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GRASPING AN OUGHT. ADOLF REINACH'S ONTOLOGY AND EPISTEMOLOGY OF LEGAL AND MORAL OUGHTS

Abstract. We almost every day direct our actions with reference to social, moral or legal norms and oughts. However, oughts and norms cannot be perceived through the senses: how can we “grasp” them, then? Adolf Reinach distinguishes enacted norms and oughts created through a social act of enactment, from moral norms and oughts existing in themselves independently of any act, knowledge or experience. I argue that this distinction is not a distinction between two species of oughts within a common genus: it is rather a deeper ontological distinction between two modes of existence that are quite different, even though both are objective, according to Reinach. This ontological distinction is reflected in the way in which enacted oughts and moral oughts can be grasped, respectively: in the former case, the enacted ought is grasped by going back to the underlying social act from which it springs; in the latter, a “grasping through feeling” (*fühlende Erfassen*) of the moral values is implied.

Keywords: Adolf Reinach, ontology of ought, epistemology of ought, social acts, feeling a norm.

1. INTRODUCTION: AN EPISTEMOLOGICAL QUESTION ABOUT OUGHTS AND NORMS

Oughts and norms are ordinary elements of the “landscape” in which we live. Almost every day we act with reference to a plurality of social, moral or legal oughts and norms, and we accordingly make choices that often collide with our own desires.¹ However, oughts and norms are not physical entities that can be perceived through the senses. This raises an epistemological question: How can we “perceive” or “grasp” the oughts and norms with reference to which we direct our actions? In other words, how can we recognize the existence of an ought or a norm in order to act with reference to it?

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¹ The capacity to act with-reference-to, or “in light of”, rules and norms has recently been dubbed by Lorini (2018) “nomic capacity”. Lorini suggests that such a nomic capacity is not exclusive to human beings and is shared by other animals. On the notion of “acting with reference to norms”, or “nomotropism”, see Conte (2000).

This epistemological question is obviously connected with the ontology of oughts and norms. The way in which an ought or a norm can be “perceived” or “grasped” is indeed strictly related to the specific ontological status of norms and oughts, that is to say, to their specific mode of existence. In Adolf Reinach’s works on law and on ethics, two different answers to this epistemological question can be found, one involving going back to the specific act which constitutes the source of the ought, the other implying a “grasping through feeling” of a value. These two answers reflect the different ontological status respectively pertaining to legal and moral oughts and norms in Reinach’s philosophy.

In section 2., I will examine Reinach’s differential ontologies of *enacted* oughts and norms on the one hand, and *moral* oughts and norms on the other. I will then examine, in section 3., Reinach’s two different answers to the epistemological question of how we can perceive oughts and norms: two different answers which are respectively implied in the modes of existence of enacted and moral oughts and norms.

2. TWO ONTOLOGIES OF NORMS AND OUGHTS

In *The A Priori Foundations of the Civil Law*, Reinach (1983) distinguishes norms that are issued through an act of enactment (*Bestimmungsakt*),² from norms that are “grounded in the moral rightness of a state-of-affairs”:

There are “norms” which are grounded in [*fundiert sind in*] the moral rightness of states of affairs. Because something is morally right, it *ought to be*, and if certain further conditions are fulfilled, *I ought to do it*. This oughtness of being [*Seinsollen*] and of doing [*Tunsollen*] exists by its nature in itself and apart from the knowing or the positing of any consciousness. An enactment [*Bestimmung*], by contrast, necessarily presupposes a person who issues it (Reinach 1983, 105).

This distinction is not a mere distinction between two species of entities within a common genus: it is a more profound ontological distinction. Despite the fact that the term ‘norm’ may apply to both moral norms and enacted norms, they are not congeneric in Reinach’s account, because they have two different – even though both objective – modes of existence.

² Reinach highlights the fact that the German word ‘*Bestimmung*’ (enactment) is ambiguous, because it may refer to five different (though related) entities: (i) the *Bestimmungssatz*, i.e. the sentence that is uttered in an act of enactment; (ii) the *Bestimmungsinhalt*, i.e. the content of the enactment; (iii) the *Bestimmungsakt*, i.e. the act of enactment; (iv) the *Bestimmungserlebnis*, i.e. the experience of the *Bestimmungsakt* in one’s consciousness; (v) the *Bestimmungswirkung*, i.e. the effect that is produced by the *Bestimmungsakt*.

2.1. The objective ontology of enacted oughts

Enacted norms – a typical example of which are the statutory norms of positive law³ – are norms that are issued through an enactment. An enacted norm and the corresponding ought (*Sollen*) come to exist only in virtue of the act of enactment.

An enactment is a specific type of *social act*, according to Reinach. In Reinach's account, social acts are a type of *spontaneous acts* (*spontane Akte*)⁴ that “cannot unfold purely within the person,” because they have three distinctive characters:

(i) social acts always *address* themselves to (*sich wenden an*) another person: they are “heterotropic”;⁵

(ii) social acts are “*in need of being heard*” (*vernehmungsbedürftig*): they must necessarily “penetrate” the other person to whom they are addressed, and they necessarily have to be “grasped” by him or her;

(iii) social acts consequently need to be *externally expressed* in order to be grasped by the other person to whom they are addressed (Reinach 1983, 19–20).

Along with the act of enactment, other examples of social acts are the act of questioning, the act of informing, the act of promising, and the act of commanding. However, within the genus of social acts, the act of enactment – like other social acts, such as commanding or promising, but in contrast to other social acts, such as questioning or informing – belongs to a peculiar subset, the subset of the “efficacious” (*wirksam*) social acts. Efficacious social acts are acts “which by being performed intend to effect a change in the world and sometimes do effect it” (Reinach 1983, 108). When an enactment or a command or a promise is made,

³ Positive law does not obviously consist uniquely of enacted norms: also unwritten customary norms of positive law exist. Reinach (1983) mentions unwritten positive law – defined as “legal rules which have gradually established themselves without ever being posited in an expressed enactment” – only once, and he does not take a stance on it; he merely suggests that the efficacy (*Wirksamkeit*) of unwritten positive law could possibly be understood in terms of *recognition* (*Anerkennung*) of the established norms (141, note 10).

⁴ Spontaneous acts are a peculiar kind of intentional experiences (*Erlebnisse*) in which the self is not merely active (*aktiv*) but specifically “factive” (*tätig*): in spontaneous acts, in contrast both to passive experiences and to merely active experiences, there is “a doing [*Tun*] of the self”, and “the self shows itself as the phenomenal originator of the act” (Reinach 1983, 18). An analogous distinction between the “operativity” (*sprawczość*) of human acts as opposed to a mere “activation” (*uczynienie*) of the self can be found in Karol Wojtyła's (1994) phenomenology of the act and of the person. For a specific analysis of spontaneous acts in Reinach's typology of experiences (*Erlebnisse*), see De Vecchi and Passerini Glazel 2012.

⁵ The adjective ‘heterotropic’ has been suggested by Amedeo G. Conte and Paolo Di Lucia (see De Vecchi, Passerini Glazel 2012, 273). As De Vecchi and Passerini Glazel (2012) highlight, the property of social acts of being heterotropic (i.e. addressed to others) is not the same as the property of being *fremdpersonal* (i.e. directed to others), because there are also non-social acts (such as envying somebody) that are directed to others without being addressed to others.

“something is thereby changed in the world” (22). In the case of commanding, an obligation is created; in the case of promising, a claim and a corresponding obligation are created; in the case of an act of enactment, a norm and an ought (an ought-to-do or an ought-to-be) are created.

This efficacy (*Wirksamkeit*), that is specific to social acts like commanding, promising and enacting, presupposes, but is not the same as, what Reinach calls the positing character (*Setzungscharakter*) of these acts. It is true that through an act of enactment something “is being posited as enacted”, “as something that ought to be”;⁶ but this is similar to what happens, for instance, in the act of questioning, which is not an efficacious act in Reinach’s sense and through which something is posited as questioned, as put into doubt. In the case of the enactment, “far more is at stake”, says Reinach (1983, 109): “whoever enacts something not only wants to bring it about that the content now exists as enacted by him; [...] it rather belongs to the meaning of an enactment that it intends to ‘be valid’ [*gelten*] for a larger or smaller group of persons” (108).⁷

If an enactment – such as the enactment of the director of a company that a bridge should be built – is valid for a certain group, and if it is consequently efficacious for the members of that group, then the corresponding state of affairs “exists as one which ought to be”, and “the action realizing that state of affairs is consequently required” (Reinach 1983, 108).

It is important to remark that, in Reinach’s account, the ought created through an enactment is not a mere psychological content existing in the consciousness of the subject issuing the enactment. An efficacious enactment creates an objective legal entity (*rechtliches Gebilde*) similar to the claim and obligation that are created by a promise. The new entities (*Gebilde*) that enter the world through efficacious social acts, like promising or enacting, possess a peculiar ontological status, a peculiar mode of existence, the investigation of which is one of the main contributions given by Reinach’s a priori theory of law to the development of social ontology.

According to Reinach, these legal entities “are surely not *nothing*”, since they can be eliminated by waiving, retracting, repealing or fulfillment. However,

⁶ Reinach underlines that, in contrast to acts of judgment, the content of the enactment is posited as something that ought to be in the very act itself: “there is no independently existing being to which it has to correspond” (Reinach 1983, 108).

⁷ According to Reinach, the validity or efficacy for a group of persons of the enactments of an arbitrator presupposes and depends on an explicit act of submission (*Unterwerfungsakt*). He remarks, though, that “some reference to a person is intrinsic to the act of submission”; consequently, the act of submission does not seem to fit in the case of the enactments of the state (except maybe for the case of an absolute monarch). Reinach thus takes then into consideration the hypothesis that the validity or efficacy of the enactments of a state is explained by a different act: the act of recognition (*Anerkennung*). However, he does not take a stance in this regards, and merely asserts that it is not a problem of the a priori theory of law, only of the philosophy of positive law, to determine what grounds the efficacy of positive enactments (Reinach 1983, 116–117).

they are neither physical, nor psychical, nor ideal entities. They are not *physical*, since they cannot be perceived through the senses, nor through any physical instrument. They are not *psychical*, since they can last in time for years without any change, which is not possible for psychical entities (which should even vanish during sleep and loss of consciousness). And since these legal entities, in contrast to ideal entities such as numbers, concepts and propositions (*Sätze*), are temporal entities – they “arise, last a definite length of time, and then disappear again” – they are not even *ideal* entities, like numbers or propositions (Reinach 1983, 8–9). Legal entities have an ontological status of their own.

With regard to the ought created through an enactment, Reinach underlines that “a distinct kind of objectivity of oughtness [*Objektivität des Sollens*] shows itself here”, a kind of objectivity that is valid “only for the persons for whom the enacting act is efficacious” (Reinach 1983, 109). The source (*Quelle*) of this objective ought is the act of enactment. The act of enactment is the necessary and sufficient condition for the emerging (the beginning to exist) of the enacted ought in its objectivity. However, the act of enactment is not the “cause” of the emerging of the ought. Between the act of enactment and the enacted ought, there is not a causal relation, according to Reinach; the relation between the act of enactment and the enacted ought is “an immediate self-evident and necessary relation of essence [*Wesenszusammenhang*]” (1983, 15).⁸

I can now summarize the distinctive characters of a legal ought created through an act of enactment. An enacted ought

- (i) is created through a social act of enactment as its source in virtue of an immediate, self-evident and necessary relation of essence;
- (ii) it consequently presupposes a person who issues it as “its origin and bearer” (*Ursprung und Träger*);
- (iii) it can be eliminated, abolished or repealed through a social act;
- (iv) it is an objective ought, whose objectivity is nevertheless restricted to the persons for whom the enacting act is efficacious.

2.2. The objective ontology of moral oughts

I have examined, so far, Reinach's objective ontology of enacted oughts; I will now turn to his objective ontology of moral oughts.

The moral ought (*sittliches Sollen*), in contrast to the enacted ought, does not presuppose a person issuing it: it is instead directly “grounded [*fundiert*] in the moral rightness of a state of affairs [*in der sittlichen Rechtheit von Sachverhalten*]” (Reinach 1983, 105). But what does this mean, exactly?

⁸ The investigation of such immediate self-evident and necessary relations of essence is the main aim of Reinach's a priori theory of law.

Reinach – whose reflections on ethics show obvious connections to Max Scheler’s theory of values (see Scheler 1973) – is an ethical objectivist. According to Reinach, moral values *objectively* pertain to objects, and never pertain to states of affairs (Reinach 1989b, 336). The kind of objects that can be morally valuable – that can be the “bearers” (*Trägern*) of value – are persons, personal qualities or actions.

Moral rightness, on the contrary, pertains to states of affairs (*Sachverhalten*), or indirectly to the actions aiming at realizing a state of affairs.⁹ The moral rightness of a state of affairs is deduced from “formal moral principles” in connection to moral values. One fundamental principle is that the existence of a morally valuable object is morally right:

If one says: ‘It is right that this object exists, because it is morally valuable’, and: ‘Because the object is valuable, [its existence is right], so] an overarching statement [is] presupposed: ‘It is right that every *morally* valuable object exists’. Further, [the statements apply: ‘It is right that an immoral object does not exist’;] ‘it is wrong that an immoral object exists’; ‘it is wrong that a moral object, which is valuable, does not exist’ (Reinach 1989b, 337).

If, as in Reinach’s objectivist conception of ethics, values objectively pertain to objects, and objects are thus objectively valuable, then certain states of affairs are objectively right or wrong. And since Reinach (1983), as we have seen above, expressly states that “because something is morally right, it *ought to be*, and if certain further conditions are fulfilled, *I ought to do it*” (105), then moral oughts have an objective existence.

However, the objectivity of a moral ought is radically different from the objectivity of an enacted ought. The objectivity of a moral ought depends neither on the positing character nor on the efficacy of any social act: the moral ought exists in itself, and it is independent of any knowledge (*Erkenntnis*) and of the positing (*Setzung*) of any consciousness, according to Reinach. Moral oughts and obligations (*Verpflichtungen*) “can never spring [*entspringen*] directly from” free social acts (Reinach 1983, 13). Every moral obligation “has as its necessary, even if not sufficient, condition, the moral rightness (*Rechtheit*) of states of affairs: in particular it presupposes that the existence of a person’s *action*, which forms the content of his obligation, is either in itself morally right or right in virtue of the rightness of other related states of affairs” (13–14).

Since a moral ought, according to Reinach, exists in itself independently of any social act, it is valid (*gilt*), on the one hand, in all circumstances – whereas an enacted ought is valid only in the circumstances where the enacting act is efficacious – and, on the other hand, it is valid in general – whereas an enacted

⁹ As Smith explains, “an action is right insofar as it aims towards the realization of a morally right state of affairs” (Smith 2013, 28).

ought is valid only for the persons for whom the enactment is efficacious (see Reinach 1983, 109).

Furthermore, just like it can never spring from a social act, a moral ought can never be abolished through any social act.

I can now summarize the distinctive characters of a moral ought:

(i) a moral ought can never be created through a social act: it is rather grounded (*gründende*) in moral values and in moral rightness;

(ii) it is independent of any knowledge (*Erkenntnis*) or positing (*Setzung*) of any consciousness;

(iii) it can never be eliminated, abolished or repealed through a social act;

(iv) it is an objective ought existing in itself, and it is valid, as such, in general and under all circumstances, and not only in relation to the efficacy of a presupposed social acts.

3. TWO EPISTEMOLOGIES OF NORMS AND OUGHTS

So far, I have clarified the main differences between the respective modes of existence of enacted oughts and moral oughts in Reinach's account. I will now return to the epistemological question: given that both enacted and moral oughts and norms are neither physical entities that can be perceived through the senses, nor psychical or ideal entities, how can we "perceive" or "grasp" them? How can we recognize the existence of an ought or norm in order to act with-reference-to it? Do the different ontologies of enacted and moral oughts have any repercussion on the epistemology of these kinds of oughts?

3.1. The epistemology of enacted oughts: going back to the act of enactment

In *The Apriori Foundations of the Civil Law*, Reinach (1983) underlines that the existential connection between an efficacious social act and the legal entities that spring from it is not a causal connection, but rather an immediate self-evident and necessary relation of essence (Reinach 1983, 14–16). According to Reinach, there is a fundamental difference between the causal connections occurring in physical external events of nature and the relations of essence occurring among a social act and the legal entities springing from it: in causal external events one can perceive the effect – such as for instance the movement of a ball – by itself, without having to go back to its cause; by contrast a claim, or an obligation, cannot be grasped (*erfassen*) through itself. Reinach explains:

If I want to convince myself of the existence of the movement, I have only to open my eyes. But with claims and obligations there is no way to avoid always going back to their "ground" [*Grund*]. Only by once again establishing the existence of an act of promising can I establish

the existence of that which follows from it. There is here no act which, comparable to an act of inner or outer perception, can by itself establish its existence (Reinach 1983, 15–16).

In other words, whereas in the case of an external causal connection “the act [of consciousness] in which the effect is given need not be grounded in an act of apprehending the cause”, no independent apprehension of a legal entity in itself is possible: in order to establish the existence of a claim or an obligation, one has always to “go back to the underlying act” that is its ground (Reinach 1983, 15–16). Only in this way, and through the eidetic intuition of the essential relation connecting the act and the corresponding legal entities, one can “apprehend” the objective existence of a claim and an obligation.¹⁰ These considerations obviously apply also to the enacted norm or ought in its essential relation to an act of enactment: the *objective* existence of an enacted norm or ought can only be grasped by going back to the act.

The objectivity of the existence of legal entities is highlighted by a further remark: Reinach remarks indeed, on the one hand, that it is possible to have a “cold knowledge” of such legal entities as claims and obligations; on the other hand, one can experience specific feelings connected to these legal entities, such as feeling oneself to be entitled or to be bound. While in the latter case the feeling is possible only with regard to one’s own claims and obligations, in the former the knowledge may regard one’s own claims and obligations as well as someone else’s ones (Reinach 1983, 10). However, Reinach stresses that in both cases the legal entities are separate from the respective experiences of knowledge or of feeling: they may exist independently of any such experience. He observes that legal entities last in time in a way that is not possible for the experiences of consciousness, and that one can well feel oneself to be obliged without there really being any obligation, as well as an obligation may well exist for someone without her or him feeling herself or himself obliged in any way. Furthermore, Reinach remarks that one’s feeling oneself obliged is not an apprehension or “grasping” (*Erfassen*) of the obligation; on the contrary, the grasping of the obligation is presupposed for the determination of the validity (*Gültigkeit*) of such a feeling (Reinach 1983, 11). And the grasping of the obligation is only possible by going back to the underlying act.

3.2. The epistemology of moral oughts: grasping a value through feeling

If enacted oughts can only be grasped or apprehended by going back to the act they spring from, how can moral oughts be grasped, given that they can never spring from a social act?

In his work on *Reflection: Its Ethical and Legal Significance* (1989a), Reinach expressly examines the possibility of an “insight into an ought-to-do” (*Einsicht*

¹⁰ I owe the suggestion to translate the German ‘*vernehmen*’ with ‘apprehend’ to Wojciech Żelaniec.

in *ein Tunsollen*) with reference to moral values. It is, indeed, in practical, or volitional, reflection (*voluntative Überlegung*) that the question of how a moral ought can be grasped typically arises.

In volitional reflection, one takes into consideration a project and asks himself: “Should I do that?”. Reinach observes that in volitional reflection, “the subject ‘opens himself’ in the questioning attitude, [...] to the insight into an ought-to-do, to the apprehension of the ‘demand’ [*Vernehmen der ‘Forderung’*] for a specific behavior” (Reinach 1989a, 291). In volitional reflection, in contrast to intellectual reflection, “it is not the being or non-being of a state of affairs that should be contemplated [...], but rather the demand for and prohibition against realization [*die Realisierungsforderung oder das Realisierungsverbot*], which arises from a project, that should be apprehended [*vernommen werden*]” (Reinach 1989a, 291–292).

When volitional reflection involves moral evaluations, “it is necessary to grasp [*erfassen*] the value- and disvalue-characters pertaining to it [the project] clearly” (Reinach 1989a, 292), since according to Reinach the demand for or prohibition against the realization of a project are based (*gründen*) in its value or disvalue. If the value- or disvalue-character of the project is apprehended, then corresponding demanding or forbidding experiences (*Forderungs- und Verbotserlebnisse*) arise (Reinach 1989a, 292).

However, how can the value- and disvalue-characters actually be grasped? Reinach remarks that values, just like oughts, “are not sensorily perceived [*wahrgenommen*] like things, not seen and heard like colors and sounds, not thought like numbers”; he asserts that values are rather *felt* (*gefühl*) through a specific kind of *grasping feeling* (*erfassende Fühlen*) (Reinach 1989a, 295). Reinach clarifies the nature of this grasping feeling through a parallelism with the aesthetical feeling of beauty: a landscape, he observes, is perceived, but its beauty – its aesthetical value – is *felt* (Reinach 1989a, 295).

Reinach stresses, however, that the *feeling* (*Fühlen*) of beauty or of a moral value is not an emotion (*Gefühle*), and that the *grasping feeling* of a value must be separated from the emotional states (*zuständliche Gefühle*) that may be founded on it as an emotional reaction. When a value is felt, it is possible that an emotional reaction occurs, that an emotion (*Gefühle*) of joy, for instance, is founded on the feeling (*Fühlen*) of the value; however, since the emotion is founded in the feeling, it presupposes such feeling and thus does not coincide with it (Reinach 1989a, 295).

Another important remark made by Reinach is that the grasping through feeling admits “manifold gradations of clarity and distinctness, up to absolute, indubitable self-givenness”, and there are “innumerable degrees of ethical sensitivity”, from the finest human ethical receptivity to “absolute ethical

obliviousness” (Reinach 1989a, 296). A person affected by absolute ethical obliviousness would never be able to grasp a moral ought.¹¹

The grasping of a moral ought – that is, the apprehension of the moral demand for or prohibition against the realization of a project – implies, in contrast to the grasping of enacted oughts, the apprehension of moral values; and this apprehension, which cannot be based on going back to an underlying social act, is based on a *grasping feeling* (*erfassende Fühlen*), which is not a mere emotional reaction, but rather a receptive feeling that solely can grant the epistemological access to moral values, and thus indirectly to moral oughts. Such moral values and oughts, however, do objectively exist in themselves independently of the grasping of any consciousness.

Therefore, in Reinach’s objectivist perspective on moral values, feeling is not the constitutive source of values, since values objectively exist and pertain to objects independently of any consciousness; on the contrary, feeling is the sole epistemological means of access to moral values objectively pertaining to objects, and it is thus a necessary condition for the grasping of moral oughts, in contrast to enacted ones.

It is now clear, in conclusion, that both in his philosophy of law and in his philosophy of ethics, Reinach defends an objectivistic ontology of oughts: both enacted and moral oughts and norms objectively exist. I have clarified, however, that the respective objective modes of existence of enacted oughts and norms on the one hand, and of moral oughts and norms on the other, are not the same: in other words, enacted and moral oughts – though both objectively existing – do not belong to the same ontological genus. Such an ontological difference is reflected, at the epistemological level, in the respective ways in which enacted and moral oughts can be grasped: the former can be the object of a “cold knowledge”, and can only be grasped by going back to the social act from which they spring; the latter can only be grasped through a “grasping feeling” of (objective) moral values (a grasping feeling which is not an emotional experience, though).

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¹¹ This remark may be interestingly compared to a similar remark made in the same years as Reinach by the Polish philosopher of law Leon Petrażycki (1867–1931). In his psychologistic theory of law, Petrażycki (2011, 15) speaks of an “absolute legal idiotism” with reference to a subject who is unable to grasp *legal* norms due to the lack of the capacity to have “normative experiences”, which consist of emotions rejecting or encouraging a certain conduct. On the analysis of normative experience in Petrażycki, see also Fittipaldi (2012), Passerini Glazel (2017; 2019; forthcoming).

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