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Law, Interpretation and Authority*

1. *Introductory Remarks*

Andrei Marmor's main purpose in *Interpretation and Legal Theory* [from now on, *I & LT*]¹ is to defend legal positivism against the criticisms by Ronald Dworkin. The central thesis of legal positivism is identified by the author in the conventionalist thesis that «law is essentially a matter of social conventions, law is, *ipso facto*, what a community of lawyers and judges *thinks that it is*»².

This thesis is rejected by Dworkin, who maintains that it is impossible fully to determine law beginning from the convergent behaviours and attitudes of the participants. This implies that to answer the question “what is law?” – both in relation to a given legal experience and in general – it is not sufficient, even if it is necessary, to look at the convergent behaviour and the attitudes of the participants: it is also necessary to provide an interpretation of the “legal raw material” or, as Dworkin puts it, of the grounds of law. This means that the theoretical enterprise has, at least in the legal domain, an interpretative nature. The perspective of the legal scholar is therefore necessarily *engagé* and parasitical compared to that of the participant.

The “interpretative turn”³ proposed by Dworkin implies that the legal scholar can only give a full account of law by getting into the participant's shoes and hence committing himself to reconstructing law in the light of an interpretation of the values incorporated in law. The theoretical enterprise mainly appears like an interpretative enterprise because the intrinsically interpretative nature of legal praxis makes it impossible, unlike what is maintained, among others, by Hart, to treat values as if they were facts⁴. In other words, the legal theorist is asked to

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¹ A. Marmor, *Interpretation and Legal Theory* (1st ed. 1992), revised second ed., Hart Publishing, Oxford and Portland, Oregon, 2005.

² A. Marmor, *I & LT*, p. 7, author's emphasis.

³ See K. J. Kress, *The Interpretive Turn*, “Ethics” 97, 1987, pp. 834-860.

⁴ In the *Postscript*, regarding Dworkin's interpretative turn Hart writes: «Moreover, even if the judges and lawyers of all legal systems of which the general and descriptive legal theorist had to take account themselves did in fact settle questions of meaning in this interpre-

look at raw legal material with a “protestant attitude”⁵ and, like the participants, to present the best interpretation (that is to say the most convincing, the most coherent one) of this material. As Stephen Guest puts it, «in short, Dworkin’s theory of *law* is that the nature of legal argument lies in the best moral interpretation of existing social practices»⁶.

Marmor’s avowed aim is to disprove this claim: «[*I & LT*] sets out to re-examine legal positivism in the light of this interpretative challenge»⁷.

The argumentative strategy adopted by the author is a broad-sweeping one.

On the one hand, he is concerned to show that many of the theses that Dworkin attributes to legal positivism, and to Hart in particular, are in actual fact simplifications or even misunderstandings of what Hart and other legal positivists have really maintained. To give just one example, Marmor convincingly contests Dworkin’s claim that legal positivism comes down to a semantic analysis of the meaning of the term ‘law’.

On the other hand, he proposes a critical reconstruction of Dworkin’s thought that, though it may sometimes be controversial and impossible to agree with, nevertheless cannot be accused of trivialising the theses confuted each time. For instance, after making a very careful analysis of Dworkin’s thesis that the perspective of the researcher coincides with that of the participant, Marmor highlights a most delicate point of Dworkin’s argument in the absence of a reflection on the possibility that there may be a «crucial difference between forming a view about the values which are manifest in a social practice, like law, and actually having evaluative judgments about them»⁸. In short, Dworkin is alleged to have omitted to reflect adequately on the fact that the evaluations necessarily present in every theory of law – indeed nobody, or almost, denies the value-leadenness of the theories – may not be moral judgments.

The defence of conventionalism proposed by Marmor and the criticisms that this author makes of the law-as-interpretation theory are after all based upon a general theory of interpretation and meaning that considers interpretative activity

and partly evaluative way, this would be something for the general descriptive theorist to record as a fact on which to base his general descriptive conclusions as to the meaning of such propositions of law. It would of course be a serious error to suppose that because these conclusions were so based they must themselves be interpretive and evaluative and that in offering them the theorist had shifted from the task of description to that of interpretation and evaluation. *Description may still be description, even when what is described is an evaluation*» [H. L. A. Hart, *The Concept of Law* (Second Edition), With a Postscript edited by P. A. Bulloch and J. Raz, Clarendon Press, Oxford 1994, pp. 239-276; the quotation is on p. 244; emphasis added].

⁵ See G. J. Postema, “Protestant” *Interpretation and Social Practices*, “Law and Philosophy” 6, 1987, pp. 283-317.

⁶ S. Guest, *Ronald Dworkin*, Edinburgh University Press, 1992, p. 1; author’s emphasis.

⁷ A. Marmor, *I & LT*, p. 8.

⁸ A. Marmor, *I & LT*, p. 42.

as an exception with respect to normal understanding of linguistic expressions: one thing is the semantic meaning, which denotes the aspects of linguistic communication that are rule- or convention-governed; another thing is interpretation, which comes into play when the meaning is underdetermined by the rules and by the linguistic conventions.

This distinction between interpretation and semantic meaning, in many respects a problematic one, is justified starting from Wittgenstein's reflections on rule-following⁹.

There are two main interpretations of Wittgenstein's reflections on rule-following.

The first one, which Marmor expressly rejects, is the sceptical reading proposed by Saul Kripke¹⁰, which attributes to Wittgenstein the thesis that the correctness of every single action that appears as the application of a rule does not depend on the attribution of a correct meaning to the rule but on the degree of consensus – due essentially to ideological and political factors – that the presumed action of following a rule succeeds in obtaining.

The second interpretation, philologically more correct, attributes to Wittgenstein the thesis that the paradox of following a rule is a misunderstanding. Specifically, Gordon Baker and Peter Hacker¹¹ point out that Wittgenstein believes that the paradox springs from «an interpretational “misunderstanding” of following a rule»¹².

“Following a rule” is a different activity from “interpreting a rule”. The latter activity consists in replacing one formulation of the rule with another. In “following a rule”, instead, there is no intermediation between the rule and the use that is made of it. In the last analysis, according to this reading, «following a rule is a practice, learned through training that fixes the internal or conceptual relationship between rule and cases of application»¹³.

⁹ See L. Wittgenstein, *Philosophical Investigations* (1953), Eng. trans. by G. E. M. Anscombe, 2nd ed., Blackwell, Oxford, 1958, in particular § 198 [But how can a rule show me what I have to do at this point? Whatever I do is, on some interpretation, in accord with the rule. – This is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning] and § 201 [It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us for a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call ‘obeying a rule’ and ‘going against it’ in actual cases].

¹⁰ See S. Kripke, *Wittgenstein on Rules and Private Language*, Basil Blackwell, Oxford, 1982.

¹¹ See G. Baker, P. Hacker, *Wittgenstein. Rules, Grammar and Necessity*, volume II, Blackwell, Oxford, 1985, pp. 81-262.

¹² See D. Marconi (ed.), *Wittgenstein*, Laterza, Roma-Bari, 1997, p. 175.

¹³ M. Barberis, *Seguire norme giuridiche, ovvero: cos'avrà mai a che fare Wittgenstein con la teoria dell'interpretazione giuridica?*, “Materiali per una storia della cultura giuridica”, XXXI, 1, 2002, pp. 245-303; the quotation is on p. 247.

The thesis that in law (too) «interpretation is required only when the formulation of the rule leaves doubts as to its application in a given set of circumstances»¹⁴ is therefore the central thesis of *I & LT*. It is a thesis that is at least as controversial as Dworkin's thesis that law is interpretation.

Here I will not directly discuss the thesis of the residual role of interpretation in the legal sphere, but I will deal with one of the main passages in Marmor's argument in support of this thesis, and that is that a constructive theory of the interpretation and the identification of law is falsified by the conception of legitimate authority proposed by Joseph Raz.

2. Coherence Thesis vs. "Law-as-Interpretation-Thesis"?

2.1. Marmor's Argument

The criticism that Marmor makes of Dworkin starting from Raz's conception of legitimate authority – a criticism that for convenience's sake from now on I will refer to as "argument from legitimate authority" – is founded on a diachronic reading of Dworkin's thought and consists in two passages.

The first passage is concerned to show that Dworkin necessarily has to refute, out of a need for consistency within his theory of law, the communication-intention model of interpretation.

The second passage affirms that Raz's conception of legitimate authority makes the alternative model of interpretation and identification of law, the constructive model, not applicable in the legal sphere.

The conclusion is that if law-as-interpretation implies the constructive model and the latter does not adequately account for interpretative praxis in the legal sphere, then Dworkin's conception of law cannot aspire to represent a way of going beyond legal positivism.

In this section of the essay I will deal exclusively with the first passage of the argument from legitimate authority.

2.1.1. The Coherence Thesis

Although Dworkin's work presents no breaks in continuity or abrupt changes of direction, one can nevertheless distinguish between a first phase, whose conclusion can be made to coincide with the publication of *Taking Rights Seriously* [TRS] in 1977¹⁵ and which was characterized by analytical and rigorous criticism

¹⁴ A. Marmor, *I & LT*, p. 118.

¹⁵ R. Dworkin, *Taking Rights Seriously* (1977), Harvard University Press, Cambridge (Mass.), 1978.

of Hart's thought, and a second phase, still ongoing, whose purpose is the ambitious one of proposing a complete theory of law not needing to rest on the "rubble" of Hart's legal positivism¹⁶.

According to Marmor, the continuity between these two phases is to be identified in the so-called "coherence thesis", which sums up the perspective expressed by Dworkin in some of the main essays collected in *TRS*¹⁷ and afterwards re-phrased and modified to the extent of leading Dworkin to affirm that «legal practice, unlike many other social phenomena, is *argumentative*»¹⁸.

Marmor reconstructs the coherence thesis as follows¹⁹:

A legal system ... comprises not only source-based law but also those norms which can be shown to be consistent in principle with the bulk of source-based law.

The author that first identified in the coherence thesis the focal point of Dworkin's theory of law was Raz, in a fundamental 1985 article²⁰ which it is useful to take as a starting point, also in light of the next section of this essay.

In the article Raz distinguishes three theses that identify three different answers to the question "what is law?".

The sources thesis, shared by Raz and also by Marmor²¹, expresses the perspective of exclusive legal positivism and affirms that «all law is source-based»²²; the incorporation thesis, an expression of a weaker legal positivism, affirms that «all law is either source-based or entailed by source-based law»²³; lastly, the coherence thesis expresses Dworkin's anti-positivism, and affirms that «the law consists of source-based law together with the morally soundest justification of

¹⁶ There is almost unanimous agreement regarding the distinction between these two phases in Dworkin's thought. Marmor himself observes that «in the earlier stages of his criticism [Dworkin] followed in the methodological footsteps left by Hart and made his own contribution to the tradition of analytical jurisprudence. Recently, however, his critique has taken a sharp methodological turn: it consists in an outright rejection of the analytical approach to legal theorizing» [A. Marmor, *I & LT*, p. 2].

¹⁷ I refer in particular to *The Model of Rules* (1967) and *Hard Cases* (1975).

¹⁸ R. Dworkin, *Law's Empire*, Fontana Press, London, 1986, p. 13, author's emphasis. In recent years, almost paraphrasing Dworkin Neil MacCormick has observed that «law is an argumentative discipline» [N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, Oxford, 2005, p. 14].

¹⁹ A. Marmor, *I & LT*, p. 79.

²⁰ The reference is to J. Raz, *Authority, Law and Morality* (1985), in Id., *Ethics in the Public Domain. Essays in the Morality of Law and Politics (Revised Edition)*, Clarendon Press, Oxford, 1995, pp. 210-237.

²¹ See A. Marmor, *Positive Law and Objective Values*, Clarendon Press, Oxford, 2001, pp. 49-70.

²² J. Raz, *Authority, Law and Morality*, p. 210.

²³ *Ibid.*

source-based law»²⁴. Raz asserts the superiority of the sources thesis starting from the emphasis on the essentially authoritative nature of law.

However, what is of interest here is that the coherence thesis, especially in Marmor's version, attributes to the early Dworkin the thesis that law is the sum of source-based law and the set of rules and principles that are compatible with source-based law.

This interpretation of the thought of the early Dworkin, though questionable, is at all events supported by precise textual references.

At the beginning of *Hard Cases*, for instance, Dworkin introduces his anti-positivism as follows²⁵:

I shall argue that even when no settled rule disposes of the case, one party may nevertheless have a law to win. It remains the judge's duty, even in hard cases, to discover what the laws of the parties are, not to invent new laws retrospectively.

The main argument developed by Dworkin in *The Model of Rules* against Hart's legal positivism can also be linked to the coherence thesis in the reading that Marmor gives of it.

Reduced to the minimum terms, the argument in question appears like a confutation of the thesis that law is a system of rules identified through a rule of recognition²⁶.

This argument can be divided into four passages.

In the first place, according to Dworkin rules are only one of the different legal *standards*. Legal *standards* that are not rules belong to the wide category of "principles."

In the second place, he believes that a qualitative difference exists between rules and principles and not merely a quantitative one: it is possible to distinguish a rule sharply from a principle.

In the third place, Dworkin maintains that the rule of recognition allows one to identify legal rules but not legal principles.

²⁴ J. Raz, *Authority, Law and Morality*, p. 211. Marmor sums up these three theses as follows: «Exclusive positivism denies, whereas inclusive positivism accepts, that there can be instances where determining what the law is, follow from moral considerations about that which it is there to settle. Contemporary anti-positivists, like Dworkin, claim that determining what the law is always requires such moral considerations about what the law should be, and thus they reject the sources thesis as incoherent» [A. Marmor, *Positive Law and Objective Values*, p. 49].

²⁵ R. Dworkin, *Taking Rights Seriously*, p. 81.

²⁶ For a general presentation of Dworkin's conception of law see A. Schiavello, *Diritto come integrità: incubo o nobile sogno? Saggio su Ronald Dworkin*, Giappichelli, Torino, 1998; for a more detailed and complete reconstruction of Dworkin's criticisms of legal positivism see A. Schiavello, *Il positivismo giuridico dopo Herbert L. A. Hart. Un'introduzione critica*, Giappichelli, Torino, 2004, pp. 51-90.

In the fourth place, he affirms that there is no break between moral principles and legal principles.

In conclusion, for Dworkin the representation of law advanced by legal positivism is gravely deficient: law is not a system of rules but a more complex system, which contains rules and principles and which, precisely because of the presence of principles, at least partly, is mixed up with morality. Therefore law is made up of source-based more law plus “those norms which can be shown to be consistent in principle with the bulk of source-based law”.

In the next paragraph we will see what changes the coherence thesis undergoes, according to Marmor, starting from the publication of *A Matter of Principle*²⁷, and what the consequences of this evolution in Dworkin’s thought are.

2.1.2. From the Coherence Thesis to the “Law-as-Interpretation” Thesis

In analyzing the passage from the coherence thesis to the law-as-interpretation thesis, Marmor begins with an oscillation that produces an ambiguity. On one side, he affirms that «... Dworkin’s recent interpretative turn is basically an attempt to re-establish [the coherence thesis] on novel grounds»²⁸ and this suggests that, according to Marmor, the interpretative turn is an evolution of the coherence thesis. On the other side, however, Marmor makes a criticism of Dworkin that implies that the coherence thesis and the law-as-interpretation thesis are at least partially independent of one another and therefore potentially conflicting.

For the time being it is better to set aside this oscillation in Marmor’s reconstruction of Dworkin’s thought in order to look closely at the first passage in his argument against the interpretative turn [see 2.1.].

Marmor maintains that if Dworkin adopts the communication-intention model of interpretation, the law-as-interpretation thesis is incompatible with the coherence thesis. In this connection, the latter thesis defines law as the sum of source-based law and the set of rules and principles that are compatible with source-based law. Now, with the interpretative turn Dworkin affirms that “law is interpretative throughout”; if with this thesis there were further associated an inten-

²⁷ R. Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, Massachusetts 1985. However, it should be borne in mind that already in the essay *The Model of Rules II*, contained in *TRS*, Dworkin specified: «My point was not that “the law” contains a fixed set of standards of any sort. My point was rather that an accurate summary of the considerations lawyers must take into account, in deciding a particular issue of legal rights and duties, would include propositions having the form and force of principles, and that judges and lawyers themselves, when justifying their conclusions, often use propositions which must be understood in that way. Nothing in this, I believe, commits me to a legal ontology that assumes any particular theory of individuation» [R. Dworkin, *Taking Rights Seriously*, pp. 46-80; the quotation is on p. 76].

²⁸ A. Marmor, *I & LT*, p. 79.

tionalist conception of interpretation, we would have to conclude that all law is source-based, and this conclusion would be a clear violation of the coherence thesis.

As Marmor observes, this concern is also perceived by Dworkin, who affirms²⁹:

The idea of interpretation cannot serve as a general account of the nature or truth value propositions of law, however, unless it is cut loose from these associations with speaker's meaning or intention. Otherwise it becomes simply one version of the positivist's thesis that propositions of law describe decisions taken by people or institutions in the past.

Marmor gives an original and rather broad interpretation of Dworkin's anti-intentionalism.

The fact that for Dworkin law, like art, is an interpretative enterprise implies that those who participate in these practices attribute a value to them. From an interpretationist perspective, a theoretical reconstruction of an interpretative practice requires that an equilibrium be sought between the practice as we find it and its best possible justification.

For the purpose of defending the coherence thesis, the dependence of practice and theory on values has to be seen in the following way: it needs to be maintained that value judgements are sufficient to determine (at least in some cases) whether something is a legal norm, or a work of art. What has to be demonstrated is the dependence of the identification of law as such, not of its content or meaning, on value. This thesis, which Marmor calls the *constructive identification thesis*, is, as previously mentioned, a broad and demanding interpretation of Dworkin's interpretative constructivism.

Summing up: according to Marmor, if the coherence thesis maintains that law is formed by source-based law plus the set of principles and rules that are compatible with source-based law, then Dworkin, in order not to contradict this thesis, has to affirm that the very identification of law, not its content or meaning, is constructive. Dworkin's constructivism would therefore appear to be incompatible not only with the idea that interpretation consists in the retrieval of the author's intentions, but also with the idea that something can be identified as a legal norm only on condition that we can identify an individual to whom or organ to which it is possible to attribute the intention to create a legal norm. In the latter case «the author's intentions are not invoked for purposes of determining what, for instance, a text means, what its content is, so to speak. Yet its identification as a text – under a covering concept of a given kind, that is, a type of texts – relies on the intention to create a text of this kind»³⁰.

It seems to me that this distinction between intentional identification and in-

²⁹ R. Dworkin, *A Matter of Principle*, p. 148.

³⁰ A. Marmor, *I & LT*, p. 81.

tentional interpretation only makes sense on condition that we hold, as Marmor does, that the semantic meaning of a sentence exists prior to interpretative activity, and therefore that the object of the intentional identification is a norm or a rule and not only a legal provision³¹. If, instead, one believes that «interpretation is the very source of legal rules, since “it is only words that the legislature utters”, and legal texts “do not interpret themselves”»³², then the importance of intentional identification considerably decreases.

Regardless of what one thinks on this point, it is worth noticing at all events that the “law-as-interpretation thesis” does not necessarily imply the rejection of intentionalism at the level of identification of norms (or, if one prefers, of legal provisions). The possibility of reconciling the interpretative turn with a form, though minimal, of intentionalism, implies that it is considered as an evolution of the coherence thesis, rather than as a theory that has to continue to reckon with the coherence thesis. The next paragraph is devoted to this possible interpretation of the interpretative turn.

2.2. Dworkin’s Interpretative Theory of Law: an Alternative View

The exegetic exercise that consists in answering the question “what did author X really say?” is one of the most boring and useless of those that are sometimes undertaken by academicians. Nevertheless it is worth noting that it is possible – and is perhaps also more correct from a philological point of view – to reconstruct Dworkin’s interpretative turn so as to refute criticisms connected to the argument from legitimate authority.

As mentioned, the possibility of an alternative interpretation of the interpretative turn implies that it has to be shown that this turn represents a way of going beyond and implicitly withdrawing the coherence thesis.

In *TRS* the latter thesis is defended starting from a criticism of Hart’s model of rules. As we saw in paragraph 2.1.1., for Dworkin law is not made up only of rules, but also of principles, whose validity as legal principles is not referable to the rule of recognition but depends, in the last resort, on their moral correctness. The clear-cut distinction between rules and principles allows one to affirm that the early Dworkin defends the conception of law expressed by the coherence thesis: law is made up of two sharply different elements, i.e. source-based law and «those standards of political morality which inform the source-based law»³³.

Dworkin’s claim that the rule of recognition is not able to identify legal *standards* that are different from the rules is an overstating.

³¹ On the distinction between legal provision and norm, see R. Guastini, *A Sceptical View on Legal Interpretation*, in P. Comanducci and R. Guastini (eds.), *Analisi e diritto 2005. Ricerche di giurisprudenza analitica*, Giappichelli, Torino, 2006, pp. 139-144.

³² R. Guastini, *A Sceptical View on Legal Interpretation*, p. 141.

³³ J. Raz, *Authority, Law and Morality*, p. 223.

First of all, in law there are explicit principles whose validity criteria do not differ at all from the validity criteria contemplated for rules.

Moreover, also as regards implicit principles, it can be maintained, adopting an orthodox positivist perspective, that their validity is subordinated to the identification of a relationship, even of an indirect type, with the rule of recognition: an unexpressed principle is valid if it makes it possible to explain and/or to justify norms that are expressed.

In relations to the latter case it would be a mistake to dismiss Dworkin's observations. The fact is that in the majority of cases there is more than one implicit principle permitting one to explain and/or to justify expressed norms; accordingly, the choice of one implicit principle, rather than another, in the last resort implies a justification in terms of political morality in a narrow sense. In short, in the case of implicit principles, the relationship, an indirect one, with the rule of recognition is a condition, at most necessary but not sufficient, of their validity. As regards the validity of the implicit principles, «there may be more than one set of normative generalizations which can be advanced in rationalization of the rules which 'belong' to the system concerning a certain subject matter»³⁴.

If the scope of Dworkin's argument were circumscribed to implicit principles, however, legal positivism could limit itself to observing that the role of implicit principles is absolutely marginal in contemporary constitutional states and, consequently, that Dworkin's criticism too risks not being very remarkable and incisive.

It is licit to hypothesize that this reply from legal positivism has not left Dworkin entirely indifferent. In this connection it is indicative that starting from the publication of *A Matter of Principle* he abandons the clear-cut distinction between rules and principles and radicalizes his opposition to legal positivism³⁵. Originally Dworkin seems to maintain that legal positivism only affords an incomplete reconstruction of law: the analysis that Hart makes of the social thesis and of the rule of recognition is correct, but is only valid for rules and not for principles.

Subsequently, he seems to question the possibility of upholding the social thesis and the existence of the rule of recognition³⁶. According to the social thesis,

³⁴ N. MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978, pp. 234-235.

³⁵ A. Schiavello, *Diritto come integrità: incubo o nobile sogno? Saggio su Ronald Dworkin*, pp. 206-228.

³⁶ M. Jori, *L'ultimo Hart e la teoria dionisiaca del diritto: una discussione mancata*, "Ragion Pratica", 21, 2003, pp. 405-434, in particular p. 407, note 5. This change in Dworkin's theory of law is highlighted by Marmor himself in an essay written a few years ago: «At least as early as the mid-1980s, when *Law's Empire* was published, it was clear enough that Dworkin was no longer willing to assume that there are any conventions about the recognition of the law, even with respect to the most limited, standard, and humdrum instances that we would call "easy cases"» [A. Marmor, *Legal Conventionalism*, in J. L. Coleman, (edited by), *Hart's Postscript. Essays on the Postscript to The Concept of Law*, Oxford University Press, Oxford, 2001, pp. 193-217, the quotation is on p. 198].

identification of law depends exclusively on given social facts, particularly on the convergent behaviours and attitudes of qualified members (expressly, judges) of the reference community. Nevertheless, participants' agreement on what is and what is not law – an agreement that, precisely, is manifested through behaviours and convergent attitudes – underdetermines the norms effectively accepted by each participant. The same recognition criteria are particularly underdetermined by the behaviours and convergent attitudes of participants and in particular of judges.

These theses have been expressed by Dworkin with greater and greater clarity; in *Justice in Robes*, for instance, he observes that «the idea of law as a set of discrete standards, which we might in principle individuate and count, seems ... a scholastic fiction»³⁷. This implies that the latter Dworkin no longer considers as important the distinction between source-based law and the remaining part of law that is not source-based or the distinction between intentional and constructive identification.

It is legitimate in general to maintain that the interpretative turn is a philosophical and epistemological thesis that has much broader scope than the coherence thesis and that, also considering its greater breadth, it is not in the least challenged even if it is shown that the identification of law implies the existence of an “intention to create a text of this kind”.

In a recent essay devoted to Hart's *Postscript*, Dworkin re-emphasises that the characteristic of interpretative concepts like law – concepts that he considers a *tertium genus* with respect to the criterial and natural kinds concepts – is that «their descriptive sense is contested, and the contest turns on which assignment of a descriptive sense best captures or realizes that value»³⁸. This notion, which it is not necessary to go into or to submit to a critical analysis here, certainly expresses a version of the constructive interpretation, but frankly it seems to have little or nothing to do with the notion of constructive identification.

In my opinion this conclusion can be further strengthened by briefly considering Marmor's reflections on the role of intentional identification in the artistic sphere.

2.2.1. *Intentional Identification and the Objects of Art: a Detour*

In working out his law-as-interpretation thesis Dworkin often has recourse to the analogy between law and art. This is the reason why Marmor addresses the issue of the role of intentional identification in the artistic sphere. In brief, he is

³⁷ R. Dworkin, *Justice in Robes*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2006, p. 4. There, moreover, Dworkin explicitly recognises (p. 264) that he favoured this erroneous vision of law through the distinction between rules and principles.

³⁸ R. Dworkin, *Hart's Postscript and the Point of Political Philosophy* (2004), now in Id., *Justice in Robes*, pp. 140-186; the quotation is on p. 150.

convinced of the fact that showing the impossibility of constructive identification in relation to works of art does not imply that the same applies to law; however, the defence of intentional identification in the artistic sphere is a useful exercise for the purpose of identifying the type of argument that will be used to show that the same impossibility applies in the legal sphere.

Actually, precisely as regards the issue of intentionalism, law and art present more differences than analogies. Specifically, if a work of art in most cases is the product of an individual author, by contrast a law, at least in contemporary legal systems, is the product of a collective author and this at one and the same time tones down and considerably complicates the notion of “the author’s intention” in the legal sphere.

This difference between law and art is very clear to Dworkin, who, speaking of the legislator’s intention, observes³⁹:

It is often problematical what a particular congressman or delegate to a constitutional convention intended in voting for a particular constitutional provision, especially one of the vaguer provisions, like the equal protection or due process clause. A particular delegate might have had no intention at all on a certain issue, or his intention might have been indeterminate. The difficulties obviously increase when we try to identify the intention of Congress or a constitutional convention as a whole, because that is a matter of combining individual intentions into some overall group intention. Even when each congressman or delegate has a determinate and ascertainable intention, the intention of the group might still be indeterminate, because there may not be enough delegates holding any particular intention to make it the intention of the institution as a whole.

Possibly this characteristic of law does not prevent one from establishing a parallel between the impossibility of constructive identification for artistic objects and the same impossibility for law, though Marmor should have gone deeper into this point.

For the rest, Marmor’s observations on the role of intentional identifications in the artistic sphere are reasonable. In brief, according to Marmor, there are two essential characteristics of what we consider a work of art.

First of all it is an artefact, something that has been created: «we do not identify trees, or landscapes, or even marvellous sunsets on bright summer evenings, as works of art (except of course, in a figurative form of speech, or when attributing the object’s creation to a supernatural entity)»⁴⁰.

Secondly, it has to be an artefact that has been produced with the explicit intention of creating a work of art. The intention plays a conceptual role in the iden-

³⁹ R. Dworkin, *A Matter of Principle*, p. 38. Analogous difficulties are also perceived by Marmor (see *I & LT*, pp. 119-139), though he does not discuss their possible relevance to the specific theme of intentional identification in the artistic and legal spheres.

⁴⁰ A. Marmor, *I & LT*, p. 82.

tification of works of art for two reasons: the first is that it allows us to distinguish between works of art and other aesthetic artefacts, and the second is that it allows us to distinguish between bad works of art and artefacts that are not works of art⁴¹.

Leaving aside some questions of detail, the question to ask oneself is whether Dworkin's theses on constructive interpretation in the artistic sphere conflict with the thesis that the existence of a work of art implies an intention on the author's part to create a work of art. The answer to this question is undoubtedly negative; indeed, Dworkin exploits the notion of intentional identification against upholders of intentional interpretation in the artistic sphere⁴²:

We can, perhaps, isolate the full set of interpretive beliefs an author has at a particular moment ... and solemnly declare that these beliefs, in their full concreteness, fix what the novel is or means ... But even if we (wrongly) call this particular set of beliefs "intentions", we are, in choosing them, ignoring another kind or level of intention, which is the intention to create a work whose nature or meaning is not fixed in this way, because it is a work of art. That is why the author's intention school, as I understand it, makes the value of a work of art turn to a narrow and constrained view of the intentions of the author.

In conclusion, Marmor's reflections on intentional identifications in the artistic sphere do not seem to create any difficulty for the constructive identification proposed by Dworkin.

2.3. *Marmor's Argument, First Step: a Summing up*

In this section of the essay I have dealt with the first passage in Marmor's argument against the conception of constructive interpretation proposed by Dworkin. Marmor maintains that Dworkin cannot accept intentional identification in the legal sphere for reasons of internal consistency in his theory of law. In the preceding paragraphs I have shown that this conclusion is founded on a questionable reconstruction of Dworkin's thought. It is possible and perhaps also useful to reconstruct Dworkin's thought in such a way as to make this conclusion false. In other words, it can be maintained that Dworkin's interpretative theory is compatible with the thesis that identification of law necessarily takes place on intentionalist bases. This possibility implies that the "law-as-interpretation" thesis is an evo-

⁴¹ Surprisingly, Marmor recognises that «this much will be conceded by Dworkin» [*I & LT*, p. 85]. However, he believes that Dworkin is wrong in any case in that he maintains that «identification in art, as in other interpretative enterprises, is basically a matter of agreement, of the consensus which happens to prevail at the pre-interpretative stage» [*I & LT*, id.]. Although I cannot dwell on it here, I have serious doubts about the possibility of a non-consensual foundation of a notion like art.

⁴² R. Dworkin, *A Matter of Principle*, pp. 157-158.

lution of the coherence thesis and not a further thesis that has to continue to reckon with the latter. If it were so, it would not even be necessary to continue with the second and decisive passage in the argument from legitimate authority.

Nevertheless, considering that, *pace* Dworkin and his aesthetic hypothesis, I have serious doubts about the possibility of identifying in an unambiguous way the best interpretation of something like a work of art or also a philosophy text, I prefer to assume as correct the reconstruction of Dworkin's thought proposed by Marmor and therefore to continue with the second passage in his argument. As the reader will remember, Marmor maintains that Raz's conception of legitimate authority is able to show that it is not possible to escape the intentional identification of law. If we assume, as Marmor does, that Dworkin's theory of law cannot eschew acceptance of the constructive model of identification, we have demonstrated the inadequacy of the "law-as-interpretation" thesis.

In the next section of this essay I will introduce some arguments in support of the thesis that the defence of intentional identification in the legal sphere cannot be founded upon Raz's conception of legitimate authority. If the arguments that I put forward are convincing, it will be necessary to conclude that, even if the interpretation of Dworkin's thought proposed by Marmor is accepted, we are still a long way from being able to proclaim the failure of the interpretative turn.

3. *Intentional Identification and Raz's Conception of Legitimate Authority*

3.1. *An Introductory Distinction: "Static" and "Dynamic" Theories of Law*

One of the "big divisions" that can be applied to theories of law is the one between theories of law tending to be *nomodynamic* and theories of law tending to be *nomostatic*⁴³.

Nomodynamic theories of law identify the salient characteristic of law in the phenomenon of authority. The aspects of the legal phenomenon that they consider concern «the institution of powers of production, elimination and application of norms and legal actions, through the specification of conditions that individuals or groups of individuals have to satisfy if they are to be able to perform such functions»⁴⁴ and the conditions of performance of such functions, namely the procedures that allow one to produce, eliminate or apply norms and legal actions. An

⁴³ I borrow this distinction from B. Celano, *Giustizia procedurale pura e teoria del diritto*, "Quaderni della Rivista internazionale di filosofia del diritto", 3 – *Giustizia e procedure. Dinamiche di legittimazione tra stato e società internazionale* (ed. M. Basciu), proceedings of the 23rd National Congress of the Italian Society of Legal and Political Philosophy (Trieste, 27-30 September 2000), Milano, Giuffrè, 2002, pp. 101-142, in particular pp. 101-102.

⁴⁴ *Ibid.*, p. 101.

outstanding example of a *nomodynamic* theory of law is the pure doctrine of law of Hans Kelsen, according to whom law is «a normative arrangement that regulates its own production»⁴⁵. Raz's theory of law, identifying the peculiar function of law in the authoritative resolution of controversies, is obviously a *nomodynamic* theory.

Nomostatic theories consider law as a system of norms derivable from some general principles of justice, or as a social practice that can only be understood in the light of the principles and the values around which the practice is constituted. In other words, *nomostatic* theories replace Kelsen's image of law as an "arrangement that coercively acts on human behaviour" with an image of law as a "community of principle", whose aim is the organization of a "true associative community" founded upon values and principles that are equitable, that is to say shareable by all its members. Traditional natural law theory, in its different versions, linking the validity of law to justice or moral correctness, is undoubtedly the most outstanding and significant example of a *nomostatic* theory of law. Dworkin's anti-positivism is a clear expression of a conception of law of this type.

Any dialogue between these two types of theories is obviously very complicated; the principal difficulty is referable to the fact that they look on law from different perspectives, so that, rather than comparable, alternative and incompatible visions of law, they seem to be in a sense complementary and axiologically incommensurable ones. Roger Shiner therefore seems to make a very reasonable observation when he says that «the continuous history of law in practice is the history of a dynamic tension between two pairs of poles. The first pair is certainty and flexibility, and the second is procedure or (non-Aristotelian) form and substance»⁴⁶.

This introductory observation makes it possible to specify that here there is no intention of taking a stand in favour of either of the two types of theory, and indeed that the very idea of a choice in favour of *nomodynamic* theories against *nomostatic* ones or vice versa underestimates the problem of the incommensurability between them.

For example, Dworkin's objection that Raz bases his version of legal positivism upon such an abstract notion as authority⁴⁷ in my opinion is a clear manifesta-

⁴⁵ *Ibid.*, pp. 101-102.

⁴⁶ R. A. Shiner, *Norm and Nature. The Movements of Legal Thought*, Clarendon Press, Oxford, 1992, p. 325.

⁴⁷ Dworkin observes: «It is important, practically and politically, to determine what judges may and must do in the exercise of their responsibility to enforce the law, and to distinguish that from other judicial acts and decisions that must rely on a different and more controversial kind of justification. *It would be bizarre for such a crucial practical distinction to turn on an abstract analysis of the concept of authority*» [R. Dworkin, *Thirty Years on* (2002), now in *Id.*, *Justice in Robes*, pp. 187-222; the quotation is on p. 199, emphasis added].

tion of a difference of perspective that to some extent prevents fertile dialogue right from the start.

Hence the criticism that in the next sections I will make of Raz's conception of legitimate authority tends to show the internal limits of this conception and consequently of exclusive legal positivism [see 2.1.1.]. Indeed, as Marmor correctly notes, «to maintain the constructive identification thesis one must either show what is wrong with Raz's analysis of authority, or show why legal norms need not be authoritative directives»⁴⁸.

The inadequacy of Raz's conception of legal authority therefore implies the impossibility of defending intentional identification in the legal sphere starting from the service conception of authority, which will be briefly presented in the next paragraph.

3.2. The "Service Conception" of Authority: a Brief Presentation

According to Raz, there are three conditions that allow one to affirm that a *de facto* authority is also a legitimate authority.

Firstly, there is the "condition of dependence" (*dependence thesis*): the decisions or directives issued by the authority must depend on – or at all events must imply – the reasons that would have guided the conduct of individuals in the absence of an intervention by the authority.

Secondly, there is the "condition of exclusion or emptying" (*pre-emption thesis*): the decisions or the directives issued by the authority are not added to but take the place of the reasons that guided the conduct of individuals in the absence of an intervention by the authority. In other words, decisions by the authority are "exclusionary reasons"; according to a telling expression used by Raz, they are «reasons not to act for certain reasons»⁴⁹.

Lastly, there is the decisive condition, that is to say the *normal justification thesis*: in order to affirm that an individual or an institution exerts legitimate authority it is necessary to show that his/her/its directives – the ones that Raz calls exclusionary reasons – allow those that are subject to the authority to let themselves be guided by reasons for the action that are different from the directives of the authority – or, more exactly, by the "first level reasons" – better than could happen if they ignored the directives of the authority. In short: an authority is legitimate if it can be supposed that the exclusionary reasons represent a balancing of the first level reasons that is more correct, more thorough or at any rate better than what each could accomplish by himself or herself.

The typical case of legitimate authority is represented, according to Raz, by the situation in which an arbitrator is called on to settle a controversy.

⁴⁸ A. Marmor, *I & LT*, p. 88.

⁴⁹ J. Raz, *Practical Reason and Norms (with a new postscript)*, Oxford, Oxford University Press, 1990, p. 183.

First of all, the arbitrational decisions are based on the same reasons that would be applied to the matter to be settled if the decision had not been submitted to an arbitrator (dependence thesis). The task of the arbitrator is therefore to establish “what the parties have to do according to right reason”.

Furthermore, the decision of the arbitrator replaces the first level reasons. If two partners, failing after long reflections and discussions to reach an agreement on how to reinvest the profits produced by the company, agree to submit this decision to an expert on financial markets, then the expert’s decision will be what the two entrepreneurs will have to do (exclusion or emptying reasons).

Lastly, in the case of an arbitrational judgment the condition of justification is, to some extent, *in re ipsa*: the very fact that the parties have agreed to entrust the settlement of the controversy to an arbitrator confers at least *prima facie* legitimacy on the arbitrator’s decision. In other words, it is because the parties have agreed to have the controversy settled by a third party that we can state that the latter’s decision constitutes a justification for action replacing any action prompted by first level reasons.

However, agreement between the parties does not entirely replace the normal condition of justification of legitimate authority; more exactly, this agreement is an indicator of the fact that the condition of justification has effectively been satisfied. Hence an authority is legitimate, according to Raz, when the probabilities that its decision is the “correct solution” to a matter are greater than the probabilities that the correct solution is identified setting aside an appeal to an authority.

In the case of an arbitrational judgment, the mere fact that the litigants voluntarily entrust the settlement of the controversy to an arbitrator implies that they believe that the arbitrator can settle the dispute better than they themselves could.

We are ready, at this point, to face the central issue, which requires us to reflect on what, in relation to law, the role of this analysis of authority is.

3.3. The “Service Conception” of Authority and Law

In the essay *Authority, Law and Morality* Raz writes: «I will assume that necessarily law, every legal system which is in force anywhere, has *de facto* authority. That entails that law either claims that it possesses legitimate authority or is held to possess it, or both»⁵⁰.

The fact that law lays claim to legitimacy evidently does not imply that the authority exerted by law is effectively legitimate.

Nevertheless, according to Raz this banal and obvious observation must not induce one to believe it is possible to identify the salient characteristics of law by putting in brackets, or at any rate leaving in the background, the question of the legitimacy of its authority. According to Raz, indeed, law could not lay any claim

⁵⁰ J. Raz, *Authority, Law and Morality*, p. 215.

to legitimacy if it did not possess at least some of the major characteristics of legitimate authority: law could not sincerely claim to exert legitimate authority if it did not possess the fundamental requisites of legitimate authority. In other words, law must at least potentially be in a condition allowing it to exert legitimate authority. Starting from this claim, Raz concludes that a theory of law necessarily implies a conception of legitimate authority.

Summing up: law always claims to be a legitimate authority. This does not mean that the authority of every legal system is effectively legitimate. The effective legitimacy of a legal authority must be appraised in each single case through the normal condition of justification. Nevertheless, every legal system must be capable, in principle, of being the type of institution whose authority can be legitimate or otherwise. In other words, law must be able, in principle, to have authority. As Raz puts it, it makes sense to wonder whether Nazi law was an expression of a legitimate authority, while it would be truly bizarre to wonder whether trees can have authority over human beings. The fact is that trees are not the kind of thing that in principle can exercise authority.

The salient issue is therefore identifying the requisites or characteristics that allow one to affirm that the claim of law, of every legal system, to be a legitimate authority a) makes sense or is comprehensible and b) exhibits *prima facie* plausibility.

According to Raz there are two necessary requisites.

Firstly, «a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave»⁵¹.

Secondly, «it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which directive purports to adjudicate»⁵². The fact is that it is only in this case that the directives of authority can replace first level reasons.

For Raz, the latter (pre-)condition of legitimacy of an authority in relation to law implies acceptance of the *sources thesis* [see 2.1.1.]; consequently, exclusive legal positivism is the only conception of law that is compatible with the “service conception” of authority.

3.4. *The “Service Conception” of Authority and Intentional Identification in Law*

Raz's conception of legitimate authority, from which he derives his version of legal positivism, is very controversial. The most frequent objection made to it is linked to the idea that authoritative directives are exclusionary reasons. In several quarters it is observed that recognition of the legitimacy of an authority does not necessarily imply that the directives that it emanates may not sometimes be balanced with other reasons⁵³.

⁵¹ *Ibid.*, p. 218.

⁵² *Ibid.*

⁵³ See, for example, J. L. Coleman, *The Practice of Principle. In Defence of a Pragmatist*

Marmor, however, correctly observes that for the purpose of defending intentional identification it is possible to get round the issue relating to the nature, exclusionary or otherwise, of authoritative directives. One can concede to Raz's critics that the notion of exclusionary reason is exaggerated without entirely being forced to abandon the "service conception" of authority. To demonstrate that constructive identification is not appropriate to legal praxis it is sufficient to save the two pre-conditions that according to Raz render plausible the claim of law to be a legitimate authority. The second pre-condition, particularly, requires that authoritative directives be identifiable without recourse to first level reasons. This, Marmor correctly observes, «runs counter to the constructive identification thesis. According to the latter, the identification of law depends, partly, on considerations about what the law ought to be, namely, on considerations which the law is there to settle»⁵⁴.

Hence in order to defend constructive identification from the argument from legitimate authority it is sufficient to demonstrate that legal directives, norms, *cannot* be identified without having recourse to first level reasons.

The factor that most challenges the possibility of identifying legal norms without resorting to first level reasons is the constitutive indeterminacy of legal language. As Frederick Schauer observes, the service conception of authority «is also incomplete insofar as it does not address the issue of the generality of exclusionary reasons»⁵⁵.

Regarding this problem, here it is sufficient to go back to Hart's observations on open texture. According to Hart, legal language, like all natural languages, contains – and it is well that it should contain, in order to reconcile the demands of certainty with those of flexibility – general terms which, being structurally vague, make legal directives partially indeterminate.

Now, a vague directive cannot entirely "replace" evaluations by those people that it addresses, and therefore it does not seem to be conceptually compatible with the second pre-condition of the service conception of authority. For instance, the directive "it is forbidden to take vehicles into the park" does not avoid an ambulance driver called to assist an injured person in the park from balancing con-

Approach to Legal Theory, Oxford University Press, Oxford, 2001, pp. 120-133; R. Dworkin, *Law's Empire*, pp. 429-430; Id., *Justice in Robes*, pp. 198-211; N. MacCormick, *Ethical Positivism and the Practical Force of Rules*, in T. D. Campbell, J. D. Goldsworthy (ed. by), *Judicial Power, Democracy and Legal Positivism*, Ashgate, Aldershot, 2000, pp. 37-57, in particular pp. 50-51; S. R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory* (1989), partly reproduced in T. D. Campbell (ed. by), *Legal Positivism*, pp. 129-151; F. Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford, 1991, pp. 88-93; W. Waluchow, *Inclusive Legal Positivism*, Clarendon Press, Oxford, 1993, pp. 129-140.

⁵⁴ A. Marmor, *I & LT*, p. 88.

⁵⁵ F. Schauer, *Playing by the Rules*, p. 92.

flicting demands and therefore using discretion. If to this we add that, unlike what Hart maintains, the presence of general terms in norms does not involve only a distinction between easy cases and difficult cases, but also the impossibility of making a clear-cut distinction between the former and the latter, it has to be concluded that the presence of general terms in legal norms is radically incompatible with the conception of authority as service.

3.5. *The “Service Conception” of Authority: a Double Effort of Defence*

The indeterminacy of legal language seems to represent an insurmountable obstacle for the service conception of authority. Nonetheless, one must avoid drawing reassuring conclusions too soon. In this connection, Raz is fully aware of the issue relating to the indeterminacy of directives and has repeatedly emphasised that it does not represent a danger either for his conception of authority or for his version of legal positivism.

In *Authority, Law and Morality*, he even states that this issue derives from a banal misunderstanding of his positions⁵⁶:

the sources thesis does not rest on an assumption that law cannot be controversial. Nor does it entail that conclusion. Its claim that the existence and content of the law is a matter of social fact which can be established without resort to moral argument does not presuppose nor does it entail the false proposition that all factual matters are non-controversial, nor the equally false view that all moral propositions are controversial. The sources thesis is based on the mediating role of the law. It is true that the law fails in that role if it is not, in general, easier to establish and less controversial than the underlying considerations it reflects.

In the course of time, in support of this thesis Raz has put forward two separate arguments that it is useful to analyze in detail. It can be anticipated that neither of these two arguments succeeds in sheltering Raz’s conception of law from the objection of indeterminacy.

3.5.1. *First Argument: Narrow and Wide Sources Thesis*

The argument originally advanced by Raz in support of the thesis that the indeterminacy of legal directives does not prevent the latter from being considered exclusionary reasons is based on the distinction between a “narrow sources thesis” and a “wide sources thesis”.

In the first meaning, the sources thesis only concerns “pure legal statements”, that is to say statements on the content of law regardless of any reference to spe-

⁵⁶ J. Raz, *Authority, Law and Morality*, p. 234.

cific facts. In the second meaning, it also concerns “applied legal statements”, that is to say statements relating to how law has to be seen in relation to a concrete case.

For instance, if a legal norm exists that forbids wage discriminations in the workplace, the utterance that affirms that workplace discriminations are forbidden is a “pure legal statement”. If instead it is stated that the norm in question prevents male nurses from being paid less than female nurses, then insofar as this wage difference constitutes “wage discrimination” we are looking at an “applied legal statement”⁵⁷.

Starting from this distinction, Raz specifies that “the fact that law claims authority supports the narrow sources thesis because it leads to a conception of law as playing a mediating role between ultimate reasons and people’s decisions and actions”⁵⁸.

The “indeterminacy argument” would therefore seem to derive from a misunderstanding; the fact is that it concerns “applied legal statements”, while, Raz maintains, «all the arguments so far concern the narrow sources thesis only»⁵⁹, i.e. “pure legal statements”.

But in effect which are “the arguments so far put forward”? In brief they are the following: a) law claims to exert legitimate authority; b) therefore law must be able, in principle, to have authority; c) in the light of the service conception of authority, this implies *i*) that legal directives can be considered as someone’s point of view on how those that are subject to them are to behave and *ii*) that such directives can be identified without relying on the reasons and considerations in relation to which they propose to take up a stand; d) finally; e) implies the sources thesis.

In other words, Raz justifies the sources thesis starting from the observation that individuals can only derive advantages from the directives of an authority on condition that it is possible to determine their existence and their content without there being any need to raise those very issues that the authority proposes to settle.

Therefore it is the service conception of authority that justifies the sources thesis. The “service” provided by an authority consists in allowing individuals to act on the basis of a decision rather than on the basis of their own considerations. Nevertheless, if the sources thesis is interpreted in the more circumscribed version, it is not possible to establish how one has to act – that is to say, it is not possible to obtain “an applied legal statement” – without having recourse precisely to those moral considerations that should have been supplanted by the authoritative decision. To state the situation even more clearly, if the sources thesis only concerns “pure legal statements”, one fails to understand what the mediation of law between ultimate reasons on one side and people’s decisions and actions on the other would consist in.

⁵⁷ I borrow this example from E. Mitrophanous, *Soft Positivism*, “Oxford Journal of Legal Studies”, 17, 1997, pp. 621-641.

⁵⁸ J. Raz, *Authority, Law and Morality*, p. 231.

⁵⁹ *Ibid.*, p. 234.

3.5.2. *Second Argument: the Autonomy of Legal Reasoning*

In the essay *On the Autonomy of Legal Reasoning*⁶⁰, Raz adopts a strategy that consists in sharply distinguishing between different aspects of legal reasoning. In particular, he suggests keeping separate “reasoning about law”, whose function is to establish what law is in relation to a given subject, from “reasoning according to law”, whose function is to determine «how, according to law, courts should decide cases»⁶¹. Raz also clarifies, on one side, that “reasoning according to law” is not to be confused with the problem – a strictly moral one – of establishing how a judicial case has to be decided “all things considered”; sometimes, indeed, «courts should decide cases not according to law but against it»⁶². On the other hand, he specifies that “reasoning according to law” does not necessarily coincide with “reasoning about the law” since «the courts may have legal discretion to modify the law, supplement it, or to use equitable jurisdiction diverted to from it, or to supplement it where it is unsettled»⁶³.

Starting from this general reconstruction of legal reasoning, Raz affirms that “reasoning about law” is guided by the sources thesis, so that it can be considered a type of autonomous reasoning with respect to moral reasoning. By contrast, “reasoning according to law” is heteronomous or, more exactly, can be heteronomous, when it is law itself, identified through the sources thesis, that attributes to judges the discretion to deviate from the norms if they believe that there are valid moral reasons for making this deviation. In this connection it is worth noting that Raz holds «that courts have discretion in every case, in so-called easy cases no less than in so-called hard ones. In every case, e.g., the court has discretion to distinguish a binding precedent, and in many it has the discretion to overrule it»⁶⁴.

If this is the way things are, it seems that Raz once again inexorably comes up against the difficulty that I have highlighted in relation to the distinction between pure and applied legal statements. The fact is that if judges always have the power to exercise discretion, then law only has a *prima facie* force in relation to them, and therefore, in light of the service conception of authority, one cannot claim to have authority over judges. Then, seeing that it is the service conception of authority that justifies the sources thesis, it would seem that even the argumentative line adopted by Raz in *On the Autonomy of Legal Reasoning* is not able to justify the *sources thesis* or, in other words, that in this case too Raz’s answer to the indeterminacy argument is unsatisfactory.

⁶⁰ J. Raz, *On the Autonomy of Legal Reasoning*, in Id., *Ethics in the Public Domain*, pp. 326-340.

⁶¹ *Ibid.*, p. 328.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 328, note 1.

⁶⁴ J. Raz, *Facing Up: A Reply*, “Southern California Law Review”, 62, 1989, pp. 1153-1235, the quotation is on p. 1204.

There is another point that needs going into before declaring that this second strategy adopted by Raz is also unsatisfactory. So far, in effect, I have only shown that law cannot exercise authority over judges. This does not necessarily mean that law cannot be authoritative towards ordinary citizens. Raz himself, besides, is prepared to grant that the “exclusion condition” exclusively concerns citizens⁶⁵. Hence an adequate answer to the arguments put forward by Raz requires showing that «if law is not authoritative for judges it is not authoritative for anybody»⁶⁶.

The latter affirmation can easily be defended starting from Raz’s very conception of legal interpretation. Raz, and to some extent Marmor, defend an intentionalist conception of the interpretation of law⁶⁷. According to Raz this does not mean that the interpreter has to seek out what the legislators “had in mind” when they approved a legislative document. The task of the interpreter consists, rather, in identifying what Raz calls “minimal intention”, which comes down to the presumption that those who vote for a norm “understand” it in the way normative texts are normally understood within the legal culture of reference.

Now, the normal meaning of normative texts evidently depends on interpretative conventions (as well as on semantic conventions); not by chance, Raz recognizes that «in the cycle of convention and intention, convention comes first»⁶⁸. In turn, interpretative conventions are determined, first of all, by judges and, as Raz also recognizes, at least in contemporary western legal systems, these conventions, in addition to attributing only *prima facie* force or authority to law, make it possible, always or almost always, to attribute different meanings to legal provisions. Hence the minimal intention of the legislator includes the conviction that law produced by him also has *prima facie* force towards citizens and moreover the conviction that the latter cannot identify legal norms without resorting to first level reasons. This implies that Raz’s conception of legitimate authority is not even applied to citizens. For our purposes, this means that the argument of legitimate authority is not able to defend the thesis that law must necessarily be identified intentionally.

3.6. Marmor’s Argument, Second Step: a Summing up

In conclusion, the limits of Marmor’s second argument against constructive identification are the same as those of the service conception of authority. If Raz’s

⁶⁵ J. Raz, *Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment*, “Legal Theory” 4, 1998, pp. 1-20, in particular pp. 17-18.

⁶⁶ Cf. J. C. Bayón, *Derecho, convencionalismo y controversia*, in P. E. Navarro, M. C. Redondo (eds.), *La relevancia del derecho. Ensayos de filosofía jurídica, moral y política*, Barcelona, Gedisa, 2002, pp. 57-92; the quotation is on p. 68.

⁶⁷ J. Raz, *Intention in Interpretation*, in R. P. George (ed.), *The Autonomy of Law. Essays on Legal Positivism*, Clarendon Press, Oxford, 1996, pp. 249-286.

⁶⁸ *Ibid.*, p. 269.

conception of authority does not work in relation to law, then it is not possible to defend intentional identification starting from this conception of authority.

The defects of the service conception of authority that I have highlighted are structural and not amendable. Extremely briefly, what I have maintained is that the role of mediation between reasons and behaviours covered by law does not imply that law can be identified without resorting to first level reasons. The arguments put forward by Raz against this conclusion do not prove convincing. On the contrary, it is precisely some theses of Raz's on the interpretation of law that allow one to affirm, probably against the author's own intention, that the exercise of a large amount of discretion is a central characteristic of interpretation in the legal sphere. If this is the way things are, Dworkin's interpretative turn, in the version proposed by Marmor too, comes unscathed through the argument from legitimate authority.