Law and Morality (2010)

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1. Does law have moral aims?

Law, unlike morality, is made by someone. So it may, unlike morality, have aims, which are the aims of its makers (either individually or collectively). Not all law has aims, however, because not all law-making is intentional. Customary law is made by convergent actions that are performed without the intention of making law, and so without any further intention to achieve anything by making law, i.e. without any aim. There are also some other modes of accidental law-making. However for the time being we will focus on law that is intentionally made, and therefore is capable of having aims.

Some have thought that law must, by its nature, have certain distinctive moral aims when it has aims at all. If it lacks those aims it is not law. It must aim to be just (Postema 1996: 80), or aim to serve the common good (Finnis 1980: 276), or aim to justify coercion (Dworkin 1986: 93), or aim to be in some other way morally binding or morally successful. The problem with such views is that at least some intentional law-makers have no moral aims. They are entirely cynical. They use law-making purely as an instrument of profit, retaliation, or consolidation of power. Sure, one may still attribute moral aims to law made by such people if it is intentionally developed or adapted by subsequent officials with moral aims. Later judges, for instance, may interpret a law as having a moral aim, and thereby endow it with one, even when it lacked one at inception. But judges too may, on occasions, be entirely cynical. Whole legal systems may, indeed, be run by cartels of self-serving officials for whom the system is primarily an elaborate extortion racket or a huge joke.

Here law has no moral aims. Yet all legal officials, even in such a system, must at least *pretend* to have moral aims when they act in their official capacities. Or as it is often put, they must at least make moral *claims* on behalf of law (Raz 1979: 28–33, Alexy 1989: 177–82). This doesn't mean, of course, that without moral claims these people will fail in their non-moral aims (e.g. lose their profit or privilege or power-base). That may be true, but it is beside the point. The point is that inasmuch as they are law's spokespeople, officials cannot avoid making moral claims for law. These are the very claims that (in combination with certain other criteria) mark these people out as legal officials.

In identifying the claims of law, the place to begin is with the language that legal officials use. In setting out or explaining legal norms, officials cannot but use the language of obligations, rights, permissions, powers, liabilities and so on. What they thereby claim is that the law imposes obligations, creates rights, grants permissions, confers powers, gives rise to liabilities, and so on. One might think that the claim here need not be a moral claim. Officials need be claiming only that there are *legal* obligations, *legal* rights, *legal* permissions, and so forth, not moral ones. But that cannot be all that their claim for law amounts to. For a legal obligation or right or permission is none other than an obligation or right or permission that exists according to law, and an obligation or right or permission that exists according to law is none other than an obligation or right or permission, the existence of which law claims. So claiming the existence of a legal obligation is simply claiming the existence of what law claims to be an obligation. It is a second-order claim. Officials (and lawyers and legal commentators and so on) have plenty of reasons and occasions to make such second-order claims, but when they do it they are reporting law's claims, not making them. On pain of vacuity or infinite regress, we still need to attribute to law itself a suitable first-order claim. Legal obligations are claimed to be something, but what are they claimed to be? This is where the idea that law makes a moral claim comes in.

'Moral', in this context, is the name given to the kind of obligation that legal obligations are claimed by law to be. Legal obligations are claimed to be obligations that are not merely claimed, and hence that are not merely legal. They are claimed to have a standing beyond law, or to bind (as it is sometimes put) in conscience as well as in law (Finnis 1980:).

2. Does law ever form part of morality?

That law makes a moral claim for itself means that the paradigm or ideal-type of law – the model to which all other law needs to be compared and through which it needs to be understood - is morally justified law (Finnis 1980: 14-15). That is because the paradigm or ideal-type of anything that has aims is the case in which it succeeds in those aims, and the paradigm or ideal-type of anything that makes claims is the case in which it makes those claims sincerely. Law makes moral claims, and when it makes those claims sincerely it has moral aims, and when it succeeds in those aims it is morally justified law. It is law that actually lives up to the moral standards that, by its nature as law, it holds itself out as living up to. It is law's paradigm case.

When law is morally justified – in law's paradigm case - it has the hold that it claims to have over those to whom it applies. Its norms have moral force. This need not always a matter of being morally obligatory. Some legal norms impose obligations, and when they do so and they are morally justified in doing so, they impose moral as well as legal obligations. But other legal norms confer powers or grant permissions (Hart 1961: 79, 247). When a legal norm confers a power or grants a permission, and the conferral or grant is morally justified, the norm equally confers a moral power or grants a moral permission as the case may be, i.e. it enables the conferee to change someone's moral as well as legal position, or makes some course of action by the grantee morally as well as legally permissible.

When a legal norm is morally justified, to generalize, it becomes part of morality. Now I started by saying that morality, unlike law, is not made by anybody. It has no sources, no officials, and no agency capable of making rulings. But this point now needs to be qualified. Morality does have these trappings to the extent that it is itself constituted by law. When a legal norm becomes part of morality, there is a sense in which law's sources and officials become sources and officials of morality too. There is then a pocket of moral authority. Yet one cannot understand morality as a whole on this model. There can be no general moral authority. Why? Because there is a further condition to be met before a legal norm (or indeed any norm that is made by somebody) becomes part of morality, namely that its application to those to whom it applies must be morally justified. There need to be independent moral standards by which the exercise of authority can be judged in order to determine whether it has the moral force that it claims to have.

There is a hint of paradox, you may think, about the idea that morally justified legal norms become part of morality. Why does morality need them? You may think that inasmuch as they are morally justified they merely duplicate content that morality already has, and so the condition of their becoming part of morality is also the condition of their moral redundancy (Coleman and Leiter 1996: 244). But this is a mistake. Morally justified legal norms need not merely replicate content that morality already has. Morally, for example, I have a reason not to crash my car into yours, namely that I may hurt you. This means that I have a reason to drive my car on the same side of the road – left or right - as you drive yours on. But morality is indifferent as between left and right. It does not matter, morally, whether we both keep left or both keep right, so long as we both do the same. The law can make it a rule that we should keep left rather than right. So long as we are both willing to accept the law's authority, and all else being equal, the law's intervention in this case is morally justified, as it will enable us to do, or to do better,

what morally we already have reason to do. Yet it does not merely duplicate morality's existing content. Morality already told us what to do but law added, by its authority, a suitable way to do it (Finnis 1999, Honoré 1993).

Such a case is known as a co-ordination case and it is one kind of case in which law adds to morality. The need for law to add to morality in such cases comes of the gappiness of morality. On many questions morality is silent (left or right on the road?). On others it harbours internal conflicts that it cannot resolve on its own (kill one innocent to stop the killing of two innocents?) On still others it is afflicted by conceptual indeterminacy (can one be cruel to be kind)? Either way, the morally best solution may sometimes (only sometimes) be whichever solution people can converge on, thereby reducing error and wasteful dispute.

Here law's co-ordinating ability is called for, or is at least available, to make morality less gappy than it would otherwise be. Law can also help us in other ways to do what morally we have reason to do (Raz 1986: 75). It can help us, from time to time, with extra expertise or extra wisdom. It can also help to strengthen our resolve. In the latter case the legal norm typically replicates the content of a moral norm that exists independently of it but changes the moral consequences of failure to conform to it (i.e. the further moral norms that bear on what is to be done in response to the failure). This is another important way in which law may make morally justified interventions, thereby adding to morality. The important thing to understand, however, is that law's interventions are not automatically morally justified. Often law does not restrict itself to choosing between morally eligible alternatives but chooses instead a morally unacceptable one. All else being equal we should treat law, in such cases, with the contempt or ridicule that it deserves. For it is a long way from claiming moral authority to actually having it.

3. Does morality ever form part of law?

Morality is gappy and sometimes needs law to help fill in the gaps. But the same is also true in reverse. Often law is gappy and needs morality's help to make it less so. Legal norms, like moral norms, often conflict among themselves, and often such conflicts cannot be resolved using legal norms alone. Indeterminacies of language and intention on the part of law-makers, moreover, can afflict law in such a way as to frustrate its role as a filler of moral gaps. Legal conflict and indeterminacy require extra-legal resources to overcome them (Raz 1979: 53–77). And the need to overcome them is often pressing in law. Many legal officials, notably judges, are bound by their oaths (or other duties) of office to decide any case before them that falls within their jurisdiction. They cannot suspend their judgment. Whereas the rest of us can often suspend judgment and keep it suspended.

How do judges, the legal officials most publicly afflicted by such legal gaps, bring morality to bear on their legal deliberations? A simple view, sketched by Hart (1961: 124–54), goes like this. First a judge goes as far as she can with legal norms. Then she has a gap, and a consequent legal discretion. She exercises the discretion by using moral reasons and norms (or indeed any other available reasons and norms) to fill in the gap. By doing this she makes new legal norms. This is the converse of the co-ordination case discussed above, in which a moral gap exists which law enables us to fill (by choosing left rather than right, for example). But it is rather rare for judges to fill gaps in this quasi-legislative way. In most legal cultures it is a last resort. Instead judges usually fill gaps by engaging in legal reasoning. They combine existing legal norms with other premises, including moral premises not hitherto recognized by law, to reach new legal conclusions. You may say that this is not really legal reasoning since, by hypothesis, it includes norms not hitherto recognized by law. True, this means it is not reasoning *about* the law. The judge who engages in such reasoning is not

working out what the law already says. But it is reasoning *with* (or according to) the law. The law figures non-redundantly in the judge's reasoning even though it does not by itself determine the judge's conclusion (Raz 1994: 326–40).

Here is a typical example of legal reasoning understood as reasoning with (or according to) the law:

(1) Nobody is to be discriminated against in respect of employment on the ground of his or her sex (existing legal rule);

(2) Denying a woman a job on the ground of her pregnancy is morally on a par with denying her a job on the ground of her sex, even though there is no male comparator to a pregnant woman that would allow the denial to count as sex-discriminatory in the technical sense hitherto recognized by law (moral proposal, invoking a moral norm of parity);

Thus (3) nobody is to be denied a job on the ground of her pregnancy (new legal rule);

(4) P was denied a job by D on the ground of her (P's) pregnancy (finding of fact);

Thus (5) D still owes P the job she was denied, or some substitute relief (legal ruling).

I included the final steps (4) and (5) to make clear that the ruling in the case (5) is a different legal norm from the rule on which it is based (3), even if the content of the ruling follows from the application of the rule to the facts as found (4). It is a different norm because it has different legal consequences. In particular, it usually allows P to access enforcement options which would not be available without the ruling in her favour. It is also worth mentioning that the ruling in the case (5) may bind later officials even if the rule on which it is based (3) does not. Whether the rule (3) binds later officials depends on whether the court engaging in the reasoning is at a level in the court system that allows it to create binding precedents. But the ruling in (5) binds

later officials even if the court engaging in the reasoning is the lowest court with jurisdiction, for it is part of the nature of a court that its rulings bind even if its rules do not.

Most misunderstandings centre on the status of (2) and the consequent status of (3). Many people worry about where the court gets its license to invoke a moral norm in (2) and thereby change the law to include (3). A common reaction is to try and show that (3) is really already part of the law before the court arrives at it, often by arguing that (2) is already part of the law before the court invokes it (Dworkin 1967: 16–40), or at any rate is covered by some more general law that licenses its use (Coleman 2001: 103–119). Some are even driven to argue that there is a body of law that comes into existence without anyone's ever having announced it, used it, or otherwise interacted with it. This manoeuvering is needed only because of a mistaken assumption that judges, while they remain judges, owe all their loyalty to law. On this assumption, the key question is: How, legally, do judges come to be entitled to invoke morality? How can they properly help themselves to premiss (2)? But this reverses the proper order of inquiry. The key question about judges is: How, morally, do judges come to be entitled to invoke the law? How can they properly help themselves to premiss (1)? For judges are human beings like the rest of us. By virtue of that fact, morality has an inescapable hold over them. Whereas their relationship to the law, just like yours and mine, is escapable. They need a moral reason to hold themselves answerable to law, but they need no legal reason to hold themselves answerable to morality (Raz 2004).

What moral reason do judges have to hold themselves answerable to law? Well of course, they have the same reasons as you and me. They should apply morally justified law because it forms part of morality; it has the moral force it purports to have. But judges, and some other legal officials, have extra moral reasons going beyond this. They have extra moral reasons to uphold the law that extend even to some cases of morally

unjustified law. For they have undertaken to uphold the law when they took the job, and this gives legal norms extra force in their work that those norms would not have had apart from the undertaking to uphold them. Judges should tolerate some moral deficiencies in the law that they should not have tolerated had they not undertaken, as part of the job, to uphold the law. But they should not by that same token tolerate just any moral deficiency in the law. Invariably, as in the example schematized as (1) to (5) above, they should strive to improve the law, at the very least by filling in its gaps in a morally decent way. Sometimes they should also improve it by reversing or containing immoralities introduced by other officials, inasmuch as they retain the legal power to do so. And just occasionally, in cases of extreme immorality, they should simply disobey the law (while perhaps pretending to uphold it).

In many legal systems the moral commitment to uphold the law that the judge undertakes on taking the job is formalized in an oath of office. The content of such oaths is worth noting. In most legal systems judges take an oath to do 'justice according to law', or something like that. This is not an oath to apply the law. On the contrary, it is an oath to do justice, to decide cases in a morally meritorious way. To do so is not to usurp the role of the legislature. For the oath does not authorize judicial legislation. It authorizes judicial changes in the law, to make the law more just, but only when these changes are brought about by legal reasoning, i.e. by reasoning with (or according to) law. That is the 'according to law' part of the oath. This explains the sense in which legal reasoning is a kind of moral reasoning. Notice that it remains consistent with the idea that all law is made by somebody. In this case, it is made by somebody (a judge) who makes new law by using a moral norm in her reasoning, a moral norm that thereby becomes legally recognized. Morality does not enter the law of its own accord. By the nature of law, it always takes an official to turn a moral norm into a legal one.

4. Does law have an inner morality?

Some people are drawn to the idea that nothing is legal unless it passes a moral test. This is quite different from the idea that morality sometimes and somehow passes into law of its own accord, without official intervention. One may accept that nothing enters the law without official intervention, and yet insist that a distinct moral test *also* needs to be passed before any norm qualifies as a legal one. The most enduring versions of this proposal claim that there is a moral value or ideal called *legality*, which is such that a norm qualifies as a legal one only if it exhibits this value (Dworkin 2004: 23-37). Many subscribers to this view add that exhibiting the value of legality is matter of degree, such that norms can be *more or less* legal.

There is some confusion here. It is true that there is a moral ideal of legality, and that law can approximate to (or depart from) this ideal, and in that sense be more (or less) legal. The ideal, however, applies to law because it is law. It is not that it is law because it lives up to the ideal. If it were not law, to put it another way, it would not be held up to the ideal of legality in the first place and so could not be found wanting relative to that ideal (Finnis 1980: 363-6). So it cannot be the case that if it is found wanting relative to that ideal, it is not law. Actually, this is a slight exaggeration. The ideal of legality can also be used to judge other norms and systems of norms to the extent that they are law-like. But once again this requires their law-likeness to be determined independently of whether they live up to the ideal. Law, then, is always legal in one sense (it always forms part of some legal system) but it can be more or less legal in another sense. It is not an oxymoron, therefore, to speak of illegal law. Its being law is determined without moral argument, just by looking to the agent by whom and the way in which it was made. Its being illegal in the relevant sense is, however, a moral judgment that one can make about it once one accepts that it is law.

What is the ideal of legality? It is the ideal also known as the rule of law or *Rechtsstaat* (MacCormick 1984) or the 'inner morality' of law (Fuller 1964). It is an ideal of government (or rule) by law, in which people can be guided by the law itself and by the expectation that officials too will be guided by the law. Its main ingredients are the following norms: legal rules should be prospective, open, clear and stable; legal rulings should be based on these prospective, open, clear and stable legal rules; the rules should be administered by an independent judiciary, with review powers over other officials; the courts should be open and accessible; and the principles of *audi alterem partem* ('both sides are to be heard') and *nemo in sua causa iudex* ('nobody is to be judge in his own cause') should be observed (Raz 1979: 214–9).

It is easy to see here why lawyers, who tend to be professionally committed to this ideal of legality, might be morally anxious about judicial legislation, or more generally about judicial law-making. For judicial law-making may seem to violate several of the norms on the above list. The law that is applied in such cases is not prospectively created, and is not clear at the time when it is violated, and to the extent that it is clear the ruling is not based on it. The law is, in short, unavailable for the guidance of those who are supposed to be guided by it. No wonder some theorists are motivated to find a way of showing that premiss (2), in the example of legal reasoning that we set out above, is already part of the law before the judge makes it so.

In fact, however, the ideal of legality does not frown on judicial law-making nearly so comprehensively as this line of thought suggests. First, there are inevitably gaps in the law and we cannot avoid leaving judges to fill them. So long as judges avoid legislating and instead fill these inevitable gaps by legal reasoning, they rely on the law in developing the law and do not defeat anyone's expectations of it. So the ideal of legality is not engaged and cannot be frustrated. Secondly, there are conflicting demands within the ideal of legality itself. Some sacrifice of prospective clarity in the law may be warranted to, for example,

ensure that everyone gets a fair hearing. Finally, and most importantly, the ideal of legality is not the be-all-and-end-all of moral success on the part of the law. Its norms may clash with other moral norms that are not part of the ideal of legality. On those occasions the legality of law should sometimes be sacrificed in favour of making other moral improvements in the law. On such occasions, judges may justifiably depart from the law (say by overruling) even if that defeats people's expectations. The last point is often overlooked. The paradigm of law is law that exhibits all of the moral virtues that can be exhibited by institutions, not just the virtue of legality. When law can exhibit legality only at the expense of other moral virtues, it is by no means a foregone conclusion that legality must triumph.

5. Is there a moral obligation to obey the law?

We have already encountered two important points about the moral obligatoriness of law. The first is that obligation-imposing legal norms are sometimes morally justified, and when they are they create moral obligations as well. The 'sometimes' here should be understood as referring to differences between different legal norms, but also to differences between different applications of one and the same legal norm. A legal rule may be morally justified as it applies to one person and not as it applies to another, or morally justified as it applies to one action and not as it applies to another. A legal rule that forbids driving through a red traffic light has more to be said for it, morally speaking, when the red light is at a busy intersection than when it is in the middle of nowhere. In some cases the traffic light's location may be so stupid as to render the law, in connection with that red light, morally unjustified, so that the legal obligation to stop that it creates does not yield a similar moral obligation. All such matters depend on the details of the case. It is hard to imagine any law that has *all* the moral force that it claims for itself. Even the best of laws encounters cases where it overextends to the point at

which its application is morally unjustified, so that ideally it should be reined in.

The second point we have encountered is that people may add to the range of moral obligations that the law gives them by taking oaths or vows of obedience, by promising or undertaking to obey, or by otherwise committing themselves to obedience. By these methods people can bind themselves to follow even morally unjustified laws: overcomplicated laws, futile laws, overextensive laws, although probably not positively immoral laws. The people we already mentioned who typically find themselves in this position are judges. But there are others. New immigrants, police officers, heads of state, and various others often make such commitments. But most people do not make them, and they cannot be made to do so. If someone were to attempt to make them commit themselves, that would already neutralise the moral effect of the act of commitment, and so would be a self-defeating intervention.

A longstanding tradition in political philosophy has attempted to extend the reach of such commitment, and hence of the extra moral obligations to which it gives rise, to everyone to whom the law applies, or at least to every citizen to whom the law applies. Elaborate arguments have been made to show how people who never made oaths or other undertakings to obey the law should nevertheless be treated as having done so. The most interesting question about this long but ill-starred tradition is: Why would it matter so much to show that people have an extensive moral obligation to obey the law, akin to that of judges and police officers? Why would one go to such elaborate trouble to show consent, contract, or other commitment? This is something of a mystery. There seems to be a common anxiety about social disorder, about the breakdown of the rule of law. This anxiety is reasonable. But the existence or not of a moral obligation to obey the law is irrelevant to the prospect of social disorder. At most the avoidance of social disorder gives one a reason to *pretend* to people that they have a moral obligation to

obey the law, i.e. to claim for law more moral justification than it actually has. And even this pretence is defensible only if people intent on social disorder will care about (what they believe to be) their moral obligations. But why would they? If they don't already care about their moral obligation not to bring about social disorder, their obligation not to threaten the Rule of Law, why would they care about their supposed moral obligation to obey the law, which seems of only paltry significance by comparison? The same is true of murderers. If they don't already give weight to their moral obligation not to murder, what makes us think that they will give more weight to a moral obligation to obey the law of murder? What such people need to stop them are effective threats of sanctions, and whether the law lays on effective threats is quite independent of whether there is a moral obligation to obey it on the part of the threatened person.

The moral problem of the law is not the problem of how or why it speaks to moral delinquents. The moral problem of the law is the problem of how and why it speaks to morally decent people. Why, morally speaking, should they cave in before the law? Why should they give credence to the say-so of elderly men in wigs, pork-barrel politicians, or burly fellows with riot shields? Is this not a morally irresponsible surrender of moral judgment (Wolff 1970)? We saw already that sometimes it is justified. But there is no reason to think that it always is, or that it typically is, or that it presumptively is. The law should be viewed with a sceptical eye, to see what nonsense (or worse) it is trying to get us to accept by claiming moral authority for itself.

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