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The Morality of Legal Obligation

Haris Psarras (PhD Student, School of Law, University of Edinburgh)

One of the principal characteristics of law is that it puts forward obligations. Law's subjects should abstain from homicide as well as pay taxes. They also owe damages for breach of the contracts they signed. Furthermore they should follow standards that may at first seem morally indifferent. They may find themselves under the obligation to drive on the right hand side of the road, but they may equally well have an obligation to drive on the left hand side, once they cross the borders of the state whose law required them to do exactly the opposite. The catalogue of law's subjects' obligations is long and varies from one legal order to another. It may include an obligation to join the military service or even a duty to be dressed appropriately when you appear in public. What do all these obligations have in common? No matter the variety of the practical issues they have to do with, no matter their close or distant relation to moral values, they are all put forward by the law. It is in that sense that they all are *legal* obligations.

This paper is part of a relatively long essay on the nature and justification of legal obligation. It asserts that legal obligation has a moral status and then discusses how and to what extent such status is honoured by a number of justificatory models for legal obligation. The paper first examines HLA Hart's criticism of the classical positivist view that attempted to make sense of legal obligations with reference to prudential reasons -notably to the prudential reason to avoid the imposition of sanctions that often follows their breach. It further suggests that Hart's theory, the first positivist account of legal obligation that emphasized its genuine- see moral- character, changed the way legal philosophers engage in the process of justifying obligations-imposing rules. The outcome of this change is the current well-spread belief that legal obligation is to be justified with reference to moral reasons. I then turn to a post-hartian trend in legal theory that does accept this belief, but still holds that the justificatory standards of legal obligation differ to those applying to moral obligation and hence that the former can be justified even if it falls short of moral bindingness. The final part of the paper offers a number of arguments against this

view and claims that such a distinction between the justificatory standards of moral and legal obligation fails to honour the genuine character of the latter.

The turn in positivist theory on legal obligation: From *being obliged* to *being under an obligation*

Since Hart brought to light the flaws of jurisprudential theories that wished to make sense of legal obligations merely in terms of sanctions,[1] legal positivism underwent an essential change: it whole heartily rejected the reductivist theory of legal obligation[2] that it was primarily associated with. Pre-hartian positivists held that legal obligation is no more than a rather obscuring label for the condition of people obliged to follow the claims of a de facto authority. Hart himself as well as post-hartian positivists hold that legal obligation is a genuine duty attributed to people by public officials.

There is no doubt that the status of those who are under a genuine obligation to x differs to the condition of those who find themselves obliged to x. Now, the real question is in what sense are the two cases distinct from each other and what does their differentiation offer to our understanding of legal obligation. Hart is the first positivist that deals extensively with the issue. He points out the difference and makes it clear through a fine example, that is now world famous as *the case of the gunman*.[3] A, who hands his money to gunman B, so that he avoids getting shot by him, does not have any obligation to comply with B's crude order, although he is obliged to follow it. The example is eloquent, but striking. How does it come that what at first sight seems to be a mere tautology (being obliged – being under an obligation), actually illustrates an instance of the famous unbridgeable difference between ought and is?

Being obliged to x differs to having an obligation to x in a two-fold sense. First, they differ in normative terms. Once a genuine obligation is attributed to us, a

[1] HLA Hart, The Concept of Law, OUP, Oxford, 1994, at 27-42.

[2] A look at the bibliography on the issue suggests that the term *legal obligation* usually accommodates two meanings. It is important to clarify that what we mean by *legal obligations* in this paper is the prescriptions made by the so-called obligation-imposing or prescriptive legal rules and not the so-called obligation to obey the law. The latter which is also known as *political obligation*, refers to a said prima facie duty to recognize law as the product of a normative authority exercised by our community's political institutions and therefore as the supreme normative order of our community. This very distinction between the two meanings of the rather vague term *legal obligation* is also drawn by L. Green, who respectively distinguishes between obligations *in* the law and obligation *to* the law. See among others Leslie Green, *Legal Obligation and Authority* (2003), Stanford Encyclopaedia of Philosophy (e-pub). See also John Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1994, at 318.

[3] HLA Hart, note 1, at 22 and 82.

change of our normative status occurs, whereas this is not necessarily the case, once one finds oneself obliged to act in a certain way. One who is under an obligation to x, should do x. One who is obliged to x may or may not be under an obligation to x. But the two cases also differ to each other in purely pragmatic terms. Once a person is obliged to x, she is aware that if she acts differently, she will experience a sort of harm, whereas this is not necessarily the case when she is under an obligation to x.[4]

Let us give an example from the everyday legal practice to see what this two-fold difference brings to our understanding of legal obligation. Think for instance of a paradigmatic duty put forward by most legal systems both past and present ones, all over the world: 'You shall not murder!' According to the understanding of legal obligation in terms of sanctions, the fact that this very prescriptive claim is embedded in a legal system and hence enjoys the status of a legal mandatory rule gives to law's subjects no more than a prudential reason to comply with it. As long as they are reasonable agents -as all humans ex hypothesi are- law's subjects cannot but wish to avoid the sanction that the breach of their legal obligation to abstain from homicide brings with it. What the theory of law as a system of sanctioning rules suggests is that the legal status that is attributed to any obligation via its enactment by legal officials, offers us nothing but a sound prudential reason to respect it, which can be simplified as follows: Do so for not being punished!

The treatment of legal duties as genuine obligations puts forward a more sophisticated view on the issue. Once the normative claim that asks us to abstain from homicide meets the standards of legal validity and is formally put forward as a legal rule, law's subjects find themselves under a new genuine- read moral- obligation. They are now bound to hold back from killing humans; bound in the sense of being guilty of a morally reprehensible act, in the case that they break the rule that forbids homicide.

HLA Hart: Reading Legal Obligations in terms of Moral Obligations

There is no need to exert much effort to see that it is the second theory that fits better with the way most people conceive and respond to legal obligation. We intuitively know that legal obligations do not owe their normative character to the sanctions that usually follow their breach, yet the question remains: How can we get from the

[4] We come back to this pragmatic difference later on, when we discuss the internalist approach that underlies the treatment of legal obligation as genuine obligation. (See note 10)

ambiguity of this intuition to the certainty of a well-justified belief that legal obligations enjoy a genuine binding character? In his criticism to Austin's treatment of law as a system of commands Hart suggests an answer. He calls us to reasonably reject the reductivism that underlies the understanding of law in terms of sanctions just by having a closer look at the way legal systems work and fulfil their functions.[5]

In the 'Concept of Law' Hart's argument against the classical positivist views that are well reflected by Austin's theory, has a twofold aim. It purports to reject first the view that all legal rules are prescriptive and second the assumption that the prescriptive legal rules succeed in attributing obligations to us by backing their normative claims with the threat of a sanction. It is only the second part of Hart's argument that is relevant to the issue discussed in this paper. The view that all legal rules are prescriptive rules, which is rejected by the first point of Hart's argument, answers a question prior and not necessarily relevant to the one on legal obligation. On the one hand we have the so-called 'prior question' asking how law exercises its normative power. Does it exercise it just through the imposition of obligations or does it also put forward non-prescriptive normative claims like the ones we find embedded in rules on rights, privileges, law-making powers etc? On the other hand we have the question on legal obligation asking whether and if so, why law is justified to make prescriptive claims, as it always -according to Austin- and occasionally -according to Hart- does.

It is helpful to have in mind that in his criticism to Austin's theory Hart discusses both these questions at once. Hence there is a need to distinguish the arguments concerning the ways in which law exercises its normative power from the ones that apply to the puzzle of legal obligation. Hart suggests four arguments among which only one is directly connected to the question of legal obligation, as defined above. Let us just summarize it in a few words.

Hart claims that a look at the everyday life of legal systems suffice to show that the understanding of legal obligations in terms of sanctions misrepresents the balance of reasons against which the citizens that honour their legal obligations decide to do so. If the normatively qualified term 'legal obligation' was not but a euphemism for the fear inspired in people by the threat of punishment, then those who have and

[5]In Hart's own words: '…the simple model of law as the sovereign's coercive orders failed to reproduce some of the salient features of a legal system', in Hart, note 1, at 79. Hart's confidence to the empiricist approach of the law and his solid belief that abstract legal phenomena are to be understood with reference to the social practise they stem from is pretty obvious.

exercise the power that is necessary for the backing of any efficient threat, would be beyond any legal obligation. Yet the everyday practice of legal systems shows that legal obligations apply both to simple citizens and to the officials who initiated them. Having said that it becomes clear that we cannot define legal obligation merely in terms of threats and sanctions, since deterrence by threat cannot apply to those who make the threat and have the power to effectuate it. Following the same line of thought, one could further suggest that if people obeyed the law just out of fear of the sanction that is supposed to follow in case they do otherwise, then they would disregard their legal obligations, as long as they were sure that for a variety of 'positive coincidences' that happened to occur at the instance of the breach of their legal duty there was no chance to be punished for it. Yet the great majority of lawful people still honour their legal duties even when they know they can escape punishment and this very fact suggests that legal obligations cannot instantiate just prudential reasons of eschewing punishment.

There is no question that the argument makes sense even to those that have little experience of what it is to live under the law, but what does it actually suggest? No more than that the legal obligation cannot be appropriately understood merely in terms of sanctions. The reasons that call people to fulfill their legal duties are still there, even in cases where there is no fear of punishment. So far so good. If this is the case –as it seems to be- then the traditional positivist theory of legal obligation fails. Yet no further clues are offered to us in support of the treatment of legal obligation as genuine obligation. And we need further clues. We cannot make sense of legal obligation's impact on our practical reasoning just by appealing to the prudential reason of eschewing either the suffering of an evil or the detriment of our interests that sanctions bring about as a direct answer to the breach of a mandatory rule. Yet this very fact does not necessarily exclude the possibility that we follow the obligation-imposing legal rules for a number of other sound prudential reasons.[6]

[6] The term *prudential reasons* stands for a particular sort of practical reasons, for the normative requirements of prudence or to put it in different terms for the practical reasons that flow from prudential values. In this context *prudence* and *prudential values* refer to the qualities of a life that is "good simply for the person living it", as Griffin nicely puts it in James Griffin, *Value Judgment: Improving Our Ethical Beliefs*, Clarendon Press, Oxford, 1997, at 19. In that sense prudential values are to be distinguished from moral values. The former refers to what is good, whereas the latter to what is both good and right. See James Griffin, *Well-Being, Its Meaning, Measurement and Moral Importance*, OUP, Oxford, 1989, at 77.

Let us assume for instance that we have a prudential reason to live in a community and that legal obligations concretise this very reason. If so, then the process of our reasoning under the impact of legal obligation will be as follows: The peaceful co-living with our co-citizens contributes to our immediate individual well-being. This particular sort of peaceful co-living (living peacefully in community) can be achieved only if we all conform with a number of conventional obligations made in the name of our political community –as legal obligations happen to be. Hence we have a good reason to honour our legal obligations. According to this scenario, the reason-giving character of legal obligations is not conceived in terms of the rudimentary prudential consideration "we'd better avoid being punished" that crudely equates the normative dimension of obligation with the factual circumstance of being under threat. Yet, the supposed genuine character of legal obligation is still depreciated, since we still consider the impact of legal obligation on its subject's practical reasoning in terms of considerations of self-interest, hence as an attribution of purely prudential reasons. Indeed since prudential considerations can never reach the level of a genuine obligation -a self-interested obligation is sort of a contradiction in terms[7]- we cannot honour legal obligation as a genuine ought, by reading it as a requirement of prudential reason.

Having said that we now see that a complete defence of the genuine character of legal obligation needs to follow two parallel yet distinct paths; one is negative in the sense that it suggests the rejection of the old solid positivist sanction-based approach of legal obligation, the other is positive for it puts forward an alternative theory of legal 'obligations' that allow us to consider them as obligations without the inverted commas. An approach that would restrict itself in taking only the negative path, would be doomed to fail, because –as we made clear above- the rejection of an analysis of legal obligation in terms of the prudential reason to avoid the harm of threatened sanctions, cannot necessarily exclude alternative models of understanding

[7]I am here denying the existence of the so-called self-interested or prudential obligations. The question on whether prudential reason can generate obligations appears to be still open. Yet it seems that even the defenders of the existence of prudential obligations accept that such 'obligations' do not have a genuine character and that the meaning of the term 'obligation' varies from the prudential to the moral context. Campbell puts it nicely as follows: "For what, after all, is a prudential obligation? So far as I can see, it can only mean one of two things: either a *moral* obligation to be prudent, in which case *cadit quaestio*; or else the sort of thing that Kant meant by his 'counsels of prudence'. Now the 'ought' in Kant's counsels of prudence, is admittedly not a moral ought. It is expressed in merely hypothetical imperatives: 'if you want happiness, you ought to adopt such and such appropriate means". C.A. Campbell, *In Defense of Free Will: With Other Philosophical Essays*, Routledge, London, 2002, at 135.

legal obligation that make appeal to other prudential reasons and hence are no less indifferent to honour its genuine obligatory character.

Hart follows both paths. Having shown the failure of the sanction-based theory of legal obligation, he then builds his own positive account of legal obligation by bringing into the discussion two further terms that he considers necessary for the grasp of legal obligation's normative character. The first is the idea of social rules and the second is a way of reading them, the so-called internal aspect of rules. Going deeper into the contrast between being obliged and being under an obligation, Hart suggests that it is only in the latter case that our behaviour is rule-governed:

> To understand the general idea of obligation […], we must turn to a different social situation which, unlike the gunman situation, includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation […] the existence of such rules, making certain types of behavior a standard, is the normal, though unstated, background or proper context for such a statement.[8]

Whenever you suggest that someone is under an obligation, you assume that there is a rule. This is the point of Hart's remark. What allows us to make sense of obligations is the existence of rules.

Now, Hart is aware that the term *rule* is often inaccurately used and considers necessary to clarify what we mean by *rule* in a philosophical context. A rule is not a matter of convergent behavior. It is a matter of the normative element that makes people treat such a behavior as a standard for criticism. Influenced by the meta-ethical approaches that flourished in his academic environment at the time he was writing the Concept of Law, Hart chose to call this normative element, the 'internal aspect of rules'. No need to say that this label bears obvious traces of metaethical expressivism.[9] The very use of the term *aspect* suggests that the normative element of rules is taken to be more a matter of the point of view from which we look at them than of any sort of objectively identifiable normative qualities that rules are there to make express through

[8] HLA Hart, note 1, at 85.
[9] For a well-justified reply to the question why Hart of *The Concept of Law* is an expressivist, see Kevin Toh, *Hart's Expressivism and his Benthamite Project*, Legal Theory (11), 2005, at 81-85.

their normative terminology ('must', 'right', 'allowed' etc).[10] Yet such meta-ethical considerations of moral epistemology are irrelevant to the point we are trying to clarify here. Whatever the meta-ethical background of one's theory is, one can still consider the genuine character of moral obligations by distinguishing them from prudential or other still normative, yet non-moral considerations. This is the case of Hart. In spite of his expressivist approach to the concept of obligation, he still treats it as a moral concept. This is made clear by the way he defines the so-called internal point of view:

> But such general convergence or even identity of behavior is not enough to constitute the existence of a rule […]: where there is such a rule deviations are generally regarded as lapses or faults open to criticism.[11]

The key words in this short quote are 'lapses or faults that are open to criticism'.[12] A person is under an obligation when she is under a rule. She is under a rule, when she is expected to be criticized for committing a fault, in case that she does not follow the pattern of behavior that the rule prescribes. This is Hart's view on obligation; a view that leaves aside any sort of theoretical reductivism and honors the moral character that designates all genuine obligations. The best indication that legal obligation is to

[10] It has been suggested (see Toh, supra note 9) that Hart's expressivism is a sign of his ethical non-cognitivism. Yet an expressivist perspective on normative statements, like the one Hart puts forward through his 'internal aspect of rules', does not necessarily commit one to the negation of the 'truth'-aptness of normative statements. One can be an expressivist and still believe that morality is a matter of reason and not of emotions or beliefs. This seems to be the case of Hart, whose expressivism follows more from his internalist view on what motivates people to act morally (a view that comes as a reply to the externalist approach on the issue that is espoused by the sanction-based theory) rather than from any sort of moral non-cognitivism. For further details on the relation between expressivism and motivational internalism see Thomas Nagel, The Possibility of Altruism, Clarendon Press, Oxford, 1970, at 8.

[11] HLA Hart, note 1, at 55.

[12] A lot remains to be said on Hart's success in clarifying that obligations cannot be but moral. Due to lack of space let us emphasize just the link between fault and criticism that Hart considers as the crucial element of the internal point of view and hence the key to the understanding of obligation. Hart is right. Indeed, what gives to the obligation its moral character is that it flows from a rule whose breach is not just a mistake, but a fault that is to be criticized. In this context, criticism is to be understood in a stricter sense than is usually the case. It is more than an affirmation that a mistake is committed, it also involves a disapproval of the person who made the mistake, a disapproval that presumes the assertion that the mistake is not just an error but a fault, – this is to say that first, the person is responsible for her mistake and second that her mistake constitutes a reprehensible act (a fault)-. None of these two conditions are met in case of failures to conform to the normative considerations of prudential or aesthetic reason, where no criticism follows the assertion that a mistake is committed. Criticism so understood is addressed only in case of moral mistakes (breaches of the normative requirements of moral reason).

be treated as a particular species of the moral obligation so conceived[13], is given by Hart himself who suggests that in order to make sense of legal obligation we should go back to the idea of obligation tout court.[14]

A further point that we need to put emphasis on here is that Hart builds his theory on legal obligation against the background of what he calls primary or duty-imposing rules. To his view, the rules that need to be assumed existent, so that we can make sense of obligations, are mandatory rules. Although Hart suggests the division of legal rules into two groups and distinguishes between primary or duty-imposing and secondary or power-conferring rules, his theory of legal obligation is built with reference only to the first group. This is a choice, not a matter of luck. Hart's theory of legal obligation was not purported to be an account of the normativity of law taken as a whole- as many theorists have falsely considered it-.[15] It was offered as a contribution on how we should make sense of a particular feature of law, namely its claim to put forward among other types of rules mandatory rules that generate obligations. In this sense Hart is aware of the distinction we drew before between the two meanings of legal obligation[16] and allows us to suggest that we do not necessarily have to offer one and the same justification for both law's claim to be recognized as the supreme normative authority within the community it governs and its claim to attribute genuine obligations to its members.

Is this distinction between the two senses of legal obligation so important for legal theory? This is a different question and remains to be discovered. For now what is good to bear in mind is that thanks to Hart's theory the positivist approach to legal obligation changed drastically. Legal positivism is now liberated from the reductivist fallacy that haunted its traditional version and hence aware of the genuine character of legal obligations that calls for the consideration of their moral dimension.

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[13] Apart from the obligations stricto sensu, law also includes a number of obligations of etiquette. The obligation to abstain from homicide is an example of the former kind, the obligation to drive on the right or left-hand side of the road is an obligation of etiquette. Although obligations of etiquette seem to be at first sight morally indifferent, they too actually have a genuine moral character. Contrary to what is broadly believed, they do not generate mere social conventions and morally indifferent musts. What they actually do is turn morally indifferent musts to moral musts. Think for instance, that once we decided to drive on the left-hand side, driving on the other side of the road is as reprehensible as breaking a rule that forbids us from carrying guns! In this sense even obligations of etiquette are or at least become genuine obligations.

[14] HLA Hart, note 1, at 82-91. and 172.

[15] See among others Gerald Postema, *Coordination and Convention at the Foundations of Law*, Journal of Legal Studies, Vol.11, (January 1982)

[16] See note 2

Natural Law Theory and the Alternative Models for the Moral Justification of Legal Obligation

One way or another all post-hartian positivist theories tried to make explicit that they do or can accommodate a view on legal obligation that takes into consideration its moral character. Yet after the reconsideration of legal positivism that came as a result of Hart's criticism to the sanction-based approach, things for legal positivists were not easy. The new account of legal obligation called not only for a rejection of the reductivist view that classical positivists were strongly associated with –its failure is not doubted by any of the current versions of legal positivism-, but also for a reconsideration of the nature of legal positivism and of its relation to its old adversary, the natural law theory. For those who considered modern legal theory as still divided in two opposite camps the latter issue proved to be the hardest to solve.

Since the old well-spread belief that traditionally wanted natural law theory and legal positivism to disagree on the grounds of legal validity was convincingly criticized, things have become even harder for the legal theorists that still insisted that the difference between legal positivism and natural law theory remained as unbridgeable as it seemed to be in the past. Starting from a hartian perspective of law, John Finnis suggested that natural law theories have always accommodated a positivist account of the grounds of legal validity and hence that the dividing line between them and legal positivism was to be drawn only on the basis of their divergent views on legal obligation.[17] Following this line of thought one could reasonably argue that natural law theorists since Aquinas have constantly made sense of legal obligation in moral terms, claiming that it owes its binding character to its conformity with moral values, whereas legal positivists did often doubt even a prima facie connection between law and morality. Having said that, it is not hard to see why Hart's revolutionary approach to legal obligation has caused legal positivism a severe identity crisis, a crisis that was due to the fact that positivist theories found themselves unexpectedly much closer to their eternal opponents.

An analysis of the reorientation of legal positivism that followed these developments goes far beyond the scope of this paper. Under the pressure of the new considerations positivists restated most of their theses. The old controversies gave way to new ones that, this time, were to be found even within the positivist camp. Yet

[17] See John Finnis, note 2, at 364.

what is of interest for us here is how this essential change in both the framework and the content of the old jurisprudential debate between natural law and positivist theories influenced the new non-natural law theories[18] on legal obligation. For the reason that they wished both to stay away from the natural law tradition-at least to the extent that was necessary in order that they remain distinct from it- and to be able to capture the genuine obligatory character of duty-imposing legal rules, the new non-natural law theories embarked on an attempt to set out theoretical models for the justification of legal obligation that take into consideration its moral status, yet without strictly equating it with moral obligation. In what follows I will focus on two fine models of this kind (the Conception of Law as Integrity and the Theory on Law's Claim to Authority) and comment on the claims they commit themselves to and on the justificatory competence of the solutions they suggested.

These two models are often conceived as opposing one another and in many respects they do. Yet their views on legal obligation do not differ to the extent one would expect, taking into account their disagreements on other issues. What brings them closer to each other are not their conclusions on the grounds of our legal duties, but rather the eyes through which they approach the puzzle of legal obligation's justification. Both models are inspired first by the Hartian claim that legal obligation is to be understood as a genuine obligation hence in moral terms and second, by the non-natural law assumption that the justification of legal obligation is considerably different to that of moral obligation.

Such models of justification occurred as or ended up becoming impediments to the rediscovery of the natural law approach that the consideration of legal obligation in moral terms was to bring about. Natural law theories differ considerably from each other, but they all agree that legal obligation is justified only when it meets the standards of a genuine moral obligation, that is to say when it constitutes either a conclusion derived from natural law –where 'natural law' stands for the normative

[18] Juriprudential theory is often considered as being divided in two main camps, the positivist and the non-positivist one. It seems that such conventional divisions do more harm than good to legal theory, since they either narrow or stretch concepts and arguments to make them fit pre-existing and rather restrictive labels. Yet since labels are sometimes useful for practical reasons we can hardly put them aside. Having that in mind I suggest a further division that cuts across the one mentioned above, a division between natural law and non-natural law theories of law, which shades further light at the upheavals that characterize the post-hartian jurisprudential debate on legal obligation. Under the label 'non-natural law theories' we can classify both the so called positivist and non-positivist theories, that no matter their differences, reject the natural law theory of legal obligation in the sense that they subscribe to the belief that moral and legal obligations do not share the same justificatory standards.

requirements of moral reason[19]- or an implementation (*determinatio*) of general moral principles.[20] This method of justifying legal obligation is no surprise, although it seems abstract and somehow not in tune with the needs and mechanisms of the everyday life of modern legal systems –these ascribe duties to their subjects in a technical and not always morally sophisticated way-. Indeed, the natural law theory of legal obligation is one that really praises legal obligation's genuine character. Hence one would expect it to have a great success among legal theorists that take for granted Hart's revolutionary suggestion that even if we hold positivist views on legal validity, we should not forget that legal obligation is to be treated in moral terms.

What then motivated a number of theorists who wished to take seriously the morality of legal obligation, to suggest alternative –non-natural law- models for its justification? The best answer is given by their own writings, where they point out what they consider as defects of the natural law approach. For instance Dworkin puts it as follows:

> [*Natural law theories*] argue that lawyers follow criteria that are not entirely factual, but at least to some extent moral, for deciding which propositions of law are true. The most extreme theory of this kind insists that law and justice are identical, so that no unjust proposition of law can be true. This extreme theory is very implausible as a semantic theory because lawyers often speak in a way that contradicts it. Many lawyers in both Britain and the United States believe that the progressive income tax is unjust, for example, but none of them doubts that the law of these countries does impose tax at progressive rates.[21]

Reading this abstract from Law's Empire one is right to think that Dworkin's criticism of natural law theories misses its point, since it is based on a doubtful assumption, namely that natural law theories are semantic theories of law, or in other words that they aim to understand what lawyers mean when they talk about law and legal obligation. There is no question that natural law theories' endeavour has nothing to do with the crude criterialism that Dworkin attributes to all semantic approaches to

[19] John Finnis, note 2, at 36.
[20] This classical idea was clearly stated for the first time in Aquinas, *Summa Theologica*, I-II q.95, a. 2c.
[21] Ronald Dworkin, *Law's Empire*, Fontana Press, London, 1986, at 35-36

law[22] and in that sense it is fair to say that the above quote misrepresents natural law theories' claims. Yet the example used by Dworkin can be rephrased in a way that brings to light a prima facie reasonable objection to natural law theories. The example says that in states where the taxation legislation follows the progressive income tax model, people do not doubt that the law imposes the progressive income tax, even if they find this very model of taxation unjust. Yet what the example actually suggests is that often people still consider themselves as being under a legal obligation to x, although they consider x as non-morally obligatory or even as morally wrong.

The same line of criticism against the natural law theory of legal obligation is followed by Joseph Raz who puts forward a similar example and states his objections even clearer than Dworkin:

> Many people, and not only natural lawyers, believe that the laws of their community are morally valid. But for most [*contrary to what natural lawyers suggest*] the moral validity of the law is contingent on its content or on the nature of the regime, which created it. A given Education Act is good and therefore morally valid but there could have been a different Act, which would have been bad and morally invalid. […] My argument is that natural law theories […] must show not only that all law is morally valid but also that this is generally known and thus accounts for the application of normative value to the law. Since this assumption is false, natural law cannot explain the normativity of law.[23]

The example of the good and the bad Education Acts is eloquent. It suggests that there are laws that enjoy the normativity that is appropriate to law and still generate duties that do not meet the criteria of normative success that apply to moral obligations. Natural law theory is criticized for suggesting far too high standards for the moral justification of legal obligation. Such standards, the argument follows, cannot really account for a number of obligations that are legally -yet not morally- binding. Based on this objection, the critics call for an alternative, non-natural approach to legal obligation that should aim at justifying how it is possible that law

[22] Ronald Dworkin, note 21, at 31-32.
[23] Joseph Raz, *Practical Reason and Norms*, Hutchinson and Co. Publishers, London, at 163-164 and 170.

generates duties that are still genuine, although they fall short of the justificatory standards of moral musts. A question worth asking is, on what grounds and to what extent, is this criticism of natural law theories fair. Yet what is of special interest to this paper is what the alternative justificatory models suggest. Their main point is that the claim that law makes when it attributes obligations to people, is a moral claim, yet not a claim to moral rightness, but a claim to normative authority. In what follows we discuss what these new justificatory model suggest and whether they really succeed in offering a third way to deal with legal obligation.

The Claim to Normative Authority and its Failure to Honor the Moral Status of Legal Obligation

The Conception of Law as Integrity (henceforth LI) and the Theory on Law's Claim to Authority (henceforth LCA) aim among other things to offer a justification of legal obligation. Although each one of them offers different justificatory standards for the appreciation of the genuine bindingness of our legal duties, they both agree on what the claim made by obligations-imposing legal rules (the claim to legal obligatoriness) is. They suggest that it is a 'claim to normative authority'. This label means two things: first that the claim to legal obligatoriness is a moral claim and second that it is not a claim to moral rightness.

A moral claim is a claim that is to be justified in moral terms, that is to say with reference to moral reasons. When the gunman orders you to hand him your money, the claim it makes is not a moral claim. This does not mean that there are no good practical reasons to comply with it. It means that these reasons, if any, are not moral reasons. Indeed, I have a good reason to hand my money to the gunman, if this is the only way I can save my life, but this reason is a prudential, not a moral one. Both LI and LCA hold that the claim to legal obligatoriness is a moral claim, in the sense that if we wish to justify it, we should appeal to moral reasons. This becomes evident even from the mere fact that they conceive it as a claim to normative authority. Since normativity is the quality of attributing rights and obligations and since genuine obligations are to be understood in moral terms,[24] normative authority cannot be justified but in terms of moral reasons.

[24] See above ch. 2., HLA Hart: Reading Legal Obligations in terms of Moral Obligations

Furthermore LI and LCA suggest that the claim to legal obligatoriness is not a claim to moral rightness, no matter its moral status. If this was the case, –their argument follows- then there would be no way that legal obligations can be justified even when they do not meet the justificatory standards of moral obligation. Yet as it becomes clear from their criticism of the natural law theory,[25] both LI and LCA claim that legal obligations that fall short of moral obligation's justificatory standards can still genuinely bind us. LI and LCA suggest that legal obligations that fail the test of moral obligation can still be justified if they stem from a normative authority. This is said to be the case because according to this line of thought the claim to legal obligatoriness is a claim not to moral rightness, but to normative authority. Practically speaking this means that one is under a legal obligation, when what the law requires one to do is not necessarily morally right, but morally justified in the sense that it is required by a normative authority. A genuine normative authority is a morally justified one, an authority that we have good moral reasons to treat as the source of rights and obligations.

The reading of the claim to legal obligatoriness as a claim to normative authority, thus understood,[26] is made explicit by Raz. Raz suggests that law claims to have legitimate authority.[27] He then explains that legitimate authority is the quality of a de facto authority whose directives, if followed, allow its subjects to better comply with the reasons that apply to them, than if they tried to follow these reasons directly.[28] It is not clear what Raz means by 'reasons' here; prudential, moral or both? Let us assume that in this context what is meant by reasons is 'moral reasons'. If this is the case, then according to this argument what law claims is not that it always requires people to do morally right things, but that following its directives is better justified in moral terms than following no directives at all. It is in this sense that a claim to normative authority is said to be a moral claim yet still not a claim to moral rightness.

Let us know turn to LI's reading of law's moral claim. Here things are a bit more complicated. LI suggests that law is not a system of directives, but a reading of

[25] See above notes 21 and 23

[26] The idea that the Razian theory treats law's moral claim as a claim to authority and not as a claim to moral correctness is well defended in John Gardner, *How Law Claims, What Law Claims*, Oxford Legal Studies Research Papers No. 44/2008, at 20.

[27] See "…the law either claims that it possesses legitimate authority or is held to possess it or both." in Joseph Raz, *Ethics in the Public Domain*, Clarendon Press, Oxford, 1994, at 199.

[28] Joseph Raz, note 26, at 195 and 198

political authorities' directives under the light of certain principles. Legal obligations are not the ones put forward by the political directives, but those that arise once we interpret such directives in the way mentioned above. One could argue that this view leaves us room to consider law's moral claim as a claim to moral rightness. No question that this will be the case if the interpretive principles that are supposed to shed light on the past political decisions were chosen on the basis of their moral rightness. Yet what is important to consider is that the reading of political directives is not made under the light of moral principles tout court. The principles that play the crucial role in this interpretive scheme are the ones that underlie the past political practice. Such an interpretation does not do justice to all moral reasons, but only to those that inspired community's political directives.[29] The result is that the balance of reasons that underlie the past political decisions cannot be changed in favor of an alternative balance, even if the latter better serves the reasons that are under consideration. In practical terms this means that values like fairness or corrective justice may be given priority over equality, distributive justice, solidarity, mercy etc, just for the reason that past political decisions were made on the basis of the former and not of the latter. It is in this sense that LI reads law's moral claim as a claim to normative authority. Once legal obligations do really honor a balance of values controlled by a community's past political practice, they are justified, even if they fall short of the values-balance required by moral reason.

The reading of law's claim to obligatoriness as a claim to normative authority and not as a claim to moral rightness purports to give us the key to legal normativity. It wishes to explain in what sense it is possible that we are under a genuine legal duty that does not meet the justificatory standards applying to moral obligations. In what follows we will concisely discuss a number of arguments that doubt the success of this alternative way of justifying legal obligation. The first thing we need to consider is whether law makes a claim to normative authority and if yes whether or not the justification of this claim holds the key to the justification of legal obligation.

It is indeed true that law claims to have normative authority. It requires us to consider it as a morally justified source of rights and obligations. If it didn't claim such an authority, it could not claim to put forward genuine obligations and it would restrict itself in conceding that it produces mere orders. It is only wannabe normative

[29] Ronald Dworkin, note 21, at 225.

authorities that can claim to generate genuine obligations. Yet what is not true is that the justificatory standards for normative authority can also work as justificatory standards for the obligations that such an authority produces. The establishment of a normative authority is neither necessary[30] nor sufficient for the production of genuine obligations. What matters for our discussion is its insufficiency.

The satisfaction of the criteria of normative authority is sufficient for the production of obligations-imposing rules. Once one is morally justified to produce obligations, the rules one creates enjoy the status of obligations-imposing rules. Yet not all obligations-imposing rules succeed in creating genuine obligations. The status of a rule as an obligations-imposing rule means that it has the status to generate obligations, but does not guarantee that it succeeds in this mission. In practical terms this means that if a rule is a product of a normative authority and hence enjoys an obligation-imposing status, its claim is a moral one. This gives us good reason to turn to it and check whether it really serves the moral reasons it purports to serve. The rules of normative authorities attempt to concretize moral reasons and in this sense they have a good chance of generating obligations. Yet the level of their success is set by the normative requirements of moral reason and not by the way rule-making normative authorities conceive such requirements. It would be unreasonable for the level of a rule's success to be judged by reference to the beliefs of the rule-maker.

Consider the following example. We want to play football and we invite Tom, who is an expert on football, to be our referee. Tom's judgments on whether we follow the rules of football, while playing, are made on the basis of his knowledge of football's rules. We have a good reason to turn to Tom whenever we wish to know whether or not we are playing the game in the right way, but Tom's judgments do not replace the rules they refer to. Hence the success of Tom's judgments are not guaranteed by the fact that they are made by Tom on the basis of football's rules. Their standard of success is set by the rules themselves. Let us now turn to law. If legal obligations are to be understood in moral terms they cannot be but applications of moral reason. The fact that an obligation flows from a rule initiated by a normative authority means that we have good reasons to turn to it, if we wish to see what our duties are. Yet the standards of a rule's obligatoriness are not guaranteed by the fact

[30] A de facto authority cannot be legitimate, if it does not have normative authority. Yet normative authority is not necessary for the generation of genuine obligations. The reason why is that it is possible that the directive of a de facto authority puts forward a genuine obligation, although this very fact does not suffice to turn the de facto authority into a legitimate one.

that such a rule is put forward by a normative authority, since the point of such an authority is to concretize the normative requirements of moral reason, not to replace them with the directives made in moral reason's name.

The problem with the theories of legal obligation that deny applying to it the justificatory standards of moral obligation, is that they look for an alternative in the wrong place. Law does indeed claim to have normative authority, but the justification of legal obligation goes beyond the satisfaction of this claim. But even if it is true that law does not make any further moral claim apart from the claim to normative authority, this does not really help the non-natural theories of legal obligation. The criticism they address to natural lawyers is that law does not make a claim to moral rightness. Since law does not wish to equate the obligations it attributes to us with moral obligations -the argument follows- we do not have any reason to deny that there is a certain distance between legal and moral normativity.

This is not true. The standards of justification of any claim are not necessarily set up by the claim itself. Claims do usually seek a certain justification, but this does not mean that the best way to justify a claim is to go through the justificatory process it calls for. Orders backed by threats, for instance, appeal to the prudential reasons of people who are under a de facto authority. Yet this does not exclude the possibility that the behavior that the order requires us to follow is advisable from a moral perspective.[31] If this is the case, then the moral reasons that we have to adopt this very behavior preempt the prudential reasons the order appeals to. The same goes for the moral claims of law. Let us assume that law claims no more than normative authority. This means that it calls for the application of the justificatory standards of normative authority to the justification of legal obligations. But this does not mean that legal obligations cannot be better justified with reference to the justificatory standards of moral rightness.

Indeed it is moral rightness and not normative authority whose justificatory standards best honor the moral status of legal obligations. Even if law does not set out high justificatory standards for the obligations it attributes to us, we have good reasons to restate law's claim and read it in the way it best suits the service that law, as all normative systems, renders to moral reason. The fact that law supports its claim that we refrain from homicide with its normative authority does not block us from

[31] See for instance the case discussed in note 30

considering further good moral reasons of why we have to comply with this claim. Why should things be different in the case of legal rules on taxation, public defense, environmental protection etc? If our legal obligations fall short of the moral expectations they purport to satisfy, how can they acquire a genuine obligatory status? Does it suffice that they meet the justificatory standards that law's authority chose and impose as appropriate to them? A positive answer to this question cannot escape dishonoring the moral status that distinguishes legal obligations from authoritative orders.

It becomes clear that the non-natural theories of legal obligation can hardly comply with both their objectives: the application of different justificatory standards to legal and moral obligation can hardly be compatible with the appreciation of the moral status of the former. What results in an equally important disregard for the moral character of legal obligation is the confidence that both LI and LCA show towards the 'first material' of legal obligations. According to LCA legal obligations flow from the directives of a de facto authority whose existence is more helpful for our compliance with moral reasons than its absence would be. Following a similar line of thought, the LI scenario suggests that the past decisions of political institutions formulate the basis on which moral principles are called to exercise their justificatory power. Yet it does not convincingly show that political institutions have the normative power to set the rules of the game, nor, if they do have this power, from where they got it.[32] The justificatory model suggested by LI and LCA claims that moral reasons are called to play their justificatory role against a normative background whose fundaments are already set down by morally unqualified authorities. Such a model may well justify a number of legal duties that fail the test of moral obligatoriness, but it does not do justice to the moral status of legal obligation. And this gives rise to more concerns about the doubtful success of non-natural law justifications of legal obligation.

The discussion is long and this paper cannot but just shed some light on the controversial issues that the justification of legal obligation brings with it. Yet what seems to be clear is that since the moral character of legal obligation was ascertained

[32] The argument that Dworkin puts forward to justify the prima facie bindingness of political decisions is based on the idea of associative or communal obligations (see Dworkin, note 21, at 195-202). This argument calls us to appreciate the biding force of agent-relative practical reasons, but does not suggest any way out of the dilemma that occurs when agent-relative and agent-neutral practical reasons clash against each other.

even by legal positivists, it has become hard to claim that there is a considerable gap between legal and moral normativity. The more we consider the moral status of legal obligation, the more difficulties we have in suggesting that it has its own justificatory standards. Finally the discovery of the morality of legal obligation is hardly compatible with the separation of our legal duties from our moral obligations.