

LAW AND MORALITY, POLITICS OF THE MEANS OF SOCIAL CONTROL

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1. *A Pragmatic Linguistic Approach*

Law and morality are means of social control. Their language is directive. The descriptive language gives information, the directive language guides conduct. A representational (semantic) meaning or function (the so-called phrasistic) is common both to descriptive and directive language. By means of descriptive language you state something (*i.e.*, you affirm or deny something). By means of the directive language you prescribe something. The representation of that which you state or prescribe is the representational (semantic) meaning of language. Neither a description nor a prescription is possible without a representation of what is described or prescribed.¹

Directive language stirs up in the receiver a conative (volitive) impulse to perform an action which must be represented to him.²

These remarks are relevant in order to distinguish the ways in which morality and other means of social control perform their function.

2. *Moral Behavior*

A moral action is disinterested, unselfish; people who act morally act regardless of their own interests and even in contrast to them. A moral action is due *per se* not for some reason or in view of some purpose: duty for duty's sake. If you prescribe a moral action, it is not your prescription that makes it obligatory; your prescription just

¹ R.M. HARE, *The Language of Morals* (1952), pp. 1 ff., 17 ff., A. ROSS, *On Law and Justice* (1958), pp. 7 ff.; *Directives and Norms* (1968), pp. 1 ff., 9 ff., 34 ff.; E. PATTARO, *Filosofía del derecho. Derecho y ciencia jurídica* (1980), pp. 127 ff., 149 ff.

² K. OLIVECRONA, *Law as Fact* (1939), pp. 28 ff.; *Law as Fact* (1971), pp. 115 ff.; E. PATTARO, *Riflessioni su Olivecrona*, in "Rivista trimestrale di diritto e procedura civile" (1968), pp. 739-754.

emphasizes over and over again the quality of being obligatory which is inherent in moral action *ab origine*.

Moral actions appear to be obligatory in themselves, “by their very nature”, because people feel an unmotivated conative impulse to perform them, and they feel so because of a social conditioning which traces back to their childhood.

It is not strictly necessary to receive from the outside a stimulus (a command, an advice, or a prescription accompanied by a threat) to perform a moral action. The idea of such an action is a stimulus in itself. It stirs up a conative unmotivated impulse to perform the action for no other reason than they feel they ought to do so, regardless of and possibly even against their desires or conscious interests. The unmotivated conative impulse people experience to perform moral actions is the so-called sense of duty.

The effectiveness of the sense of duty depends on the greater or smaller depth that familiar and social conditioning have reached in people’s psyche.³

3. Moral Prescriptions

The representation of the required action is necessary to any prescriptions (be it moral, legal, of etiquette, etc.), but takes on a specific importance to the functioning of moral prescriptions.

In this case, the stimulative power of the prescriptions consists in recalling the idea of a moral action which is already interjected by the receiver and connected with his sense of duty. For example, the prescription given in a church, “you ought to make the sign of the cross”, has different effects respectively on Christian and Taoist visitors. Because of their education, the former will feel a sense of duty to perform the required action, the latter will not. Linguistically identical prescriptions, made up of the same words with directive meaning, such as “you ought”, “it is your duty”, or “you are obliged to”, have different effects depending on the morality of the receivers. Moral prescriptions release psychological mechanisms which are prearranged by education and social conditioning. To their functioning it is necessary not so much the directive as the representational meaning of the sentence: the presentation of an action already associated in the receiver with a sense of duty.

³ A. HAGERSTROM, *Inquiries into the Nature of Law and Morals* (1953), pp. 127-170; E. PATTARO, *Il realismo giuridico scandinavo, I, Axel Hagerstrom* (1975), pp. 137-178, 189 ff.; A. ROSS, *On Law and Justice* (1958), pp. 364 ff.; H.L.A. HART, *The Concept of Law* (1961), pp. 99 ff.

Moral prescriptions, as such, never have an original effectiveness (that is, they don't attain their end just because they are pronounced; this, e.g., is frequently the case with commands) but always presuppose morality, that is, a previously formed psychic arrangement, on the part of the receiver. It follows from this that morality never originates as morality. Originally, those actions which later on will appear to people as moral, that is, as obligatory in themselves (because they will be associated with a sense of duty), are impressed upon people by some means that are not moral prescriptions. The moral attitude, that is, the association between the idea of certain actions and the sense of duty, is originally determined in people through commands, or threats, or persuasion, or strength of example, in other words, through all the coercive means at large which can be resorted to by both the family and society.

Morality is inculcated through non-moral prescriptions. Once it has been inculcated it works by itself or with the help of moral prescriptions as recurring stimulations.⁴

4. *Commands, Threats, Advices*

Besides morality, there are other kinds of social control.

I have already mentioned commands. A command is a prescription issued by a definite person towards a definite receiver which stirs up in the receiver a conative impulse to act, not because the idea of the requested action is already associated in the psyche of the receiver with a sense of duty, but thanks to an immediate power of suggestion whose effectiveness depends on the more or less strong personality of the issuer and of the receiver, on the inter-relations between these two persons, and on the factual circumstances in which a command is issued. The effectiveness of a command is original (it does not depend necessarily on previous conditioning) and episodic (it is limited in time, and provisional).⁵

I have also mentioned threats. The prescription accompanied by a threat is effective neither because it revives and makes actual a sense of duty (moral prescription) nor because by means of the prescription the issuer exerts an immediate suggestive power (commands) but

⁴ E. PATTARO, *Filosofía del derecho. Derecho y ciencia jurídica* (1980), pp. 166 ff.; A. ROSS, *Directives and Norms* (1968), pp. 78 ff.

⁵ A. HAGERSTROM, *Inquiries into the Nature of Law and Morals* (1953), pp. 117-126; K. OLIVECRONA, *Law as Fact* (1939), pp. 32 ff.; H.L.A. HART, *The Concept of Law* (1961), pp. 18 ff.; E. PATTARO, *Il realismo giuridico scandinavo, I, Axel Hagerstrom* (1975), pp. 119 ff., 185 ff.

because, and in as much as, the receiver believes the threatened penalty is a serious civil which is not avoidable without performing the required action.⁶

Finally mention should be made of advices. Advice consists in showing a person which behavior is most advantageous to him in a given situation. "You'd better take your umbrella because it is going to rain" is an advice. Advices stand at the boundary line between prescriptions and descriptions. The effectiveness of an advice depends on the credibility of the description of an action, in the eyes of the receiver, as that which is most in keeping with his interests.⁷

5. *The Effectiveness of Law as a Means of Social Control*

Although many theories present law as a set of commands, it is evident that law is rarely effective through commands. The effectiveness of legal prescriptions is not based on episodic and immediate suggestive power exerted by definite persons on other definite persons.

It is true, on the other hand, that law resorts to the threats of evil (sanctions, punishment).

Law, moreover, is obeyed on grounds of expediency, that is, because the behavior it requires fits the interests of the receiver of legal prescriptions. In such a case the stimulative power of a legal prescription is that of an advice.

Besides, many legal prescriptions are observed because of habit and a spirit of conformism.

Finally, there are two very important connections between law and morality.

First, many legal prescriptions are obeyed because the receiver is pushed by that particular psychological mechanism which is typical of morality: because the prescribed action is associated in his psyche with a sense of duty. For instance, incest, murder, betrayal of trust, and perjury are not practised in our societies —when they are not practised— for the most part not for legal reasons, not because they are prohibited by the law, but because they are felt to be morally wrong, for moral reasons, that is, because people feel a duty not to commit them (sense of duty).

In spite of all distinctions between legal duties and moral duties the sense of duty as a psychological phenomenon cannot be divided into a sense of legal duty and a sense of moral duty. From the point of view

⁶ K. OLIVECRONA, *Law as Fact* (1939), pp. 123 ff.

⁷ A. HAGERSTROM, *Inquiries into the Nature of Law and Morals* (1953), p. 126; A. ROSS, *On Law and Justice* (1958), pp. 358 ff.

of social control, actions performed according to legal prescriptions are moral actions when they are performed because of a sense of duty.

Second, legal systems usually do not include a general prescription to obey legal prescriptions, that is, to obey the various prescriptions issued by the established legal authority. However, there are ethical, political, and legal theories which call for obedience to the established authority, either in absolute terms or under certain conditions, for example, under the condition that persons in power be chosen by free electoral competition. In this respect one speaks of a political obligation of obedience and loyalty towards the authority. Also, this kind of obedience actually is given by people on the basis of different motives: self interest, fear of punishment, spirit of conformism, etc.; but in many cases the motive of political obedience is moral, that is, it is a sense of duty.

Here too, in spite of all distinctions between political and moral obligations, the sense of duty as a psychical phenomenon cannot be divided into a sense of political and a sense of moral duty. From the point of view of social control, political obedience given on the basis of a sense of duty is a moral behavior.

Morality helps law not only because it leads the people to perform a number of actions required by the law, but also because it often leads the people to obey the law as such. In this case morality justifies the law, giving it legitimacy: obedience to the law is felt as moral, that is, obligatory in itself; a formidable strength is given to present and future law; a sense of duty predisposes the people to obey the law in advance.⁸

There are also kinds of morality which are contrary to the law: contrary to certain contents of the law or contrary to the idea that one ought to obey the established legal authority. These kinds of morality will be the winners when they have made the law appear, to all or at least a large part of society, as something else than a colossal machinery for repression. At this very moment, law will no longer be law: it will only be a set of hateful prescriptions issued hand in glove by a gang of criminals. As long as it exists as a means of social control, law has on its side some kind of acceptance by people to which the law is addressed.

⁸ A. HAGERSTROM, *Inquiries into the Nature of Law and Morals* (1953), pp. 30 ff., 194 ff.; K. OLIVECRONA, *Law as Fact* (1939), pp. 40 ff., 50 ff., *Law as Fact* (1971), pp. 128 ff.; H.L.A. HART, *The Concept of Law* (1961), pp. 50 ff., 56 ff., 113-114. E. PATTARO, *Il realismo giuridico scandinavo, I, Axel Hägerström* (1975), pp. 87-118, 178 ff.

Therefore, a definition of law as a means of social control should include at least two elements: law implies actual and/or potential use of force, but use of force by law is largely accepted within society. Now the point is: what kind of acceptance of the law and of the use of force on its part is desirable? An answer to this question is a matter of politics of the means of social control. My answer is concisely given in the next paragraph.

6. *Critical Morality Versus Positive Morality*

I do not object in principle to the law because it implies the use of force. The use of force is unavoidable; the best we can get is that it be governed by the law. Then our problem of politics of means of social control is by what kind of law force should be governed.

I am not confident in a law which relies on moral attitudes, that is, on unmotivated conative impulses originated from early psychic conditioning uncritically undergone by the people. In many cases moral attitudes lead to good behaviors like avoidance of murder, violence, fraud, etc. But the idea that the avoidance of harmful behavior relies on irrational, emotional bases, does not appeal to me. Man's worst impulses bridled by purely emotional attitudes (like a sense of duty) come to surface in devious ways: moral indignation felt towards homicide leads to the desire for the death of the murderer; moral rejection of homosexual practices to the persecution of the homosexuals, etc. Moral attitudes, as motives of acceptance of the law, inspire retaliatory views of justice, encourage authoritarianism and, at times, totalitarianism.

On the other hand, the downfall of moral uncritical values leads to cynicism. In times of fast social changes, which destroy the emotional bases of morality, we witness private and public violence and cruelty as irrational counterparts of the irrational previous beliefs. In such times even the obvious utility of the law as controlling the use of force is denied. In static societies morality is too strong a basis for acceptance of the law, in dynamic societies it is too fragile.

The acceptance of law would be better based on the psychical mechanism of advice than on that of morality. It should rely on the interests of the receiver of the prescriptions: on his acknowledgment that which is required of him which will turn to his advantage within a short time or longer. Law founded on this kind of acceptance is based on consent and reasonableness. Law that relies upon morality is based on training and irrational feelings.

However, as it is possible to manipulate will through morality, it is

likewise possible to gain consent by manipulating intellect through false advices. False advices are ideology and propaganda. The risk is to pass from law based on morality, on the conditioning of the will, to law founded on ideology and propaganda, on the conditioning of intellect. The mechanism of advice, consent, needs safeguards against ideology and propaganda. The main safeguards are (i) political participation and (ii) protection of fundamental rights of the individual and of minorities.

Participation avoids that consent be a mere outside adhesion, which can easily be manipulated either directly or indirectly: directly, by the agents of propaganda; indirectly, through the establishment of forms of social life which produce artificial needs and interests. It is necessary that there are places for the formation of consent, in which the addressees of rules take part making in their decision process, as they are in a position to understand their range and to foresee their consequences. The protection of fundamental rights of the individual and of minorities is intended to avoid totalitarianism which can thrive also in a participatory system. Participation without pluralism would fail its goals, as only debate allows conscious identification of interests and of the most suitable means to pursue them.

A politics of the means of social control inspired by the above principles is, in its turn, in a sense “moral”. It is inspired by a “critical morality” as opposed to the “positive morality”. Positive morality is the described means of social control based on early conditioning of people. Critical morality is criticism of social institutions through a rational consideration of the data of social experience, so that it includes also a critique of the positive morality.⁹

⁹ H.L.A. HART, *Law, Liberty and Morality* (1963), pp. 20 ff.; A. ROSS, *On Law and Justice* (1958), pp. 369, ff., V. LUNDSTEDT, *Superstition or Ratonality in Action for Peace?* (1925), pp. 33 ff., 41 ff., 44 ff.; *Legal Thinking Revised* (1956), pp. 53 ff., 136 ff., 159 ff.