The Paradox of the Moral Irrelevance of the Government and the Law: A Critique of Carlos Nino's Approach

JUAN CIANCIARDO

Abstract. Some authors have speculated about the fact that if the law were connected to morality, then it would not be relevant, because morality would be enough to regulate social life. A study of this objection to the connection thesis will be outlined in this paper. In other words, the possible answers to the question about the practical difference that law gives to morality will be analyzed. The work of the Argentine philosopher Carlos Nino will be taken as the starting point for this task.

1. Introduction: Nino and the Argument of the Paradox

According to Javier de Lucas, the ontological question about the law (what is the law?) should not be regarded as a starting point. In his opinion, it can only be considered to be the first question if the real initial question is overlooked. Paraphrasing Heidegger, the real initial question could be formulated as: Why the law and not violence? De Lucas says that only from this point of view can we define the core around which the philosophy of law can turn (De Lucas 1982, 121–5, 122). It is only from this perspective that we will be able to understand the relationship between two facts of the utmost importance, which are provided by sociology and jurisprudence: the relationship between the law and (social) human life, and the normative condition of the law, "which always tries to govern human behavior" (ibid.). It is only from this viewpoint that we can transcend the one-dimensional approach in the search for an answer to a philosophical question (see Serna 2006, 127–41): Why the law rather than violence?

   The following discussion will deal indirectly with this fundamental topic. My objective is to contribute to dealing with it by analyzing a

problem that is closely connected to it. This may be summarized in the following question: Why the law rather than morality? In other words, what is the practical difference that the law brings to morality? Among the many existing options, I will choose to base the development of the topic on the description of the "paradox of irrelevance" and its corresponding solution, as proposed by the Argentine philosopher Carlos Nino. I will then criticize this proposal and outline an alternative position, that is, in my opinion, better and more useful to ultimately answer the question posed in this section.[1]

Nino referred to this topic on several occasions, two of which are worth mentioning: the paper "La paradoja de la irrelevancia moral del gobierno y el valor epistemológico de la democracia," first published in 1986 (see Nino 1986; 1989, 111–33; 1991, 36–51); and the book *Derecho, Moral y Política. Una revisión de la teoría general del Derecho*, published in 1994 (Nino 1994, 130–60), after his death.

Carlos Nino approached "the paradox" from two different perspectives. In the paper mentioned above, the starting point was a question about the moral justification of democracy, "in the sense of the rule of the majority" (Nino 1989, 113). Instead, in his book, the starting point was the analysis of the possible direct connection between law and politics (Nino 1994, 130).

In this paper I will only deal with the first of the approaches mentioned above. According to Nino, two answers have been given to the question about the moral justification of democracy. There are some people who focus on the "intrinsic characteristics that the democratic decision-taking system seems to have, which would give it a moral value that cannot be found in other systems that do not possess such characteristics" (Nino 1989, 113). As an example of this type of argument, Nino asserts that democracy "enables the exercise of the popular sovereignty" and "ensures the consent of the governed to the norms which are adopted by the rulers." A second group of answers aims at "the beneficial consequences that the democratic form of government brings about" (ibid.). As examples of this type of argument, Nino states that democracy: a) "increases the opportunities of the individuals to exercise their autonomy," b) "promotes self-respect and independent spirit," c) "ensures the satisfaction of the biggest number of preferences" (ibid., 114).

According to Nino, these two types of argument are deficient. In the first case, because "either the properties which are taken into account are not genuine attributes of democracy, or because such properties materialize in such a way, the fact that they really give value to democracy becomes doubtful" (ibid., 113). This is evident with regard to the argument of popular sovereignty: "Unless we hypostatize the people as an entity that

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[1] About this expression, see Ródenas 1991, 279–93, Ródenas 1996, 226ff., and Greppi 2008, 221–59. Raz (1999, 190–4; 2001) has examined it.

is different from the individuals who constitute it, democracy does not ensure that the will of the rulers will coincide with that of each of the governed" (ibid.). On the contrary, the second type of justification provides reasons, though they are "relatively weak if they are not accompanied by another type of argument"(ibid., 114). This weakness comes from the type of justification that is aimed at because it depends on contingent circumstances and on an uncertain appraisal of the consequences, which "makes the value of democracy narrower than that which our intuition assumes" (ibid.). On the other hand, "the appraisal of the beneficial consequences of democracy is performed in a holistic manner, taking into account the benefit of society as a whole, which brings about problems of distribution, such as: Why would the increase in the autonomy of the majority of the population, achieved by means of the democratic system, justify the possible restriction on the autonomy of the minority?" (ibid.).

In view of the problems with current justifications, Nino proposes a change in strategy: "Maybe it would be more useful to inquire first about the justification of the existence of some sort of government, and then determine whether that justification requires conditions that are only met by a democratic government" (ibid.). The approach he proposes is to deal with this matter starting from the related question about the obligatory nature of juridical norms (see ibid.). According to Nino, this is far from being a trivial question, and as a result its answer must satisfy some conditions: "Such obligatoriness comes from other norms whose obligatoriness does not depend on subsequent norms nor on the fact that they are obeyed or not" (ibid., 115) because the former would lead to an *ad infinitum* reasoning and the latter to a fallacy. This type of obligatoriness is characteristic of moral principles. "In other words, when we inquire about the obligatoriness of juridical norms, we are inquiring about their moral obligatoriness, that is, about the moral principles which, under certain conditions to be defined, prescribe that some rules should be obeyed" (ibid.). According to Nino, this is connected to the moral justification of the government associated with those (morally) obligatory norms: "The fact that a government is morally legitimate seems to be a good reason (which may be displaced by others) to make its rules obligatory (although there may be other reasons which justify the obligation to obey some rules of a morally illegitimate government) (ibid.).

At this point, the initial question about the justification of democracy may be reconstructed as follows: "Does the fact that juridical norms are originated in the democratic process make any difference?" (ibid.). In attempting to answer this, Nino realizes that there is a paradox: "If, in order to decide whether to obey the juridical norms or not, we have to turn to moral principles that will determine if they are obligatory or not—which is the same as saying if what they prescribe should be done or not—then, why are such juridical norms necessary? Why do we not simply focus on

the moral principles which determine the behavior to be adopted?" (ibid.). The paradox arises because, at least apparently, "it is necessary to resort to moral principles for juridical norms to be operational, so that they provide or complete reasons for action; but as such principles indicate on their own how we should act, they make those juridical norms superfluous" (ibid., 115–6).

After outlining the situation in this way, Nino examines two possible answers that he finds unsatisfactory, and concludes with his own solution, that he believes to be the best. In the following, I put forward a critique of Nino's proposal.

2. Nino's Proposal: Analysis of the Deeper Assumptions

According to Nino, there are two meta-ethical assumptions underlying the paradox argument. "The first one is that there is a moral system which is independent of the social practices involved in the constitution, recognition and exercise of the government, in such a manner that when the moral citizen resorts to such a system to justify the government or its norms, he can reach conclusions as regards what he has to do, without taking such practices into account" (Nino 1989, 124–5). The second assumption refers to the epistemological rather than the onto-logical dimension. From this point of view, it is possible to recognize the moral system in a manner independent of the social practices involved in government and the law. Nino accepts the first assumption, but he rejects the second one, arguing against the validity of the paradox of irrelevance.

In the first place, there is a position that states the non-existence of an independent moral order (and thus, it could be concluded that it would uphold the relevance of government and the law, and the unsustainability of the paradox) that is called moral nihilism and that rejects the existence of a moral order in itself, regardless of the form in which it might be understood. Nino does not consider this position due to the fact that what gave rise to the inquiry was precisely the search for moral reasons sound enough to justify government and the law. In other words, the question in itself—regarding the moral reasons that justify government and the law— implies that the law does not justify itself simply because it consists of a set of prescriptions or because it is efficient, on the one hand, or because of the unacceptability of moral nihilism, on the other.

In the second place, social subjectivism rejects the existence of an independent moral order, as from this point of view "saying that some-thing is good is like saying that the majority prefer it, or approve of it" (ibid.). On the basis of this line of thought, "the moral order would be built by exercising democracy" (ibid., 126). Thus, "the moral individual would

find no reasons independent of the norms of government to justify such government, which would, consequently, make the norms of the government superfluous" (ibid.).

As Nino rightly points out, this position is untenable. With regard to the issue under examination, his key objection is that "due to its definition, it makes the position of the minority false, and thus, it cannot explain the moral progress (the result of the position of the minority becoming that of the majority), and it establishes the most absolute moral conservatism" (ibid.).

A third position that rejects the assumption of the existence of an independent moral order is that of Habermas, that Nino defines as "a more complex and subtle variety of the ethical subjectivism of a social nature" (ibid.), "which is sometimes identified with a sort of ethical constructivism, and which maintains that moral reasons are built by means of the development of moral discourse." According to this position, "valid moral principles are those that are attained through a discussion which is limited by certain formal restrictions" (ibid.). If such a discussion were identified with that which develops in the heart of democracy, then not only would it justify the relevance of government and the law, but it would lead to the conclusion that democracy is the only legitimate form of government. In other words, "we would come to the conclusion that democracy is the only form of government in which government is not superfluous for those who autonomously follow moral principles, as only democracy brings into the government the discussion on which morality is built" (ibid.).

This alternative is the most attractive for Nino, who elaborates on the relationship between democracy and moral discourse. Nino proposes an "epistemological constructivism," based on the work of Rawls and Habermas (ibid., 93).[2] In his view, moral discourse "is social practice intended to achieve unanimous consensus on certain principles that could be used to ultimately justify actions and institutions." Although in many cases it is possible to achieve such a consensus, in other cases it is impossible to do so because "there is a relevant moment to adopt the norm or course of action and if by such moment no unanimous consensus has been achieved, the discussion becomes ineffective" (ibid., 127).

The solution to this problem is not to insist on achieving unanimous consensus, because doing so would imply favoring "the group that supports the *status quo* so that no decision is adopted, although the group could be a minority" (ibid.). Consequently, a new course of action should be identified. In Nino's view the solution would be to set a timeframe for

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[2] Nino says that he will defend this approach "by contrasting the thought of two outstanding philosophers: John Rawls and Jürgen Habermas. However, I believe neither of them correctly explains this position. As they miss the target by moving in opposite directions [. . .] let us infer the appropriate theoretical direction" (ibid., 93).

taking the decision and to replace the unanimous consensus with a simple majority, instead of a qualified majority that would give veto power to the minority (see ibid.). From this point of view, democracy is "a substitute for moral discourse": "It is a regulated form of discussion which has to be resorted to when a discussion leads nowhere." On the one hand, moral discourse is a procedure of pure procedural law because the criterion for the assessment of its validity is whether the rules have been followed, which in turn ensures its validity. On the other hand, democracy is also a procedure of pure procedural law, but it is imperfect because its rules imply a drift away from the ideal procedure (cf. ibid.).

If the first deep (that is, metaethical) assumption were false, the paradox of irrelevance would be overcome. That is to say, if an independent moral order did not exist (independent of democracy), then democracy and law would be relevant. However, according to Nino, the independent moral order exists. The reason for this conclusion is that in every moral discussion the issue is the legitimacy of the interest defended by those taking part in the discussion. Moreover, the discussion about the legitimacy of the interest implies the existence of moral principles whose validity is independent of the outline of such a discussion (cf. ibid., 128). From this viewpoint, "it cannot be denied that every moral discourse implicitly or explicitly alludes to moral principles or theories" (ibid.).

As a result, a deep moral discussion should ultimately identify the basic moral principles that are valid (cf. ibid.). The validity of a principle lies on its hypothetical acceptability by "all those who may be affected by this principle (no matter what their interests, life plans and personal characteristics are)" under certain conditions (full impartiality, rationality and knowledge) (ibid.). If this is the case, moral principles are not the result of real discussion. Instead, valid moral principles are the result of an ideal consensus that is alluded to in the discussion (cf. ibid.).

On this basis, Nino rejects what he calls "ontological constructivism," and accepts "epistemological constructivism." This leads him to accept, at least implicitly, the existence of an independent moral order, but not the existence of independent moral knowledge (i.e., it is impossible to access such a moral order in an individual and isolated manner, independent of social practice) (ibid., 129). He places epistemological value on democracy "as an adequate method to acquire moral knowledge, as democracy essentially includes the discussion and agreement of the majority, which are ways to approach moral truth" (ibid., 131). It is worth mentioning that in the first stages of his thinking, Nino opted for "ontological constructivism" (see Ródenas 1991, 279–93; Nino 1984, 241; Nino 1989, 393–8).

By setting aside the assumption of independent moral knowledge, Nino believes that he has also rebutted the argument of the paradox. He says: "In contrast with what we supposed at the beginning, the second assumption is partially false as a general hypothesis and its non-existence makes

the existence of the government relevant as far as it is democratic: The moral individual usually wants to act according to moral reasons even if he is not sure which such reasons are. The process of democratic discussion, which is reflected in the decisions made by the democratic authorities, can guide the moral individual towards valid moral principles" (Nino 1989, 131–2). However, the law is relevant because it is substitute for moral discourse. On the contrary, a non-democratic government—and its laws— would not allow the moral individual to access a valid moral order, and in this sense, the argument of irrelevancy would not be affected.

3. Notes towards a Critique

Following on from Nino's description of the paradox, and this presentation of the different options that he analyzed and refuted, together with his response, it is time to put forward a critique.

3.1. An Insufficient Rationality

From Nino's point of view, the non-existence of the independent moral knowledge is an argument to rebut the paradox of whether the government, democracy and norms are efficient means to develop moral discourse. If this were not so, the paradox would be valid, and it would be necessary to find another way to invalidate it.

The basic problem is that Nino's constructivism fails. Let us consider why this is the case. He tries to formulate a proposal that would overcome dogmatism and skepticism without setting aside ethical objectivity.[3] This is important for him because "it is impossible to offer moral solutions to normative problems without it" (Blanco 2002, 145). Such problems are those that are fundamental for the participants in legal practice, that is, judges and citizens. However, Nino tends to be dogmatic and skeptical. What happens is that his proposal is incapable of achieving a strong, ethical objectivity. The reason for this failure is that Nino's morality is an artifact created by human beings, as a technique or a construct. The rationality of morality and its justification should consequently be a rationality which comes from the core of morality itself, capable of achieving internal coherence or logical-formal correction, though not truth. Nino's reason is internal, and as such, it is not useful to offer a justification for the practice that we call morality which cannot be found by resorting to its ends or to the rational nature of moral performance (ibid.).

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[3] Nino is one of the many authors who are driven by a concern that has been identified key to an understanding of contemporary philosophy of law: "the search for a certain kind of ethical-legal objectivity, without the need to resort to a cognitive, and thus veritable, conception of ethics" (Massini, C. I., 2004, 8).

As regards dogmatism, Nino points out that democracy is above all a procedure (similar to moral discourse) for learning moral principles. On the other hand, as regards skepticism, he highlights a normative nature of democracy. Democracy, both in terms of procedures and rules, lacks sufficient justification. In fact, "the justification of the discursive moral practice according to its ends and functions proposed by Nino only postpones the problem, because discursive moral practice presupposes, in the first place, the need to identify such ends and functions, and in the second place, to consider such ends and functions valuable" (ibid., 148). That is why, in the end, Nino's justification of morality "is achieved by means of the somewhat dogmatic assumption of a certain conception of man, which is supposed to be backed up by sociological verification. This voluntaristic selection of the ends of morality is also what determines its consideration mainly as an intersubjective phenomenon" (ibid., 149).

Although Nino realizes that a justification for the normative nature of democracy cannot be achieved from a point of view that reduces it to mere procedure, he only progresses halfway along that route (as Kaufmann has noted, from procedure and form it is impossible to obtain anything but procedure and form). Dealing with this critique requires some knowledge of what humans are and of what is good for them, that is to say, anthropology and ethics become imperative. In Nino's case, the problem is that he designs "a juridical morality which [. . .] is constructed in the image and after the likeness of democracy. Instead of giving value to democracy as a substitute for moral discourse, he creates a morality which, because it includes the characteristics of democracy, leads to the defense of democracy as a morally acceptable form of government whose norms must always be obeyed by all the citizens" (ibid., 150).

3.2. A New Ideological Positivism

My second critique consists in rejecting the practical difference between ontological and epistemological constructivism. It may be argued that Nino's thinking evolved from ontological constructivism to epistemological constructivism, which he considered to be more advantageous. However, from the point of view offered by the argument of the paradox, the difference seems to fade away.

According to Nino, democracy is not the same as moral discourse (because if this were so, he would be an ontological constructivist). In contrast, democracy is a substitute for moral discourse, giving rise to the possibility for the norms produced by democracy not to be morally valid. At this point, there are two problems to be dealt with. On the one hand, if democracy is a substitute for moral discourse, then it is necessary to explain how it is possible to ascertain whether democratic norms are valid

or not. On the other hand, if such democratic norms are morally invalid, then it is necessary to decide what to do.

As it is difficult for Nino to find an answer to the first problem, he concludes that "except in case of error, in democratic countries it should be compulsory to act according to the juridical system" (ibid., 151). As regards the second problem, and as a result of the first one, "from a practical point of view, Nino demands that this probability becomes a certainty when putting it into practice. According to the principle that the possibility to act in a morally correct manner should be maximized, in Nino's view democratic discourse, even if it is imperfect, justifies and even requires one to set aside one's own opinion and to comply with the norm" (ibid., 152).

From this point of view, juridical norms are "exclusionary reasons" according to Raz (see Raz 1999; 1986, chap. 3; 2004; 2006), though Nino does not define them in this way. He believes that juridical norms are epistemic reasons. That is to say, they are reasons to believe that there are reasons for action. In this way, he wants to preserve the autonomy of morality, which he believes would be questioned if there were practical authorities, and also to escape from ideological positivism (which would be the case if norms were directly defined as exclusionary reasons) and, simultaneously, to state the enforcement of positive law (Nino 1989, 152).

This response gives rise to two difficulties. The first one is that "if we believe that within epistemological constructivism democratic norms become exclusionary reasons, autonomy, which is an assumption of moral discourse, is at risk, because those subject to juridical norms will always overlook their own moral judgment since they will adopt the norm as the only possible guideline. On the contrary, if we believe, as Nino did, that there are epistemic reasons [. . .] when it is stated that an individual has reached through his own reflection the conviction that there are relevant moral mistakes in democratic norms, and at the same time he is supposed to believe in the existence of moral reasons which favor these norms, we are in fact requiring him to accept two different criteria of correction simultaneously, without offering any definite reason to choose one or the other" (Blanco 2002, 153).

As a result, as Blanco stated, Nino's proposal ultimately bears a certain resemblance to ideological positivism, although he was seeking to achieve the opposite outcome (ibid., 155–6).

3.3. A Problem of Circularity

As shown above, according to Nino, the practical difference that the norms provide reflects the fact that they are an expression of democracy, which is a substitute for moral discourse. In this way the existence of democratic government (and not of any other of type) would be justified.

As noted above, Nino relates the answer to the paradox to three problems: the justification of democracy (this is, his starting point), the justification of the government, and the justification of the law. If we analyze Nino's approach the other way round, we see that it involves trying to find out what practical difference the law will provide, so that the government can be justified and, depending on the type of practical difference we find, democracy may be justified.

This leads to a third critique. If the practical difference of democracy can be perceived by studying the difference that is brought about by the existence of the government and, in turn, if the practical difference of the government requires the study of the relevance of the law, then it does not seem to be logical to explain the importance of the law by resorting to democracy. It is insufficient to argue that Nino is only referring to one aspect of democracy. If only democracy justifies democracy, then its justification is impossible. We are only able to describe it, thus it is impossible to limit it.[4] A more adequate response to this serious problem requires our reasoning to be based on a richer anthropological description that will not consider autonomy and rationality as absolute values (see Rivas 2004, 1–33).

3.4. Outlining an Alternative Proposal

Why law and not only morality? If that were so, would any morality do? Why government instead of anarchy? Why democracy and not any other type of government? What are the limits of democracy? Who is to strike a balance between what is political and what is juridical? All of these belong to a group of significant questions underlying many political and social conflicts at the beginning of this century.

The classical tradition brings forth an interesting line of thinking, that I will only sketch here, based on Aristotle: Human beings are the only political creatures. This statement can be interpreted as follows: Human beings can only find fulfillment in the *polis,* in society; it is only in this context that they can obtain the necessary means to reach their ends. The *polis* is autarchic (unlike the family and other communities) because it has the capacity to produce these means (see Aristotle 1932). For this reason, the *polis* is also a means of basic coexistence.[5]

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[4] It is easier to understand why Nino describes democracy in these terms if we analyze his biography, considering the fact that he played an outstanding role in the development of Argentine democracy immediately after the military dictatorship that the country suffered between 1976 and 1983. See Blanco 2002, 262–315, and Malem Seña 2008, 281–357. See, too, the preliminary study of Owen Fiss in Maurino 2007, 11–7. The impact of this context is even clearer if we analyze the topics Nino became interested in, in particular from 1984 (for example in Nino 1984, 1985, 1992a, 1992b).
[5] See a development of this idea in Cotta 1985.

Since human beings exist within the *polis*, there are social relations that call for coordination and the adoption of criteria that would solve any conflicts that might arise. This role cannot be completely played by morality for several reasons: first, because there are people who are not willing to abide by moral rules; second, because morality is inconclusive and indeterminate. To overcome these deficiencies, there are two elements that are necessary: on the one hand, an authority that will guide the *polis* towards autarchy (the common good) and, on the other hand, the law that punishes certain immoral acts (not all) and concludes and determines all the aspects relevant to the common good that are not dealt with by morality (see Massini 1999, 91–103).[6]

At least as a hypothesis, it seems it would be possible to accept the forceful imposition of morality on those who are not willing to comply with it, the forceful resolution of coordination problems and conflicts, and the forceful settlement of those aspects of the moral which the moral neither concludes nor determines. However, morality itself prescribes the acknowledgement of the other as equal. Human beings acknowledge other humans as an end in themselves, giving rise to the need for respect and prohibiting any instrumental use (Kant 1949, chap. 2). For this reason, morality requires that the solution to conflicts and the solution to problems of coordination should be implemented without violence, respecting the demand for recognition. Neoconstitutionalism has coined the idea of reasonableness to describe those norms that could be considered juridical because they comply with the requisite mentioned above. A solution is reasonable if it is possible to justify it through attractive reasons. That is to say, it is a solution which is capable of arousing rational consensus. It is possible to argue that the best way to find such reasons is to search for them within democratic dialogue. Democratic deliberation ensures an important minimum of respect: Every human being should be considered a valid social actor or interlocutor.

The need to adopt reasonable norms that punish some immoral acts (those that seriously affect the common good); that coordinate behaviors and solve social conflicts; and that conclude and determine what the moral norms do not conclude or determine, justifies the need for government, and the fact that such government should be democratic. Both government and democracy are required by the common good. Politics and morality (that are inconclusive and indeterminate) demand a way of coexistence (the law) that calls for government. And government must be democratic

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[6] What is stated above is the starting point of one of the arguments to support the connection between law and morality. Morality requires conclusion and determination, and at the same time, it guides the decisions of legal practitioners in cases in which the juridical system does not provide a univocal solution. In my opinion, based on this, it is possible to argue in favor of the connection thesis, even if the Dworkinian thesis of the only right answer were upheld. See Dworkin 1978. See also Massini 2006, Mora Restrepo 2009, 137–53, and Zambrano 2009.

because only democracy can provide those norms that are reasons for action entrusted with authority (although it may be achieved in varying degrees or even though it may not be achieved because its actions are never perfect). Democracy is not a substitute for moral discourse. Rather, it is a requirement of moral discourse, that will always be inconclusive and indeterminate, especially as regards relations with others.

University of Navarra
Institute for Culture and Society
Edificio Central
31009, Pamplona
Spain
E-mail: jcianciardo@unav.es

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