10-1-1995

Carlos Santiago Nino: A Bio-Bibliographical Sketch

Jorge F. Malem Seña

CARLOS SANTIAGO NINO: A BIO-BIBLIOGRAPHICAL SKETCH

JORGE F. MALEM SEÑA*

* The author is a Professor of Philosophy of Law, Morals and Politics, Pompeu Fabra University, Barcelona, Spain. Professor Malem Seña is the author of two books: CONCEPTO Y JUSTIFICACIÓN DE LA DESOBEDIENCIA CIVIL (2d ed. 1990) and ESTUDIOS DE ÉTICA-JURÍDICA (1996). He has also written several articles on philosophy of law. He is member of the advisory board of DOXA, Alicante, Spain and ISONOMIA, México D.F. Professor Malem Seña was a visiting scholar at Yale Law School 1993-94.

I. INTRODUCTION

Carlos Santiago Nino[1] was an all-around jurist. He took no part in the rigid compartmentalization of academic disciplines dominating our universities.[2] From the beginning, his interests included an extremely wide range of problems extending to criminal law,[3] constitutional law,[4] family law,[5] legal theory,[6] the foundation of human rights,[7] ethics and the theory of action.[8]

---

1. Born in Buenos Aires, Argentina, on November 3, 1943, Carlos Nino was married to Susana Bergstein and had two sons, Ezequiel and Mariano. He died in La Paz, Bolivia, on August 29, 1993. Nino graduated with honors from the University of Buenos Aires Law School in 1967, and in 1977, received his Ph. D. in Philosophy, emphasis on Legal Philosophy, from Oxford University.

Since his early youth, Nino had shown a clear predilection for intellectual work. This vocation found its expression in a dozen books and over sixty articles. He combined his prolific activities as a researcher with an inexhaustible passion for teaching. Over the years, Nino served as a visiting scholar at Harvard (1977), UCLA (1987) and at the University of Freiburg, F.R.G. (1982). Since 1978, he held a research fellowship at the Argentinean National Council for Scientific and Technical Research. As for his teaching, Nino was Professor of Legal Philosophy at the University of Buenos Aires and Visiting Professor at the University of New York (1988), Yale (1987, 1989 and 1991-1993) and at the Universitat Pompeu Fabra of Barcelona, among others. Brilliant and unrelenting in his discussion, Nino participated in innumerable conferences in a great number of universities all over the world. Such participation included conferences in San Marcos (Lima, Peru, 1972); Cornell (1977); Frankfurt/M. (F.R.G., 1982); Helsinki (1984), Graz (1984); Salzburg (1984); Lund (1984); Universidad Autónoma de Madrid (1986); Centro de Estudios Constitucionales (Madrid, 1988); San Diego (1989); Norwegian Academy of Science (1990); Universitat Pompeu Fabra (Barcelona, 1990); Supreme Court of Guatemala (1991); Pisa (1991); Florence (1991); Universidad Autónoma de Barcelona (1992), and others.

Carlos Nino's feverish activity, however, was not limited to academic research and teaching; he also realized political aspirations. During the Alfonsín administration, he held various political posts: Presidential Advisor 1983-1989; Coordinator of the Council for the Consolidation of Democracy 1985-1989; member of the Committee on the Reform of the Criminal Code at the Secretary of Justice in 1985. He was also a member of the commission engaged in drafting a new Constitution for the Republic of Bolivia. Nino died while working on this project. Interestingly, he died in the middle of a sentence which urged the need for a new Constitution.

2. This compartmentalization of academic disciplines is the product of corporate interests rather than scientific and intellectual necessities or practical convenience.

3. *See, e.g.*, CARLOS NINO, EL CONCURSO EN EL DERECHO PENAL (1972); CARLOS NINO, LOS LÍMITES DE LA RESPONSABILIDAD PENAL (Guillermo Rafael Navarro trans., 1980); CARLOS NINO, LA LEGÍTIMA DEFENSA (1982).

4. *See, e.g.*, CARLOS NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL (1992).

5. Nino was preparing a paper on family law at the time of his death.

6. *See, e.g.*, CARLOS NINO, LA VALIDEZ DEL DERECHO (Astrea ed., 1985).

7. *See, e.g.*, CARLOS NINO, ÉTICA Y DERECHOS HUMANOS (1984).

8. *See, e.g.*, CARLOS NINO, EL CONSTRUCTIVISMO ÉTICO (1989); CARLOS NINO, INTRODUCCIÓN A LA FILOSOFÍA DE LA ACCIÓN HUMANA (1987).

Convinced that intellectual work could not and should not be separated from political work, and that political action is more appropriate when preceded by rational discussion, Nino wrote a number of papers regarding reasons to implement specific political measures.[9]

Since a detailed description of Carlos Nino's thinking would by far surpass the scope and purpose of this Article, I intend only to mention his most relevant contributions in the area of legal philosophy and to forward reasons for their significance. My presentation will be divided into six Parts. Each section will be dedicated to Carlos Nino's conception of the following topics: Metaethics, Human Rights, the Law, Democracy, the Constitution, and Politics.

II. METAETHICS

Carlos Nino himself defines his metaethical position as "moral constructivism," a term taken from Rawls and indicating a certain familial likeness with the positions adopted by, among others, Bruce Ackerman, Kurt Baier, William Frankena, Jürgen Habermas, Thomas Nagel, David Richards, and John Rawls himself.[10] As Nino himself acknowledged, his constructivism is indebted to Hobbes and to Kant. From the first, Nino adopts the notion that morality fulfills certain social functions; from the second, he analyzes the formal prerequisites of moral reasoning. The Hobbesian and the Kantian aspect are integrated in Nino's interpretation of morality as a social practice intended to solve conflicts and to promote cooperation through consent, while simultaneously affirming that this practice has a formal and even substantial structure making it especially well suited to fulfill those functions.

It is a well known fact that the deepest ethical disagreement has traditionally concentrated on two closely connected

---

9. *See, e.g.*, CARLOS NINO, UN PAÍS AL MARGEN DE LA LEY (1992); Carlos Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 YALE J. INT'L L. 217 (1985) [hereinafter *The Human Rights Policy*]; Carlos Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129 (1989) [hereinafter *Transition to Democracy*]; Carlos Nino, *La Legitimidad, Estabilidad y Eficiencia del Presidencialismo, in* PRESIDENCIALISMO Y GOBERNABILIDAD EN ARGENTINA (1992).

10. *See* ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 92. As in all families, there are varying degrees of similarities and differences between them.

questions: (1) Whether there are any moral facts, and if so, (2) whether it is possible to know them. However, Nino believed that the central problem of ethics is neither ontological nor epistemological, but rather a conceptual one: "In other words, I think that the question posed by moral facts does not concern their existence or their knowledge, but their recognition as such."[11]

If the problem is conceptual, then it can only be solved by conceptual analysis. Furthermore, if one rejects all essentialist claims and accepts instead that the source of all concepts is conventions, then one would have to conclude that there is not a single concept of morality and that the utility of the different concepts depends on the context in which they are used and on the ends they are used for. The concept of morality has been employed as much for descriptive ends, in explanatory contexts, as for normative ends. Therefore, Nino supposed that reconstructing moral concepts, and the concept of morality itself, will serve to both identify social institutions widely recognized as valid and satisfy certain basic needs of life.[12] Nino further believed that these concepts have to be characterized in a way so as not to disturb the functioning of these institutions.[13] The first condition results from a descriptive and the second from a practical preoccupation.[14]

When using the word "morality" one may be referring either to positive, social morality or to an ideal, critical morality. Many ethical disagreements have arisen precisely because this distinction, and the relationship between the two sides, has been neglected. According to Nino, social morality is the product of the formulation and acceptance of judgments intended to describe an ideal morality. Without the hope of acting in accordance with an ideal morality, there would be no positive morality. Thus, ideal morality logically exists prior to positive morality. The judgments which social morality refers to indicate facts (e.g., in society X there is a rule Z prescribing . . .), and as such, they cannot serve a justificatory function. Positive morality concerns only the prudent, who adjust their conduct to a norm in order to avoid the unpleasant consequences connected with its violation. In

11. EL CONSTRUCTIVISMO ÉTICO, *supra* note 8, at 62.
12. *Id.* at 66.
13. *Id.*
14. *Id.*

contrast, moral agents (i.e., those who wish to justify their actions) are only interested in ideal morality. And, as Nino observed: "Paradoxically, positive morality is created through the acts and attitudes not of the prudent, but only of the moral. A social morality can be maintained only insofar as there is some degree of convergence in the critical moral judgments people are willing to formulate."[15]

Therefore, while it is improper to confuse social morality with ideal morality, it is equally improper to completely separate one from the other. The only distinction between these two forms of judgments is that the first are accepted socially (independently of whether or not they are valid), while the second are valid (independently of whether they are socially accepted). However, if a valid judgment is socially accepted, then ideal morality, in this instance, also constitutes social morality. Conversely, if a socially accepted judgment is valid, then it is also part of ideal morality.

Nino recognized that the complex relation between social and ideal morality requires an examination of the moral practice of society in order to determine what criteria any judgment — whether valid or not — must satisfy in order to be a moral judgment. Because society's moral practice intends to formulate judgments of an ideal morality (and this intention is independent of whether the formulation turns out to be correct), the criteria for the validity of moral judgments are contained in moral practice. Thus, in describing a society's morality, both the rules enforced and the practice used in deliberative discourse for giving reasons in favor or against certain conducts must be mentioned. These considerations bind Nino's position to certain types of moderate conventionalism. These issues are discussed in Nino's critique of communitarianism, *infra*.

According to Nino, forms of discourse are the relevant moral social practices one must examine: "Moral discourse aims at reaching a convergence of actions and attitudes, through the individuals' free acceptance of principles guiding their actions and their attitudes toward the actions of others. This is morality's characteristic of autonomy . . . ."[16]

---

15. ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 93.
16. *Id.* at 109.

According to this characterization, the moral discourse proposed by Nino must be legitimate discourse, free of compulsion, deception or reference to any authority. Additionally, discourse depends on consent. Moral discourse implies the adoption of an impartial perspective. For individuals to freely consent to principles of conduct, the principles must satisfy the following minimal conditions: they must be public, i.e., recognizable by all; they must be general, in the sense that they establish normative solutions based upon certain properties and concerning generic relations; they must be supervenient with respect to factual circumstances, that is, with respect to all the factual circumstances under which the normative solutions which must be knowable by everyone are reached; they must be universal, if they justify the action of one person, they must also serve to justify that of any other person under the same circumstances; lastly, they must be final, the principles must be the last justification of actions and practices. For these reasons, a moral judgment formulated in the practice of moral discourse can be characterized as,

> a judgment which predicates of action X that it is required, under certain circumstances defined by factual properties of a generic type, by a public principle that would be accepted as a last and universal justification for actions by any person fully rational, absolutely impartial and informed of all the relevant facts.[17]

In short, Nino has suggested that morality is a human artifact depending on human actions and that moral judgments formulated by human beings may be true or false depending on whether they give a correct account of moral facts. The dispute over moral facts marks the differences between ethical theories. In his version of ethical constructivism, Nino proposes to reconstruct this notion of moral fact in the following way: It refers to the acceptance, under ideal conditions of impartiality, rationality and factual knowledge, of those principles which satisfy the prerequisites mentioned above and jointly contribute to the solution of problems in a cooperative consensus. This notion of moral fact is counterfactual because it relies in claiming that something would happen if something else happened, but which

17. *Id.* at 117.

does not actually occur. According to Nino, acceptance of this counterfactual does not imply a sumptuous or metaphysical ontology because its acceptance is identical to that of counterfactuals in the natural sciences. We must attempt to determine which principles would be accepted if ideal conditions of moral discourse actually were obtained. This requires not an empirical but a conceptual reflection.

As stated earlier, Nino's metaethical position is one of ethical constructivism. His objective in reconstructing moral concepts is to identify practices that fulfill relevant social functions. These concepts must be consistent with the fulfillment and development of these functions. Nino's distinction between ideal and social morality perceives the truth-character of moral judgments. Nino described the facts constituted by the acceptance of such principles as follows:

> [M]oral philosophy has great moral relevance: the more it tries to clarify the rules that are constitutive of an institution which satisfies certain highly valuable social functions, the more the operationality and efficacy of this institution is promoted, since those who participate in it (all of us, insofar as we participate in disputing the justification of an action or decision) will get a clearer picture of the 'game' they are playing, and will get better at it. This obviously does not serve to justify morality and moral philosophy without circularity, but since our conscience does not have too many logical scruples, it does serve at least to put it at rest while we dedicate ourselves to this activity instead of taking on some other, more obviously beneficial job.[18]

Any presentation of Carlos Nino's metaethical position would be hopelessly incomplete without mentioning two authors with whom he was in permanent dialogue, and whose perspectives, through agreement and disagreement, became the basis for his own theoretical constructions. These authors are John Rawls and Jürgen Habermas. By analyzing their writings Nino attempted to develop a conception of moral knowledge he calls "epistemological constructivism": "[A] conception according to which social practice is an adequate means to such knowl-

18. EL CONSTRUCTIVISMO ÉTICO, *supra* note 8, at 71.

edge."[19]

Nino adopted a notion of uncertainty regarding the metaethical position which Rawls uses as his ultimate basis for two principles of justice. This uncertainty is confirmed by Rawls' position reflected in his *A Theory of Justice*. Rawls finds recourse in several metaethical theories. For example, he adopted contractualism, holding that his principles of justice would be accepted in the original position. He also used rational-choice theory as a foundation for his principles invoking the method of maximin. Even intuitionism crept into Rawls' work. He affirmed that there exists a reflective equilibrium between the principles which would be adopted in the original position and our most deeply rooted intuitions. Finally, in order to justify his moral principles, Rawls invoked the formal prerequisites of moral discourse. He recognized that principles of justice must satisfy the conditions of generality, impartiality, publicity, and universality.

According to Nino, moral discourse is the one metaethical foundation of Rawls' principles which is most consistent with his own work and which also gives greater coherence to the totality of the various metaethical criteria he invokes. From this point of view, the original position would simply be a dramatization of the formal requirements of such discourse. The hypothetical contract only points to the aspect that principles are valid if they are unanimously accepted under ideal circumstances. Self-interest and the veil of ignorance represent the condition of impartiality, etc. This would also be the version of Rawls closest to Kant.[20]

On the other hand, Rawls' method for knowing moral truth is just as uncertain, although in *A Theory of Justice* there are several indicators suggesting that Rawls tends toward individualism in epistemological matters. According to Nino, Rawls clearly showed his epistemological individualism when he spoke of majority rule as the justification of democracy.

In fact, distinguishing between ontological and epistemological theses, Nino thinks that Rawls sustained the following ontological thesis:

---

19. *Id.* at 93.
20. *Id.* at 97.

> Moral truth is constituted by the satisfaction of formal prerequisites inherent in the practical reasoning of all individuals, especially the one that a moral principle is valid if it can be accepted by everyone, or cannot be rejected by anyone, under ideal conditions of impartiality, rationality, and knowledge of the relevant facts.[21]

Rawls' epistemological thesis would be as follows:

> Knowledge of moral truth is accessible only through individual reflection determining, by way of a method of reflective equilibrium or some alternative, whether the proper relation between formal prerequisites and substantive principles obtains. Discussion with others is a useful auxiliary tool for individual reflection, but in the last instance, we inescapably must act according to the final dictates of the latter.[22]

Nino thought that the writings of Habermas, the German author, supported the justification of moral judgments as part of a social practice dominating a substantial portion of our lives; only by considering this practice can the truth or falsehood of moral judgments be determined. Accordingly, norms stand between speech acts and empirical reality. The truth-character of moral judgments must be different from the truth-character of factual descriptive sentences. While the truth of empirical sentences is independent of theoretical discourse, the truth of moral judgments depends on practical discourse.

In this discourse people present differing arguments, in a regulated way that presupposes ideal conditions, in favor or against different claims of validity, striving to reach consensus. Such a consensus can be reached because of the principle of universality, representing the moral requirement of impartiality. Nino believed that Habermas can be interpreted in one of two ways. One may view Habermas as an epistemological constructivist because his conception of the ideal situation of discourse permits moral principles to be known indirectly, through the result of discourse. He may also be considered an ontological constructivist since many of his writings teach that moral principles are the result of discourse under ideal circum-

---

21. *Id.* at 124.
22. *Id.*

stances. In short, Habermas' ontological thesis provides:

> [M]oral truth consists in the consensus resulting, de facto, from the actual practice of moral discourse when it is performed respecting procedural constraints for the arguments as, for example, that a principle must be acceptable or non-rejectable for everyone under ideal conditions of impartiality, rationality, and information.[23]

Epistemologically,

> [t]he method of discussion and collective decision-making is the only possible way of access to moral truth in the area of justice, since monological reflection is always distorted by the individuals' prejudices in favor of themselves, by their contextual conditionality and the insurmountable difficulty of putting oneself 'in somebody else's shoes'. Only the actual consensus obtained after a long debate with as little exclusions, manipulations and inequalities as possible is a trustworthy guide to the requirements of morality.[24]

Nino, in reconstructing the central theses of Rawls and Habermas, stated that,

> Habermas coincides with Rawls in that there are formal requirements, as that of impartiality, which are decisive for the validity of moral principles. But while for Rawls they are formal prerequisites of monological moral reasoning, for Habermas they are rules of a social practice of intersubjective discourse. Besides, while for Rawls the validity of moral principles derives from the fact that they satisfy the requirement of impartiality, among other things, independently of whether anybody declares that it is satisfied, there is reason to think that for Habermas validity requires that a de facto consensus has been reached in application of the rule of impartiality. Finally, while for Rawls it seems that one can come to the conclusion that a moral principle is valid by way of individual reflection, although discussion may play an auxiliary role, for Habermas this is obviously impossible, and only collective discussion, the "cooperative search for truth" is a trustworthy road to moral knowledge.[25]

---

23. *Id.* at 105.
24. *Id.*
25. *Id.* at 104.

On an ontological level, Nino criticized Rawls' approach for failing to recognize moral discourse as a social practice. By Emphasizing practice, one creates an empirical basis from which to infer de facto rules and criteria — prerequisites for the practice itself. Social practice fulfills social functions; it contains rules and prerequisites that ensure its continued viability. Finally, this practice also contains substantive principles such as autonomy that permit the derivation of substantive norms without begging the question.

Habermas did not escape Nino's ontological criticisms. Habermas confuses validity and efficacy and ends up in relativist conventionalism. Furthermore, he, apparently, does not adequately account for the phenomenology of moral discourse insofar as this discourse is not characterized by the expression of personal interests, but by the confrontation of different claims of validity. On the other hand, however, those who participate in moral discourse could not claim the validity of their proposals if it could only be determined by the discussions outcome. And it would make no sense to submit a principle to discussion if it were not first accompanied by a claim of validity.

On the ontological level, Nino's thesis reflects Habermas' position insofar as it recognizes the empirical basis of moral discourse as a social practice. However, Nino did not commit himself to the result of an empirical consensus. He affirmed that moral truth is established in accordance with the formal and material requirements of moral discourse. Among those requirements, he recognized the principle of autonomy as well as procedural rules like the one that embodies the principle of impartiality. Here, his debt to Rawls is obvious.

On the epistemological level, Nino seemed to accept Habermas' thesis that discussion followed by collective decision-making is the proper method for knowing moral truth. This is so not only because free discussion brings out the errors in an argument, but also because it is the only way to guarantee the principle of impartiality. This could, however, lead to a type of moral populism when moral discourse becomes institutionalized and democratic decisions are reached through the application of majority rule. Therefore, Nino proposes the following as his own ontological thesis:

> [M]oral truth is constituted by formal or procedural prerequisites of a discursive social practice aimed at cooperation and the avoidance of conflict, on the basis of the convergence of actions and attitudes through consensual acceptance of behavior-guiding principles. Among these prerequisites of the social practice of moral discourse is that a principle is valid when it is acceptable, or non-rejectable, by everyone under conditions of impartiality, rationality, and factual knowledge.[26]

As his epistemological thesis he espouses that,

> [d]iscussion and intersubjective decision-making is the most trustworthy procedure for reaching moral truth, since the exchange of ideas and the necessity to justify them before others not only broadens knowledge and brings to light fallacious reasoning, but especially because it allows to determine whether the requirement of impartial consideration of everyone's interests is satisfied, presuming that there are no better judges of the respective interests than the affected persons themselves who participate in the collective process of discussion. However, this does not exclude that someone can acquire knowledge of correct solutions through individual reflection, although it must be admitted that this method is much less trustworthy, above all because of the difficulty of faithfully representing the interests of others and, therefore, of being impartial.[27]

In other words, Nino held that the social practice of moral discourse, even in the form of democracy as an imperfect surrogate, is the most trustworthy procedure for getting to moral truth. Individual reflection under conditions of impartiality, generality and universality may provide another adequate method for moral knowledge, especially where it is doubtful whether the prerequisites of moral discourse are actually satisfied. Nino's epistemological constructivism is thus closer to Rawls than to Habermas. This is probably why Nino himself defined his position as halfway between that of Rawls' and Habermas'.

---

26. *Id.* at 105.
27. *Id.*

III. HUMAN RIGHTS

A great part of Carlos Nino's intellectual reputation is certainly due to his writings on the concept and foundation of human rights. This topic attracted him both theoretically and morally; he felt compelled to do all he could to promote the effective implementation of those rights. One can find the main aspects of Nino's conception of human rights in his seminal work *Ética y Derechos Humanos*.[28] Nino holds that human rights are derived from a system of moral principles. Those principles are said to have the following properties: (1) Their existence depends on their intrinsic validity or acceptability (i.e., they are independent of their recognition by any legal order or their social acceptance); (2) they are accepted as a final or ultimate justification of behavior (i.e., there is no other class of principles with higher justificatory weight); and (3) they serve to evaluate all kinds of conduct.

Whether or not a behavior is morally relevant cannot be decided a priori; it depends on the content of basic moral principles. Human rights should be characterized as deriving from moral principles. According to the methodology proposed by Nino, we must first determine from which moral principles basic rights are derived, and then define as moral persons those who have the properties de facto necessary to enjoy or exercise such rights.

> The idea is that moral personality is a concept related not with the fact of being the addressee of fundamental moral rights but with the fact of being in the condition of exercising or enjoying them. Who is a moral person therefore depends on who can enjoy the rights generated by the basic moral principles.[29]

Nino proposes three moral principles from which human rights are derived: the principle of personal inviolability, the principle of personal autonomy, and the principle of personal dignity.

---

28. ÉTICA Y DERECHOS HUMANOS, *supra* note 7.
29. *Id.* at 45.

The principle of personal autonomy prescribes:

> [T]hat, because of the value of the free individual choice of life plans and the adoption of ideals of human excellence, the State (and other individuals) may not interfere in this choice or adoption; it must content itself with designing institutions that promote the individual pursuit of these life plans and the satisfaction of the ideals of virtue everyone sustains, and prevent mutual interference in the course of this pursuit.[30]

Acceptance of this principle bars the possibility of all unjustified perfectionist or paternalistic theses. Perfectionism as well as paternalism suppose that there are some life plans that are better than others and which constitute the realization of ideals of excellence. Additionally, perfectionism supposes that these ideals should be imposed, first to force people to become better, and secondly to prevent people from harming themselves. While Nino accepted the thesis that some life plans are better than others, he did not follow those who mistakenly believe that the two concepts are ethically acceptable. He explicitly rejected the idea that they would justify the imposition of any life plan by the State.

The principle of autonomy operates in both an empowering and protective capacity. It stresses freedom of choice regarding models of life and acts as a protective wall against possible interference by the State or other persons. Accepting the principle of personal autonomy implies acceptance of an individual's subjective preferences, even those believed to be wrong, constrained only by the prohibition of harm to others. From this basic idea — which has been presented here in a rather dogmatic, overly succinct way — Nino derived a number of rights that the principle of autonomy protects or requires.

The most basic benefit one can infer guarantees the freedom to do whatever one wishes, as long as it does not harm others. Note that this presupposes a right to conscious life and physical and psychic integrity. In order to assure that life plans can be chosen from the widest possible range of options, it is necessary to have a framework of basic liberties, including the freedom of expression and the freedom to live a private life. Such rights

30. *Id.* at 204.

allow a person to choose his or her sexual, cultural, familiar or religious life projects without fearing interference from others. This list is not exhaustive, only exemplary. One should note that some of Nino's analysis contains rights which are necessary conditions for autonomy along with rights from which autonomy can be directly derived.

The principle of personal inviolability "prohibits to impose sacrifices and deprivations on people, against their will, that are not to their own benefit."[31] This principle, evidently of Kantian origin, means that rights may not be withheld or taken (this is the notion of sacrifice) from people without justification, and that a person may not be used merely as an instrument to satisfy another's desires. It also means that consent plays an important moral role in social life, not only with respect to self-commitment and the restriction of one's rights, but also for the justification of certain basic legal institutions.[32] In that sense, the principle of personal inviolability blocks the path to utilitarian versions which, for all their preoccupation with the total quantity of social happiness, deny moral relevance to the separability and independence of individuals. It also prevents all holistic adventures such as, for example, those expressed by extreme nationalism.

Recognition of the principle of personal inviolability implies certain constraints in the pursuit of social ends and in the imposition of personal duties. Furthermore, it restricts the application of majority rule in the solution of social conflicts, and, instead, indicates that there are certain areas which the legal system must protect; where an individual's rights "trump" — to use Dworkin's expression — those of fellow citizens or concerns of the State.

The principle of personal dignity "prescribes that persons must be treated according to their own decisions, intentions or expressions of consent."[33] This principle precludes evaluation of people's actions on the basis of personal characteristics like race or religious belief, and requires that we pay special attention to

---

31. *Id.* at 239.

32. This is especially clear with respect to punishment. *See* Carlos Nino, *A Consensual Theory of Punishment, Philosophy and Public Affairs*, 12 PHIL. & PUB. AFF. 289 (1983).

33. ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 287.

consent-based institutions when designing social structures. Naturally, this principle excludes all determinist theories concerning the justification of conduct.

Although there may be a certain primacy to placing the principle of personal dignity over the other two principles, the relationship between the three principles, according to Nino, is not lexicographical. The relationship between the principles of autonomy and dignity, for example, is not easily determined. On the one hand, the principle of autonomy seems to imply one of dignity, since what makes an action morally relevant is that it is part of someone's life plan. On the other hand, it appears that the principle of autonomy presupposes the principle of dignity because evaluating the adoption of certain life plans implies that there are at least some decisions and actions to be imputed to individuals. The principle of personal dignity restricts autonomy among those for whom the restriction is voluntary and the maximization of autonomy for one implies an unjustifiable sacrifice for another. It is important to note this uncertain relationship when evaluating the principles of autonomy and dignity.

Merely stating these moral principles, from whose combination it is possible to justifiably infer human rights, does not solve all problems. We still need to define the scope of those rights and solutions to address conflict among the rights. Nino explores these issues in some detail through his discussions of actions, omissions and positive and negative duties.[34]

Nino's thesis calls for a kind of egalitarian liberalism. Unlike conservative liberalism, Nino's form of liberalism does not allow people, through the justification of omissions, to be used as the means to satisfy someone else's life plan. On the other hand, the moral principles from which human rights are derived imply that people are mutually independent, separate moral beings. This implication excludes a certain type of holistic liberalism, conceiving autonomy as a gradual property of groups of people, that is bent on justifying the instrumentalization of others through omission:

> [Egalitarian liberalism] does not consist in maximizing global autonomy nor in leaving untouched the autonomy everyone

34. *See generally id.* at ch. VIII.

> (erroneously) seems to have gained for himself; instead, it consists in maximizing the autonomy of every single individual, as long as this does not put other individuals in a situation of comparatively lesser autonomy. This implies the directive to always expand the autonomy of those whose capacity to choose and implement life plans is more restricted.[35]

This position explains — and provides some criteria for determining — the duties linked to the satisfaction of human rights, especially with respect to the State. Its task is to expand the autonomy of some without unjustifiably restricting the autonomy of others. This implies not only the guarantee of certain rights through the prohibition of specific actions[36] in compliance with negative duties, it also means that the goods necessary for the exercise of those rights must be provided.[37] Viewed from this perspective, there are no second or third generation human rights (some are even talking of a fifth generation), but rather the same rights satisfied either by omission or commission.

Since human rights can be violated by action as well as by omission, we need to address the question of what should be done when those rights are violated. This question was especially important to Nino for two reasons. First, from 1976 to 1983, Argentina experienced the most brutal military dictatorship in her history; the most appalling and cruel consequence was that thousands of people were exiled, kidnapped, tortured and killed. The National Commission on the Disappearance of Persons, in its report entitled *Nunca más* (*Never again*), chronicled this historic nightmare. Carlos Nino lived through this reality and felt that one could not write about human rights without trying to determine how these atrocities become possible. Second, during the Alfonsín administration (a democratic regime which followed a military dictatorship) Nino held important posts such as presidential advisor. The government he worked for had been elected precisely for its campaign promise to bring morality back to Argentinean social life and to punish those responsible for

---

35. *Id.* at 344-45.

36. For example, the right to life is guaranteed by the prohibition against killing.

37. In complying with positive duties, it would not make sense to guarantee the right to life if the necessary medical and pharmaceutical services were not provided.

human rights abuses.

A society based on liberal principles must design its institutions so as to make them compatible with the effective implementation of human rights. The institutions of criminal law must be especially sensitive in this respect. For example, Nino argued that the principle of autonomy has serious implications for the regulation of criminal responsibility.[38]

Using Nino's principle of autonomy, we can infer the prohibition of actions that infringe upon the autonomy of others or their capacity to choose and realize plans of life, either directly — e.g., by killing, injuring or raping — or indirectly, through aggression against institutions fostering autonomy, as in the case of fraud or tax evasion. We can also infer permission to impose penalties that lead to an increase in autonomy. This is what prima facie justifies punishment. A penalty reduces the autonomy of the person to whom it applies,

> but if it can be shown that the effects of the threat as well as the application (necessary to make the threat effective) of punishment lead to the preservation of greater autonomy, then the value of autonomy provides a reason for imposing such punishment. On the other hand, this same reason implies that the possibility of prescribing and applying penalties reaches its limit where it results in a net decrease of autonomy available in society as a whole. These considerations lead to the principle of what I have called 'prudential protection of society.'[39]

Since punishment is a harm, each imposition of punishment produces harm in the respective society. According to Nino, justifying punishment requires satisfaction of the same three criteria that justify declaring a state of emergency: (1) the evil intended to be prevented must be greater than the one produced; (2) the penalty must actually be able to produce this effect; and (3) it must be necessary, i.e., there must be no other more efficient means to bring about the desired effect.

---

38. *See* LOS LÍMITES DE LA RESPONSABILIDAD PENAL, *supra* note 3; *La derivación de los principios de responsabilidad penal de los fundamentos de los derechos humanos*, 12 DOCTRINA PENAL 29 (1989) [hereinafter *La Derivación*]; *Los fundamentos de la legítima defensa. Réplica al profesor Fletcher*, 2 DOCTRINA PENAL 235 (1979).

39. *La Derivación*, *supra* note 38, at 37-8.

If imposition of a penalty always produces a harm, then the penalty may only be imposed for those actions that cause a harm or risk that the law explicitly intends to prevent. Nino called this restriction the "principle of enantiotelity." In addition, moral discourse further limits a states punitive action when it recognizes the value of individual ideals of excellence. Only those actions performed by agents, other than the persons harmed or endangered, that harm or endanger goods or rights derived from moral principles may be punished. Nino calls this restriction the "principle of inter-subjectivity of criminal law."

There are cases of justified paternalism where the State may intervene in order to prevent an agent from carrying out an action that would harm himself on the ground that the agent is basically incompetent.[40] Such measures of legitimate paternalism are exceptions to the principle of inter-subjectivity of criminal law.

The principles of personal autonomy and personal inviolability prescribe that individuals can acquire rights and obligations through consent. Such consent does not necessarily have to be given verbally, and its scope depends on the context in which it is given. But consent does require that the person who has performed the voluntary act (marriage, contract, etc.) know and assume the normative consequences of her action. Nino holds that these conditions must be fulfilled if the imposition of a penalty is to be justified.

Delinquents must comprehend the normative consequences of their action, i.e., they must know that they are assuming a criminal responsibility in the moment of committing a crime:

> This gives rise to a principle we can call the principle of 'assumption of the penalty' which holds that it is justified to apply a penalty to an individual if he has agreed to assume the respective criminal responsibility through a voluntary act carried out with the knowledge that this liability is its immediate normative consequence.[41]

---

40. On the notion of "basic incompetence," see Ernesto Garzón Valdés, *On Justifying Legal Paternalism*, 3 RATIO JURIS 173 (1990).

41. *La Derivación*, *supra* note 38, at 45.

These two principles — prudential protection of society and its complement, assumption of the penalty — make it possible to justify a certain type of criminal law in a liberal society. The following theory creates the consent-based framework Nino proposes for the justification of criminal law:

> [W]hile justifications derive from the principle of social protection (more specifically, that of enantiotelity) and, in the last instance, from the idea of autonomy, excuses derive from the principle of assumption of the penalty and from the idea of personal inviolability. Excuses, like defects of contract, exclude consent. This is obvious in the cases of error or compulsion where the agent does not have the desires or beliefs necessary to ascribe to him to have agreed to assume criminal responsibility.[42]

Nino himself recognized that there are some types of crimes for which the preventive character of punishment works only indirectly. Therefore, prevention depends on a number of factors, such as social ideology or the institutional context. A typical case is that of massive human rights violations. One must view Nino's writings on justified punishment[43] for those who commit human rights violations in light of his general conception of criminal law and the function of punishment.

This conception is incompatible with a retributivist justification of punishment. Nino believed that retributivism is intuitively implausible because the sum of two evils — that generated by the act of delinquency, and that of the imposition of the penalty — cannot produce a good. If the retributivist theses and the notion of just deserts inherent to them are accepted, then without doubt all agents of human rights violations should be punished. But Nino does not accept them, and from his consensual justification of punishment we cannot infer the obligation to punish all those guilty of such violations. In his own words:

> [A]lmost all approaches to punishment, with the exception of the retributivist mandate, deny that anyone has a right that someone else be punished for a previous crime. To punish

---

42. *Id.* at 47.

43. *See generally The Human Rights Policy*, *supra* note 9; Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991) [hereinafter *The Duty to Punish*].

> those who have renounced their right not to be punished does not result from the recognition that the victims or their relatives have a right to this punishment. It is the consequence of a collective goal imposed by the policy to protect human rights in the future. Therefore, nobody can claim to universalize this punishment to other similar cases when the goal of the punishment will not be satisfied.[44]

Punishment thus appears to be of an entirely instrumental nature. It is a means for reaching certain social ends. Therefore, it is justified to punish some criminals and not others. One only has to show that the criterion of selection is capable of leading to the pursued end precisely through the imposition of the penalty:

> This does not mean that the selection may be totally arbitrary, or that one may proceed according to impermissible criteria such as the race of the accused. The selection must be made on the basis of its usefulness for reaching the pursued objectives within a generally permitted criterion.[45]

Thus, according to Nino, the policy adopted by the Alfonsín administration can be legitimized with respect to the legal prosecution of the Argentinean military for human rights abuses. A closer look at Nino's philosophy will reveal the socio-political context at the time of Alfonsín's inauguration as President of the Republic of Argentina. During the campaign preceding the elections of October 30, 1983, Alfonsín and his followers of the Radical Party developed their human rights policy according to five points: (1) Human rights are moral rights every human being possesses, independent of such contingencies as sex, religion or nationality, and of whether or not they are recognized by the government; (2) the function of these rights is to prevent people from being used to satisfy the ends of other people, corporate entities, or the government; (3) human rights can be violated by actions as well as omissions; (4) the basic justification of a political organization is the promotion of human rights, and a government is morally illegitimate if its actions are not directed towards attaining this end; and (5) the protection of human rights

---

44. *The Duty to Punish*, at 2621.
45. *Id.*

concerns the government as well as civil society.[46]

On the basis of these considerations, the Alfonsín administration designed a double human rights policy, heavily influenced by Nino's philosophy. The administration also enacted a number of laws aimed at protecting and preventing the violation of human rights in the future. To address past abuses, the administration devised a strategy aimed at punishing some of those responsible.[47] This latter aspect of the radical government's design has theoretical implications which lend themselves to a better understanding of Nino's ideas.

The second aspect of the policy was itself divided into two parts. The first was the creation of a fact-finding commission to investigate what had actually happened; the result of this investigation was the report, *Nunca más*, discussed *supra*. The second was aimed at encouraging the competent organs to try, and possibly convict, some of those responsible for past human rights violations. According to Nino, the implementation of this idea faced formidable obstacles of very different kinds. Firstly, only the governing Radical Party supported it. The Peronists,[48] through their presidential candidate, Italo Luder, affirmed that there could be no prosecution of those responsible due to the law of self-amnesty enacted by the military government. The left wing party as well as social movements like the Mothers of the Plaza de Mayo had adopted maximalist positions.[49] Secondly, there was a strong corporative cohesion in the military sector which exerted substantial pressure on the Alfonsín administration, supported the factual non-compliance with judicial orders, and attempted several *coups d'état*.[50] Thirdly, there was an unprecedented economic crisis culminating in a long period of hy-

46. *Transition to Democracy, supra* note 9, at 218.

47. For an analysis of this strategy, compare *The Duty to Punish, supra* note 43, at 2619, with *The Human Rights Policy, supra* note 9, at 217. Alfonsín and his government distinguished three levels of responsibility for the violation of human rights during the military dictatorship. The distinction was made between those who designed the plan for these abuses, those who gave the orders, and those who carried them out.

48. The Peronists were the main opposition party.

49. *The Duty to Punish, supra* note 43, at 2622, 2634. In Congress, Peronists did vote for a number of laws in favor of human rights and the punishment of the military, but in Nino's opinion, this was due to manifest political opportunism.

50. *Transition to Democracy, supra* note 9, at 137.

perinflation.[51] Lastly, there was a network of legal provisions which, strikingly, included a law of self-amnesty issued by the last military junta and an exemption that recognized superior orders of the Argentinean code of military justice.[52]

These circumstances had enormous influence on the policy of Alfonsín's government, and in Nino's opinion, its unparalleled success (especially in Latin America) in punishing human rights violations. The government solved the problem of self-amnesty through a disposition declaring it void *ab initio*. This implied a clear change in its position on the validity of de facto laws, discussed *infra*. Furthermore, the enactment of Law 23.049 modified the scope of the exemption allowing amnesty for those acting in compliance with superior orders. Again, one can see the practical influence of Nino's theoretical postulates.

Several members of the military sector were tried and convicted. Those who had violated human rights in compliance of orders were acquitted. The government, however, produced more erratic results[53] when determining the fate of high-ranking officers who could not defend on the ground of compliance with superior orders but who had not participated in designing the plan of repression. Nino justifies this result for two reasons. Firstly, it is unnecessary to diminish a society's existing global autonomy by imposing punishments which are above and beyond the minimum required to promote deterrence. Thus, it was sufficient to punish a few members of the military to publish the enforcement of the sanctions.[54] Secondly, the eagerness to impose responsibilities had to be weighed against the need to protect the democratic system itself; a necessity for prosecuting some of the implicated soldiers. A general trial of all those who committed human rights abuses could have caused a successful *coup d'état*.[55]

In summary, according to Nino, the following measures should be taken with respect to human rights violations: (1) Any

---

51. *Id.* at 139.

52. *The Human Rights Policy*, *supra* note 9, at 224.

53. The results were generally favorable to the military.

54. If the military had been convinced that the Alfonsín administration intended to prosecute only a limited number of their comrades, they would have lost their fear of a general trial for all its members and might possibly have agreed to a trial for only those few. *See*, *The Duty to Punish*, *supra* note 43, at 2632.

55. *Id.* at 2630.

State action should be aimed at the promotion and effective implementation of human rights; (2) no one can invoke a right to have all those who commit human rights abuses punished — it is enough to punish only some of them, as long as three conditions are met: (a) The discrimination between those who are tried and those who are not is not arbitrary; (b) the number accused is not greater than that absolutely necessary for punishment to serve as a deterrence; and (c) the prosecution of the delinquents is weighed against the protection and preservation of the democratic order. In all cases, this is the most important condition.

The Alfonsín government was legitimized by following these criteria:

> The formation of a social conscience against human rights abuses depends more on the exposition of the atrocities and their unmistakable condemnation than on the number of persons actually punished for them. Therefore, one of the justifications of the measures taken by the government of Alfonsín in order to limit the number of trials was to make the punishment of the main offenders possible . . . .[56]

IV. THE LAW

The basic premise underlying Nino's understanding of the law presumes that there is no necessary connection between words and reality. For Nino, word meanings are purely conventional. Nino applied this concept to its furthest logical extension. He believed that there is no true definition or single concept of law. He subscribed to this notion in his early publications,[57] but treated it more extensively in one of his last, posthumously published works.[58] This radical perspective has far-reaching consequences for the task of the legal philosopher. If one agrees that there is a multitude of legal concepts, each could be evaluated in view of the purposes or necessities of the respective context in which it is applied. Furthermore, adoption of Nino's

---

56. *Id.*

57. *See, e.g.*, CARLOS NINO, NOTAS DE INTRODUCCIÓN AL DERECHO (1973); CARLOS NINO, LOS CONCEPTOS DE DERECHO (1981).

58. *See* CARLOS NINO, DERECHO, MORAL Y POLÍTICA (1994). *See also* FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 37.

concept of law terminates many ill-conceived discussions about the alleged essence of law, thus clearing the path for analyzing substantive questions. Lastly, Nino's theory links the task of theoretical elucidation with the substantive problem to be treated in each instance. According to Nino, in formulating a concept, the theorist should proceed as follows: First, start the analysis with pre-theoretical, approximate concepts. Second, the theorist should use these concepts to initiate discussion of the justificatory aspects of the problem and to determine which properties are relevant for a presumably adequate substantive theory. Third, the theorist should check the performance of the concepts subsequently found in the context of that theory, especially with respect to relevant properties. If necessary, the theorist should adjust the concept and then proceed to critically analyze the substantive principles of the theory. This process should be repeated as a dialectic process of mutual adjustments of substantive and conceptual aspects.

Different concepts of law are used in different contexts. Consequently, there are a multitude of definitions of law, each critical of the others because each operates in a different context.[59] Nino often discussed the following possible concepts of law:

1) *The realist descriptive concept of law* refers to the set of standards recognized as de facto by those who have the capacity, through their decisions in concrete cases, to mobilize the machinery that has the quasi-monopoly on the use of force in a society. Alf Ross is said to have been a proponent of this concept.

2) *The systemic descriptive concept of law* refers to the set of standards identified by the former criterion, plus the standards which are their logical consequence. Nino attributed this concept to Carlos Alchourrón and Eugenio Bulygin.

3) *The institutional descriptive concept of law* is more restricted than the former; it refers only to the standards de facto recognized by the primary state organs because

59. This was probably the reason a perplexed Flaubert muttered, "[l]aw: unknown entity." MANUEL ATIENZA, INTRODUCCIÓN AL DERECHO 3 (1985) (quoting GUSTAVE FLAUBERT, DICTIONNARE DES IDÉES REÇUES).

these standards were dictated by certain authorities or sources. It no longer denotes all the standards recognized by judges and other primary state organs, but only those originating from an authoritative source such as the legislature, precedent, etc. H.L.A. Hart used this concept.

4) *The de lege ferenda concept of law* refers to the set of all standards that should be recognized in the quasi-monopoly of the use of force. This concept refers to an "ought," as all normative concepts do. Naturally, this element of "ought" cannot be strictly legal, and it therefore cannot be denoted by the concept itself. This would be self-referring. According to Nino, sometimes the term "valid" is used to describe a standard that is obligatory or binding.

5) *The wide judicial normative concept of law* refers to standards which judges must take into account in their decisions. This concept is more restricted than the last, because it excludes standards that the legislator *should*, but has yet to, enact.

6) *The restricted judicial normative concept of law* denotes those standards that the primary organs should recognize because they have been established by some authoritative source. According to Nino, this concept is probably the most widely used in justificatory contexts by judges and lawyers.

7) *The mixed normative concept of law* refers to the de facto standards recognized by the primary state organs in their decisions as well as to the standards the primary organs *should* recognize as the best justification for the recognition of the decision-based standards. Nino believed that this is the approach defended by Ronald Dworkin in his interpretative theory of law.

8) *The hypothetical normative concept of law* refers to those standards which hypothetically should be recognized and which are, therefore, hypothetically valid. This implies that the standards should hypothetically be applied in the use of the quasi-monopoly of force in a society when they have been issued by an authoritative source. Kelsen defended this characterization with the

help of his hypothetical *Grundnorm*.

Nino stressed the importance of recognizing that the different concepts of legal norms formulated by legal philosophers do not strictly correspond to the different concepts of law mentioned above. Actually, only the normative concepts of law seem to refer to norms, understood as deontological propositions, because these concepts assume that the prescriptive behavior be carried out. But it is not clear whether this also applies to the descriptive concepts of law since they refer to the existence of norms only insofar as they are social texts or practices.

According to Nino, if one accepts this diversity of concepts and takes into account that there are different kinds of legal discourse which pursue different objectives, then the traditional debate between advocates of natural law and of legal positivism dissolves. This is because the discussion is understood from the perspective of conceptual essentialism and not, as has often been proposed, from that of a disagreement between moral objectivism and ethical skepticism. Consequently, the classic legal philosophic questions about the conceptual relation between law and morality should not be answered a priori, since the answer will depend on the context of discourse from which the question is posed. The only question remaining then becomes which of these concepts is the most adequate for each of the different contexts.

Nino believed it is more appropriate that external observers use descriptive concepts of law and internal observers use normative concepts of law. This seems to coincide with H.L.A. Hart's distinction between the external and internal points of view. Although Nino himself distinguished his position from that of Hart,[60] his writings suggest that those differences gradually dissolve. Nino maintained that there is a logical connection between the internal and external points of view, because there can be no adequate external observation without presupposing the internal point of view. Nino theorized that,

the internal perspective is inseparably connected with the

---

60. *See, e.g.*, Carlos Nino, *El Concepto de Derecho en Hart*, *in* LIBRO DE HOMENAJE A H.L.A. HART (1987); Carlos Nino, *Las Limitaciones de la Teoría de Hart Sobre Las Normas Jurídicas*, 5 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 1985; DERECHO, MORAL Y POLÍTICA, *supra* note 58.

> internal perspective of that morality, and especially the internal perspective of the discursive practice, which modernity has linked with positive morality. If that is true, then the external perspective of law as a social practice is distorted if it does not, in its explications, connect this social practice to the social practice of moral discourse.[61]

This is why the law, in its justificatory sense, cannot be identified from the position of an external observer. According to Nino, even a legal anthropologist undertaking the identification of certain regularities in the prescriptions utilized by the primary organs of a particular society would, in addition, need to know which organs to consider as legitimized. These organs' issuing prescriptions may be considered legitimate by some other normative propositions. Therefore, the institutional descriptive concept of law cannot be used indefinitely and recursively to qualify as legal norms those norms used by judges to justify their decisions. If that were the case, the justificatory reasoning of judges would be invalid. It is possible that a judge may accept a norm because a competent authority has enacted it by relying on other norms, and that those norms are accepted for the same reason. But this reasoning cannot guide us *ad infinitum*. Because it is impossible to infer normative justifications from facts, we cannot break the chain at some point and accept some norm — the basic norm of the system — simply because it has been enacted by a certain authority. In Nino's opinion, therefore, the last criterion for the identification of the law must refer to non-legal norms. These are moral norms, i.e., norms accepted on their own merit.

This understanding and identification of the law manifests itself in Nino's interpretations of both Hans Kelsen's[62] and Alf Ross' works.[63] In all of these studies, Nino emphasizes that the law cannot offer autonomous reasons for the justification of actions and decisions, rather it can only offer auxiliary reasons.

---

61. DERECHO, MORAL Y POLÍTICA, *supra* note 58.

62. *See* Carlos Nino, *Some Confusions around Kelsen's Concept of Validity*, 64 ARCHIV FÜR RECHTS UND- SOZIALPHILOSOPHIE 357 (1978); LA VALIDEZ DEL DERECHO, *supra* note 6.

63. *See* Carlos Nino, *La Concepción de Alf Ross Sobre Los Juicios de Justicia*, 3 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL (1983); Carlos Nino, *Ross y la Reforma del Procedimiento de Reforma Constitucional*, 25 REVISTA DE CIENCIAS SOCIALES 347 (1984); LA VALIDEZ DEL DERECHO, *supra* note 6.

Morality alone provides this justificatory basis.

In asking whether the law justifies actions, one must first define the concept of reason. Two types of reasons are relevant in this context. The first refers to an actor's mental state that drives a particular action. These mental states are identified with motives. The second type serves to evaluate rather than explain an action. Nino, following Joseph Raz's reasoning, suggests that in order to adequately reconstruct the concept and function of justificatory reasons, one must start from practical reasoning.[64] This is because practical reasons serve as premises upon which one may develop arguments to justify an action.[65] Practical reasoning leads to many different questions and understandings. Nino's interest, however, lies in a logical inference that permits evaluation, foundation or guidance of an action.

> And, obviously, an argument can help to evaluate, found or guide an action only if its conclusion is a normative or value judgment, i.e., to say it in a more obscure, but also more suggestive way, a judgment the formulation of which is not compatible with just any action or attitude of the person uttering it.[66]

If the argument is in the form of an inference, and its conclusion is an "ought" judgment, then at least one of the premises must also be an "ought" judgment. In following the proposals of Raz, Nino distinguishes between complete reasons, operative reasons, and auxiliary reasons; this is because common usage deems any premise of a practical argument a *reason*. Complete reasons consist of the set of all premises that are not superfluous in a valid practical argument. Operative reasons are "ought" premises that, by themselves, could be complete reasons for an action. Auxiliary reasons are premises consisting of empirical judgments which define the means for satisfying operative reasons.

Operative reasons have implicit assumptions: An autonomous nature, and the generality, universality and supervenience of the judgments serving as operative reasons. Finally, justificatory operative reasons can be ranked. The ultimate reason is

---

64. LA VALIDEZ DEL DERECHO, *supra* note 6, at 129.
65. *Id.*
66. *Id.* at 130.

moral.

> This is the principle of unity of practical reasoning that prevents the inability to decide on actions which are guided by a plurality of reasons. This is the integrative characteristic of reasons, since it consists in the property of grouping together in a system, maintaining some sort of hierarchical order.[67]

What is the role of the law in practical reasoning? Nino forwards the following example: Suppose that the reasoning of a judge has the following elements: (1) A democratically elected legislator should be obeyed; (2) legislator L has been democratically elected; (3) L has enacted a norm prescribing "The killing of another person will be punished by 8 years in prison"; (4) those who kill someone should be punished; (5) John has killed Peter; and (6) John should be punished with 8 years of prison. According to Nino's analysis, this reasoning fulfills the following functions:

a) (1) is, in the broadest sense, a moral judgment and cannot be identified with a legal norm.

b) (3) is a descriptive judgment that mentions a legal norm and constitutes an auxiliary reason.

c) The conclusion in (6) must be of the same kind of normative judgment as the operative reason. It is a moral judgment because it is inferred from (1) (a moral judgment) and from (3) which describes the existence of a legal norm. Nino calls this arrangement of sentences, "judgments of normative adhesion."

"Since this kind of sentence is the justificatory legal judgment par excellence, this confirms the conclusion advanced above that practical legal propositions are a kind of moral judgment."[68]

d) The question is whether (3) can — independent of (1) — be a justificatory operative reason. The answer is no because it is a judgment of a descriptive nature and whoever invokes it for justificatory purposes commits the naturalistic fallacy.[69]

---

67. *Id.* at 133.

68. *Id.* at 140.

69. *See* Carlos Nino, *Respuesta a J.J. Moreso, P.E. Navarro y M.C. Redondo*, 10 DOXA 261 (1993).

e) (4) appears in the argument as an intermediate conclusion and constitutes a judgment of adhesion. If a judge assumes (4) as a justificatory operative reason, he does not observe a legal norm but rather considers it a moral norm. The judge's argument becomes a moral one instead of a practical legal argument.

f) If, instead, a judge assumes (4) because the legislator L commands as much, he assumes it as a judgment of adhesion. Thus, it follows that the judge, in effecting compliance with a norm, invoke reasons different than those held by L when he enacted the norm. The judge performs a practical legal argument insofar as he does not argue like a legislator.

From all this, Nino concludes, "legal norms do not express autonomous operative reasons for the justification of decisions unless they are identified with moral judgments . . . they do not by themselves express operative reasons for action."[70]

Nino's concept of law influences his view of the activity performed by legal theorists and his characterization of legal dogma.[71] Traditional legal dogma assumes certain preconditions which any scientific activity should satisfy. Legal dogma is characterized as *scientific* depending on whether jurists' actions satisfy these conditions. The assumptions of legal dogma and the perception dogmatists have of their own work can be explained historically as well as ideologically.[72]

At least since codification, it is commonly known that dogmatists believe that their function is not to evaluate the law but to contribute to its systematization. Strangely enough, Nino explains that "these assumptions of dogmatic jurists about their own activity have little to do with reality. What legal dogma intends is a genuine reconstruction of the positive system, in order to eliminate its indeterminacies as well as to adjust it to certain underlying axiological ideals."[73]

---

70. LA VALIDEZ DEL DERECHO, *supra* note 6, at 143.

71. *See* CARLOS NINO, CONSIDERACIONES SOBRE LA DOGMÁTICA JURÍDICA (1974); CARLOS NINO, ALGUNOS MODELOS METODOLÓGICOS DE "CIENCIA" JURÍDICA (1993).

72. For an analysis of those explanations, assumptions of legal dogmatics and the functions they fulfill, see ALBERTO CALSAMIGLIA, INTRODUCCIÓN A LA CIENCIA JURÍDICA (1986).

73. ALGUNOS MODELOS METODOLÓGICOS DE "CIENCIA" JURÍDICA, *supra* note 71, at 17.

So-called legal theories (e.g., the general theory of crime) not only function descriptively but also normatively. This is because they give justificatory support to the positive law and, at the same time, offer solutions for those cases not yet solved by the same law they claim not to evaluate. One can clearly see the normative function jurists fulfill by observing jurists as they interpret norms. In giving meaning to legislated measures, jurists clearly display moral and ideological preferences (especially, but not exclusively, in constitutional interpretation), disguised under an alleged *scientist's* coat as methods of interpretation.

Nino was dissatisfied with the traditional model of legal dogma that purports to describe an activity legal scholars do not perform, while covering up the one they actually carry out. He called for a reconstruction of legal dogma that would satisfy the demand for showing how jurists work and what functions they serve. Consequently, Nino proposed a model of law as a normative science.

His proposal attempts to answer two questions. The first asks why legal theorists should discuss the values they forward and which values are necessary for the reformulation of positive legal norms. The second asks what general lines should the theoretical elaborations of legal dogmatists follow. The first is the more important question. According to Nino, the first function of the theorist is to offer guidelines for the administration of justice by offering models for the "sentence *ferenda*." But since the interpretation and application of the law performed by judges necessarily depends on axiological questions, theorists must also take those into account if they want to formulate guidelines for the administration of justice.

Nino theorized that the axiological implications of the function of judges are observed in the following ways. First, judges must give meaning to legal provisions. Those analyzing these interpretations should be critical of using the ordinary meanings ascribed by common usage because, in many cases, the legislature uses words in a technical sense. Moreover, if jurists are interpreting old provisions literally, they may give them a different effect than that intended by the law. "In order to transform the 'rule of common usage' from a practical guide to infer what meaning should necessarily be assigned to the words of the law, one must take recourse to axiological or pragmatic consider-

ations."[74]

Second, the legal system may be severely underdetermined. This can be due to pragmatic, semantic, syntactic or logical factors. The use of certain mechanisms to solve those indeterminacies shows a clear normative tendency even if it is descriptively disguised as in the case of so-called "legal nature":

> The legal order, in short, is not in fact a self-sufficient system for the resolution of any conceivable case. And since it is impossible to give a definite solution to unforeseen cases only with the help of axiologically neutral techniques of interpretation and systemic reconstruction, judges are compelled to solve such cases by invoking, at some point of their arguments, non-legal principles and rules.[75]

Third, as I have already discussed, the law, according to Nino, does not offer justificatory reasons but only auxiliary ones. Therefore, in order to justify a decision, one must always refer to evaluative criteria of a moral nature. When handing down a sentence, a judge cannot suspend her moral responsibility by saying that her decision is justified because the law says so. She must presuppose (and make explicit) the axiological assumptions that make compliance with this norm legitimate.

However, just as judges must rely on values to justify their decisions, legal scholars must abandon their evaluative inhibitions if they want to offer "*sententia ferenda*" (that is, recommendations about what judicial decisions ought to be made). According to Nino, if it is true that legal theorists do fulfill this socially important function, then the question remaining is how. He suggested a two-level approach. On the first level, the justification of the legal system, its basic institutions, and the effective legal practices should be evaluated.

Problems like the division of power, the justification of punishment, the relevance of agreements between private persons, and the inheritance system are some of the questions analyzed on this level. The purpose here is to offer guidelines *de lege ferenda* to both justify legal norms and to suggest ways for their modification. On the second level, the activity of the jurist is

74. *Id.* at 93.
75. *Id.* at 94.

viewed as eminently normative. The task here is to try to reconstruct the system, eliminating its indeterminacies with the help of open (as opposed to traditional dogma's secret) evaluative directives:

> Organs of application that are conscious of the fact that their work inevitably implies taking a stance on fundamental axiological questions will find extremely valuable orientation in theoretical elaborations constructed along those lines . . . . [I]f they have at their disposition different theoretical approaches developed explicitly from different basic value conceptions, showing their implications for specific questions and the forms in which positive norms can be interpreted and applied in order to adjust them to the necessities of those conceptions, judges will have an invaluable source to live up to their responsibility of reaching morally justifiable decisions with a clear mind and good judgment.[76]

V. DEMOCRACY

While it is true that Carlos Nino's conception of human rights is that they are of a basic and central moral nature, he also postulates that their recognition in legal theory and practice must be considered a precondition for the justification of legal norms and decisions. This is why he claims that "it is the function of effectively guaranteeing basic individual rights that provides the primary moral justification for the existence of any legal order or government."[77]

Thus, the set of moral principles reviewed above gives moral justification to the legal order; to the existence of authorities capable of issuing norms and implementing them through the apparatus that holds a quasi-monopoly on the use of force in a society. This concept lead Nino to dedicate a substantial portion of his efforts to find a solution to two questions: The first is the determination of what type of government is least likely to dictate ethically unacceptable norms and whether or not there is an obligation to obey the unethical law; the second question is how to solve the apparent paradox regarding the moral irrelevance of

---

76. *Id.* at 108.
77. ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 368.

law and government.

Obviously, the answer to the first question is democracy. Following the standard conception, Nino defines democracy as a system of decision-making through majority rule, either directly or through periodically elected representatives. This definition does not answer the question of why democracy is justified. Nino rejects several theories that attempt to justify democracy: democracy as an expression of popular sovereignty; democracy as government based on the consent of the governed; democracy as government based on contractualist assumptions; and consequentialist theories of democracy. In his opinion, democracy is justified because it is a surrogate of moral discourse.

Utilizing as a point of departure William Nelson's observation that democracy is a form of government that tends to produce morally acceptable laws due to the tests laws must pass before enactment, Nino sets out to broaden this idea by profoundly emphasizing the relation between democracy and public debate. Prior to Nino, Stanley Benn and Richard Peters emphasized that democracy operates in an atmosphere of discussion, and the rules of the political game underlying democracy are intended precisely to facilitate and guarantee political dialogue and debate among all members of the community.

According to Nino, the rules of democracy prescribe the following: no discrimination on grounds of race, sex, or economic means; the votes of all citizens hold equal weight; collective political decisions are to be made by majority rule; representatives are to be elected periodically; and minority rights may not be violated. These are all examples of rules that create a decision-making procedure which is similar to the procedure in moral discourse. Respecting the rules of democracy enables citizens to enter into an active dialogue on an equal basis, in the absence of pressures and coercion, either directly or through representatives.[78] This active dialogue is aimed at reaching a politically correct decision. Thus, following majority rule provides the most practical formula for moral consensus.

However, Nino recognized that the rules of democratic procedure, although similar, are not identical to those of moral

78. *See* JORGE F. MALEM SEÑA, CONCEPTO Y JUSTIFICACIÓN DE LA DESOBEDIENCIA CIVIL (2d ed. 1990).

discourse. First, democratic decisions must be reached within a certain time frame otherwise they constitute implicit decision. This temporally limits deliberation. Moral discourse, on the other hand, operates free from time constraints. Second, majority rule's acceptance in solving conflicts makes people strive for unanimity even though it may be unattainable. Third, the theory of representative democracy poses problems that obscure, to a greater extent than moral discourse, individual participation in debate. These three deviations suggest that democratic discourse can be viewed as "regulated" moral discourse or, in Nino's own words, a "surrogate for moral discourse."

The justification for democratic discourse as a surrogate for moral discourse is not only that it expands the pragmatic possibility for moral discourse, but also that it tends to be impartial. In the interplay between the majority and minorities, individuals strive to gain converts to their own agenda. We achieve this goal by discussing the respective merits of each position. In addition, the process must take place in public, take into consideration all affected interests, and cannot evaluate these interests on grounds of particularistic considerations. The need to collect votes would thus be a strong incentive for everyone to come close to a position of impartiality.

This approach implies that democracy acquires epistemic value. Democracy is a good method for approaching moral truth both because free discussion exposes fallacious arguments and because it is improbable that an isolated person would impartially consider all affected interests. Therefore, the process of democratic discussion has a higher probability of guiding a moral person to adhere to moral principles than if she deliberated in isolation. Democratic procedures, however, are no guarantee that all decisions will be morally correct. Instead, the value in democratic procedures is that they produce a greater probability of morally correct decisions than any other procedure.

These considerations acquire special relevance when applied to analyzing compliance with the law. If the democratic legal order recognizes individual rights, facilitates cooperation among citizens and solves social conflicts impartially, then citizens have a duty to obey the law. Besides, democracy as a surrogate of moral discourse has an additional epistemic value which is also important. If the conditions of democracy are satisfied, there is a strong presumption that decisions are morally correct and

should therefore be obeyed. It is in this context that Nino questions the correct moral attitude toward a person who feels that her own evaluations collide with democratically established legal norms. His response distinguishes between rights violated by democratic legal norms that are necessary conditions for moral discourse or its democratic surrogate and those rights that are not. For example, disobeying democratic legal norms would be justified in issues involving the right to life or the freedom of expression. This conclusion can be reached by individual deliberation because "they are a priori rights with respect to the method of moral knowledge consisting in discussion and collective decision, and they are determined through deliberation about the conditions that give value to the latter."[79]

In contrast, citizens and judges have a prima facie duty to obey, even against conscientious objection, because democratic discussion is a better procedure for determining the moral correctness of actions. Nino argued that beliefs to the contrary advocate a kind of individual moral hubris.

Analysis of compliance with the law must be complemented by an examination of two social practices that have gained unprecedented relevance in the past few years: conscientious objection and civil disobedience. Nino, more reluctant to accept the second than the first, opined that both could be justified in a democratic regime under very special circumstances. If one disobeys a norm for reasons of conscience, and the norm, without reason, violates the principle of individual autonomy, the conscientious objection is justified. For example, if ordered to salute the flag or prohibited from engaging in certain sexual practices between consenting adults, conscientious objection may be proper. Also, if the democratic procedure has been plagued by so many mistakes that its epistemological value and its guarantee of individual rights have become totally ineffective, civil disobedience may be justified although its justification is much more difficult.

Nino also analyzed citizens' attitude toward the law from the related perspective of anomy.[80] The examination of this problem permitted him to formulate a tentative explanation for

79. ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 406.

80. *See generally* UN PAÍS AL MARGEN DE LA LEY, *supra* note 9.

the underdevelopment and economic and social setbacks suffered without significant interruption by the Republic of Argentina since the beginning of this century. According to Nino, the emergence of anomy and illegal conduct in Argentina today were evident in some characteristics of the last years of colonial life. Disobedience against the laws dictated by local authorities and the practice of smuggling, which was endemic at the time, are examples. These characteristics became more prevalent at the beginning of Argentinean independence. Nino illustrated the disastrous consequences of these characteristics. The actual distribution of land in Argentina followed improper interpretation, legal loopholes and later, open violation of Rivadavia's Lease Act of 1826. The Act, in principle, was aimed at the distribution of state-owned land among immigrants, but resulted in the distribution of 6.5 million acres of fertile land to 122 persons, ten of which received 133,000 acres each.[81]

Through a summary analysis of illegal conduct, Nino presented several examples in support of his thesis. Illegal conduct considered representative of the situation in Argentina includes tax evasion and corruption in manufacturing. Although ignored by politologists, sociologists and historians, Nino calls attention to the fact that Argentinean underdevelopment cannot be understood without reference to this situation of anomy that has frustrated more than one attempt at cooperation in Argentinean society.

Nino calls to mind problems with game theory and its connection with the inefficiency of interactions among self-interested participants; problems that make it impossible to reach the desired ends. Nino suggested that the obvious solution depends on the existence of norms that form a necessary condition for the development of efficient collective action, either because they modify the preferences of the participants, or because they ensure their expectations are realized.

The Sáenz Peña Act of 1912 established the obligation to vote in Argentina and is a good example of how a norm can serve to eliminate certain obstacles to social cooperation. In states where voting is not compulsory, self-interested and rational citizens may tend not to vote because their one vote is prac-

81. *Id.* at 59.

tically insignificant compared to the total amount of votes. The citizens believe that the utility gained by casting one vote does not compensate for its inconveniences. Thus, if everyone were self-interested, no one would vote, the system would break down, and the consequences for all citizens would be irreparable.

This paradox, Nino adds, is complemented by a particular social dynamic. There are social sectors that do not vote. In turn, elected representatives do not promote these societal interests thus reinforcing the tendency of these sectors to abstain from voting in future elections. The only way to overcome these difficulties and to promote social action is to make voting compulsory. This justifies the Sáenz Peña Act. This law was intended to solve the voting paradox and tripled voter turnout. Also, the law gave considerable weight to the popular sectors in electing authorities. According to Nino, the more immediate consequence was that the conservative sectors now rule Argentina through the proscription of so-called popular parties or through military coups.[82]

In order to overcome the anomical situation in Argentina, Nino proposed a number of institutional reforms that would affect the structure of the State.[83] However, these reforms would not be sufficient unless they are accompanied by measures to facilitate education about liberal democratic values in society. This concerns not only the promotion of education on all levels, from elementary to post-graduate, but support for socially acceptable behavior through the compliance with norms. This promotes the autonomy of the people to freely make life choices, while at the same time fostering awareness of the hardships brought about by generalized anomy. Nino stated that,

---

82. *Id.* at 179. This leads to a new paradox. Democracy requires the vote of the majority of citizens. The larger sectors in society have a higher probability of seeing their interests represented in government. The negative reaction of economically more powerful though smaller sectors of society undermines the basis of democracy. In Argentina, this conflict has traditionally ended in military coups in favor of minority interests. Also, the interests of the smaller more powerful sectors have been promoted by governments that were elected by the masses but then moved away from popular expectations, as is the case with the Peronist Carlos Menem. A solution creating new norms that strengthen the state in its role as an arbitrator may encourage cooperative undertakings between the different sectors allowing those that are unrepresented to improve their position in some way.

83. For a discussion of these reforms, see UN PAÍS AL MARGEN DE LA LEY, *supra* note 9, at 217-33.

> [t]he development of personal autonomy requires intersubjective norms permitting its egalitarian expansion . . . . There are intersubjective norms that must necessarily be promoted and even coercively implemented if the personal autonomy advocated by liberalism is to be realized. One of the forms of promoting such intersubjective norms is through the education process. It may even be true that there can be no effective compliance with public norms without the formation of certain virtues of character which are part of a civic spirit. We inevitably must use the education process to foster those virtues . . . .[84]

VI. THE CONSTITUTION

If Nino's non-essentialist view of the meaning of words is adopted, then the words "constitution" and "constitutionalism," like "law," can have several meanings. Nino distinguished constitutionalism in a minimal sense from constitutionalism in the full sense. This distinction coincides with the classical way of understanding a constitution as both a formal piece and as a document having important components.

Constitutionalism in a minimal sense refers to the demand that states have a constitution to serve as the backbone of the legal order, give structure to the organs of the State, determine the relation between state and citizens, and limit the competences of the legislative power.

Constitutionalism in the full sense demands that the constitution satisfy certain basic procedural and material requirements. The minimal sense of constitutionalism seems to imply the rule of law, while constitutionalism in the full sense implies a liberal democracy.[85] "Constitution" can be a notion of normative, descriptive, or mixed nature, depending on the concept of law. The normative nature of "constitution" refers to the set of valid principles created by the system of individual rights or to a

---

84. *Id.* at 251.

85. *See* FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 2, 4. The idea that the rule of law is compatible with any content, except State terrorism, is not new, although some do not agree with it. In this respect, one could also speak of a minimal and a full sense of "rule of law" where the full sense would be identified with the idea of a democracy that respects individual rights.

legitimate structural organization of the state and its decision-making procedures. "Constitution" in the descriptive sense refers to the basic norms actually recognized by the primary organs. Basic norms adopted through a legitimate procedure of collective decision-making represent the notion of "constitution" of a mixed nature. These definitions may vary depending on the specific context and the ends they are meant to serve.

Nino was interested in finding an answer to the alleged irrelevance of the constitution in practical reasoning. He believed that for logical reasons the existence of a legal norm did not justify a decision or action. For example, a judge cannot validly order that no-one may be deprived of liberty except by a written order issued by a competent authority if the order is arbitrarily based on an article of a constitution. If the judge, using a descriptive concept of "constitution," describes a social practice when she invokes this constitutional norm, then she cannot infer a duty to issue an order releasing a detainee. In effect, the judge cannot infer any order at all because to do so would be a naturalistic fallacy. To justify her decision, the judge's appeal to the constitutional provision must have a normative character. She must assume that there is another norm saying "what the constitutional authority prescribes ought to be done." But then, she must also assume another norm, and repeat this process over and over.

Since this process may not continue *ad infinitum*, a norm prescribing that a certain authority should be obeyed on its own merit must be accepted. This norm must be a moral rather than a legal one. A legal norm, however, must derive from a moral norm, for the moral norm gives legitimacy to the authority that issued the legal norm. If one accepts that a norm deriving from a moral authority is, in turn, a moral norm, then one would have to conclude that legal norms are a kind of moral norm. This implies that legal discourse is a type of moral discourse in which judges widely recognize moral norms that justify the application of legal norms derived therefrom. The judges adopt this principle by adhering to the legal norms, which is in effect adherence to moral norms.

Moral principles already contain everything a constitution can contain. Therefore, a constitution does not add anything to these justificatory principles. If a constitution does not embody moral principles, it is not legitimate and cannot be used in prac-

tical discourse. If a constitution does recognize moral principles, it is redundant because it appeals to the very principles of moral discourse inherent in practical reasoning.

The apparent paradox of the legitimizing function of constitutions, however, does have a solution. The original constitution, whether written or not, is an historical fact establishing a process that gives rise to a legal order. Not all historical constitutional attempts are successful, of course, but because of certain characteristics that were relevant at the time, some of them do succeed. This enables the community to coordinate its actions around this constitutional norm. No legal operator, whether constituent, legislator, or judge has exclusive control over this process. They can influence it only in part. Therefore, their respective actions must be guided by an appropriate rationality. This implies that each of the operators' actions must be aimed at preserving and improving the legal order, unless this order is so immoral that the legal operators have the ethical obligation to make it inoperative.

The practice may be justified by adopting Nino's two-tiered argument.[86] On the first, more basic level, a constitution is legitimized by examining procedural and material considerations. The following issues should be considered: whether the constitution is the fruit of a democratic, collective decision-making procedure; whether its promulgation was preceded by free and open debate; whether its approval was consensual; and whether it contains the basic individual rights that are a prerequisite for the epistemic value of the decision-making procedure. On this first level, morally valid principles and procedures for the constitution and constitutional law are of paramount importance.

If this first-level evaluation produces satisfactory results, the constitution is examined at the second level to justify actions and decisions. On this level, reasoning is constrained by the reasons established on the first level. This implies that principles or procedures that are incompatible with the preservation and the improvement of the constitution may not be proposed. On this level too, moral reasoning plays a role. Because the first level ranks higher than the second, moral principles and proce-

86. *Id.* at 70. *See also* Carlos Nino, *La Constitución como Convención*, 6 REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 189 (1990).

dures take precedence. Moral principles and procedures are manifest in the solution of constitutional indeterminacies, thus permitting the enrichment of constitutional practice and its movement in the direction of more acceptable forms of legitimacy. Summing it up in Nino's own words, this two-tier reasoning corresponds to,

> a 'second best' type of rationality because individual cases would, by definition, be solved much better if we could justify our actions and decisions on the basis of last principles. But this we cannot do outside of a constitutional practice, and in order to preserve this practice and not fall into another, or be left without any — which, I assume, would lead to solutions that are worse — we must resign ourselves to justifying our actions and decisions in a way that is compatible with the constitution we have, while at the same time trying to improve it.[87]

Nino's conception of the role of the constitution and the criteria that must be satisfied in order to justify it are also reflected in his treatment of two related topics: judicial review and the validity of de facto laws.

A. Judicial Review

As is well known, in almost all modern democracies there are special procedures by which certain organs — constitutional courts, other courts, or judges in general — may examine whether or not a law conforms to the constitution. The conditions, processes and consequences of such judicial review are different, but the common underlying idea is that judges have some sort of veto over decisions made through democratic procedures. In principle, this is a serious setback for democratic ideals since a nonrepresentative organ, a judge, can constrain majority decisions.

Nino dedicated two of his papers to the formulation and the proposal of a solution of the apparent paradox of judicial review.[88] Nino questioned the foundation of this judicial review.

---

87. FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 76.

88. *See generally* FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 657; Carlos Nino, *La Filosofía del Control Judicial de Constitucionalidad*, 4 REVISTA

His conception of legal norms does not justify actions and decisions as binding force. The validity of legal norms does not derive from the law itself but from moral evaluations. Democracy, on the other hand, has epistemic moral value since it is the most trustworthy procedure for finding moral truth. Decisions are made after free and open debate with a view toward consensus, presupposing individual rights and satisfying the requirement of impartiality. In this context, constitutions and legal norms have a claim, and the highest probability, of being just. Nino believed that allowing a judge or a court to pass judgment on the validity of a law is tantamount to advocating a certain kind of unacceptable elitism, assuming that moral truth can be reached by individual reflection. This opinion appears to bar any possibility of judging the value of a law that has been dictated by democratic organs. However, Nino argues that if one proceeds with the utmost caution, there may be several possible ways to justify judicial review.

First, it seems clear that not all "actual democracies" satisfy the procedural prerequisites they ideally should satisfy. Judges do not have epistemic reasons for putting moral trust in decisions that are not respected or decisions that are considered open violations of democratic procedures. Consequently, in judging the constitutionality of a law, it is the duty of judges to determine whether, in the elaboration and subsequent promulgation of the law in question, the steps required by democratic discourse have been observed. If this is not the case, judges should uphold an ideal constitution and declare that law unconstitutional. Accordingly, there is a process-based possibility to justify judicial review.

Second, in a democracy, it is empirically possible to enact a perfectionist law imposing behavioral patterns of personal excellence on the citizens. It is well known, however, that inter-subjective moral principles should be distinguished from ideals of personal excellence. Only the former may be legitimately imposed by law since the epistemic value of democracy resides in its tendency to be impartial. In contrast, ideals of personal excellence are related to and depend on the principle of personal autonomy which is a prerequisite of democratic discourse. In view of the two-tiered structure of constitutional reasoning, the

---

DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 79 (1989).

principle of personal autonomy also takes precedence over the final result of the discourse as a whole. Thus, there is another form of legitimizing a declaration of unconstitutionality based on the procedure followed by the majority if the principle of autonomy, other moral principles, or the rights deriving therefrom are violated.

Third, Nino points out that while democracy supplies trustworthy epistemic evidence of the moral correctness of the principles and decisions which it adopts and which should be applied to constitutional practice, it is also true that this practice is a precondition for the continuity and efficacy of democracy. Therefore, judges are also guarantors of this continuity and, as such, should declare unconstitutional those laws adopted by the majority that endanger it. A certain paradox of democracy is thus overcome. A judge cannot, and state organs should not, permit this structure to be subverted through democratic procedures. This yields a third way of justifying a declaration of unconstitutionality. According to Nino,

> the judge should continually reexamine up to which point he prefers the continuity of practice to its perfection; up to which point democratic procedures are competent enough to be trusted to determine the principles in the light of which practice is to be perfected; in what measure this process should be corrected and deepened; in what measure such correction or deepening undermines the continuity of practice; in what measure individual autonomy is violated on the basis of a democratic decision, etc.[89]

This requires that judges not only act with caution, but also surpass the most "Herculean" qualities Dworkin imagines his Judge to possess.

B. The Validity of De Facto Laws

The doctrine according validity to legal acts issued by governments that emerged out of military coups is a problem closely related to judicial review. This problem has had great, albeit negative, impact in Argentinean constitutional life.

---

89. FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 704.

Quite a few writers have attributed the same legal validity to de facto norms as to norms issued by democratic governments. Carlos Nino was troubled primarily by two questions: What validity do de facto norms possess? And what validity do they have once a democratic government has been established? According to Nino, the answers to these questions have been obscured by the different meanings given to the term "validity," which in his terminology is identified with "binding force."

Nino distinguished between norms that are just because of their content and norms that are just because of their origin. It is perfectly possible for a de facto government to issue a norm whose content is morally unobjectionable (i.e., that complies with basic moral principles and respects individual rights). Even though the hypothesis is empirically difficult to verify, no logical reason prohibits imagining a benevolent dictator whose only mission is to dictate just norms. If such a dictator does issue such norms, they should be obeyed. If the norms are just with respect to their content, then considerations about their origin are superfluous. Citizens would actually satisfy the demands of morality if they carried out the prescribed action; the fact that this action is ordered by the law would be irrelevant.

A totally different question is whether a law issued by a de facto government could ever be justified without invoking its content. As Nino observed, it is likely that once power has been usurped, the return to democracy is difficult. Disobedience against the dictatorial laws creates more problems for order, the security of persons, or the return to democracy than obedience, so long as the norms are not intolerably unjust. In any case, the recognition of laws that originate from undemocratic governments is radically inferior since the laws lack the presumption of justice that applies to laws established through democratic procedure. In this sense, de facto norms have,

> a very low grade of prima facie validity . . . (just as we must admit the idea of prima facie validity indicating the fact that it derives from some moral reasons or principles that can be displaced by other, higher-ranking ones, we must also accept the idea that validity comes in different grades, depending on the hierarchy of the principles or considerations it is based on).[90]

---

90. *La Validez de las Normas De Facto, in* LA VALIDEZ DEL DERECHO, *supra*

Despite this original weakness, norms that are just because of their content may have higher ethical value than those deriving from disobedience of the law. If this is so, judges should, after careful examination, declare them valid and binding and citizens should comply with them.

It is important to emphasize the different attitudes judges should have toward de facto and democratic laws. With respect to the latter, one should recognize the epistemic value added by democratic procedure. Where problems of conscience are caused by a clash between judges' own value judgments and the content of the laws, judges should accept the opinion of the majority with the aforementioned exceptions. Otherwise, they would be guilty of moral hubris. This, however, does not apply to de facto laws which carry no epistemic value and for which judges should be aware of their special responsibility. Judges must carefully examine whether these norms are just and, if they are not, they must declare them invalid unless considerations of security and order suggest otherwise.

This last consideration in favor of an eventual recognition of a very low grade of validity of de facto laws is weakened even more when a democratic government returns to power. In such a case, citizens are bound by the de facto laws until the laws are submitted for judicial review in actual cases. Here, it must be added that reasons of order or security would have much less weight, at least until the democratic parliament derogates them.

In summary, if de facto norms are just, they must be recognized as valid and judges must apply them. If the content of a de facto norm is axiologically unsatisfactory, a judge could still balance reasons of security and order if they would be assured of obedience to the norm in question despite its deficits in content. If necessary, the judge could declare the law unconstitutional. Finally, since de facto norms do exist, albeit with a weak degree of validity, they bind citizens until they are derogated or declared unconstitutional. In Nino's opinion, however, de facto laws do not give rise to rights gained through public acts (e.g., acts to stabilize employment in the public sector) until they have been ratified by democratic authorities.

---

note 6, at 101.

VII. POLITICS

Carlos Nino was a liberal, but not a liberal in the false sense this word is sometimes given in our latitudes: synonymous with conservativism in politics and unlimited confidence in the market in economic matters. Instead, he understood liberalism as a genuine moral position squarely opposed to all totalitarian conceptions of society. Liberalism in this sense is not a neutral position of social morality but refers to binding moral standards and the respect of personal ideals of excellency. The liberalism Carlos Nino advocated is not at all skeptical, rather it is based on a clear conception of what is socially good. In other words, Nino sustained that the autonomy of individuals to choose and pursue plans and styles of life is intrinsically valuable.

On the level of practical constitutional politics, this moral liberalism is incompatible with any form of holism, perfectionism, or normative determinism. It is, however, perfectly compatible with the ideals of fraternity, equality, and democracy. This moral liberalism even seems to imply these ideals, although their scope should be determined through democratic discussion.

In several studies,[91] Nino demonstrates that the practice of moral discussion is a protoliberal institution because the requisite values and procedural rules lead to liberal principles. He of course believed that it would be a practical inconsistency to participate in this moral practice and at the same time refuse to accept principles or prerequisites necessarily accepted by participating in that practice. Liberalism has been linked to the practice of the moral discourse of modernity ever since the value of autonomy was recognized. From this general premise, the specific moral principle of autonomy that is part of the moral conception of society is derived.

In Nino's conception, the idea of autonomy implies the idea of separability and independence of persons, and this led him to defend a second liberal principle constraining autonomy: the principle of individual inviolability. Still, these two principles alone could not adequately develop a liberal society. A third

---

91. *See, e.g.*, FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 163; EL CONSTRUCTIVISMO ÉTICO, *supra* note 8, at 113-33; ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 92.

principle is needed: establishing that individuals may legitimately constrain their rights or acquire obligations through voluntary acts. This is the principle of individual dignity. Together these three principles provide a valid normative foundation for the derivation of a broad set of individual basic rights.

For this reason any institutional design adopted on liberal grounds must contain a provision similar to that of Article 19 of the Argentinean Constitution, which provides that the State may not interfere in private acts that do not harm other people or the public order. The institutional design should guarantee a basic catalogue of individual rights, such as life and physical integrity, and a set of political liberties guaranteeing an equal vote as well as the possibility to elect and be elected. There should be provisions that guarantee private property and the freedom to do with one's belongings as one chooses. These norms, according to Nino, constitute the nucleus of liberalism.

If one accepts the distinction between conservative and egalitarian liberalism, then Nino clearly tended toward the latter. Characteristically, this is perfectly compatible with the three ideals usually viewed as opposing liberalism: fraternity, equality, and democracy. Showing the compatibility of liberalism and the value of fraternalism is important. This not only contributes to clarify certain forms of institutional design but also implies a reply to some communitarian objections that point out some of liberalism's deficits. Nino assumed that individuals need to adhere to others, form groups and identify themselves with others to achieve optimal development. This need is normally satisfied through family institutions, clubs, associations, regional communities, and the like. These groups create bonds of affection and cooperation, and the social control over their members is usually effective. Occasionally, individuals respond even more to the standards of social morality generated by those groups than to general and universal principles. Liberalism must find an answer for this problem.

Nino also accepted that attempts by central organs to solve certain problems may create an impartiality deficit. Those who evaluate the case are too remotely situated from those whose situation is evaluated. Thus, the former cannot adequately anticipate what the latters' interests are. As a result, evaluators tend to substitute excessively abstract and general conceptions for actual interests. Here too, liberalism is challenged to provide an

answer.

With these two fundamental challenges, Nino attempted to show the compatibility of liberalism and the requirements of fraternity. Actually, associations and fraternal groups are admitted by all liberal constitutions, and they must be as long as members can come and go voluntarily. A liberal social design must admit, and in some cases even foster, different forms of partial unions, but they must always be voluntary and free of holistic or perfectionist aims. This is why, for example, divorce is a more just social institution than one that upholds the indissolubility of marriage. The possibility of fraternal unions is legitimate not only in private circles, but also in public. According to Nino, there would be no problem in combining a certain degree of institutional decentralization with a liberally designed society that would permit citizens to maintain closer contact with those public servants immediately responsible for them or with whom they most identify. "Institutional decentralization in neighborhoods, municipalities, and regions may be required by the liberal imperative of impartiality, because the concentration of decisions in centers that rule over extended and general areas can distort the consideration of affected interests."[92]

Note that liberalism is not only compatible with the ideal of fraternity; according to Nino, it is also compatible with equality. Liberalism has often been accused of ignoring the ideal of equality. In light of this tension between equality and liberty, liberalism has always underestimated the value of equality. Conversely, the value of autonomy is said to close the door to solidarity. Liberalism's support for the market plus its defense of private property even give it a share of responsibility for the greatest inequalities.

However, the existence of strongly egalitarian advocates of liberalism[93] is reason enough for Nino to doubt that liberty and equality are irreconcilably opposed. Liberty and equality have different structures; one is either free or not free, regardless of whether someone else is free or not. In this sense, liberty is not a relative value. Equality, on the other hand, is a relative, comparative concept in which one is more or less equal to another

92. FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 186.

93. For example, Immanuel Kant, John Stuart Mill, John Rawls and Jürgen Habermas.

with respect to goods or property. This difference implies the possible combinations of the two. Nino wrote, however, that an egalitarian distribution of liberty or personal autonomy should be promoted.[94] The principle of personal inviolability opens the possibility of reducing the autonomy of some persons in order to raise it for those who started out with a lower level of autonomy. Such restrictions derive from Rawls' difference principle, which does not imply a total equalization of autonomy for everyone, but rather recognizes that greater autonomy for some is justified if it increases the autonomy of those who possess it to a lesser degree. Nino sustains the idea of equality "not as equalization, but as non-exploitation: a greater autonomy is illegitimate if it has been obtained at the expense of lesser autonomy for others."[95]

If understood in this way, the principle of personal inviolability opens the door for the justification of positive duties restricting the liberty of some in the name of equality. The difficult question is where the limit should be:

> [A]lthough this limit cannot be determined a priori through some precise formula, we must necessarily conclude that positive duties to further the autonomy of the less autonomous — either directly or through the State — must preserve the choice and realization of plans of life in a recognizable measure.[96]

Although there are no precise limits, egalitarian liberalism advocates so-called social rights as a derivation of individual rights. For example, it is practically inconsistent to approve a right to life and at the same time not accept that there is a duty to provide food to the needy or medical treatment to the sick. Nino believed that a liberalism of this kind is not committed to any specific economic system. It should be clear that such liberalism does not leave room for a totalitarian collectivism nor for an absolutely free market system that generates intolerable inequalities. Between these two extremes, however, there are a number of intermediate possibilities that should be democratically explored.

---

94. *Id.* at 188.
95. *Id.* at 192.
96. *Id.* at 192-93.

It has repeatedly been observed that democracy is incompatible with liberalism. One argument is that majority decisions lose all sense in the face of a system of rights as strong as that assumed by liberals. If democracy should respect rights, then the only questions that could be decided democratically would be morally neutral, but insubstantial. The reply to this, according to Nino, depends on how one justifies democracy. Nino believed democracy is justified by its epistemic moral value. As noted *supra*, majority decisions reached through orderly procedures have a higher probability of being morally correct.

We must, however, examine Nino's conception of the relationship between rights and democracy in order to explain what he believed to be the connection between the latter and liberalism. Nino thought that there are two kinds of rights. First, there are a priori rights that are a precondition to democratic discourse, ranging from individual to social rights. Second, there are those rights that are posterior to democratic procedure because their existence and range is determined through the process of discussion and collective decision. What is important about this distinction, though, is that the a priori rights are not subject to democratic discussion. Also excluded from democratic procedures are moral questions concerning ideals of personal excellence belonging exclusively to the individual domain. This is due to the recognition of the value of autonomy and the principle of personal dignity. The epistemic value of democracy does not extend to the ideals of personal excellence.

What then is the relation between rights, democracy and liberalism? According to Nino,

> the epistemological justification of democracy provides the basis for a reconciliation between liberalism and democracy: democracy, with all its imperfections, is the most adequate means to secure the recognition of the principles of liberalism. This requires, of course, that democracy satisfy a priori rights, and it also implies that the epistemic value of democracy is greater or lesser, depending on whether the procedures of discussion and decision fulfill to a greater or lesser extent the requirements of a broad and open discussion . . . .[97]

97. *Id.* at 209-10.

It is therefore necessary to adapt the institutions of democracy to enable them to fulfill their epistemic function, for example, via fostering free discussion or consensual decisions.

Nino was in fact a fraternal, egalitarian and democratic liberal. His liberal conception is also reflected in his treatment of basic needs. In his view, basic needs play an important role within a liberal conception of society.[98] Nino thought that there is no conceptual link between the notion of categorical needs and those of wishes or preferences. Categorical needs are needs arising from ends that are not themselves dependent on individual wishes or preferences. Categorical or absolute needs should be identified with states of affairs that are prerequisites for autonomy, since personal autonomy is a value basic to a liberal conception of society. Personal autonomy, Nino observed, has two aspects: its creation and its exercise.

Some may argue that individuals must be treated equally regarding their exercise of autonomy and the results therefrom. The supporting reasoning recognizes that these individuals value the act of choosing a plan of life, independently of the existence of the corresponding resources. Once an individual makes his choice, all other persons are committed to contribute to the satisfaction of his life plan. This choice allows the individual to reach the same level of satisfaction as all others who, in turn, are guaranteed the satisfaction of the objectives of their life plans.

Others emphasize the conditions surrounding a choice of realizable life plans. Here, the capacity and creativity in choosing plans of life in accordance with existing resources is valued. Nino points out that this version of autonomy, while more attractive than the former, implies that autonomy is seen in the context of a wider conception of self-realization, understood as the full and balanced development of an individual's capacities.[99] There are many alternatives to the exercise of an

98. *See* Carlos Nino, *Autonomía y Necesidades Básicas*, 7 DOXA 21 (1989).

99. Carlos Nino here uses the word "capacity" in the same sense as Amartya Sen speaks of "capacity" to refer not to what an individual actually does or is, but to what he or she could do or be. This is interesting because two individuals with the same bundle of goods could be or do very different things, since there is the possibility of combining the goods in different ways. Sen's egalitarian position, then, refers to the level of "capacities."

individual's personal capacities and we should value the creativity in taking advantage of them. This position suggests that the basic needs necessary to give individuals equal capacity should be satisfied. This is important because it implies that a portion of public resources should be used to satisfy the preconditions for the choice of life plans that can be realized to some degree, rather than for the satisfaction of individual preferences:

> Only in this way do we promote the creativity of individuals in the construction of their life that does not merely consist in an initial exercise of the imagination but is a virtue coming to light in all the choices we make in the course of our life, in view of certain given conditions that do not adapt to each of these assessments.[100]

This implies that the state should contribute to the maximization of an individuals' capacities. In addition, the central role of self-realization allows individuals to decide which of the many alternative ways they want to go.

According to Nino, there is still another point where basic needs play a relevant role in the liberal conception of society. By placing emphasis upon the satisfaction of individual preferences, satisfaction of the preferences of some would collide with the preferences of others. The lives of individuals would be severely affected by the decisions of others. This clashes with the liberal principle of personal inviolability that prohibits one's decision to affect the life of another, unless they are intersubjectively justified. To satisfy the conditions for the exercise of individual capacities and to serve as a protection from the decisions and preferences of others, certain basic needs must be satisfied for an egalitarian distribution of goods:

> Thus, the concept of basic needs not only is central to a liberal conception of society but also creates a link between the two basis ideas of liberalism — that the ends of individuals should be respected, and that every individual is an end in itself — by permitting their simultaneous satisfaction.[101]

---

100. *Autonomía y Necesidades Básicas*, *supra* note 98, at 32.
101. *Id.* at 34.

Nino's liberal conception is manifested in his defense of liberalism against communitarian attacks.[102] Evidently, communitarianism is directly influenced by Hegel, from whom it takes the eminently social character of man and the idea of a necessary relation between morality and the customs of society.[103] Also, communitarianism draws from Aristotle the idea of good as linked to human nature. Among the communitarians most hostile to liberal positions are Alistair MacIntyre, Michael Sandel, Charles Taylor, and Michael Walzer. In his defense of liberalism, Nino used the following pattern of argumentation: First, he describes how communitarianism reconstructs the liberal doctrine; second, he presents the communitarian critique, which he finally subjects to a critical examination. The same course is followed in presentation of his thesis.

MacIntyre, a spokesman for the communitarians, characterized liberalism according to five distinctive traits: (1) morality consists of rules that would be accepted by any rational person under ideal circumstances; (2) these rules are neutral with respect to individual interests; (3) moral standards are also neutral with respect to the different individually held conceptions of the good; (4) the addressees of moral rules are individuals, not collective entities; (5) moral rules must be applied equally to all human beings.

The main critical points advanced by communitarianism against each of these elements of liberalism, according to Nino, are as follows. First, through abstraction and universalization, liberals empty morality of all content and make it impossible to draw substantive moral standards from it. The thesis of morality as independent of a conception of the good is untenable. Second, individuals, as seen through the liberal prism, are too abstract and universal and cannot form the basis of a social morality. With respect to the ideals of human excellence, liberal neutrality is possible only if one assumes that moral agents are noumenal beings and that their identity is independent even of their desires and preferences. Third, liberals hold an atomistic concep-

---

102. ÉTICA Y DERECHOS HUMANOS, *supra* note 7, at 129; FUNDAMENTOS DE DERECHO CONSTITUCIONAL, *supra* note 4, at 178; EL CONSTRUCTIVISMO ÉTICO, *supra* note 8, at 137; Carlos Nino, *Liberalismo 'versus' Comunitarismo*, 1 REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 363 (1988).

103. *See generally* GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HEGEL (Carl J. Friedrich eds. 1953).

tion of human beings; they present them as self-sufficient and independent of any social context. In fact, human beings can only be thought of as belonging to some community because this is what determines their personal identity. On this basis, Nino tries to distinguish the following characteristics for the communitarian approach:

> In the first place, there is the derivation of the principles of justice and moral correctness from a specific conception of the good. Second, a conception of the good in which the social element is of central and even primordial importance. Third, the relativization of the rights and obligations of individuals in terms of their relations with other individuals, their position in society, and the particular properties of that society. Finally, the fact that the moral critique depends on the moral practice of each society as it is manifest in its traditions, conventions and social institutions.[104]

Nino maintains that the communitarian theses have two faces: a nice one with its sharp and not always mistaken critique of liberalism, and a sinister, frightening one with a tendency to take perfective, holistic positions, advancing a certain kind of conservative relativism. First of all, the priority of good over individual rights justifies perfectionist measures. If rights were only instruments in the pursuit of the good, they would have to be given up every time there is a collision. The idea of good would have to be imposed even against individual will. Besides, the priority of society together with the idea of good promote policies of personal sacrifice that favor the community. Finally, making criticism dependent on moral practice generates a conservative relativism in that effective social practice is the ultimate judge in moral conflicts.

To counter the attacks of communitarianism, Nino's strategy consists of weakening some of the proposed premises of liberalism while simultaneously strengthening the core of the liberal conception. In this sense, communitarianism did serve to expose errors in liberal positions. Nino argued that the idea of a radical dissociation of critique and moral practice must be weakened. Furthermore, the conception of democracy should not be considered definitive but rather we should adopt the practice of moral

---

104. *Autonomía y Necesidades Básicas*, *supra* note 98, at 32.

discussion with all the prerequisites and procedures practiced today in the Western world. This practice draws criticism because it basically consists of advancing arguments in favor or against certain positions. The criticism of the practice of criticizing itself is the only thing that must be excluded. This way one would accept a very mild form of conventionalism or relativism.

If the function of moral practice is to manage conflicts by fostering cooperation between persons in search of consensus, then some of the rules of that practice are determined by the goals they want to reach. Because principles must be accepted freely and voluntarily on their own merit, their acceptability must be determined counterfactually, under ideal conditions of rationality and impartiality, and on the basis of general and universal principles:

> This implies that communitarianism commits a radical contradiction: on the one hand, it defends a relativist and conventionalist metaethical position, and on the other, it criticizes the current culture for incorporating as essential elements the assumptions of Kantian liberalism. But the fact that these assumptions are effectively incorporated in our moral discourse, even in that of the communitarians themselves, makes them unassailable. Therefore, if what communitarians themselves say about the common culture is true, then the communitarian attack presupposes what it is attacking. This attack, then, seems to be an intent to change those assumptions rather than to argue against them.[105]

According to Nino, the integration of moral discourse in Western culture allows one to refute communitarian attacks on liberalism's conception of moral agents as beings that are isolated from any social context, mutually separate, and independent of their wishes and preferences. This objection is exaggerated. Liberals do not describe real people of flesh and blood in these terms. Rather, this way of thinking corresponds to a heuristic construction of the normative preconditions of moral discourse. Even if communitarians accepted this, one of their strongest objections would still require an answer; from such a construction no substantive moral norms can be inferred. It would be

105. Carlos S. Nino, *Liberalismo versus Comunitarismo*, REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, Sept.-Dec. 1988, at 371.

impossible to derive rights without some conception of good.

Liberals do, however, possess a conception of what is socially good due to their recognition of the value of autonomy. Thus, moral discourse does not rest on procedural rules only. It also incorporates the substantive value of autonomy in connection with the foundation of human rights. Nino posits that this substantive liberal conception of good, including the value of autonomy, should refer to the idea of self-realization:

> I think that the central core of Kantian liberalism is strengthened considerably if the following two concessions to communitarianism are made: It is certain that moral criticism must somehow be connected with moral practice; but precisely our own culture does have a practice that subjects all other conventions and traditions to criticism, on the basis of impartially acceptable universal principles. And it also seems to be true that this practice of moral discourse presupposes a full conception of the good because otherwise it could not lead to the principles liberals defend; but this conception of the good includes as an essential, though not the only, component the value of impartially distributed autonomy, and any action endangering that autonomy in the name of the good is self-defeating.[106]

VIII. CONCLUSION

A number of years ago, Manuel Atienza published a book on legal philosophy in the Argentine Republic.[107] The work clearly presents the main theses of the most important Argentinean legal philosophers. According to Atienza, it was necessary at that time to undertake studies about the legitimacy of the law and of human rights; such studies had been neglected or developed in an incomplete, insufficient and conservative manner by Neothomists who lacked and still lack any theoretical relevance. Atienza's book recognized Nino as one of the most brilliant young legal philosophers of Argentina. It was Nino who worked in the areas with the greatest theoretical deficit in Argentinean legal-philosophical thinking. Nino pulled the problems of the

106. *Id.* at 376.

107. MANUEL ATIENZA, LA FILOSOFÍA DEL DERECHO ARGENTINA ACTUAL (1984).

justification of law and human rights from the obscurities of Argentinean natural law doctrine and put them into a context of discussion characterized by rigor and a substantial degree of clarity. Independently of whether or not one agrees with his theses, this was one of Carlos Nino's greatest merits.

Presenting ideas with clarity has been and is one of the central objectives of those who call themselves analytical philosophers. This preoccupation with clarity and analysis tempts philosophers to work on such a high level of abstraction, creating such a sophisticated conceptual apparatus that they appear to have lost sight of the problem they sought to solve. This is especially problematic in the area of legal philosophy. The center of legal-philosophical reflection should be the law, and results obtained through such reflection should be useful to legal practice.

Nino was perfectly conscious of this, and he always tried to relate even the most abstract aspects of philosophical work to positive law, referring in his early works to criminal law and later to constitutional law. He combined analytical conceptual rigor with an effort to formulate solutions to material problems of positive law. He tried to write and teach simply law, and his work was closer to that of a professor of law in the United States than to that of a typical professor of law in his own cultural context. From a purely descriptive point of view, one could say that Carlos Nino was the most "anglo-saxon" of all Spanish-speaking legal philosophers.

Nino's conceptions of human rights and of the justification of democracy have had a strong intellectual[108] and practical impact. From a practical point of view, Nino's influence is evident in a number of measures implemented by the Alfonsín administration, especially in the area of human rights. His influence is also seen in several projects of constitutional reform in Argentina. Nino was a great teacher with numerous disciples, in

108. Theoretically, his theses have been widely received and discussed not only in the Spanish-speaking world, but also in the German, English and Italian languages. There is ample evidence of this in the frequent references to his work, translations of his works, and original publications in foreign languages. The growing interest for his thinking is also shown by the fact that in September 1994, Yale University organized a Symposium on Legal Philosophy in his honor. In addition, Robert Alexy of the University of Kiel taught a course based on The Ethics of Human Rights in the summer of 1994.

Argentina and the United States. He was very generous with his time, devoting long hours to educating the young. Nino committed himself to the foundation of institutions that provided a framework for the development of rational discussion in response to the academic and economic weakness of Argentinean universities. He believed that rational discussion was the only way to solve problems because it eliminates the errors in one's own reasoning and opinions. He developed institutions that provided rational discussions to promote the effective validity of human rights and democracy. Together with Eugenio Bulygin, Genaro Carrió and others, Nino founded the Centro de Estudios Institucionales (CEI). This Center became a meeting point for scholars from various legal cultures including Italy, the United States, Finland, Spain, Germany, Mexico and others.

Carlos Nino hoped his work would become a solid and coherent whole. He died at his peak and while his theses were still developing. Some of his most radical assertions give rise to a number of questions but to present them here would distract from the objective of this Article. It is not at all obvious that one should accept democracy without question, even as a regulative ideal that does have an epistemic function. Nor is it obvious that Nino's conception of the consensual justification of punishment is useful when it comes to legitimizing punishment to those who violate the most basic human rights. With respect to his attempts to link politics, morality and the law, it is also far from evident that his efforts were successful. Independent of the doubts and disagreements Nino's work is apt to provoke, it is only just to acknowledge that at the basis of any of his positions there was always the examination of a thesis. His works are thought-provoking and intellectually stimulating and they invite further development and perfection of his line of argument. This is possibly the best aspect of his legacy.

I knew Nino for many years, and gained immensely from his friendship and intellectual excellence. In spite of his many responsibilities, he was always open for dialogue, managed to find time to discuss ideas, read draft papers or debate his own arguments. During his last three years, he repeatedly visited Barcelona and the University Pompeu Fabra. He proved tireless in his marathonian seminars. After three or four hours of discussion, we could never be sure whether his opponent's defeat was by force of argument or simply through physical exhaustion. He

was also an absent-minded man. It was typical for him to come to dinner at my house twenty-four hours after the agreed time. He always wore jackets a bit tight, grasped the collars with both hands in a useless gesture to bring them together, and raised his head to address his interlocutors. He moved around in nervous steps, setting loose an avalanche of words that left one in awe. It was just as impossible to make him stop working as it was to silence him.

Nino's death has left a profound vacuum, not only because it robbed us of one of the most brilliant representatives of legal theory and philosophy, but because he more intensely than anyone was committed to educating new generations and to stimulating dialogue between legal scholars from different traditions. I am one of a great number of people who are indebted to Carlos Nino. My stay at Yale was due partly to his insistence, and partly to a common project. His death has left us all poorer.