

Law and Morals

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On the Unities of Law, Practical Reason, and Right

Foundations of the Unity of Reason beyond the Plurality of Knowledge and of Normative Orders

ANDRÉ FERREIRA LEITE DE PAULA¹

Introduction

The problem that will be addressed here is the relationship between law and morality. It is asked (1) to what extent law and morality are connected and separated and (2) since when has it been so. To the extent that law and morality are distinct normative orders, it is asked (3) whether they rule exactly the same behaviors or whether each order rules different kinds of behaviors. If they rule at least some of the same behaviors, it is asked (4) whether there can be antinomies (contradictions) between them. If there are antinomies, it is asked (5) whether the antinomies are only apparent (*prima facie*) and are therefore mistakes of human reason, or are definite and real. If the antinomies are apparent or real, it is asked (6) whether law or morality prevails (or should prevail) in the case of an antinomy. If one of these prevails, it is asked (7) whether this is always so, or whether law sometimes prevails (and should prevail) over morality and vice versa. In the case of existing coherence or at least solvable antinomies between law and morality, it is asked (8) whether the consequent achieved unity of practical reason is a specifically moral unity and whether it is a matter of cognition, of institutionalization, of individual or collective construction, or of consensus.

In order to answer these questions, it will be necessary to consider the normative order of politics, for politics is sometimes said to pertain to the field of morals, sometimes it is said to be a different normative order that nonetheless has relationships with law. In any case, if a specifically political action collides with the normativity of morality or law (e.g. if a behavior is immoral and/or illegal but politically reasonable), the questions posed above apply also to the relationship between, on the one hand, law and politics,

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and on the other hand, morality and politics, in particular in regard to the order of prevalence between all of them.

Obviously, some criterion must be found in order to establish the above-mentioned conceptual and normative relationships, if only in regard to particular cases. Therefore, it will also be asked (9) what is the normative nature of the criterion according to which one normative order prevails over the other; for example, whether it is in itself a moral criterion (from which it follows that morality would be the hierarchically highest normative order), or a political, legal, or even religious criterion, or (10) whether the good is a matter of teleology (purpose-orientedness) that transcends the deontology (rule-establishing) of all normative orders. In this case, it is asked (11) what the relationship between ought and good, i. e. between deontology and teleology is, especially (12) whether there can be contradictions between them and (13) whether either the ought or the good should prevail in the case of a contradiction.

Part One: The Historical Transition from Natural Law to the Genealogical Critique of Normativity

I. The Teleology of Nature as the Original Unity of Practical Reason

The simplest providence for the preservation of life in the case of a conflict between two individuals is the appeasement of their animosities in order to prevent violence and to prevent, at the end of the conflict, that their body integrity should be seriously damaged or, worse, that one or both lives are lost. If a body is seriously damaged or if an individual life ceases to be, the chance of reproduction of these individuals, the preservation of their race, species, genes and, hence the continuity of life, decreases.² For the purpose of the preservation of life, an event or action that fulfills this providence is **good**. If the action is carried out by a rational being who is able to consciously follow rules and purposes,³ the action is not only good and not only teleological, but also normative: it is **just** (or right). Since its most immediate aim is to conserve physically and organically organized matter, this providence can be called **material justice**.⁴ For the immediate

2 In sociobiological terms, "... mercy is 'good for the species,' since it allows the greatest number of individuals to remain healthy and uninjured", Edward O. Wilson, *Sociobiology: The New Synthesis* (Cambridge: Harvard UP, 2000), at 129.

3 Due to the brain size and capabilities present in most ancient human groups, human agency has most probably always been normative in the sense of containing at least some rule-following behavior, which does not exclude the fact that many life-maintaining actions have been carried out spontaneously, without normative reflexion. According to Walter Kargl, "Selbst die frühesten Jäger kennen Mythen, die Moralität vermitteln. Es fragt sich daher, ob es bei Menschen überhaupt die phylogenetische Stufe des 'prä-moralischen' Zustands der bloßen Handlungsgewohnheit gibt. ... Ein solcher Zustand wäre aus erkenntnisbiologischer Sicht ein 'unmenschlicher'", Walter Kargl, *Handlung und Ordnung im Strafrecht. Grundlagen einer kognitiven Handlungs- und Strafreorie* (Berlin: Duncker & Humblot, 1991), at 411.

4 From the German "materielle Gerechtigkeit" according to Johann Jakob Bachofen, *Das Mutterrecht: Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer religiösen und rechtlichen Natur*, 3rd ed. (Basel: Benno Schwabe, 1948), § 66, p. 377.

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purpose of preservation of life, the previous actions of the disputing individuals are irrelevant, i. e. the history of their conflict is irrelevant. The guilt and merits of the individual are equally irrelevant. Their bodies must only be separated and the possibilities of material action against each other must be excluded. Disengagement from a conflict and mere appeasement can be exercised instinctively, since the purpose of the preservation of life is inscribed into the entelechy⁵ or, in contemporary terms, into the genetic program of living beings. Thus, the pursuit of good actions and the exercise of material justice do not require the conscious processing of a great amount of information. They do not presuppose a highly complex stage of development of reason and culture.⁶ But

- 5 Entelechy (Gr. ἐντελέχεια) or internal teleology is the movement of a living being toward a certain purpose such as self-preservation, preservation of the group, of the species, and, thereby and by reproduction, preservation of life. About entelechy in general, see Aristotle, 1050b, in: Aristotle, *Metaphysik*, 6th ed. (Hamburg: Rowohlt, 2010), 9th book, 1050a, 1050b; Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Geschichte der Philosophie II*, 2nd ed. (Frankfurt am Main: Suhrkamp, 1993), at 174–181; *Phänomenologie des Geistes*, 2nd ed. (Frankfurt am Main: Suhrkamp, 1989), 195–197. Teleology is based on the possibility of actions in one or in other way, which is opposed to the idea of mechanical causality. About this point, see Aristotle, *Lehre vom Satz* (Hamburg: Felix Meiner, 1958), at 104 (19a); Aristotle, *Metaphysik*, 9th book, 1045b, 1046a, 1047b. In contemporary terminology, the entelechy of living beings is called a self-organizing ‘system’ that exchanges energy and nutrients with the environment with the purpose of self-preservation. See Gerhard Roth, *Wie einzigartig ist der Mensch? Die lange Evolution der Gehirne und des Geistes* (Heidelberg: Spektrum Akademischer Verlag, 2010), at 42; Irenäus Eibl-Eibesfeldt, *Grundriß der vergleichenden Verhaltensforschung: Ethologie*, 7th ed. (Munich: Piper, 1987), at 619. For contemporary views about living beings as functional systems, see also Mossio and Moreno: “the relationship between a biological organization and its environment is asymmetrical: the organization acts on the environment to promote its own maintenance, while perturbations generated by the environment on the system are monitored in accordance with its own needs. The interaction is asymmetrical because it is guided by one side only, which imposes its own norms and aims on the other”, Alvaro Moreno and Matteo Mossio, *Biological Autonomy. A Philosophical and Theoretical Enquiry* (Dordrecht: Imprint Springer, 2015), at 90–91; “We will refer to this interactive dimension as *agency*. A system that realizes constitutive closure (metabolism) and agency, even in a minimal form, is an *autonomous system*, and therefore a *biological organism*”, *ibid.*, at 89. See also David S. Oderberg, ‘Teleology: Organic and Inorganic’, in Ana Maria González, ed., *Contemporary Perspectives on Natural Law. Natural Law as a Limiting Concept* (Burlington: Ashgate, 2008), 272–279. The purposiveness of the movement of living beings is real, independently of what is the most basic unity of evolution (whether the individual, the group, the species, or ‘the gene’). According to many scholars, the most basic unity of selection throughout evolution is neither the individual nor the species, but “the gene”. See Charles Crawford and Catherine Salmon, ‘Evolutionary Psychology: The Historical Context’, in Charles Crawford and Dennis Krebs, eds., *Foundations of Evolutionary Psychology* (New York u. a.: Lawrence Erlbaum Associates, 2008), 1–21 and Richard Dawkins, *The Selfish Gene*, 40th ed. (Oxford: Oxford UP, 2016), at 16. As is well known, modern science normally denies the existence of teleology of nature. Nevertheless, it maintains in its descriptions of living beings and processes some indispensable concepts such as ‘functions’, ‘instincts’, etc., which are nothing else than local teleologies. For a critical discussion about the many attempts by modern science to comprehend of nature without teleology, see Marco Solinas, *From Aristotle’s teleology to Darwin’s genealogy. The stamp of inutility* (Houndsmill, Basingstoke, Hampshire: Palgrave Macmillan, 2015). For a defense of teleology, see Robert Spaemann, ‘Die Unvollendbarkeit der Entfaltung’, in S.J. Follon and James McEvoy, eds., *Finalité et Intentionnalité: doctrine thomiste et perspectives modernes. Actes du Colloque de Louvain-la-Neuve et Louvain 21–23 mai 1990* (Paris: Éditions de l’Institut Supérieur de Philosophie Louvain-la-Neuve, 1992), 305–324 and Reinhard Löw, ed., *Die Frage Wozu? Geschichte und Wiederentdeckung des teleologischen Denkens* (Munich: Piper, 1981).
- 6 As Friedrich Nietzsche points out, “die längste Zeit der menschlichen Geschichte hindurch – man nennt sie die prähistorische Zeit – wurde der Werth oder der Unwerth einer Handlung aus ihren Folgen abgeleitet: die Handlung an sich kam dabei ebensowenig als ihre Herkunft in Betracht ...”, Friedrich

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