Critical Remarks on Andrei Marmor’s Theory of Legal Obligation

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1. Introduction

Obligation is widely regarded as a fundamental legal notion. On this ground, a significant number of legal theorists, especially those who embrace the research programme of conceptual jurisprudence, not only agree that an explanation of legal obligation is a central task of legal studies but also devote their energy and effort to constructing a comprehensive theory of legal obligation.1

In this essay, I intend to critically engage with the theory of legal obligation defended by a prominent champion of conceptual jurisprudence: Andrei Marmor. By Marmor’s account, the law is understood as an institutional structure that seeks to provide sound normative reasons for action as well as purports to give rise to obligations to act as prescribed. Accordingly, Marmor believes that any general theory about the nature of the law must seriously consider the task of systematically elucidating how obligations are generated by the law and therefore, the nature of a legal obligation.2 From this standpoint, a legal theory that leaves the concept of legal obligation unexplained should be regarded as pro tanto defective because it fails to address what is conceived as an essential feature of the law. For that reason, it is central to Marmor’s legal theory to analyse the fundamental

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1 Conceptual jurisprudence designates a distinct approach to the study of law and legal notions taken to be fundamental and common to legal orders with a degree of maturity and organisation comparable to that displayed by current legal frameworks. The distinctive characteristic of conceptual jurisprudence is its attempt to describe the essential features of legal systems, or at least all comparably sophisticated legal systems, by providing a philosophically rigorous, morally neutral, and non-empirical explanation for those features (which are in turn treated as the necessary legal constructs) and their mutual relationships. The theory of legal obligation, as it takes shape in the works of the advocates of conceptual jurisprudence, hence, constitutes an intellectually meticulous and empirically uncontaminated treatment, which is purported to offer a morally unbiased elucidation of the concept of duty as it is generated by the law and thus to identify the essential (or necessary) features of the types of obligations that the law engenders. The many systematic contributions to conceptual jurisprudence include Herbert Hart, The Concept of Law (1994; or. ed. 1961), Joseph Raz, The Concept of a Legal System (1970), Joseph Raz, The Authority of Law (1979), Joseph Raz, Practical Reason and Norms (1999; or. ed. 1975), Joseph Raz, ‘Two Views of the Nature of the Theory of Law: A Partial Comparison’, in Jules Coleman (ed.), Hart’s Postscript (2001), 1-37, Andrei Marmor, Interpretation and Legal Theory (1992), Andrei Marmor, Positive Law and Objective Values. (2001), Will Waluchow, Inclusive Legal Positivism (1994), Jules Coleman, The Practice of Principle (2001), Jules Coleman, ‘Methodology’, in Jules Coleman and Scott Shapiro, The Oxford Handbook of Jurisprudence and Philosophy of Law (2002), 311-51, Scott Shapiro, Legality (2011).

2 This objective is clearly spelled out in Andrei Marmor, Positive Law and Objective Values. (2001) 25–6.
characteristics of legal obligation and provide a conceptual explanation of how the law can give rise to obligations.

In my critical engagement with Marmor’s study of legal obligation I will proceed as follows. After introducing the basics of Marmor’s view of legal obligation (Section 2), I will consider (what I regard as) a theoretically significant limitation inherent in the account. In that context (Section 3), I will notice that Marmor depicts legal obligation as an intra-institutional protected reason for action. By making use of a narrative, I will specifically argue that such conception fails to exhaustively elucidate and thoroughly describe which sorts of a reason for action are conceptually associated with, or at least typically constitutive of, the existence of the obligations issued in law. This conclusion should be considered of particular significance for the purpose of assessing Marmor’s overall programme for the study of legal obligation in consideration of the fact that Marmor’s approach to legal obligation is best understood as reason-based—for Marmor the obligations generated by the law are to be conceptualised as reasons for action of a specific kind. Despite Marmor’s emphasis on the notion of a reason as a fundamental determinant of the obligatory dimension of law, his theoretical construction can be shown to give us a merely partial account (of the nature) of the reasons defining legal obligation. This means that the picture emerging from Marmor conceptual analysis of legal obligation, whilst neither intrinsically mistaken nor fundamentally confused, can be regarded as incomplete and insufficiently detailed.

2. Marmor’s account of legal obligation

As anticipated, the primary aim of this section consists of reconstructing Marmor’s theory of legal obligation. However, in consideration of the strict dependence that Marmor establishes between legal obligation and the conventional practices underlying the foundation of the law, I must first briefly introduce his conceptual analysis of conventions (2.1) and ensuing conception of the law (2.2).

2.1 Conventions

Marmor sets out three defining features of a convention. First, a convention is not just a regularity of behaviour; rather, it is a norm, meaning that it provides reasons for acting as it directs. Unlike other

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3 These defining features are understood by Marmor as necessary conditions ‘for the applicability of the concept-word [convention] to all its standard examples, but not to every example one can think of’ (Andrei Marmor, ‘On Convention’ (1996) 107 Synthese 351, emphasis in the original). Therefore, Marmor is only interested in identifying the fundamental features of a convention—those that characterise its paradigmatic case—rather than in attempting a formal definition of a convention as the set of necessary and sufficient conditions applicable to every convention. Indeed, Andrei Marmor (‘On Convention’ (1996) 107 Synthese 350–1) is skeptical of formal definitions of conventions.
conceptions of conventions, then, Marmor’s account is grounded in the acknowledgement that conventions have an in-built normative force and so cannot be reduced to mere collective patterns, or behavioural regularity. The practical reasons for the normativity of conventions are compliance-dependent, and that is the second defining element of conventions. We have a reason to act as a convention instructs only so long as the convention is generally followed within the community to which we belong. Likewise, an unfollowed convention could not be recognised as a convention to begin with, and even if this were not the case, such a convention would have no normative force. That is because a convention has an essentially social character: it exists as a norm only insofar as there is a group of individuals who consistently follow it. Thirdly, as social rules, or standards that provide reasons to comply by virtue of broad compliance with the rule or standard itself, conventions are arbitrary social rules. In this sense, a social rule is arbitrary if its core function can be preserved by an alternative rule that the group could conceivably follow.

Once they are so understood, conventions can be seen as internally differentiated practices. In contrast to Lewis’s theory of conventions, which is one-dimensional in that all conventions, on that theory, can be conceptualised as methods of solving the problem of coordination by securing some uniformity of behaviour, Marmor’s conventionalism accounts for the fact that conventions may have a constitutive role that is distinct from a coordinative role. In addition, there is a third type of convention (irreducible to both coordination conventions and constitutive conventions) that Marmor considers important. For all of their differences, coordination and constitutive conventions are alike in that they are surface conventions. Surface conventions, however, are not always stand-alone normative practices capable of providing their own solutions to pre-existing coordination problems or responding directly to the basic needs and interests from which those problems originate. That is

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4 Here the main term of comparison is Margaret Gilbert’s theory of conventions (see Margaret Gilbert, ‘Social Conventions Revisited’ (2008) 27 Topoi. A detailed account of the differences between Marmor’s and Gilbert’s theories can be found in Andrei Marmor, Social Conventions (2009) 25–30.
8 For a discussion of how Marmor understands his account of conventions to differ from Lewis’s (as the latter is presented in David Lewis, Convention: A Philosophical Study (1969), see Andrei Marmor, Social Conventions (2009) 19–25.
9 See Andrei Marmor, Social Conventions (2009) 31–57. A constitutive convention brings into being an autonomous practice that typically responds to a social group’s need or interest. It is therefore informed by values that have wide currency among those who are subject to the convention (even if these values are not so controlling as to “determine” the convention, which therefore retains some autonomy).
because in Marmor’s theory, “surface” conventions often exist on a more abstract conventional layer: the layer that Marmor calls “deep” conventions.¹⁰

2.2 Law

This general theory of conventions has direct implications for our understanding of the law. The law, Marmor argues, is best understood as a practice that is at once social and conventional. Marmor grounds the conventional structure of the law on two bases. First, he relies on his general view of conventions to reinterpret Hart’s notion of a rule of recognition, which fundamentally contributes to shaping the bare bones of the law. In Marmor’s conventionalist framework, rules of recognition are understood as constitutive conventions. Accordingly, at the very core of the law we find conventions that establish the sources of law, understood as any fact that determines what the law is and is not. Insofar as we can derive the sources of law from rules of recognition that in turn are characterised as constitutive conventions, we can make two claims: (1) that the law rests on a conventional foundation; and (2) that all legal contents can be traced to that conventional foundation.¹¹ The picture that emerges from this account, then, is one in which the law is deeply structured by—and primarily organised around—a set of conventional social practices. Second, the law is also associated with deep conventions. In the law, deep conventions correspond to what we would ordinarily call legal traditions that trace back to (but are not determined by) the basic needs and interests to which the law responds. In other words, legal traditions are best understood as freestanding conventions that set the boundaries within which the surface conventions of the law unfold. Underneath the layer of surface conventions, then, the law is shaped by a deeper conventional layer.

2.3 Legal obligation

The law, I claimed, is understood by Marmor as a densely conventional network unfolding at different levels: at its foundation lies a conventional practice, which in turn is associated with an even deeper layer of practices that are themselves conventional. Importantly, conventions are conceived by Marmor as norms: far from being mere socially effective patterns of behaviour or regularities, conventions are normative practices, i.e., standards that guide the behaviour of those who are subject to them by instructing them to act in one way or another. By their very nature, therefore, conventions


¹¹ A connection can be established between legal contents and the constitutive foundations of law (however indirect it may be) insofar as those contents derive from the sources of law, which in turn are conventionally established. Legal contents thus bear some indirect connection to the conventional foundations of law via their common relation to the sources of law.
provide reasons for action: they point the way for us in shaping and justifying our practical undertakings.

What the normativity of conventions cannot by itself directly explain is the capacity of the law to generate not only (and generically) practical standards and reasons but also (and more specifically) obligations. That is of paramount importance in Marmor’s conceptual framework, because if conventions could not give rise to obligations, neither could the law qua practice that is grounded in and identified by conventions.

In addressing the obligatory dimension of the law as a conventional practice, Marmor partly relies on Raz’s theory of norms and practical reasons. Marmor agrees with Raz that for an obligation to come into being, there must be a “protected reason for action”, namely, a configuration of first-order reasons for acting in the prescribed way and second-order reasons for not acting on the basis of (certain types of) conflicting standards. Protected reasons instruct us to both act in certain ways and disregard some contrary considerations. Therefore, an obligation does not necessarily require us to act on the balance of the practical reasons that apply to us: some of those reasons may be altogether excluded from consideration.

By building on his understanding of obligations as protected practical reasons, Marmor introduces a basic distinction between two broad classes of what is obligatory: external obligations and internal obligations. External obligations are defined by Marmor as statements of the protected reasons to participate in a given practice. Typically, the reasons that comprise external obligations are non-institutional considerations; thus, their quality is not conventional. In other terms, although external obligations support compliance with the social, possibly conventional practice that they underpin, they are neither (as a rule) engendered by that practice nor dependent on its conventional dimension. The type of obligation so grounded is qualified as “external” because it is primarily supported by considerations based on practical rationality that appeal to certain basic needs, interests and values originating outside the practice with which those obligations are associated and pre-existing that practice (at least in the conceptual sense).

Unlike external obligations, internal obligations are protected reasons instructing someone in how to act within the relevant practice on (and against the background of) the assumption that such a person has an independent reason to participate in that practice. Far from establishing the reasons one

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12 See Joseph Raz, Practical Reason and Norms (1999; or. ed. 1975), 49–84.


has to join in a certain enterprise, internal obligations (contribute to) determine how one participates in that enterprise. Otherwise put, internal obligations are (merely) intra-institutional demands. And, insofar as the institutional framework they refer to is conventional, internal obligations may well be considerations whose nature is entirely conventional, Marmor claims. Relatedly, internal obligations qua intra-institutional demands set out merely presumptive requirements, the nature of which is *conditional*. Marmor characterises internal obligations as conditional in consideration of the fact that their binding force depends (namely, is conditional) on the existence of one’s external reasons for participating in the obligation-generating practice—and these reasons, as noted, find their sources outside the relevant practice and therefore are normally of non-conventional quality even when they refer to a conventional practice.

This distinction between external and internal obligations is used by Marmor to shed light on the nature of the obligations generated by the law. The law is a conventional practice, and Marmor believes that conventions do not generate *external* obligations. In other words, by virtue of their existence alone, conventions do not produce duties for someone to fulfil. Accordingly, the conventions associated with the existence of the law are structurally unable to provide protected reasons for engaging in the legal practice that they define and regulate. The issue of whether one has an external obligation to abide by the law as a practice ultimately grounded in convention cannot be settled based on conventional considerations but instead only by the moral and political considerations that justify having a legal system in the first place.

In Marmor’s framework, this claim—that the conventions upon which the law is grounded cannot themselves engender an obligation to participate in the practices constitutive of the law—combines with another view: the thesis that once we have a reason to participate in the legal enterprise, we may have obligations generated by the conventions of which the law is composed. That is to say, although conventions are not equipped to generate external obligations, they have the resources to engender *internal* obligations. Accordingly, the conventions the law is made of at once define and regulate a practice, by establishing requirements for those who engage in that practice: once we have reasons for committing to the law—that is, once for whatever reason we become part of the social group governed by some system of laws—we will thereby come under a legal obligation to act as the conventions constitutive of that system require. And this means that the binding force of legal obligation is conditional on the extra-legal considerations that make participation in the legal enterprise both intelligible and valuable.

In Marmor’s work, the specific mechanism through which constitutive conventions can generate legal obligations, qua internal obligations, is further elucidated by analogising the law to games. A game (such as chess) comes into existence by virtue of the set of conventions by which it is constituted. Therefore, once we have a reason for playing the game, we are also obligated to behave
as the game prescribes, making only the permitted moves. Likewise, the law is framed by certain social conventions that bring a practice into existence. Thus, once we participate in the legal practice as legal subjects—as players in the “game” of the law, so to speak—we become obligated to act as the law either requires or allows us to act. Just as a player’s obligation to play chess in accordance with the rules of the game is grounded in the conventions that comprise that game, so a legal subject’s obligation to follow the rules of the law is given by the social conventions constitutive of the practice that is the law. This analogy also sheds light on the conditional quality of legal obligations. Not unlike the obligations engendered by games, legal obligations, qua internal protected reasons (as opposed to external protected reasons), have a constitutively conditional binding force.

In sum, legal obligations are defined by Marmor as intra-institutional obligations, and the latter are obligations that Marmor further characterises as genuine, presumptive, and conditional protected reasons for action of a conventional nature.

3. In search for a comprehensive conceptualisation of legal obligation

In this section, I will be concerned with the capacity of Marmor’s analysis to accurately and comprehensively conceptualise the idea of legal obligation. The claim that I intend to defend here is that Marmor’s theoretical framework results into a less than exhaustive description of the different kinds of reasons that contribute to shape what is legally obligatory. More specifically, by building on a historical narrative, in what follows I will argue that the conception of legal obligation as an intra-institutional protected reason generated by the law can only be the beginning of an informative account of the nature of legal duties. Which is why Marmor’s treatment falls short of a far-reaching characterisation of the quality of the obligations the law engenders.

A caveat is in order before I lay out that argument. If the critique that I will level in this work is sound, then Marmor’s overall approach to legal obligation can hardly be claimed to suffer a fatal blow. For my critical argument should not be taken to show that Marmor’s project is internally incoherent, conceptually confused, theoretically self-defeating, or intrinsically contradictory. On the contrary, I am prepared to acknowledge that Marmor’s conceptual analysis of legal obligation forms a tightly knit and (to an extent) illuminating theoretical whole. Nonetheless, I will submit, the picture of legal obligation emerging from Marmor’s body of work fails to engage with all the types of practical reasons that paradigmatically define legal obligation. Despite its limited scope, the critique I level here is in itself of theoretical significance, or so I believe.
3.2 An introductory narrative

In order to show that the conceptualisation of legal obligation in terms of intra-institutional protected reasons for action is a theoretical framework insufficiently sensitive to, and inaccurately descriptive of, the practices underlying the obligations the law engenders, I will take you to Italy in the mid-1930s. Back then the Fascist regime was in its heyday and those opposing the government could be condemned to the so-called “political internal exile” (confino politico), namely, to compulsory stays on small islands or in villages situated far from their homes. Because in the 1930s the means of communication and transport among different areas of Italy were scarce, those condemned to political internal exile were, for all practical purposes, cast away from civil society outside the place of their compulsory residence, virtually secluded in a confined territory that they were forbidden to leave at any time or under any condition, and therefore prevented from taking part in any meaningful social and political activity.

In 1935 the Italian writer Cesare Pavese was arrested and accused of anti-fascism for possessing letters from a political prisoner and for his relationship with the group “Justice and Freedom” (Giustizia e Libertà). Found guilty, Pavese spent a few months in prison in Turin and Rome before being sent into political internal exile in the minuscule village of Brancaleone Calabro, located more than 1000 Km away from his previous place of residence. During his political internal exile, Pavese was free to move within Brancaleone Calabro, to have social relationships with the inhabitants of that village, who treated him with humanity and respect, to attend to his literary work, and to write to his family and friends. However, he was not only barred from leaving the village area and required to report daily to the local police station but also had no opportunity to establish any physical contact with the world outside Brancaleone Calabro. During his stay in Brancaleone Calabro Pavese made acquaintance with a number of natives and residents in that village. One of them, who goes by the name of Gaetano Fenoaltea in the novel The Political Prisoner where Pavese revisited the experience of his political internal exile,15 was a wealthy young man whose family had a number of businesses and economic interests in the village. Another acquaintance Pavese made in Brancaleone Calabro was a beggar and wanderer, in the novel called Barbariccia, who regularly walked around the village in search for company, a glass of wine on the house, or cigarette stubs.

In considering this scenario, one may wonder whether the obligations the law generated for all the characters living in Brancaleone Calabro at the time of Pavese’s political internal exile can be

15 See Cesare Pavese, The Beautiful Summer with The Political Prisoner (1960).
fully conceptualised in terms of intra-institutional practical reasons. In addressing this concern I will focus in particular on how the legal duties of the chief police officer to whom Pavese daily reported, Fenoaltea, Barbariccia and Pavese himself could be described. If we follow Marmor’s conceptual analysis we are led to conclude that the qualification of the reasons defining the legal obligations of those individuals as intra-institutional, protected, conditional, genuine, presumptive, and conventional is both aptly informative and theoretically insightful, to the effect that such qualification exhaustively accounts for what is legally obligatory. I find this conclusion objectionable, though, since Marmor’s conceptualisation of the reasons in terms of which legal obligation is defined is insufficiently detailed and thorough to elucidate the quality of the duties the law engenders.

The limitation and partiality of Marmor’s conceptual analysis emerges as soon as one broadens the perspective and pays attention as well to the kind of external reasons the individuals living in Brancaleone Calabro had to conform to the law in force in Italy at the time. Take the chief police officer to whom Pavese had to report daily first. In consideration of the fact that the chief police officer acted in an official role and took a formal oath when assuming office, the external reasons for acting as the law required him to that the chief police officer can legitimately be presumed to have had can be described as reasons he endorsed and identified with—call the reasons of the chief police officer endorsed reasons for action.

No endorsement, one can plausibly believe, was (necessarily, or even paradigmatically) associated with the external reasons Fenoaltea had to obey the law. It is reasonable to assume that the obligations set by the law were like a second nature for someone who, like Fenoaltea, was born and raised in Brancaleone Calabro: Fenoaltea can thus be expected to have naturally acted in accordance with (most of) the legal requirements regulating the social exchanges within Brancaleone Calabro. On this basis, his reasons for complying with the demands of the law can specifically be characterised as customary considerations in favour of one’s conducting a lawful life.

Barbariccia was also likely to have had reasons for acting in conformity with the law. True, he was a destitute wanderer and so (to an extent) a citizen of nowhere—someone with no specific attachment to any particular community. As such, he should be thought to have had a very limited and purely instrumental connection to Brancaleone Calabro—perhaps he walked around that given village only because he had experienced its inhabitants as more generous or better disposed towards him than those living in nearby villages. Barbariccia’s reasons for conforming to the law, thus, can hardly be described as either endorsed or customary. He rather seems to me to have had merely prudential, and possibly even just implicit and unconscious, reasons for acting in accordance to the law.

Finally, Pavese’s compliance with the law was not backed by reasons he endorsed, habitually followed, or experienced as prudentially valuable. For Pavese—a political dissident unwillingly
confined to Brancaleone Calabro—set no great store in the reasons underlying the conventions that regulated life in Brancaleone Calabro. Nonetheless, Pavese was aware of his legal duties, which he deliberately chose to obey as a way of reciprocating the humanity and respect the inhabitants of the village showed to him and of staying in good terms with the community where he was temporarily confined to. The external reasons associated with Pavese’s legal obligations can on this basis be placed in a descriptive category of its own: the category of *unbidden*, or forcible, reasons. This specific qualification is grounded on the fact that a political dissident’s reasons for acting in accordance to the law, unlike a legal official’s reasons, a native’s reasons, and a wanderer’s reasons, originate in practices the inclusion in which takes effect independently of any process of endorsement, interiorisation, implicit acknowledgement, unconscious assumption of responsibility, or prudential calculation. By contrast, those reasons are grounded in a form of unwilling inclusion in the obligation-generating practice; hence their qualification as unbidden.

### 3.2 How the reasons establishing the nature of legal obligation should be conceptualised

At this point one may wonder why in elaborating on the narrative I have mainly focused on the external reasons different legal subjects had for obeying the law, when in Marmor’s construction those reasons are instead claimed to be irrelevant to determining which obligations legal subjects have, since those reasons can vary from one subject to another. The rationale of my concern with the reasons legal subjects have for complying with the duties the law engenders—that is, external reasons in Marmor’s parlance—can be formulated as follows.

Emphasising the intra-institutional character of the reasons that are conceptually associated with the emergence of legal obligation may serve well the purpose of explaining the fact that the content of the claims the law makes on us is not a subjective variable and so is independent of the reasons underpinning a specific legal subject’s participation in the relevant obligation-generating framework. Likewise, conceiving the reasons constitutive of legal obligation as purely intra-institutional standards has the potential to insightfully account for the circumstance that the substance of legal obligation remains constant even when the (external) reasons for acting as the law requires are not the same for all the individuals to whom they apply.

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16 As Pavese himself tells us in his literary work, those duties were analytically disclosed to him by the local authority on his arrival at Brancaleone Calabro.
Nonetheless such conception is objectionable, because it is exclusively interested in establishing the sources of the *contents* of what it is legally obligatory, by thus failing to deal with the determinants of the *quality* of the duties engendered by a legal order. I take this to be a problem, since a comprehensive theory of legal obligation will have to engage with the quality of legal obligation too. And such quality cannot be specifically determined unless *external* reasons are taken into consideration. For what affects the way in which legal obligation should be conceptualised is the qualification of the set of reasons conceptually associated to a legal obligation as endorsed, customary, prudential, unbidden, or else—the catalogue of the sorts of relevant reasons as they were individuated by introducing the narrative was meant to be merely tentative and programmatically far from exhaustive: unless we are told whether a legal obligation stands for an *endorsed* intra-institutional reason, a *customary* intra-institutional reason, a *prudential* intra-institutional reason, an *unbidden* intra-institutional reason, or some other type of intra-institutional reason, the nature of a legal obligation is left underdetermined. That is to say, in order for us to be able to thoroughly establish which kind of duty a legal obligation is, we need also to engage with external reasons. True, content and (some) distinctive features of legal obligations are largely dependent on intra-institutional considerations. But, the overall character of what is legally obligatory and the conceptual relations between legal obligations and the system engendering them are primarily set by the external reasons supporting an individual’s legal obedience. Which is why those character and relations escape a conceptual analysis that, like Marmor’s, is exclusively concerned with *internal* reasons.

From what precedes it follows that, insofar as establishing the nature of legal obligation is acknowledged to be as important to the theoretically sound elucidation of the specific kind of binding standards the law generates as vindicating the subjective invariance of the content of legal duties, the explanatory power of Marmor’s conceptualisation of legal obligation as an internal reason for action should be considered limited. The precise extent of this limitation in explanatory power can be better appreciated if one considers that, insofar as it is defined by an *endorsed* intra-institutional reason, legal obligation stands for an “ought” supported by non-necessarily prudential practical considerations, namely, it stands for a normative statement that may or may not cater for the interests of the legal obligees. By contrast, understanding legal obligation as a *customary* intra-institutional reason means to construct it as a habit-like claim and hence as a standard closely resembling collective usage. Once it is defined in terms of *prudential* intra-institutional reasons, legal obligation is instead conceived as an expedient-based requirement and thus as a norm that by definition, or inescapably, incorporates a specifically interest-based “ought”. Finally, as long as legal obligation is accounted for as an *unbidden* intra-institutional claim, what is legally obligatory is to be fundamentally conceptualised in terms of its coercive dimension and therefore something hardly distinguishable from sheer imperatives and impositions. Now, non-necessarily prudential “oughts”, habit-like standards, expediency-based norms, and imperatives are far from mutually reducible terms,
or so they are widely regarded in the legal-philosophical literature. Therefore, establishing which of them specifically define what is legally obligatory is of theoretical significance.

An implication of the preceding remarks is that Marmor’s account, exclusively concerned as it is on internal reasons, can be argued to be unable to determine the distinctive quality of legal obligation. That is to say, unless it is expanded and integrated by the individuation of the specific kind of external reasons defining legal obligation, Marmor’s account is constitutively unequipped to specify whether by legal obligation we mean a non-prudential claim, a habit of obedience, a self-interested standard, or a sheer imposition by the law. On such account, then, “legal obligation” stands for a phrase referring to a set of altogether different declinations of the normative. As a result, Marmor’s conception fails to secure a determinate basis, or less than generic reference, for legal obligations, which are poorly described and too abstractly accounted for if they are all presented as institutionally-sourced requirements. The problem with Marmor’s theory, therefore, is not that it necessarily tells us something wrong about legal obligation and associated reasons, but rather that it does not say enough and so is to be considered unable to capture the rich typological variety of reasons in terms of which the obligations engendered by the law can be defined. For, while in some respects legal duties are to be conceptualised as having the binding force of a type of reason which I referred to as unbidden, in other respects the reasons associated with legal obligation are essentially embraced, or customary, or prudential, and so on. Which gives one a strong ground for concluding that the explanatory power of Marmor’s analysis of legal obligation is limited and, related, that his conceptualisation of what is obligatory in terms of intra-institutional protected reasons for action need at least be integrated and deepened (when not radically revised).

To rephrase the main point argued in this subsection, the type of external reasons conceptually associated with the emergence of legal obligation decisively impacts on the way in which the character of the duty the law generates can be specifically described. External reasons, however, are not explored in any significant detail in Marmor’s study of legal obligation—a study that considers the discussion of external reasons beyond the scope of jurisprudence. Marmor’s conceptual analysis, insensitive as it is to the role played by the external reasons conceptually associated with the existence of legal obligation and to the significant differences setting some of those reasons apart from the others, therefore, can be considered unperceptive of the specific kind of considerations that support, for example, the law-compliance of a political dissident as distinct of the statements justifying the obedience of, say, a legal official, or a subject committed to the relevant legal framework, or someone who approaches the law in a merely instrumental fashion. Marmor’s thesis that legal obligations are conditional on one’s reasons for living within a legal order, in other words, fails to look into, and draw the theoretical implications of, the circumstance that legal obligations are duties binding even individuals who may regard themselves as having reasons to reject the practices the law essentially
consists of. Hence the partiality and limited explanatory capacity of Marmor’s conceptual analysis, which provides some insight into the determinants of the content of legal obligations—internal reasons—but at the same time is insufficiently informative about the fundamental factors contributing to settle the character of the requirements issued by the law—external reasons.

To conclude, Marmor conceives of legal obligations as intra-institutional requirements conditioned on the reasons that subjects have to participate in the legal practice. This understanding is sound insofar as it detaches the existence of a legal obligation from the mere fact of one’s membership in a legal practice. However, it also is too minimalist and so overall descriptively inaccurate, since the view of legal obligation as a intra-institutional normative reason for action fails to analytically single out all (the typological varieties of) the reasons that are relevant to conceptualising what is legally obligatory. As the historical narrative introduced in Subsection 3.1 indicates, only a more encompassing engagement with the reasons defining legal obligation is able to comprehensively deal with those reasons, which need be qualified (not simply as internal or external, conditional or unconditional, presumptive or conclusive, and protected or weighable, but also at least) as endorsed, customary, prudential, or unbidden. It is on this basis that Marmor’s conceptual analysis of legal obligation can be criticised. On a close scrutiny, such analysis can be argued to be (not necessarily misleading but at least) scarcely informative about, and insensitive to, the different kinds of reasons that paradigmatically accompany the emergence of obligation in the law. For there is no merely intra-institutional characterisation of those reasons that is sufficiently illuminating in that respect: reasons cannot be simply described as intra-institutional without missing an important dimension the reasons defining legal obligations possess—their being endorsed, customary, prudential, or unbidden too. That is to say, Marmor’s conceptual analysis of legal obligation is questionable, since it presents the reasons conceptually associated with legal obligation as merely intra-institutional, when by contrast a far richer conceptualisation of those reasons is required for us to be able to grasp the nature of legal obligation.

### 3.3 Related concerns

As a result of its systematic disengagement from external reasons and consequent disregard of the specific quality of legal obligation, Marmor’s theory can also be argued to lack the resources to elucidate the variegated relations that characteristically obtain between the reasons constituting the obligations the law engenders and the (a) obligation-generating institutions, on the one hand, and (b) legal subjects, on the other.
To briefly elaborate on the first relation that Marmor’s analysis is unable to account for—the relation between reasons defining legal obligation and institutions generating those obligations—consider (what I referred to as) endorsed reasons, to begin with. Insofar as legal obligations are reasons that, besides being internal, conditional and protected, are endorsed by those living under the jurisdiction of the law (or at least by a large majority of them) the obligation-engendering institution is best conceptualised as a cooperative scheme governing social interaction. In the same vein, legal subjects can legitimately be presented as individuals committed to a shared enterprise, or participants in a joint venture. This means that, on the one hand, legal authority can be said to have a collegial and reciprocal character, on the other hand, legal obligations can plausibly be regarded as necessary burdens each participant in the collective endeavour will be legitimately required to bear for the common legal project to succeed, flourish, or even be possible at all.17

The conceptualisation of legal institutions is irreducible to such cooperative model when the legal requirements are supported by another typology of external reasons: customary reasons. As long as the duties legal practices establish are best viewed as customary reasons for action (and thus the basis of the claims made by an institutional arrangement is predominantly habit-centred), the resulting system of governance cannot be adequately characterised as a cooperative establishment. It is rather to be accounted as an instance of traditional authority—an order grounded in, and legitimised by, the collective usage and implicit acceptance of the governed. Related, if the form of authority to be associated with the existence of the law is traditional in quality (for legal obligations are to be understood as customary reasons), those in authority cannot be claimed to owe their institutional roles and positions to their instrumentality to promote a set of goals shared by legal subjects (as it is the case with regimes that can be interpreted as cooperative schemes in consideration of the fact that the requirements they issue are supported by endorsed reasons). The sources of the legal authority lie instead primarily in some acquiescence to, and recognition of, norms that over time have proved to serve well the relevant community.18

This conceptualisation of legal governance too is untenable, however, if legal obligations are reasons appealing to prudential concerns. In legal communities that, as it tends to be the case today,


are not homogenous wholes and are inhabited by groups of individuals with different interests, an institution enacting requirements supported by prudential considerations can reasonably be presumed to programmaticallly purport to prioritise the claims made by one social group over the claims made by the other sections of the relevant community. Accordingly, insofar as (i) the external considerations underpinning the requirements set out by legal institutions are largely based on expediency and (ii) personal interests cannot be generalised in inherently pluralistic and heterogeneous social groups, a legal order engendering demands grounded in prudential reasons is appropriately described as an *exploitative* system of social control. Legal authority should accordingly be understood as an arrangement oriented to a discrete set of particular goals and thus as an institution potentially functional to secure the domination of some faction(s) over the others. In turn, the legal dynamics corresponding to this form of governance is irreducible to the interactions shaping cooperative orders and traditional systems, since it distinctively involves a permanent struggle for power in which those exercising legal authority at a given time are systematically challenged by those bearing conflicting interests and embracing alternative values.

Finally, if the demands a legal order makes are defined by reasons that can be qualified as unbidden, the obligation-generating institution should be conceptualised in a further distinctive way. In this case the requirements of the law are buttressed by considerations that legal subjects find undesired and unwanted. Therefore, the type of institution corresponding to this state of affair is a regime oriented to (what is widely perceived by its subjects as) a disvalue. As such, it can legitimately be described as a *coercive* political arrangement, or an imperative-based scheme of governance, which issues sheer impositions over its recalcitrant addressees.

These remarks should suffice to indicate that the kind of (external) reasons underpinning legal obligation decisively contributes to establish not only which specific type of normative standard a legal obligation should distinctively be taken to be but also which sort of regime the institution issuing legal obligations is. This in turn gives one the sense of how deep the implications of establishing and accounting for the external reasons associated with the existence of legal obligation, at least in its paradigmatic instantiations, are for the conceptualisation of the law and its claims. Which is why a theory of legal obligation, especially if it is purportedly reason-based (as Marmor’s is), can afford to neither largely neglect the analysis of those reasons nor expel such analysis from the province of jurisprudence. For such theory would end up missing dimensions that are central to legal experience, by thus also providing an impoverished explanation of what is legally obligatory.

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19 Some readers may see traces of Max Weber’s treatment of the types of legitimate authority—traditional, charismatic, and legal-rational—in this part of the argument (see Max Weber, *Economy and Society* (1978; or. ed. 1964)). However, I do not intend to specifically draw on Weber’s work in this context. Nor do I rely on Weber’s distinctive (indeed peculiar) theoretical framework in my criticism of Marmor’s account. So, readers are advised to refrain from building too much on the Weberian flavour, if any, of this component of my critical argument and from emphasising any argumentative continuity between Weber’s discussion of the types of legitimate authority and the point I am making here.
(b) In addition, the conceptualisation of legal obligation as an internal duty conditional on one’s reasons for participating in the legal enterprise fails to shed light onto the position legal subjects occupy in relation to the obligation-engendering institution. For, unless we analyse the external reasons underpinning one’s legal subjectivity, the description of the predicament those living under the law experience will be too abstract and generic. True, a conceptualisation of legal obligation in terms of internal reasons has the resources to characterise legal subjects as individuals who have conditional reasons to take part in, and so to be bound by, the legal practice. At the same time, though, it is constitutively unable to capture the more specific dynamics, which is possibly conflictive, obtaining between legal obligations and those who live under the jurisdiction of the legal system generating those obligations.

That is to say, the theoretical inadequacy of Marmor’s conceptual analysis becomes apparent also when one considers the distinct stances various profiles of legal subjects (such as official members of the legal community, committed participants, those approaching the law in a merely instrumental way, and alienated legal subjects, among others) have with respect to the institutional practices shaping the jurisdiction in which they live. As it can be derived from the narrative introduced above, in order for us to make full sense of the position legal subjects may find themselves in when relating to the obligations engendered by the law, we should go beyond a conceptualisation of legal obligation solely in terms of intra-institutional reasons for action and consider instead whether the external reasons fundamentally associated with the existence of legal obligations—at least the reasons that essentially accompany the emergence of legal obligation in standard cases—are endorsed, customary, prudential, or unbidden.\(^{20}\)

In other words, a systematic treatment of legal obligation should be able to establish whether legal obligations—or legal obligations in their typical instantiations—are requirements that legal subjects (a) endorse and identify themselves with, since those requirements are dependent on having a reason that the legal subject values (or at least ought to value) to personally commit to them, (b) simply interiorise and so unreflectively take up the moment legal subjects have reasons to be committed to the relevant legal practice, (c) merely follow, even in the absence of any specific attachment to the obligation-generating institutions, as they are beneficial to those subjects, and so law-compliance is in those subjects’ personal interest, or (d) have by virtue of finding themselves under the sway of some practice despite the fact that such practice may be regarded as unsupported by valuable considerations and so worthless. Marmor’s analysis is silent on these issues. As a result, it fails to account for the way in which those under the jurisdiction of the law approach, and relate to, legal obligations.

\(^{20}\) To reiterate, this fourfold typology should not be taken as a complete description of the types of external reasons we may encounter in connection with legal obligation. Thus, although the typology I refer to is already more detailed than the one at play in Marmor’s conceptual analysis and moves one step closer to accounting for our practical experience with legal obligations, it still hardly captures the richness of that experience.
legal duties. Otherwise stated, only if Marmor’s skeleton analysis, organised around the claim that legal obligation is best understood as an internal and conditional reason for action, were integrated by the characterisation of the specific nature of the external reasons conceptually associated with the existence of legal obligation—are those reasons of the endorsed kind, or the customary kind, or the prudential kind or the unbidden kind, or else?—it could aspire at arriving at a sufficiently detailed and informatively rich theory of legal obligation.

What I regard as questionable in Marmor’s conception of legal obligation, therefore, is its inability to grasp the specific senses in which a legal official, a committed participant, someone who has a merely instrumental connection with the law, and a political dissident can be said to have a legal duty. Whilst each of those typologies of legal subject may legitimately be claimed to have duties engendered by the law, simply describing such duties as intra-institutional reasons amounts to a less than insightful description of one’s predicament in relation to the law. On this basis, it can be reasonably concluded that Marmor’s theory constitutes a significantly incomplete account of the duties engendered by the law.

So far the abstractness and limitation of Marmor’s account have been made to emerge by arguing that for Marmor the reasons defining the legal obligations of different individuals can be described as intra-institutional and protected. This description, I claimed, should be regarded as leading to an inaccurate representation of the workings of legal obligation. However, the abstractness and descriptive inaccuracy of Marmor’s account are particularly remarkable when one considers legal obligation as it relates to a political dissident. For, it may be sensibly argued, there is something peculiar, or even jargonish, in stating that the legal duties of a political dissident are appropriately conceptualised and properly qualified as conditional on her reasons for participating in legal system. True, this conceptualisation is not completely misleading—indeed, one might even claim that the characterisation is formally correct and less than untenable in the abstract. After all, it is conceptually sound to assert that a political dissident’s legal obligations come with a couple of if-clauses attached—so, to that extent, those obligations are conditional. For political dissidents have an obligation to conform to the norms of law (1) if they have reasons to continue to live in under the law and (2) if they have reasons to stay on non-conflictive terms with their neighbours. But these if-clauses attached to the legal obligations of someone who has reason to take part in the legal practice but she has no commitment to it are markedly different from the type of if-clauses attached to paradigmatic instances of conditional obligations, such as those of legal officials and committed members of a legal community.

To elaborate on the difference between the reasons at play here (and so to expand on what I take to be one of the problems with Marmor’s account of legal obligation), we can return to the historical narrative and consider how Pavese’s relation to the norms and attendant obligations that
governed life in Brancaleone Calabro differed importantly from those of two other characters: the chief police officer (or more generally anyone who formally endorsed, and expressly promised allegiance to, the legal system regulating the life in that village) and the native (namely, someone who, being born and raised in Brancaleone Calabro, habitually obeyed the set of legal rules and fulfilled the associated duties in place there). The quality of the obligations of the chief police officer and the native can be described as conditional in a full-fledged sense. Such quality is paradigmatically conditional, since it depends on those individuals having reasons, which they endorse or at least abstain from questioning, to follow the conventional practices shaping life in Brancaleone Calabro and therefore on those individuals’ being in a position to appropriate the reasons buttressing the obligations to conform to the relevant conventions. For the chief police officer had reasons to endorse those practices as a legal official and hence as a committed member of the community; the native had reasons to embrace those practices as someone for whom those practices were a second-nature. In a rather different sense can the quality of the legal obligations of a political dissident like Pavese be said to fit any of these descriptions, since Pavese hardly valued the conventions that regulated life in Brancaleone Calabro (indeed, he experienced these conventions as meaningless).

To generalise the point, let us assume that a practice, or institutional framework, can accurately be described as giving rise to “obligations of type X” if those whom it claims are bound by such obligations have reasons they are committed to for going along with the conventions on which the practice, or institutional framework, is based. This means that in the (paradigmatic) case of type-X-obligations one’s duties are backed by reasons that legal subjects embrace for doing what the obligation-generating enterprise requires from them. In other words, type-X-obligations are understood as duties that are associated with endorsed reasons, namely, reasons those subject to them regard as valuable and are generated by a practice with which those individuals identify. On this hypothesis, it seems to be inaccurate also to categorise as type-X-obligations the duties defined by reasons that, qua unbidden reasons, are not endorsed or regarded as worthy by the obligees. For a significant difference sets apart the two kinds of reasons. And this difference should be reflected in one’s conceptualisation of the obligations defined by those reasons. That is, the reasons a political dissident has to conform to the demands arising out of the conventional practices regulating the life of the law-governed community she is confined to—the reasons associated with her legal obligations—cannot be accurately described as on a type-X-wise par with the reasons supporting the binding force of the legal obligations of the official or the native. From this it follows that the legal obligations of the political dissident are best placed in a category of their own. And doing so, in turn, requires us breaking out of the partial view of the reasons associated with the existence of legal obligation as they are theorised by Marmor—the view presenting all those reasons as intra-institutional reasons for action—so as to offer a more thorough and nuanced view as well as a less general and abstract conceptualisation of the reasons in terms of which legal obligations is defined.
3.4 A possible objection

At this point, the problem with Marmor’s theory of legal obligation should have emerged with clarity. That theory conceives of legal obligation as an intra-institutional protected reason. By contrast, the quality of legal obligation cannot be grasped unless its rational core is qualified as either endorsed, or customary, or prudential, or unbidden, or else. This is to say that Marmor’s theory offers a conceptualisation of legal obligation that can be argued to be unable to establish the nature of what is legally obligatory.

Before bringing the discussion of Marmor’s treatment of legal obligation to an end it may be of some interest to briefly consider a possible alternative reading of Marmor’s thin approach with a view of trying and defending his choice to confine himself to conceptualise the reasons conceptually associated with the existence of legal obligation as no more than intra-institutional. So far I have assumed that Marmor simply failed to notice the theoretical significance of giving a more thorough account of the reasons associated with the existence of legal obligation. I have then charged Marmor with an omission: in refraining from deepening his conceptual analysis of what is legally obligatory Marmor omits to appreciate the theoretical importance of determining in full detail all the kinds of reasons that accompany the obligations the law issues. On this basis, I concluded that his theory of legal obligation lacks descriptive depth and, related, whilst not necessary unsound, it is less than sensitive to the practice of legal obligation. In accordance with the alternative reading I intend to briefly discuss here, the fact that Marmor abstains from characterising those reasons any further should not be qualified as a careless omission but rather as a deliberate and theoretically informed decision. This decision is in turn justified by the belief in the theoretical insignificance of any deeper description of the reasons defining what is legally obligatory. Marmor’s attitude can, in other terms, be interpreted (not as a lack of care for details, but) as a form of intentional disinterest in a more far-reaching account of the reasons defining legal obligation.

Such disinterest can be claimed to be virtuous—even a strength of the account—one may continue, since the fact that a reason, in addition to be internal, protected and conditional, is endorsed, customary, prudential, unbidden, or else should be considered of no theoretical consequence. From this perspective, then, the soundness and strength of Marmor’s account consist precisely in its thinness and so in its capacity to preserve some distance between what is obligatory in law and the kind of reasons supporting the requirements engendered by the law. To ignore this distance would be tantamount to conceptualising legal obligation in terms of some personal attitude, thus espousing a subjectivist, or individualist, view of the law as a source of obligations. Which is why, while intra-institutionality should be regarded as an essential element of the kind of reasons specifically defining
what is legally obligatory, the remaining attributes—those referring to certain subjects’ endorsement, habit, interest, and unwillingness—are best conceived as merely possible properties of those reasons and so as less than fundamental traits they possess.

The attempt to defend Marmor’s treatment of legal obligation along these lines is, however, unviable, or so I think. For the claim that any further characterisation of the reasons defining legal obligation, beyond their minimalist qualification as intra-institutional considerations, is theoretically irrelevant has a crucial conceptual implication that should not be taken lightly. The implication of Marmor’s minimalist qualification that I consider relevant in this context is the commitment to the thesis that the obligatoriness of specific legal provisions as well as whole legal systems is completely independent of the attitudes of those living under the jurisdiction of the law. That is to say, on the proposed reading Marmor ends up being committed to a picture in which a system of laws can possibly be regarded as obligatory despite the fact that the vast multitude of, and indeed possibly all, those subject to the jurisdiction of the law regard the legal demands as unbidden claims made on them. Likewise, in the picture emerging from this reading of Marmor’s account, neither the legal subjects’ endorsement nor their interiorisation of (at least the core of) the requirements enacted by those holding the legal power is essential to secure the obligatory status of those requirements.

Personally, I find this picture hardly convincing, as it is at odds with the way in which ordinarily a legal system is understood by both laypeople and practitioners. Indeed, a widely accepted view within the legal community seems to be that some degree of endorsement and commitment, at least by certain categories of legal subjects, is constitutive of, and intrinsic to, what is obligatory in law. Arguably, thus, no credible theory of legal obligation can afford to completely neglect to consider the attitudes of (some of) those living under the jurisdiction of the law (and so their external reasons for complying with legal norms). Related, those attitudes should be acknowledged to figure as a theoretically significant element (although certainly not the only element, and possibly not even the most important element) of a conceptualisation of legal obligation.

However, in this context this remark arguably is not the necessarily decisive consideration supporting the concern one may legitimately raise in respect to Marmor’s disinterest in more thickly conceptualising the specific kind of reasons associated with the existence of legal obligation. Far more fundamental to justifying such concern is the fact that the proposed reading would commit Marmor to defend a radical thesis about legal obligation that has no counterpart in the current legal-theoretical debate. This radical thesis allows for the possibility that a system of laws entirely associated with, and backed by, unbidden normative reasons for action (does not just exist but also) should be qualified as obligatory. This thesis is to be understood as radical, because at least since Hart’s discussion in The Concept of Law, even the champions of legal positivism (namely, the advocates of the legal school Marmor aligns himself with) have acknowledged that the bare existence, let alone the bindingness, of
a system of laws is subjected to two minimum conditions that should be regarded as essential, qua necessary as well as jointly sufficient: consistent obedience of legal provisions on the part of the generality of legal subjects and acceptance of a legal system’s rule of recognition as a common public standard of official behaviour by those in power.\(^{21}\) Apparently the second of those conditions does make reference to, and so it recognises the theoretical significance of, the attitudes of (a selected component of) the legal community. That is, within contemporary jurisprudence as well as within today’s instantiations of the legal-theoretical perspective Marmor’s body of work contributes to, the attitudes of legal subjects are far from insignificant in determining the essential traits of the law. True, those attitudes are neither the primary determinants of the law nor its sole determinants. But they are of some importance, often in combination with other characters, in establishing existence and obligatory force of the law. By contrast, insofar as the alternative reading of Marmor’s indifference for a detailed conceptualisation of the reasons associated with the existence of legal obligation is underwritten, Marmor’s stance towards the obligatoriness and, related, existence of legal systems is shaped by the claim that those attitudes are completely irrelevant. This statement apparently marks a radical break with what is (at least nowadays) a deeply consolidated view. As a result, it can legitimately be expected to require a sustained and detailed argument in support: in consideration of its highly innovative status, Marmor’s position, when interpreted along the proposed lines, can hardly be simply taken for granted. Such argument, however, is not to be found in Marmor’s work. And this can reasonably be considered evidence of the fact that what I referred to as the alternative reading of Marmor’s approach to legal obligation is in need of more groundwork before it can be established.

4. Conclusion

In this contribution, I called into question the descriptive accuracy of an approach to legal obligation—Marmor’s—that I nonetheless reckoned to be an original and largely sound proposal for the analysis of legal obligation. My argument was that the framework of thought theorised by Marmor gives us an insufficiently detailed picture of the (different kinds of) practical reasons paradigmatically associated with the emergence of legal obligation. For those reasons are only conceptualised by Marmor as intra-institutional, while they should be further qualified at least as endorsed, interiorised, implicit or unbidden. On this basis, I claimed that Marmor’s conceptual analysis of legal obligation falls short of providing a comprehensive conceptualisation of the kinds of reasons constitutive of legal obligations.