conditions the second one. In my opinion it is a correct approach, despite the criticism which will be presented at the end of this paper, because it considers law as praxis and on that basis confers primacy to its ends.[31] The description of a human product – and Law is this – does not allow for its explanation. For example, the description of a clock (what does it consist of?): a sphere, two needles that turn at differing speeds, etc., does not allow for an explanation (what is a clock?). In order to give an account it is necessary to ask oneself why it was produced. In the same manner, a sole description of the legal phenomenon does not allow for an explanation, let alone, an understanding of it.[32] Understanding can only

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27 Ibid.

28 Ibid.

29 Ibid., p. 141.

30 Ibid.

31 See *F. J. De Lucas,* La pregunta fundamental. Una precisión metodológica, in Persona y Derecho 9, 1982, p. 121–125.

32 To this respect, see *S. Cotta,* El Derecho en la existencia humana. Principios de ontofenomenología jurídica, transl. I. Peidro Pastor, Pamplona 1987, pp. 21–28. Persona y Derecho 57 (2007), has dedicated an issue to this author and his thinking. Cotta notes: "when something occurs, the first suitable inquiry examines the objective pursued by the subject producing the act. This is the basis of the so-called teleological or finalist interpretation capable of clarifying the act produced by addressing the objective which was desired (…). Without a doubt, law (…) is a human cultural product, in its most common, simplified meaning of product: it is men that produce laws, sentences, contracts, etc., and they produce them to serve a specific objective and to apply countless specific cases" (op. cit., p. 21 f.).

be reached on the basis of considering the ultimate objectives of law as a practice. This and the connection between description, explanation, and understanding explain why, as Dworkin affirms, an answer to what are those objectives is found, at least in an implicit manner, in all those that participate in Law.[33]

Based on the foundations provided by these ideas, Nino proposes the rebuttal of the two paradoxes mentioned at the beginning of this paper.

3. Surpassing the Paradoxes of Irrelevance and Practical Reasoning

This Argentine author maintains that "the conception of positive law as a collective act extended over time to which the principles of justice and social morality should be applied instead of directly applying these same principles to each contribution to the practice, allows (...) to overcome the paradox of irrelevance in positive law in practical reasoning."[34]

In fact, "the reference to positive law cannot be ignored in practical reasoning aimed at justifying acts and decisions, since without that reference the application of moral principles and of justice have an inappropriate objective. The principles under scrutiny have as subject of evaluation, social practices like positive law, and not the acts of one isolated individual. Positive law, therefore, despite not providing the ultimate reasons for justifying acts or decisions – which are only provided in those principles independently accepted –, constitutes the object of reference of such reasons and an obligatory intermediate phase in practical reasoning that leads to a decision."[35]

With the previously cited analogy in mind, Nino's opinion of the social practice which constitutes law is not the aesthetic ideal of the musician used in the example – morality or moral principles – but instead the aesthetic criterion with which the band plays – positive law. Therein this Argentine professor's affirmation that obviating positive law would mean an error in purpose. The correctness of a decision that is taken in the context of a collective practice does not exclusively depend on the opinion of the person deciding but also on the criterion and principles that arise from this context. A well-known example made by Dworkin is that of the interpreter who wonders whether it is a demand or a prohibition

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33 See *Dworkin* (note 18), pp. 31–44 and 65–68.

34 See *Nino* (note 1), p. 145.

35 Ibid.

in a specific community to enter church with a hat. The answer to this question cannot be reached without the praxis followed until now by members of that community.[36] This praxis is the real objective of this specific inquiry. In an immediate sense, however, the personal opinion of the interpreter on the fairness or convenience of a norm of that nature is not. Said in other words, according to Nino, when the interpreter asks: How should I resolve a case?, in that same question there is a reference to positive law because it is impossible to be fair without bearing in mind the criteria for justice that society has accepted through it.

4. Surpassing the Paradox of Extreme Indecisiveness of Positive Law

This paradox is the result of the perception of the central role occupied by appraisements in legal interpretation. In Nino's opinion, "once we recognize that legal reasoning presents this phased structure and that the corresponding rationality is of the second best position then it is clear that moral and legal principles are not objective individual acts or decisions but instead acts and practices that are collective. Law, then, no longer seems to be a black, assimilating box by means of which any solution, no matter what our appraisements, is incorporated but instead a practice that includes conventional criteria for the interpretation of texts and other relevant legal material. This implies demonstrating that extreme indecisiveness of law is only assumed if we conceive of acts and decisions as if they were isolated acts and decisions."[37]

We will now regress for a moment in this discussion in order to understand better what Nino proposes. The paradox to be resolved could be synthesized as such: if legal interpretation is extremely indecisive and its determination can only be achieved through morality, then the question that follows is: Why Law? Why not, better yet, morality? Although Nino does not use these words, it is true that his proposal consists ultimately of the affirmation that legal indecisiveness is not extreme. That is to say, not any legal interpretation is acceptable and for it to be it depends on positive law and not on morality since it is not a case of individual action performed by a specific interpreter but instead that of a collective practice.

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36 The example, although applied to another problem, in *R. Dworkin*, Taking Rights Seriously, London 1977, chapt. 2.

37 See *Nino* (note 1), p. 147.

III. Law as a Collective Practice and its Importance

1. A Return to the Introduction: Interest in the Topic

Having reached this point in the discussion it is necessary to make some observations on the problem we have been analyzing and the answers posed by Nino. The first thing that is well worth noting is the interest expressed. It is not a question of something purely theoretical or of a pseudo-problem to be analyzed as would be suggested in a superficial approach. The axis of the iusphilosophic debate of the past fifty years has been the connection between law and morality which ranged and still ranges between its acceptance and rejection. Among those who accept the connection there are shades of differences. The acceptance of the thesis of such a connection leads to the question of the importance of law. If there is a connection it is worth asking what is the importance of law, and why, and not only that of morality. It is obvious that acceptance implies – at least implicitly – differentiation. If there were no differentiation there would be no connection but confusion or identification instead. And if there is differentiation it should be relevant since the contrary would make either one or two of the terms lose partially or totally its sense – and one could not really speak of a connection.

The question, in a nutshell, is interesting even though Nino's answer contains some inconsistencies.

2. A Wide Range of Problematic Answers

Let us now look at the positions, synthetically speaking, that directly or indirectly deny relevance: at least three alternatives exist.

One initial possibility is to deny relevance on the basis that Politics independently provide reasons for acting. It is the stance taken by some authors belonging to the *Critical Legal Studies Movement*. For Duncan Kennedy, for example, "a legal decision works to guarantee personal ideological interests and general interests of the *intelligentsia* type, related to the social and economic *status quo*".[38] From this perspective, legal interpreters should practice "a hermeneutics of distrust when dealing with the affirmation that legal discourse and particularly legal argumentation (…) are autonomous with respect to an ideological dis-

[38] *D. Kennedy,* Izquierda y derecho. Ensayos de teoría jurídica crítica, transl. Guillermo Moro, Buenos Aires 2010, p. 29. For a global account of what this author has contributed to this current of thought see *M. Funakoshi,* Taking Duncan Kennedy Seriously: Ironical Liberal Legalism, in: Widener Law Review 15-1 (2009), pp. 231–287.

course".[39] Law, definitely, lacks relevance: what truly matters is the ideological discourse that lies hidden behind its facade.

A second option consists of playing down the importance to the point of overshadowing the relevance of Law on the basis that only Morality is capable of providing exclusive reasons to act. This stance has been historically maintained by the rationalist branch of ius naturalism or by some of its derivations.[40]

In both alternatives the final result – if all of the consequences are coherently followed – is legal nihilism, postulating the replacement of law by a government that in practice has no limitations or, respectively speaking, by anarchy. If law in reality is power, then there is nothing that limits power. If law is in reality morality, then law and, *a fortiori,* government, lack any justification.

There exists another group of authors who although do not completely deny the importance of law, do in fact reduce its relevance to such an extreme that they deprive regulations within everyone's reach of meaning and directly call for and accept being governed by judges.[41] This phenomenon, very present in certain South American countries usually goes hand in hand with a deep political crisis. The Court Hall becomes a complaints office where everyone goes to resolve everything that the rest of the governmental organisms do not. Yet these legal workers have not been elected nor are there any guarantees that the legal procedure used possesses a relevant democratic perspective.

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39 *Kennedy* (note 38), p. 30.

40 The lack of distinction between law and morality can be observed, for example, in *V. Cathrein,* El Derecho natural y el positivo, 2da. ed., transl. A. Jardón and C. Barja, Madrid 1926, pp. 268–286, and *passim*. This author maintains that "Law is an essential part of Moral order" (p. 272), and that "one cannot totally cover all of moral order without referring it to legal order" nor, on the contrary, "understand legal order without immediately entering the field of morality" (p. 274). He affirms, as well, that "as with the rest of the moral order, legal order also has its roots and foundations in the rational will of law, organizer of the world; the compliance of divine intentions is its objectives and its insurmountable limitations lie in Divine will" (p. 277). See *N. Brieskorn/Viktor Cathrein S. J.,* Naturrechtliche Strömungen in der Rechtsphilosophie der Gegenwart, in: Archiv für Rechts- und Sozialphilosophie 116 (2009), pp. 167–185.

41 This phenomenon has especially been promoted in Neo-constitutionalism. Hand in hand with the surge in constitutional control that generates a "tension", according to *Roberto Gargarella,* between "the democratic organization of society and the social function of the revision of laws". On this topic, in general, see La justicia frente al gobierno. Sobre el carácter contramayoritario del poder judicial, Barcelona 1996 (cited on p. 13), and, most recently, *R. Gargarella,* De la alquimia interpretativa al maltrato constitucional. La interpretación del Derecho en manos de la Corte Suprema argentina, in: J. Espinoza de los Monteros/J. R. Narváez Hernández, Interpretación jurídica: modelos históricos y realidades, México 2011.

In the light of the difficulties posed by these different alternatives, Nino believes that the proposal of law as collective action can serve to overcome them. Its attraction lies in the following: in the face of plural conceptions of morality, law would permit that each moral agent would act in accordance with, society as a whole, thus preventing the social anarchy that would be produced by a basic moral anarchy.

3. Context and Criticism of Nino's Proposal

Nino's proposal is obviously related to the manner in which the question of connection and relevance is posed. And the latter is framed, in turn, in an ethics (constructivism) and a political philosophy (reflexive democracy) that are very definite.

In my opinion, such a contextualization is essential for an in-depth understanding of this proposal and, in turn, of its main conditioning factors and limitations. As Pilar Zambrano maintains with respect to Dworkin, Nino is an example of those who tend to "take a critical stance with respect to 'positivism' without accepting in all of its extension the epistemological assumptions upon which this criticism is founded".[42] Let us see.

a) Dialectic of modernity, ontological constructivism and epistemic constructivism

A global criticism precisely originates from the ethics and liberal political philosophy advocated by Nino. It is about an inevitable paradox which leads to the "dialectics of modernity":[43] for the sake of fomenting freedom, our author's stance results in leaving those who are not in accord with the majority without any margins for maneuvering. Continuing with the analogy proposed by Nino himself, there is no room for those musicians whose aesthetic criterion fails to coincide with the orchestra.

The basis of the latter demand further progress in this discussion, thus opening the doors to a second, complimentary critique. As is known,

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[42] See *Zambrano* (note 18), p. 283. In Nino's case the intention of contributing from the Theory of Law to avoiding human rights violations as were seen in Argentina during the last military government (1976–1983), whose impact on the academic work of this author is quite evident. See, for example, his Introduction to *C. Nino* (ed.), Rights, Darthmouth 1992, pp. xi–xxxiv.

[43] An analysis of this expression and its implications can be found in *D. Innerarity,* Dialéctica de la modernidad, Madrid 1990. See also, *P. Rivas,* Las ironías de la sociedad liberal, México 2004, passim; *C. Velarde,* Liberalismo y liberalismos, Pamplona: Cuadernos de Anuario Filosófico, 1997, pp. 9–55; *R. Alvira,* Dialéctica de la Modernidad, DADUN, EBSCOhost.

Nino proposed epistemological constructivism as an alternative to ontological constructivism that it explicitly rejects (in reality this is a development in his thinking). From the perspective borne out of the analysis of the paradox of irrelevancy it can be perceived, in my opinion, that the result of distinguishing between one and the other becomes irrelevant. We will see why. According to Nino, democracy is not identified with moral discourse (if this occurred we would be facing an ontological constructivism) yet it is its substitute. For this reason, there exists the possibility that the regulations produced by democracy may not be morally valid. Said in another way, regulations borne from a democracy allow us to learn about moral standards since democratic discourse functions as a substitute for moral discourse, but nonetheless, not all democratic regulations are moral because otherwise there would be no limits to the behavior of the majority and democracy could not lay the foundations for rights (ontological constructivism). At this point we come across two problems: that of explaining how it is possible to know whether democratic regulations are valid or not, when democracy is a substitute for moral discourse on the one hand, and that of establishing what should be done in the case of the moral invalidity of those regulations.

The first problem is very difficult to solve for Nino and his proposal ends with the conclusion that "except for error, in democratic countries it is probable that acting according to the law is obligatory".[44] With respect to the second, and as a consequence of the former, as Blanco notes, "Nino demands, for practical purposes, that this probability be taken as a certainty when acting. Appealing to the principle that the possibilities of operating in a morally correct form should be maximized, Nino believes democratic discourse – even when flawed – justifies and even demands relegating one's own judgment and compliance with the norms".[45]

Legal norms are, according to the school of thought to which Nino adheres, "excluding reasons" according to Raz' characterization;[46] yet this Argentine author concerns himself with not defining them as such: in his opinion, legal norms are, in reality, "epistemic reasons". That is to say, reasons to believe that there exists reasons to act. With this he seeks to preserve the independence of morality (which would be questioned, in his opinion, if there existed practical authorities), and, in a simultaneous way, fleeing from ideological positivism (which would be committed if norms or regulations were defined solely as excluding reasons) without

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44 *S. Blanco Miguélez,* Positivismo metodológico y racionalidad política: una interpretación de la teoría jurídica de Carlos S. Nino, Granada 2002, p. 151.

45 Ibid., p. 152.

46 See *J. Raz,* Practical Reason and Norms (note 3), *passim*.

giving up the affirmation of the obligatory nature of positive law.[47] The attempt, nonetheless, faces insurmountable obstacles: "if it is understood that for epistemological constructivism democratic norms act as excluding reasons, autonomy or independence, an assumption of moral discourse, is called into question, since the addressees of the legal regulations will always have to relegate their own judgment, adopting the rule as a sole guide. On the contrary, if we agree with Nino that there are epistemic reasons (…) when it is affirmed that a subject has reached through individual reflection the conviction that democratic regulations show important moral errors and at the same time is required to believe in the 'existence of moral reasons in favor of these regulations', then in reality what is being requested is a simultaneous acceptance of two criterion of emendation without offering any definite argument to take precedence over another".[48]

In short, as Blanco affirms, Nino's proposal ends up having something of ideological positivism despite its confessing to attain exactly the contrary in results.[49]

b) Indecisiveness and lack of conclusion

As has been seen above, Nino rejects the notion that morality's lack of decisiveness and conclusion can provide relevance to law. He maintains, in this sense accurately, that it is not possible to resolve this indecisiveness and lack of judgment without appealing to morality. Being thus so, the new (and inevitable) incursion into morality would once again face indecisiveness and lack of judgment that would redirect us back to law, falling thus into a vicious circle. This leads to the seeking of relevance in another place ultimately situated in the political nature of the legal phenomena. I will formulate below, in a brief manner, the three critiques or objections that this approach is worthy of.

aa) It should be kept in mind that Morality is also a collective practice. Man does not adopt moral decisions by disregarding all of the rest of his peers. In Nino's proposal, there is an underlying Solipsist ethical nature, typically liberal, against which community criticism,[50] amongst others[51] has revolted. To begin with, the reason for this is that moral decisions

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47 See *Blanco* (note 44), p. 153.

48 Ibid.

49 Ibid., pp. 155–156.

50 *A. MacIntyre,* After Virtue: A Study In Moral Theory, 3rd. ed., London 2007 and *id.,* Ethics And Politics, Cambridge (UK)/New York 2006.

51 See *A. Cruz Prados,* Ethos y polis. Bases para una reconstrucción de la filosofía política, Pamplona 1999, passim.

taken involve others directly, to a greater or lesser extent. Secondly, because its identity is a social one, meaning that problems must be faced and resolved from the same cultural context provided by other human beings and to which man belongs. This being so, it is not possible to distinguish law from morality by asserting that only the first is collective or social.

bb) Going beyond this initial criticism, if the reasoning process expounded above is adhered to it will be confirmed that according to Nino, this marked, political nature would provide law with something that morality – starting from the existing pluralism – does not possess: the capacity to coordinate behavior and to resolve conflicts. From this perspective, the relevance of law would come, ultimately, from precisely that purpose initially denied by Nino: the indecisiveness and lack of judgment of morality, incapable of establishing by itself how to proceed in the midst of political demands for coordination and resolution of conflicts. In other words, this author ends by affirming at the end of his theoretical discussion precisely what he had denied at the beginning. The relationship between law and morality is basically one of decisiveness: Law settles that which morality cannot.[52]

cc) In my opinion, this last criticism is related to the epistemological perspective from which Nino poses the question of relevance. This is a point of view which seems to ignore the functioning of practical reasoning. Actually, *determinatio* is not but a crass example of how practical reasoning functions and what it achieves (practical truth) with the added fact that in the area of Law it blends with poetic reason (it elaborates products like regulations and sentences).[53] This is compatible, from my point of view, with the acceptance that in all legal reasoning there exists a delivery and re-delivery between the case and the norm, between regulations and principles,[54] and between law and morality.[55] Yet there is no vicious circle at work here which in every case is a threat. One does not exit it in a linear fashion but instead in a spiral mode: the circle is dis-

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[52] See *C. Massini Correas/J. García Huidobro,* Valoración e inclusión en el Derecho. La máxima "lex injusta non est lex" y la iusfilosofía contemporánea, in: J. Cianciardo/J. B. Etcheverry/J. García Huidobro/C. Massini/P. Zambrano, Razón jurídica y razón moral. Estudios sobre la valoración ética en el Derecho, México 2012, pp. 109–137. See, also, in the same book, *J. B. Etcheverry,* La relevancia del Derecho que remite a la moral, pp. 31–70.

[53] I would like to express my gratitude to Prof. Pedro Rivas for this idea. See to this respect, *C. Llano,* Examen filosófico del acto de la decisión, Pamplona 2010, passim.

[54] See *D. Priel,* Trouble for Legal Positivism?, in: Legal Theory 12 (2006), pp. 225–263, who denied the legal positivism proposal consistent in identify "what the law is" without resort to evaluative considerations.

[55] *Murphy* (note 3), pp. 262–264.

solved if it is ascertained, on the one hand, that the sensible decisions conducting to the determination of morality are a mixed product of reasoning and will, and on the other hand, that those decisions – precisely because of the mutual dependence between reason and will – are intelligible and justifiable.

The objective proposed will only be productive if the presence of some ontological referent is accepted (that of one or various human assets, or that of the person, in short), to instill meaning.[56] A thesis of connection cannot be vigorously sustained from the vantage point of an ethical skepticism or a diluted or diffuse ethics. To declare a connection between law and any type of ethics (where everything goes) is equivalent to denying it, inevitably leading to legal nihilism. The principles, in short, lead us to an ontological referent. On the other hand, indecisiveness in law leads us to a theory on human action that operates as its reference margin.[57] The intelligibility of the attempt will depend, ultimately, on the theory of justice and of action both united through a semantic theory.[58]

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[56] See *P. Zambrano,* La inevitable creación en la interpretación jurídica (…), op. cit., passim.

[57] I would like to express my gratitude to Prof. Pilar Zambrano for this idea.

[58] See *P. Zambrano,* "El Derecho como práctica y como discurso. La perspectiva de la persona como garantía de objetividad y razonabilidad en la interpretación", Dikaion, Nro. 18 (2009), Colombia, 20–40.