

LAW AND MORAL JUSTIFICATION*

*Andrea Faggion***

<http://orcid.org/0000-0003-4260-1771>

andreaaggion@gmail.com

ABSTRACT *Many prominent legal philosophers believe that law makes some type of moral claim in virtue of its nature. Although the law is not an intelligent agent, the attribution of a claim to law does not need to be as mysterious as some theorists believe. It means that law-making and law-applying acts are intelligible only in the light of a certain presupposition, even if a lawmaker or a law-applier subjectively disbelieves the content of that presupposition. In this paper, I aim to clarify what type of moral claim would be suitable for law if law were to make a claim to be morally justified. I then argue that legal practice is perfectly intelligible without moral presuppositions – that is, that the law does not necessarily make moral claims.*

Keywords *law, justification, authority, justice.*

RESUMO *Muitos filósofos do direito proeminentes acreditam que o direito levanta algum tipo de pretensão moral em virtude de sua natureza. Embora o direito não seja um agente inteligente, a atribuição de uma pretensão ao direito não precisa ser tão misteriosa como alguns teóricos acreditam que seja. Significa que atos pelos quais fazemos e aplicamos leis são inteligíveis apenas à luz de uma certa pressuposição, mesmo se um legislador ou um aplicador do direito não acreditar subjetivamente no conteúdo dessa pressuposição. Neste artigo, eu busco esclarecer que tipo de pretensão moral seria adequada ao direito*

* Article submitted on 11/04/2019. Accepted on 25/06/2019.

** Universidade Estadual de Londrina. Londrina, PR, Brasil.

se o direito levantasse a pretensão de ser moralmente justificado. Eu então argumento que a prática jurídica é perfeitamente inteligível sem pressuposições morais – isto é, que não é necessário que o direito levante pretensões morais.

Palavras-chave *direito, justificação, autoridade, justiça.*

Introduction

Why is law not the “gunman situation writ large”? Does it make a difference to the concept of law that our rulers usually claim that they are coercing us for our own good? Is it essential to law that the use of force is always accompanied by a moral claim, which is to be objectively attributed to law itself? If the law claims to be morally justified in its interference with our lives, what kind of moral justification would be appropriate to it? Is it enough that the law claims to do the right thing? This paper is a reflection on these questions.

In the first section, I present an overview of Robert Alexy’s thesis that the law necessarily makes a claim to correctness that embraces a moral claim, along with preliminary objections to this thesis. The next section concerns Philip Soper’s thesis that law necessarily makes a claim to justice. I choose Alexy’s and Soper’s views as examples of the thesis that the law’s moral claim is related to the content of its norms. In the third section, I introduce Joseph Raz’s thesis that the law necessarily makes a moral claim but that this is a claim to a content-independent obligation held by the norm-addressee, i.e., a claim to moral authority. In this section, I develop a Hobbesian argument to show that in order to morally justify law, it is necessary to justify the authority of law roughly in Raz’s sense. In other words, I argue that Alexy and Soper are wrong to believe that the law can make ordinary moral claims. In the final section, I argue that, despite being right in maintaining that the law’s moral claim would have to be a claim to authority, Raz is wrong in defending that the law necessarily makes such a claim. This being so, the fourth and final section deals with the thesis shared by Alexy, Soper, and Raz that the attribution of a moral claim to law is necessary for the distinction between the law and the “gunman situation writ large”. Following in the footsteps of Frederick Schauer and Matthew Kramer, I argue that this essential part of Alexy’s, Soper’s, and Raz’s jurisprudence is misguided.

1. Alexy and the Claim to Correctness

According to Alexy (1989, p. 173), “in the process of enacting and applying law, a claim to correctness is necessarily made by the participants, a claim which embraces a claim to moral correctness”. Some remarks are in order here. Firstly, we are told that participants in legal practice necessarily make a claim to correctness by making and applying law. This means that such a claim is supposed to be a presupposition that is necessarily connected to the sense of those practices. Put differently, Alexy’s point is that it is impossible to make sense of legal practice without attaching an implicit claim to correctness to each act of creating or applying law. This holds true even if individual participants do not actually make a claim to correctness, for the hypothesis concerns not the mental state of actual participants but the practice’s intelligibility conditions. Such a distinction between objective claims made by the law and subjective claims made by legal officials is essential to making the thesis that law makes claims something more than an empirical generalization that is easy to refute by counterexamples.¹ Secondly, the claim to correctness is not restricted to a claim to conformity between a participant’s action and a positive norm that applies to her. Let us call a “weak claim to correctness” a claim that legal practice is in accordance with norms whose membership in the legal system at hand is warranted. Alexy argues that the claim to correctness is stronger than that; for him, it embraces a claim to moral correctness. Thus, it is not enough that the practice is guided by rules. The claim to correctness is a claim that “the practice is right, because it serves some higher purpose” (Alexy, 1989, p. 177). This being so, the question is why such a stronger claim to correctness should be thought of as “a necessary element of the concept of law” (Alexy, 1989, p. 177).²

Alexy (1989, pp. 178-180; 1998, p. 209) offers two examples, in which he applies the method of performative contradiction in order to refute the objection that the stronger claim to correctness is not conceptually connected to the

1 See, for instance, Alexy (2000, pp. 141-142; 2007, pp. 334-335), Soper (2002, p. 56) and Gardner (2012, p. 131). Frederick Schauer (2015, pp. 95-96) is one of the major opponents of the thesis that law necessarily claims some kind of moral legitimacy. He provides empirical examples of regimes (“kleptocracies”) whose claims do not go beyond the demand of obedience based on force. These examples, however, are useful only to show how restrictive the concept of law held by philosophers like Alexy, Soper, and Raz is. They do not amount to a refutation of the thesis that the law claims moral legitimacy, since that thesis’s advocates could reply that, if those regimes actually do have law, their legal officials are subjectively contradicting objective claims that are implicit in their practices.

2 In this paper, I am not discussing the methodological question of whether there are necessary elements in social concepts like law in general. My objections against the thesis that law necessarily makes some kind of moral claim does not depend on the refutation of the essentialist view held by its proponents.

law. The first example is a constitutional article of a state, X , in which it is proclaimed that X is unjust (Alexy, 1989, p. 178). In this case, the relevant claim to correctness necessarily made by constitutions is the claim to justice (Alexy, 2000, p. 139). It is implicit in the constitution. Thus, there is a contradiction between the claim implicit in the practice of creating a constitution and the explicit claim made in the content of that constitution (Alexy, 1989, p. 179). This contradiction between implicit and explicit claims is what Alexy calls “performative contradiction”.

In the second example, a judge announces a verdict in which it is admitted that the defendant is wrongly sentenced to life imprisonment (Alexy, 1989, p. 179). In a later work, Alexy clarifies that the judge in his example claims that the imprisonment is “wrong, because the valid law was interpreted incorrectly” (Alexy, 1998, p. 212). But the implicit claim always present in judicial decisions is that such decisions apply the law correctly (Alexy, 1989, p. 180). Therefore, there is another performative contradiction here.

Nonetheless, in this second example, the claim to correctness seems to merely amount to what I have called above a weak claim to correctness. This is why Alexy needs to add that such a claim to correctness “implies a claim to justifiability” (Alexy, 1989, p. 180). Although a claim to justifiability allows for different kinds of justification, for Alexy it also means that a critical perspective is opened, such that the initial claim to correctness ends up being a claim to morality in the form of justice. After all, “[j]ustice is correctness with respect to distribution and balance [...], and law, in all its ramifications, cannot do without distribution and balance” (Alexy, 2000, p. 146). As we will see in section 4, Alexy seems to be making a point that is quite similar to Raz’s reasoning that the appeal to a rule to justify a judicial decision for the enforcement of a legal obligation implies an appeal to a particular type of reason. Reasons that apply only to the enforcer of rules, such as those that concern her self-interest, do not qualify for that justificatory role.

According to Alexy (1989, p. 181), “[the aspect] which is more important here, is that a legal decision which applies unreasonable or unjust law correctly, in no way fulfils the claim to correctness necessarily raised by it in every respect”. Alexy appeals to the alleged necessity of a stronger claim to correctness to justify why the bare proof that a judicial decision is in accordance with an authoritative rule is not enough to legally justify it. Nevertheless, it is hard to see how Alexy can prove the necessity of a stronger claim to correctness as part of the concept of law without circularity, since it appears that the only ones willing to admit that a judge’s denial that her sentence is correct can involve a performative contradiction that goes beyond bare conformity to authoritative

rules are those who are already convinced that a stronger claim to correctness is necessarily connected to the law.³

Alexy says that performative contradictions are merely a means of showing the necessary presuppositions implicit in legal practice. They work by exposing an “inevitable absurdity” that can only be explained by the existence of a certain necessary presupposition in the practice (Alexy, 1998, p. 213). But why would it be absurd for a judge to admit that her sentence is not correct in any other sense than the sense of being in conformity with current positive law? Indeed, there are examples of official statements in which judges regret their decisions while legally supporting them (for instance, Heidemann, 2005, p. 138; MacCormick, 1978, pp. 20-21, 36-37), and these are perfectly intelligible.

As for the first of Alexy’s examples, a constitution that did not purport to be just would indeed be odd, but this unusualness may be explained by requirements of political rhetoric rather than logical consistency. Moreover, it would be odd for anyone – even a criminal – to announce that her aim is to be unjust, since being unjust is not usually a purpose. Instead, injustice is usually a byproduct of an egoistic purpose, and the egoist simply does not care about whether her action causes injustice. As Matthew Kramer (1999, p. 108) says, between self-approbation and moral self-denunciation there may be “the silence of utter unconcern”.

To sum up, Alexy (2000, p. 141) notes that, in a performative contradiction, “only one part of the contradiction stems from what is explicitly stated by performing the legal act, whereas the other part is implicit in the claim necessarily connected with the performance of this act”. What I am saying in reply is that the implicit part in his examples is a matter of interpretation. We can detect such performative contradictions only if we assume that there is only one possible interpretation of enactments or applications of law: they must be acts that attend some purpose that is higher than bare egoistic purposes. Therefore, there are no such performative contradictions if we can make intelligible the utility of legal practice to serve openly egoistic purposes. That is what I intend to do in section 4.

In addition to the method of performative contradiction, Alexy (1998, p. 215) offers an argument for the stronger claim to correctness based on his view of the law’s open texture, which is wide enough to include basically all cases of legal indeterminacy, such as “the vagueness of legal language, the possibility of

3 Besides, as Heidemann (2005, p. 145) says: “even if we concede – and this is plausible – that it is a general postulate of rationality that true sentences must be justifiable ‘absolutely’ (meaning that their justification transgresses all subsystems), it would not follow that a justification which sticks to the criteria of positive law alone is legally faulty or leads to a result that is not legally valid”.

a conflict between norms, the gaps that exist in the law, and the possibility of deciding a case contrary to the language of a statute in special cases". According to Alexy, since we are in the sphere of openness, legal decisions cannot be made only on the basis of legal standards. Thus, Alexy concludes:

[C]onsiderations on utility and the recognition of tradition and value of the respective community do have without doubt a legitimate place in judicial rulings. Yet, if the claim to correctness is to be met, the question of correct distribution and correct balance must have priority. Questions as to correct distribution and as to correct balance are questions of justice. Questions of justice are, however, moral questions. Therefore, the claim to correctness produces a necessary methodological or argumentative connection between law and morality. The claim to legal correctness is on no account identical with the claim to moral correctness but it includes a claim to moral correctness. (Alexy, 1998, p. 216)

Firstly, as Heidemman (2005, p. 144) argues, this strategy for connecting law and morality does not seem to work, for according to Alexy, law is necessary as a special case of practical discourse precisely because general practical discourse is indeterminate. Therefore, in the sphere of legal openness, it is not clear that Alexy's theory allows for further reasoning such that moral discourse ends up settling the legal issue. On the contrary, given the indeterminacy of general practical discourse, Alexy's theory seems to require that an authoritative choice be made in the sphere of legal openness.

Be that as it may, we should ask why the practice of law necessarily embraces a claim to correct distribution and correct balance in the sphere of openness rather than merely giving rise to discussions about the course of action that is most beneficial to the elite who control the system and to the system's beneficiaries in general. If the elite controlling the legal system are powerful enough not to fear rebellion from the oppressed, would they not be expected to be open about their self-concern by bringing considerations of self-interest to settle matters in cases of legal indeterminacy? If there is such a possibility, the argument from open texture is no better than the argument from performative contradictions. Thus, we should provisionally conclude that Alexy cannot provide anything beyond the bare assertion that a stronger claim to correctness is necessarily connected to the law.

Regarding the open texture of law, Soper (2002, p. 58, n. 12) makes a point similar to the one criticized here. Let us now turn to Soper's other arguments for the necessary connection between claims of justice and the law.

2. Soper and the Claim to Justice

According to Soper (2002, p. 4), we are confronted by two exhaustive alternatives in theory of law: either law is a normative system in the sense that it makes implicit moral claims to justify the use of force, or law is not normative at all but rather “a system of organized and effective coercion”. Soper supports the first alternative. His thesis is that law necessarily makes ordinary moral claims regarding the content of its norms. Soper (2002, pp. 12, 54-55, 57; also 1996, p. 218) calls this the “claim to justice”: based on the content of the norm being enforced, law claims a right to decide and a right to enforce the norms it has chosen, but it does not necessarily claim a correlative obligation to obey. In other words, according to the law, the norm-addressee should comply with the norm that is being enforced because the norm-content is just, not necessarily because he or she has an obligation to obey the law *qua* law. This thesis regarding the “claim to justice” is to be opposed to the influential and stronger thesis (discussed below, in section 3) that the obligation that the law imposes on the norm-addressee is independent of the norm-content, which amounts to a claim to moral authority.

Soper’s aim in rejecting the claim to moral authority as part of law’s nature is to make legal theory consistent with political theory, since he is unsatisfied with a certain tendency in legal theory to attribute to the nature of law a claim that is too strong to be vindicated by political theory (Soper, 2002, pp. 12-13; 1996, p. 231). It should be stressed that Soper is not denying that the law *has* authority. He is denying that the law necessarily *claims* authority. Thus, if a system can have authority even though it does not claim authority, the unity of both legal and political theory can be restored by Soper’s theory (Soper, 2002, p. 53).

Nonetheless, it is not clear that it would be a problem if our legal theory were to attribute to law a claim that political theory considers invalid. After all, it seems that just as law can have authority without claiming to have authority, as Soper argues, law can also claim to have authority without actually having authority. Leslie Green makes a nice analogy regarding this point:

Compare the case of papal authority. Suppose a sceptical argument to the conclusion that popes lack the infallibility they claim – suppose that atheists or the reformed Christian churches are right in thinking this an unjustifiable pretence. Would this in any way undermine our confidence in the *character* of the claim? Would it suggest that the pope doesn’t really claim any such authority after all? (Green, 2002, pp. 542-543; see also 2008, p. 1049).

Since I agree with Green, I will view the question of whether a legal theory supports or denies the law's claim to authority as irrelevant. In the next section, I will advance an argument in favor of the law's claim to authority as the right type of claim to be made by law if it is to claim to be morally justifiable (or merely defensible) at all. In the remainder of this section, I will examine Soper's arguments for his conception of legal normativity as necessarily connected to a moral claim.

According to Soper (2002, p. 31), denying that law necessarily makes moral claims amounts to asserting that legal systems are indistinguishable from coercive systems, which leads to inconsistencies with the language of guilt and blame that we associate with lawbreaking. This is a very common argument among defenders of the view that the law is necessarily associated with moral claims. In replying to this line of reasoning, it is important to note that what is at issue is whether the meaning of terms such as "right", "obligation", and "guilty", when qualified as "legal", remains the same as the meaning they have in moral discourse. Thus, Soper's terminological argument seems to beg the question. There is no inconsistency between the denial that law necessarily makes moral claims and the normative language of law if the meaning of normative terms changes depending on whether the term is being used in a legal or a moral context.

Leaving aside the linguistic question, another of Soper's arguments runs as follows:

The natural response to one who suggests that law makes no moral claim is simply to call attention to common features of social life: the kinds of things that law does when it imposes sanctions – taking property, liberty, or life – are such serious invasions of another's interests that it is impossible to exempt them from the normal assumption that a morally conscientious agent will commit such acts only in the belief that they are justified. Only if one thought that the law did not purport to be a morally conscientious agent (if it purported, for example, to be no more than a "gunman writ large") could one fail to see that the practice of law belongs in the same category of other social practices that purport to be morally defensible. (Soper, 2002, p. 57; see also 1996, p. 219)

A morally conscious agent who enforces the law will indeed do so only if he or she believes that such an act is morally justified. But this does not prove that, by virtue of the nature of law, only morally conscious agents can create or apply laws, and thus that all actions performed in the name of the law implicitly and objectively make a moral claim. It can be proven that this is not the case if we can show that agents who are unconcerned with morality would have good reason to make laws and make decisions according to those laws. This hypothesis will be developed in section 4 with the help of Matthew Kramer.

First, however, we need to analyze arguments in favor of a stronger moral claim that is allegedly made by the law in order to understand the type of moral justification that the law needs to claim if it indeed claims moral justification.

3. Raz, Hobbes, and the Claim to Authority

From the start, we need to keep in mind that, contrary to what Soper (1996, p. 230; 2002, p. 78) says, the thesis that law makes a claim to moral authority is not a mere assertion or an empirical assertion, but a thesis about the nature of law (Raz, 2009, p. 97). This being so, we need to explain why, because of the nature of law, a more ordinary moral claim to justice (Soper) or correctness (Alexy) cannot be the type of claim that is suitable to law if law indeed claims to be morally justified.

To handle this issue, we need to understand the difference between the claim to moral authority and ordinary moral claims. Whereas the latter are about the content of law, the claim to authority is a content-independent claim to obedience. In other words, the claim to authority is a requirement of obedience based on the existence of a directive as law.

We can argue for the claim that morally justifying the law hinges on justifying the *authority* of law by pointing out that the law does not allow just any kind of substantive argument to be used in defense of someone's suffering the imposition of a legal obligation. If law merely claimed to enforce a right or just decision when it claims to be moral, it would have to accept as a defense every kind of sound argument that is capable of proving that the content of the norm being enforced is wrong or unjust.

Nevertheless, Soper has a solid reply to this argument. For Soper (2002, pp. 75-76), when law demands that a decision be made according to a pre-existing rule, excluding consideration of substantive arguments about the merits of the case, law is claiming that, in that particular field, it is better to regulate actions by rules than on a case-by-case basis. In short, there are contexts in which we should decide what it is right to do by applying rules, and there are contexts where we should decide in accordance with a substantive assessment of the merits of the case. For Soper, the moral claims of law are also claims to the right to decide which model of decision is best suited to which field.

Soper's reply sounds plausible enough. But I believe there is a stronger argument to consider in support of the idea that if law is to be morally justified, then its claim to moral justification is a claim to moral authority and not merely a claim to enforce correct or just decisions.

When Soper (2002, p. 59; see also 1996, p. 221) says that law makes claims “about its actions that are no different in kind from those of any ordinary conscientious individual”, he commits himself to what Raz (1986, p. 30) calls the “no difference thesis” regarding law. According to the no difference thesis, the norm-addressees’ reasons to act are always content-dependent; i.e., the bare fact that a certain norm is legally valid cannot change what the norm-addressee ought to do. But this is the main thesis of philosophical anarchism. For the philosophical anarchist, law is at most the occasion for an agent to become aware of her duty, a role that can be filled by a friend or the agent’s own conscience (Wolff, 1998, p. 6). Thus, our question is whether it is conceptually possible to view law as morally justified if law itself accepts such a thesis.

In order to assess this hypothesis, we need to note that Soper (2002, p. 59) is aware that a claim of justice made by law entails further claims drawn from political philosophy. For Soper (2002, p. 76), these further claims amount to “the right to make the ultimate decision and act on it”. I shall argue that this is a misunderstanding of the relevant points made by political philosophy regarding the issue.

If political philosophy has to explain how the coercive interference of law in people’s lives is to be justified, it is not enough to account for an entity that claims the right (understood as the license or liberty) to make (even ultimate) decisions and act on them. After all, in a state of nature, what prevents any individual from making (ultimate) decisions and acting on them? Indeed, like Hobbes, we should understand the state of nature as a state in which there is no option for individuals but to act on their own best judgement. It is a state of nature because there is no public pattern available to assess decisions or actions. As Hobbes (1998, p. 27) says, “[b]y natural law one is oneself the judge”. The result is that I need to enforce my own judgement while allowing the other the right (liberty) to resist – that is, the right to enforce her own judgment against me. I cannot claim to be more justified than the other to use force, and vice versa.

This being so, leaving the state of nature cannot be a general acceptance of a claim to the license to make and enforce ultimate decisions on the part of a specific agent. For, in the state of nature, such an agent always had such a liberty, just like everybody else. On the contrary, it is the renouncement or transference of certain liberties that constitutes the departure from the state of nature (Hobbes, 1998, p. 34). The main liberty to be transferred or abandoned by those who seek to leave the state of nature is the liberty to make every kind of decision and act on it.

Now if the origin of law depends not on the acquisition by someone of the license to make and enforce ultimate decisions but on the transference or renouncement by others of such a liberty such that civil law becomes the public pattern allowing distinctions between right and false reason, it makes no sense to assert that it is possible to morally justify law without justifying its claim to create content-independent obligations. From the point of view of law, if a reason is a right reason, this is because it is a legal reason. For law, rightness itself is not content-dependent. If it were, there would not be a moral point to having law. Law is necessary, from this perspective, because without it every judgment about right and false reason made in good faith is as good as any other.⁴

Therefore, how is it possible for law to claim that the norm-addressee should comply with its directives because of their content? To claim this would be equivalent to bringing back the state of nature, in which everyone is a judge who claims to be able to distinguish right from false reason, and who grants the same presumption to others. Hence, what law is actually claiming if law claims moral justification for its use of force is that the norm-addressee ought to substitute her own judgments regarding the right thing to do with legal judgments⁵ because they are legal judgments – the common pattern of judgment we were in need of to make peace – and not due to the content of those judgments. But this would be a claim to moral authority: it would be a claim to an obligation to obey law *qua* law, not an ordinary claim to justice or correctness.

Now it should be pointed out that my option of following Hobbes's lead with regard to this issue of political theory is not coincidental. First, the main elements of Raz's concept of authority – pre-emption and content independence – are essentially Hobbesian. Second, Soper appears to wrongly believe that his own conception of law's claims is Hobbesian. Soper (2002, p. 55, n. 7) says that “the only claim the state makes is the claim of a ‘justification right’ (the right to use coercion to enforce its norms), which need not entail a further claim of a duty to obey law *qua* law” (at this point Soper refers to Robert Ladenson's famous paper, “In Defense of a Hobbesian Conception of Law”, which is a failure as a reading of Hobbes).

4 Even if moral realists are right, and thus there are objectively right answers to all moral problems, there is still no universally accepted methodology that can allow us to discover whose opinion is objectively right. Therefore, the truth of moral realism is indifferent to Hobbes's point. See Jeremy Waldron (1999, ch. 8).

5 Raz calls this “the pre-emption thesis”. See Raz (1986, pp. 46-47).

Ladenson's theory is in fact anti-Hobbesian. Whereas Hobbes starts from a state of nature where everyone has the liberty to use force (the use of force is not immoral for anyone), and the sovereign arises when the others abandon their liberty and acquire (through a promise) an obligation not to resist the sovereign, Ladenson (1990, pp. 36-37) starts from a context in which, for some reason, nobody has the liberty to coerce anyone at all (the use of force is immoral for everyone), and the sovereign arises when it acquires the exclusive liberty to coerce. In short, Ladenson's view is Hobbes's view, only upside-down.

Hobbes gives us good reason to believe that if law is to be morally justified, its claim to authority must be warranted. This means that – *pace* Alexy, Soper, and other theorists – if we should attribute moral claims to law, those should not be ordinary moral claims like claims to justice or correctness. But now it is time to deal with the question of whether we should attribute moral claims to law at all. This is the object of our final section.

4. On the Possibility of Law Without Moral Claims

We saw in the first section that, for Alexy, it is absurd to conceive of law as limited to a weak claim to correctness, i.e., a claim to conformity with the internal rules of the legal system, without embracing a claim to justice. The claim to justice as defended by Soper was the object of our second section, whereas our third section argued that an ordinary claim to justice is not appropriate to law. Raz is right in holding that the task of morally justifying law would require the justification of law's moral authority, but he is wrong in sharing with Alexy and Soper the thesis that law necessarily claims moral legitimacy, or so I will argue in this section.

I have already presented Alexy's and Soper's main arguments for this thesis, along with some preliminary objections. Nonetheless, a satisfactory reply to those arguments depends on a plausible account of law-applying and law-creating acts that are compatible with openly egoistic purposes. The aim of this section is to advance this account in replying to what I take to be the rationale behind the Razian thesis that law necessarily makes moral claims. Raz writes:

It is well understood that no one can impose a duty on another just by expressing his will that the other have that duty. If governments can do so, this can only be because and to the extent that there are valid principles that establish their right to do so. Those principles, the principles establishing the legitimacy of man-made laws and of the governments that make them, are themselves, whatever else they are, moral principles. (Raz, 2009, p. 188)

Raz's point is that, if they lead to the enforcement of duties, law-creating and law-applying acts can only be understood as resting on reasons that transcend the system of positive norms, whatever the legal official's subjective beliefs. Furthermore, according to Raz (1984, p. 130), legal officials' self-interest is not capable of providing these extra-systemic reasons, for the interest of a subject A that a subject B ϕ is not a reason capable of justifying that B ought to ϕ unless B has a duty to promote A's self-interest. As a consequence of this line of reasoning, which seems to be in perfect harmony with Alexy's and Soper's arguments, Raz claims:

It is not [...] possible to think of the law as a ground of reasons independently of morality. Given that much of it is man-made, at least man-made legal duties bind their subjects only if moral principles of legitimacy make them so binding. (Raz, 2009, p. 188)

Therefore, if a legal duty is based on an enacted rule, on a custom, or on a judicial precedent, it is only possible to think of it as a reason for B to ϕ if there are moral principles of legitimacy that validate that legal duty. We have seen that, for Alexy and Soper, these moral principles must be connected to the content of the legal duty at issue, while Raz maintains that these moral principles are supposed to ground a content-independent duty of obedience. But all of them would agree that law cannot be a reason for B to ϕ if it is conceived as a source of reasons independently of morals. Hence, they agree that law necessarily claims to be morally legitimate.

I believe that the argument explained above is unobjectionable, provided we accept its premise: that a legal duty is a reason providing that B ought to ϕ . But this begs the question. The point at issue here is whether a legal duty can be conceived as an imperative in the sense explained by Kramer (1999, pp. 83-89). Kramer distinguishes between prescriptions (practical "ought" judgments) and imperatives (practical "must" judgments). Prescriptions "necessarily lay down or presuppose reasons-for-action for their *addresses*" (Kramer, 1999, p. 84), whereas imperatives "do not in themselves (i.e., in isolation from attached penalties) constitute such reasons-for-action" (Kramer, 1999, p. 85). This implies that if a legal duty is based on an imperative, legal officials' subjective reasons to enforce that duty can be self-interested or prudential reasons, and there is no reason to attribute to their law-creating and law-applying acts a different and implicit objective claim in order to make them intelligible. But does this mean that, *pace* Raz, one can impose a duty on another simply by expressing her will that the other have that duty? Soper thinks so.

According to Soper (2002, p. 68), Kramer's suggestion amounts to a regress to the model of law as orders backed by threats that Hart successfully

replaced with a model of rules accepted by officials. In other words, Kramer's account of legal duties is incapable of distinguishing between a situation in which one is being obliged from a situation in which one has a legal obligation.⁶ Is this true?

Being able to discriminate between law and the raw use of force is important for a theory of law, but it does not mean that the attribution of a moral claim to law helps us to learn what is special about law. Indeed, if our arguments in section 3 are reasonable, we should expect that Soper's thesis regarding an ordinary claim to justice made by law will be unable to capture a typical feature of law. Now the question is whether the bare introduction of a complex system of rules is enough to lead us to understand something that is relevant to the difference between law and what Hart (1994, p. 7) famously called "a gunman situation writ large".

Perhaps conservative minds will be unsatisfied with (or shocked by) Schauer's suggestion that even a Mafia organization can be considered a legal system, since, besides having primary rules determining actions to be exacted from subjects, "it has rules of recognition [...]; it has other secondary rules governing the processes of rule and regime change; and it has rules about the procedures to be followed when it is suspected that the rules have been broken" (Schauer, 2015, p. 136),⁷ such that "[w]e are no longer talking about a lone gunman jumping out from behind the bushes and demanding money" (Schauer, 2015, p. 160). But if there is something unsatisfying about a concept of law that allows for the Mafia to have law, this seems to have more to do with the Mafia's lacking certain characteristics commonly associated with state law – such as the comprehensiveness, durability and efficacy of its norms (Kramer, 1999, pp. 95-97; Schauer, 2015, p. 137) – and less to do with a deficiency on the part of the concept that the addition of a moral claim might fix.

This being so, the difference between being obliged and having a legal obligation can be roughly explained in terms of the existence of actions that may be properly demanded from a subject according to a positive norm regulating demands for action. By contrast, a subject is merely being obliged if an action that is exacted from her is not specified under a system of rules that is capable of justifying that requirement. This is Hart's account of legal obligations in his "Essays on Bentham" (1982, pp. 159-160), a view that Soper (2002, p. 58, n. 12; pp. 68-69) considers a retreat from his previous distinction between having

6 For the distinction between being obliged and having an obligation, see H. L. A. Hart (1994, pp. 82-87, 167-180).

7 For the distinction between primary and secondary rules, see Hart (1994, ch. 5).

an obligation and being obliged. From what I understand, there is no retreat, since Hart never explained legal obligations as moral obligations or purported moral obligations.

That being the case, it is still worth considering whether it makes sense to justify the exaction of actions by appealing to rules if the actions being exacted do not correspond to moral obligations or to the self-interest of the subject from whom those actions are exacted. In other words, is the practice of creating and applying rules consistent with lower purposes as the self-interest of legal officials, or do we need to presuppose an implicit moral claim made by legal officials *qua* legal officials in order to make sense of such a practice? Kramer's reply to this question runs as follows:

The official may well explain their heinous decisions by reference to people's legal obligations, but their purposes in doing so will not necessarily be to demonstrate the decisions' moral warrantedness; rather, their purpose might be to make clear that violations of applicable legal requirements will indeed trigger punishments and that punishments are not inflicted on anyone who abstains from such violations. In emphasising the connection between the breaching of duties and the incurring of penalties, the officials need not be motivated by a desire to establish that their rulings are fair. They may simply want to sustain people's incentives for conformity to the law's evil demands. (Kramer, 1999, p. 90)

This is a possibility, and demonstrating possibility is enough to refute a necessity. Therefore, it is not necessary to attribute a moral claim to law in order to understand the use of force under systematized rules. Certainly, legal officials will be able to obtain a higher level of cooperation if they are able to convince the addressees of legal norms that those norms themselves are practical reasons for them. But this is an empirical matter, not a conceptual truth.

Indeed, we can go even further than Kramer by conceiving imperatives being applied by legal officials whose interests are not satisfied by such law-applying acts. Certainly, an objection against this possibility is David Hume's "Praetorian Guard Argument" (Hume, 1994, pp. 17-18; see also Lagerspetz, 1995, pp. 75-76). This counter-argument runs as follows. If citizen B is coerced to ϕ by official A, it is possible that A coerces B just because she is coerced to do so by another official C, and so on. But, at some point in this chain, an uncoerced coercer is to be assumed in order to avoid an infinite regress. Thus, since a single tyrant would be unable to solely coerce a large group, in large societies, there must be a large group voluntarily enforcing imperatives. How large is the group of enforcers supposed to be? As Hart (1994, p. 201) says, the answer depends "on the means of coercion, solidarity, and discipline available"

to the enforcers, and “the helplessness or inability to organize” of the coerced group.

Even though the “Praetorian Guard Argument” is empirically plausible, it is not conceptually necessary, as has been demonstrated by Gregory Kavka’s hypothesis of a perfect tyranny:

Rational citizens may obey a frail and universally disliked ruler out of fear of one another. That is, each citizen is obedient out of fear that some of his fellow citizens would answer the ruler’s call to punish him if he were not. So citizen A obeys out of fear of citizen B, C et al., B obeys out of fear of A, C, et al., and so on. In this situation, the beliefs of rational citizens that their fellows will punish them for not following the ruler’s orders constitute a network of interlocking mutual expectations, a ‘net of fear’ that provides each citizen with a sufficient motive of obedience. (Kavka, 1986, p. 257)

Even though Kavka’s hypothetical scenario is highly unstable due to its dependence on a frail structure of mutual ignorance, its conceivability allows us to take Kramer’s theory to the next level, because it dispenses with sincerity being necessary in those (pretendedly) voluntary acts of imperative-application. Nevertheless, since imperative-appliers in perfect tyrannies still have to *pretend* to accept the system voluntarily, there is an important difference between self-interested reasons and moral reasons regarding law-application. A perfect tyranny works if and only if coerced officials’ unwilling intentions to apply imperatives are covered as if they had self-interested reasons to maintain the legal system running, whereas they do not even have to pay lip service to morality. Therefore, though law does not need to make any kind of moral claim, when it does not, it does need to claim to serve a large group’s self-interested reasons.

Conclusion

According to this paper, Soper (2002, p. 85) is wrong in two ways when he interprets law as necessarily saying to the citizen: “I think the norm is just and I am entitled to act on my own judgment...”. First, this could be anybody’s speech in the state of nature – that is, in a condition devoid of law. What law needs to claim before its citizens if it claims to be morally justified at all, and not merely stronger than ordinary citizens in enforcing its decisions, is that citizens *qua* citizens are not entitled to decide whether the norm is just and to act on their own judgment. Second, the creation and application of law are equally comprehensible if there is only a threatening voice saying that it is preferable to comply with the legal norm than to suffer the consequences. This amounts to concluding that Alexy must also be wrong when he asserts that legal

practices without purposes that go beyond the accomplishment of the ruler's self-interests involve performative contradictions, and, by the same token, Raz must be wrong when he says that, in enforcing law, governments necessarily presuppose moral principles regarding their right to do so. It may be difficult to account for the difference between law and the "gunman situation writ large" if we are not satisfied with a connection between primary and secondary rules in the Hartian sense, which is present in the first and absent in the last situation. But morals cannot help us to escape such difficulties in any case.

References

- ALEXY, R. "Law and Correctness". *Current Legal Problems*, Oxford, Vol. 51, Nr. 1, 1998.
- _____. "On Necessary Relations between Law and Morality". *Ratio Juris*, Vol. 2, Nr. 2, 1989.
- _____. "On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique". *Ratio Juris*, Vol. 13, Nr. 2, 2000.
- _____. "Thirteen Replies". In: G. Pavlakos (ed.), 2007. pp. 333-366.
- COLEMAN, J., SHAPIRO, S. (eds.). "The Oxford Handbook of Jurisprudence & Philosophy of Law". Oxford: Oxford University Press, 2002.
- COYLE, S., PAVLAKOS, G. (eds.). "Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory". Oxford: Hart Publishing, 2005.
- GARDNER, J. "Law as a Leap of Faith: Essays on Law in General". Oxford: Oxford University Press, 2012.
- GEORGE, R. P. (ed.). "The Autonomy of Law: Essays on Legal Positivism". Oxford: Oxford University Press, 1996.
- GREEN, L. "Law and Obligations". In: J. Coleman and S. Shapiro (eds.), 2002. pp. 514-547.
- _____. "Positivism and the Inseparability of Law and Morals". *New York University Law Review*, New York, Vol. 83, 2008.
- HART, H. L. A. "Essays on Bentham: Studies in Jurisprudence and Political Theory". Oxford: Clarendon Press, 1982.
- _____. "The Concept of Law". 2nd ed. Oxford: Oxford University Press, 1994.
- HEIDEMANN, C. "Law's Claim to Correctness". In: S. Coyle and G. Pavlakos (eds.), 2005. pp. 127-146.
- HOBBS, T. (1642). "On the Citizen". Edited by Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press, 1998.
- HUME, D. "Political Essays". Edited by Knud Haakonssen. Cambridge: Cambridge University Press, 1994.
- _____. (1741). "Of the First Principles of Government". In: D. Hume, 1994. pp. 16-19.
- KAVKA, G. "Hobbesian Moral and Political Theory". Princeton: Princeton University Press, 1986.

- KRAMER, M. "In Defense of Legal Positivism: Law without Trimmings". Oxford: Oxford University Press, 1999.
- LAGERSPETZ, E. "The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions". London: Springer, 1995.
- LADENSON, R. "In Defense of a Hobbesian Conception of Law". In: J. Raz (ed.), 1990. pp. 32-55.
- MACCORMICK, N. "Legal Reasoning and Legal Theory". Oxford: Clarendon Press, 1978.
- PAVLAKOS, G. (ed.). "Law, Rights and Discourse: The Legal Philosophy of Robert Alexy". Oxford: Hart Publishing, 2007.
- RAZ, J. (ed.). "Authority: Readings in Social and Political Theory". New York: New York University Press, 1990.
- _____. "Between Authority and Interpretation: On the Theory of Law and Practical Reason". Oxford: Oxford University Press, 2009.
- _____. "Hart on Moral Rights and Legal Duties". *Oxford Journal of Legal Studies*, Oxford, Vol. 4, Nr. 1, 1984.
- _____. "The Morality of Freedom". Oxford: Clarendon Press, 1986.
- SCHAUER, F. "The Force of Law". Cambridge, Mass.: Harvard University Press, 2015.
- SOPER, P. "Law's Normative Claims". In: R. P. George (ed.), 1996. pp. 215-248.
- _____. "The Ethics of Deference: Learning from Law's Morals". Cambridge: Cambridge University Press, 2002.
- WALDRON, J. "Law and Disagreement". Oxford: Oxford Clarendon Press, 1999.
- WOLFF, R. P. "In Defense of Anarchism". 2^a ed. Los Angeles: University of California Press, 1998.