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Law, Authority and Political Pressure\*

“I draw pictures, but I don’t idealize”  
Andreas Gursky\*\*

“one should not distort the picture by ignoring the actual politics”  
Andrei Marmor [ILT, p. 92]

1. *Introduction*

What kind of phenomenon, practice, or game, is law? There are, at least, two main answers to this question:

- a) law is basically to follow the language (or words) of certain persons which satisfy certain conditions;
- b) law is basically to follow certain values, irrespective of whether someone has previously said so or not.

There is a way to read a) that is opposite to b). Marmor’s enterprise in *Interpretation and Legal Theory* [henceforth ILT] is to defend one version of a), rejecting a particular version of b) present in Dworkin’s work.

Marmor’s main idea could be summarized in the following statements:

*Literal meaning:*

- (a) a (legal) text could be clear;
- (b) if something is a clear (legal) text, we can understand its meaning (i.e. it has literal meaning);
- (c) in order (a) and (b) to be possible it is necessary (and perhaps sufficient) that speakers have an appropriate knowledge of a complex set of rules of language and possess a certain background knowledge<sup>1</sup>;
- (d) if (a)-(c) fail to obtain (i.e. a text is not clear), it is necessary to interpret it;

\* I have received detailed and helpful comments to a previous version of this paper from Federico Arena, Cristina Redondo, Rodrigo Sanchez Brigido and Scott Shapiro.

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<sup>1</sup> Of course, there are theories according to which this background knowledge amounts to a background of concepts or classificatory capacities, and this background of concepts functions like (or is) a system of rules of language. For those theories, the second part of (c), that is, *possession of a background knowledge*, is redundant.

*Interpretation:*

(e) the correct way to interpret a text is intimately bound to the nature of the text, that is: it depends on which kind the text is a kind of;

*Intentionalist identification thesis:*

(f) legal texts (like works of art) belong to a special kind. A kind in which, in order to advance an identification of the text, you cannot say without contradiction [ILT, pp. 79, 82, 83, 87, 93]:

(i) “that is an A (legal text, work of art) but there is no author”, or

(ii) “that is an A (legal text, work of art) but it is totally irrelevant to know if there was an author”, or

(iii) “that is an A (legal text, work of art), there is an author but it is totally irrelevant to know her intention”<sup>2</sup>;

(g) (f) is a thesis about what enables to identify a text as such, not about what enables to identify the content of a text as such [ILT, pp. 81, 93]<sup>3</sup>;

(h) law is basically a set of texts where (a)-(c) obtains, and if not, (d)-(g) is the case;

(i) Dworkin’s coherence thesis rejects (h). A norm can be a legal norm even when it has never been created, or in fact previously contemplated, as such [ILT, p. 79];

(j) Dworkin’s coherence thesis is closely tied to the constructive identification thesis;

(k) the constructive identification thesis affirms that legal practice is an interpretive enterprise: the participants presume that the practice has a value, and the requirements of the practice are taken to be sensitive to this value [ILT, p. 80]<sup>4</sup>.

Marmor intends to demonstrate the plausibility of (a)-(h) and, consequently, rejects (i)-(k).

## 2. *Art and Law*

The main purpose pursued by Marmor in analyzing the idea of a work of art is to show that a work of art is the kind of thing in which you cannot say without

<sup>2</sup> (f) does not apply in “exceptional or unusual circumstances”. It functions as a *criterion* [ILT, p. 84].

<sup>3</sup> “A particular text’s identification as a novel, for instance, on the basis of the assumption that it has been created as such, does not entail that its content ought to be determined by considerations about what its author had in mind” [ILT, p. 81].

<sup>4</sup> For Dworkin, constructive interpretation is the process of “imposing a purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong”. Dworkin, R. *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986) p. 52.

contradiction, in order to *identify* that object, “it is a work of art but it was not conceived at all in that way by his author, there was no author” or logically equivalent statements (see (f) above). Eventually the same remarks would work for law. This is an ancient idea: art is an *artifact* (that is, it is made by persons, agents, etc.) in the way that nature is not. A work of art could try to represent nature, to stand for nature (or for something else), but it is not nature at all. Conversely, nature (facts, causal relations, physical properties etc.) does not stand for given objects, and does not represent anything.<sup>5</sup> This nature’s facts are the objects that could be represented by signs (for example in a picture), but alone they do not *tend to* represent anything. They do not stand for other things. They are things in themselves (and not more than that). I can say that this tree in front of me is a “nature’s work of art” in a metaphorical sense only. As far as what is taken to be a work of art (a sign that stands for something else) must have this general capacity to represent or stand for something else (in the broad sense), it must be so conceived by its author. Simple facts of nature (a stone) have no intentionality at all. Agents have. If you say “that is a work of art” but (f) is irrelevant, you cannot distinguish between that sample (paint splash, mark on a paper, etc.) as a nature’s fact, and that as an *arti-fact*. It is the discovery of an intention which enables us to add the *linguistic particle* “arti” to some *facts*. If that is accepted, we have to solve a further problem, namely how to distinguish between different artifacts. The only solution is to try to find the author’s intention when he created it. Works of art are artistic artifacts, because someone intended them to be so. The same goes for law<sup>6</sup>.

Marmor’s point is the following: there are certain things that are artifacts. If

<sup>5</sup> I’m using “represent” and “stands for” in a broad sense. In the sense that a sign refers to something else. I’m not saying that just figurative art could be a work of art, but instead that there is a way in which a “paint-splash”, if it is just nothing but an accidental “paint-splash” is not a work of art. The same “paint-splash” could be a work of art, although is not figurative (i.e. is not representative in a narrower sense) if it was intended to stand for something else in a way that the accidental “paint-splash” cannot.

<sup>6</sup> It is difficult to see what justifies concentrating on the idea of a work of art in order to prove the *Intentionalist identification thesis* (f). It would be sufficient to say that law seems to be a language artifact (that is Marmor’s final goal) and we cannot talk meaningfully nor without contradiction about a language if we don’t prove that is reasonable to think that there was an intention (agent’s intention) to utter that sample of language as such. That is the classical approach to this question exemplified in Putnam’s example of an ant who (or “which”) is crawling on a patch of sand and whose lines ends up looking like a recognizable caricature of Winston Churchill. Putnam, H. *Reason, Truth and History* (Cambridge, London, New York: Cambridge University Press, 1981) pp. 1-21. Is that a *picture* of Winston Churchill or merely *resembles*, by chance, Winston Churchill? Is that an *arti-fact* (a language) or is just a fact? In order to say the former, but not just the latter, it is necessary to presuppose certain features in the agent that the ant fails to have. I don’t want to pressure Marmor on this point, because the natural answer could be that it is just a question of strategies. About strategies could be pointless to argue.

they are artifacts you need to presuppose a *specific* intention in order to affirm *that* without contradiction and (which is more important) in order to identify artifacts as such. Law is one of those. I think this is Marmor's main point in Chapter 6 and, perhaps, Marmor's main idea in *ILT*. In a nutshell:

- a) Law is a matter of language,
- b) Language is a matter of intentionality,
- c) Intentionality is a matter of agents,
- d) Let's look at the relevant agents, that is *legal agents* or *legal authorities* and the appropriate relations between their words, their intentions and the world they refer to.

(a)-(d) is Marmor's main idea and, I will try to show, his main problem.

### 3. *Authority vs. Constructive Identification in Law*

In order to understand Marmor's enterprise I think it is useful to quote the following passage:

“Only certain kinds of things can be considered as possessing authority, and only that which can be authoritative can either possess or fail to possess legitimate authority. Since law claims to possess legitimate authority, although it can fail to possess it, it must have the requisite features of what might be called authority-capacity. Raz identifies two such features: “First, 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. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate” [quotation from Raz]. Patently, both features of authority-capacity undermine the possibility of constructive identification” [*ILT*, p. 87].

This passage and, specially, Marmor's quotation of Raz is rather curious. From the beginning, the discussion seems to be about *whether* the law is a matter of human authoritatively binding directives or not<sup>7</sup>. If now we begin to discuss under what conditions a person could have authority over others (or claims to have it), we are leaving behind the central question. Although this is an important point, I will leave it aside for the moment.

There are two relevant notions in the passage quoted above. The first, for Marmor, “reflects the idea that only an agent capable of communication can have authority on them” [*ILT*, p. 87].

These first notion is not sufficient for Marmor's point and he is aware of that. Before analyzing the whole passage quoted above I would like to make a few re-

<sup>7</sup> See the beginning of this paper.

marks about the notion of a reason and the possibility to know what a reason is. It is obvious that if *there is a rule or a reason*, whether human (social) or not, we have to know what the rule imposes in order to be possible to follow it<sup>8</sup>. That imposes the following restraint: rules must be made of a kind of *stuff*, material, which makes possible to enter in contact with what the rule requires. Of course it is possible to discuss about what satisfies the restraint “possible/impossible to get in contact with”, and what capacity we have to develop in order to know the thing in question, once we have decided what is knowable. Do we need a sensory capacity, a conceptual capacity, or both? Physicalists and naturalists say that all what there is belongs to a causally closed space-time system, and if you proposed something that is outside that *extensional traffic*, you are proposing something that is inaccessible and, thus, problematic. Others reject that idea or try a middle way between intensional and extensional properties (predicates, propositions and the like). All these discussions have an impact on our ontology and, consequently, on what *can* be a reason, and how we get in contact with it<sup>9</sup>. Let’s call this problem the *knowledge of a reason problem* (KRP).

If a theory has solved KRP in general, it could still need to add further conditions in the case of reasons enacted by an agent. In the case of reasons or rules enacted or laid down by *persons* it seems plausible to say that without language it would become impossible to know that reason or rule. What is the human or social reason here? Well, let’s see what *S* (he, she or the group) says. If it is impossible to know what *S* says (because *S* does not have any language, or has lost that capacity, etc.), *S* is not capable of communication. If *S* cannot communicate what she or he wants, she or he cannot communicate her/his reasons. *S* cannot have authority over others. We have here a necessary condition to solve the *knowledge of a reason problem* (KRP), when those reasons were enacted by human agents. So the necessary condition is the following:

*If S is not able to communicate, S is not able to be an authority (neither de facto nor legitimate).*

We could say that this condition makes the practice of having an authority *possible*.

Although that idea seems to be plausible, it only constitutes a necessary, not a sufficient, condition for *S* to have authority. And what is more important, it is be-

<sup>8</sup> In what follows I will use “rule” and “reason” interchangeably.

<sup>9</sup> In the field of practical theory you can get, depending on the position assumed about these problems, theories that proposed the continuity between the extensional and the intensional (scientific and moral, etc.) or the discontinuity between them. The problem, of course, is much more complex. See Darwall, S., Gibbard, A., Railton, P. “Toward *Fin de siècle* Ethics: Some Trends” in *Philosophical Review*, vol. 101, n. 1, Jan. 1992, pp. 115-189.

sides the point. The question is not what is necessary for a rule or reason created by a person to be knowable to other persons. The questions are, rather (in order to answer Dworkin's challenge):

- a) When does someone able to communicate reasons have practical authority?
- b) Does the law belong to the type of situation identified in (a)?

In order to answer (a), we need to consider the second idea of the passage quoted above and Raz's theory of practical authority [ILT, pp. 88-90], which imposes, that "if the authority's directives are meant to replace some of the reasons on the basis of which he was meant to decide it, it must be possible for the disputants to *identify* his directive *independently* of those reasons". This second condition coupled with the first one (that is, that the authority is able to communicate her reasons) not only makes *possible* the existence of an authority (legitimate or *de facto*). It also gives *sense* to the enterprise. If the agents have to reopen, in every case, the balance of reasons on the basis of which the authority was meant to decide, the practice *in se* loses its sense. We could say that this condition makes the practice of having an authority *possible* and *sound* or *meaningful*<sup>10</sup>. This idea is closely related with the following three conditions quoted by Marmor and belonging to Raz's theory:

(DT) *The Dependence Thesis*: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives [...]. Such reasons I shall call dependent reasons.

(NJT) *The Normal Justification Thesis*: The normal and primary way to establish that a person should be acknowledged to have authority over persons involves showing that the alleged subject is likely better to comply with reasons which apply to him [...]. If he accepts the directives of the authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.

(PT) *The Preemption Thesis*: the fact that an authority requires performance of an action is a reason for its performance which is not be added to all other relevant reasons when assessing what to do, but should replace them.

If these three further conditions are met, the practice would be not only possible and sound or meaningful: it will constitute an instance of a practice with *legitimate authority*.

<sup>10</sup> Instead of "possible and meaningful" one could choose the label "rational". The practice of having an authority and reopen in every case the balance of reasons could be considered in certain sense contradictory and, therefore, in an important aspect, *irrational*.

Marmor concedes that the preemption thesis is the more problematic, so he discards it. Whether DT, NJT and PT (or only the first two) succeed is a problematic question. As it is known, that depends on the answer to further questions. For example, it must be proved that, at least in one sense, it is plausible to say “X is obligatory (forbidden, etc.) *because* someone says so”. That would work if there were available a proper way to dissolve or solve the old Euthyphro’s Dilemma. That is, if something is good (true, obligatory, correct, etc.) because someone desires it, or someone desires it because it is good (true, obligatory, correct, etc.)<sup>11</sup>. It seems to me that Raz’s theory intends to defend both at the same time, without dissolving the dilemma, and that generates the multiples objections that his theory has received. Other classical problems that resemble the *paradox of analysis* are present here as well. If the reasons issued by the authority *reflect* perfectly the underlying reasons (the reasons for action that apply to the agents) the former are irrelevant (redundant). If the former are irrelevant or redundant, the law is irrelevant. If it is not, it is something that does not deserve to be followed. In our case because it lacks some *true* reasons. The authority’s decision is meant to *reflect* certain reasons, it has a *mirror nature* (to borrow Rorty’s expression)<sup>12</sup>. If the mirror, just like a map, reflects all the reasons, it is not a mirror, it is not a map; it simply is those very reasons. If it does not, just being a group of them, how it can be a good one? In our case, how could it be an authority? Whether such a theory can surmount or overcome such problems is still an open question. For the moment two conceptual notions that are crucial here should be kept in mind. First, there must be a certain *correspondence* or successful relation between underlying or dependent reasons and authority words<sup>13</sup>. That restraint lies behind the *dependence thesis*. Second, there must be a certain correspondence or successful relation between the outcome that results from following the authority’s directives and the reasons that apply to the agent. It must be the case that following an authority’s directives the agent complies *better* with his reasons than if he tries to follow the reasons which apply to him directly. The first relation is a correspondence relation between the world (underlying reasons) and words (directives issued by an authority). The second one is a correspondence or successful relation between certain reasons (underlying reasons) and certain actions (those which are constitutive of the following of an authority’s directives). To sum up: there are two correspondence or successful relations in play here. One between reasons and words, the other between reasons and actions. I will call these two successful relations

<sup>11</sup> Plato, “Euthyphro” in Margolis, E. and Laurence, S. (eds.) *Concepts* (Cambridge, MA: MIT, 1999) pp. 87-99.

<sup>12</sup> “[Raz] takes the case of arbitration to represent a paradigmatic example of authority. The arbitrator’s decision is meant to *reflect* certain reasons, to sum them up, and present their right balance” [ILT, p. 88, my emphasis].

<sup>13</sup> That is what amounts to say that, in a certain sense, words laid down by an authority *reflect* (or aim to reflect) certain reasons.

that are necessary both for the dependence thesis and the normal justification thesis, the *successful relation restraint*. With this in mind, I would like to concentrate on Marmor's idea, assuming that such a theory could succeed when faced to the problems sketched above (Euthyphro's Dilemma and the Paradox of analysis).

What has Marmor proved so far? Marmor has tried to show that there is game, let's call it "to follow the authority", that has certain necessary and sufficient properties, and that it would be a *self-defeating* game if it does not work in a certain way (in the same way in which I can say that if a certain game which consist of putting a ball in a sort of basket, it has no sense without a basket and a ball). The "follow the authority game" depends on the fact that the authority has a language, its directives could be identified without reopening the balance of reasons, *plus* the dependence thesis, the normal justification thesis and the preemption thesis (if the authority is legitimate). We can assume that something like that is a possible game, but that does not prove that law is one of those games. Recall the questions that are relevant here:

- (a) When does someone able to communicate reasons have a practical authority?
- (b) Does the law belong to the situations identified in (a)?

Marmor, using Raz's apparatus, has succeeded (if he had) in proving "a". What about the second question? There are good reasons to give a negative answer to "b". These reasons were laid down by Dworkin. It is time to analyze Dworkin's idea.

#### 4. *Another game: Meant but Irrelevant*

Dworkin's point is not that languages do not have literal meanings (that is, meanings determined solely by the meaning of the words plus background and context). Nor is it that there could not be persons who speak clear in order to let others know what their claims are. Rather, his point is that it is possible to say with sense that

- (a) words could be clear, and
- (b) words don't exhaust what law is.

Why is (b) the case? Roughly, the explanation is this: we have a widespread practice of participants (judges) who say that, from the point of view of the "literal meaning", the words are clear; what is also clear is that *that* literal meaning does not exhaust what the law is. From the fact that the language could be clear (could have literal meaning) and certain orders or rules are written in *that* language in a clear way, it does not follow that the law is *just* that (clear, literally meaningful) language. The language was clear in several cases quoted by Dworkin, but it was also clear what the participants said about it<sup>14</sup>. Judges said (honestly, we are ask to

<sup>14</sup> The content of Dworkin's theory is much more complex and could be divided, at least,

assume) that *that* was not the law. Or, better, law is related to a practice in which texts count, but not necessarily win. In a different way: law is not what certain persons have said about certain matters, because participants (judges) say that *that* is not the case.

The question is: Can a clear and communicable rule created by someone *create* a reason to act in a certain field (for example, in the field related to what we call law)? And, tied to that question: Is there anyone who consistently believes that? Dworkin's answer to the second question is: Let's take what they are saying in pivotal cases. They are not following reasons or rules enacted by a human putative authority. At the same time they don't talk (or can be reconstructed) as if they were violating the law. So what is law? If we are asked to observe what certain participants say, and those participants are judges, and judges don't play the game "to follow what certain persons say" (at least in pivotal cases), we have to choose: or they are really playing this game but their linguistic reports are not trustable, or their linguistic reports are trustable so the game is not the authority-game. In an informal way, we have two options: either we say that the law is essentially the game "*literally meant*" (or its variations), remaining indifferent to the words of certain participants, or we take seriously what certain participants say, and in this case the game seems to be "*meant but irrelevant*".

To put it in a more precise way, Marmor's approach has to face the following dilemma:

*Marmor's Dilemma:*

- I) To know what kind of game the law is, is closely tied to what certain persons (participants) say about it;
- II) Judges are participants;
- III) Judges say (at least in pivotal cases) that they are following the law *and*, at the same time, that they are not applying what a human putative authority has enacted;
- IV) Judges say that the game is not "to follow the human authority"; therefore
- V) Law is not the game "follow the human authority";
- VI) We have independent reasons to think that the game is "follow the human authority";
- VII) V or (exclusive) VI.

into two different ideas. The first one is related with the idea that positivism could not give a proper account of the role that principles play in legal reasoning. This critique is rejected by Hart himself in his *Postscript to the Concept of Law*. The second one, and more powerful, is that law contains norms (whether we call it principles or rules) that are binding even though they have not been the subject of past social guidance. For a detailed reconstruction of Dworkin's different ideas against positivism across the time see Shapiro, S. "The 'Hart-Dworkin Debate': A Short Guide for the Perplexed" in *The Cambridge Guide to Dworkin*, ed. by A. Ripstein (forthcoming).

It is already known to everyone familiar with the debate between Dworkin and Anglo-Saxon Positivism that this Dilemma, in particular its premises I-V, are generated by the restraint “fit the practice of adjudication”. Marmor is aware of that [ILT, p. 91]. If we are asked to observe what they (judges) say, and they say “X is Z”, every alternative analysis which asserts “X is T”, will become problematic or false<sup>15</sup>. The only way out of this dilemma is to reformulate or reject a couple of premises. This is Marmor’s strategy: not to take seriously what participants (judges) say about the law (at least in certain cases). That is, reformulate I-VII, through the argument of political pressure.

### 5. *Judges and Political Pressure*

The argument of political pressure is taken to prove that there are good reasons not to trust judges’ linguistic reports in certain cases. On this regard Marmor says<sup>16</sup>:

“It is presumably clear to anyone familiar with the politics of law, that at least sometimes judges have a very good reason to claim that they are following the law when they are in fact inventing it” [ILT, p. 91].

The idea behind this quote is the following. In the cases picked up by Dworkin, when judges say “that is the law, although it was not so issued by any human or other practical authority” we don’t have to be misled by their words. Normally, they are under political pressure [ILT, p. 91]. Their words (judges’ words) don’t *represent* what is really going on there (that is, there is a *distortion* of the world).

The idea of political pressure is taken to prove that this factor severs the relation between world and words. Thus, when they say that “the law is not T but Z” (for our purposes, “law is not what human authorities have said, but something else”) we don’t have to assume that that is the case. This kind of strategy plays the same role that is played in the scientific field by the clause “under normal conditions”. There are certain *data* that are not trustable if certain conditions ob-

<sup>15</sup> I’m using “say” or (later) “linguistic reports” in a broad sense. It includes every act which could be considered with semantic and pragmatic relevance. If someone considers that what *participants say* depends on a complex set of facts (word, gestures, context, and so on) that does not affect the point here.

<sup>16</sup> By the way, this kind of assertion is rather strange. This kind of passage assumes that we *already* know what we actually do not, or is under discussion. It makes little sense to say that “anyone familiar with Childs behavior knows that sometimes Childs invent reality, rather than report it”, if it is not yet clear what “reality” is. (Substitute “Childs” with “Judges” and “Reality” with “Law” and the circularity becomes evident). Despite this, it is possible to infer what Marmor is pursuing. See below.

tain. For example, are not trustable the linguistic *data* that a person utters about the external world if she or he is under drugs effects. It is easy to see what this strategy aims at. It aims at restraining the scope of the particle “persons” or “participants” in the premises I-III sketched above. After this restraint is accepted, we have to reformulate I and restate the argument in the following way:

I') To know what kind of game the law is, is closely tied to what certain persons (participants) say about it, except for those persons who don't satisfy the condition of providing “reliable linguistic reports”;

II) The condition of providing “reliable linguistic reports” does not obtain in certain facts, like political pressure, are the case;

III) Judges, in the cases picked up by Dworkin, are under political pressure;

IV) Judges, in the cases picked up by Dworkin, do not provide “reliable linguistic reports”;

V) Given I', what Judges say in those cases is, in principle, excluded in order to know what law is.

Put in a rather *pedestrian* way, Dworkin was looking at the wrong place. A place where, because of political pressure, judges uttered the word “law” (or equivalents) when nothing like that was actually the case. In Marmor's words:

“Dworkin's most convincing examples concern constitutional cases from the American Supreme Court, which is not surprising, for two main reasons. First, a legal system based on a written constitution is bound to be concerned with special problems [...]. Second, in a democratic country where the (appointed) Supreme Court has the power to overturn democratic legislation, the court is bound to be under enormous political pressure” [ILT, p. 92].

The strategy seems convincing but it is not. There are two problems here. *The first one* is that the argument presented by Marmor [ILT, pp. 90-92] does not offer an independent criterion to determine when it is the case that judges are under political pressure and, therefore, they are not reliable. It seems that Marmor's idea could be presented in the following way:

“When are their linguistic reports not reliable? When they are under political pressure. When are they under political pressure? When they say that the law is something not related to the words of authority”.

Translated, this would amount to saying that their linguistic reports are not reliable just in the case that judges say what Dworkin says. That is circular and

does not prove the thesis or give an independent criterion to verify when participants are not trustable. The criterion that determines that they are not reliable could not be “if they are saying that the law is not something issued by a human authority”.

*The second problem* for Marmor is the idea itself that political pressure severs the relation between words and world. It is difficult to see how this argument does not turn against Marmor. If there are good reasons to distrust what people say when they are under political pressure, and it seems reasonable to assume that the putative authorities (for example legislators) are *always* in that situation, it seems that the dependence thesis (and the normal justification as well) are not instantiated in such a world. And if that is the case, why should we follow the *literal meanings* of their words?<sup>17</sup> The idea of political pressure is taken to prove that this kind of situation severs the relation between world and words (judges’ words). The relation between world and words is crucial in order to satisfy what here was called the *successful relation restraint* (see Section 3, above). If it is reasonable to distrust the judge’s words in that situation, it is also reasonable to distrust the authority’s words in every situation of that kind. The authority’s words are always uttered under political pressure. So it is highly probable that the successful relation does not obtain when that happens. The argument of political pressure undermines directly the dependence thesis and normal justification thesis in the *actual* world (that is, these theses are not satisfied). The argument of political pressure give us, at least, reasons to reopen in every case the balance of reasons, given that it is highly probable that the authority has not relied upon the very *true* reasons. It shows that we have good reasons, at least in the *actual* world, to distrust the authority’s words. It is highly probable, given that pressure, that the authority’s words do not *reflect* the very true reasons that apply to the agent (dependence thesis) and that it wouldn’t be reasonable to think that we are likely “better to comply with reasons which apply to us [...]. If we accept the directives of the authority as authoritatively binding and tries to follow them, than if we try to follow the reasons which apply to us directly” (Normal Justification Thesis). If political pressure interferes between what it is true, and what persons say, and the putative authority is a person, political pressure interferes between the true reasons which must be taken into account, and the authority words. If the interference takes place with judges, it takes place with other authorities as well. At least in the actual world, where authority is under political pressure, we have *reasons to believe* that what she has said does not satisfy the dependence and the normal justification thesis.

Of course, it could be replied that this objection is an empirical one and therefore has no impact on conceptual ones (possibility of identifying the directive without reopen the balance of reasons, dependence thesis, normal justification,

<sup>17</sup> Nothing changes if one decides to sophisticate the idea of *literal meaning* and adds pragmatic considerations. The question is: why follow their words?

etc.). After all, what this objection argues is that in the actual world we have strong reasons to believe that the dependence thesis and the normal justification thesis are not instantiated. That is, that the authority is not legitimate, but could be. But this argument – continues the reply – does not prove that in every possible world in which an authority exists, that is the case. If that were the answer it must be shown or proven that there is at least one possible world in which an authority exists, and there is no political pressure. Put in another (and more simple) way, that there could be authority *without* political pressure. I have no idea how such a world would look like. In any case, the answer and its plausibility depend on the importance of this factor in different situations. Regarding this it seems reasonable to ask two questions:

I) When political pressure exists, does that *determine* that people lie (or that their linguistic reports are not reliable)? Or it just makes this possible?

II) Is political pressure always present? (In a rather more technical way, Is it a necessary property in every world in which authority exists or is just a contingent one?).

Regarding the first question, it seems difficult to accept that political pressure determines that people lie or that their linguistic reports are not reliable. It is possible to imagine political pressure and truthful persons. So the correct interpretation would be that when political pressure obtains, it is possible, but not necessary, that people lie or give unreliable linguistic reports.

The second question aims at establishing how often it is the case that political pressure obtains. At least two answers seem available:

IIa) *It is always the case*. That is, necessarily, in every world where authority exists, there is political pressure. In this case it seems reasonable to say that we have always a reason to verify if the words are reliable (that is, if the words reflect the dependent reasons);

IIb) *Not always, but sometimes*. Here the range of possibilities goes from “less probable” to “highly probable”.

If the answer is IIa, the objection becomes conceptual, not empirical. On the one hand we have reasons, if we want to play the “follow the authority game” *rationally*, not to reopen the balance of reasons. That is, not to look through the words of the authority. On the other hand, in every world in which we want to play that game, we have reasons to inspect if what the authority has issued reflects or not the underlying reasons.

It has to be assumed that this argument against Marmor sounds similar to those which maintain that we have always a reason to act for the reasons which apply to the case, and that impose always to revise or check what other persons have said, ordered, enacted and so on. I assume that it sounds similar or is part of the same argument. But in this case, it was Marmor himself who gave us the reasons to think in that way. The same argument that he uses to reject the words of some persons under some situations, as a strategy to answer Dworkin’s challenge, is the argument that works against the theory of authority he defends.

Similar consequences would apply, perhaps, if we think that the answer is not IIa but IIb. But I just want to give some reason to believe that the concept that we are trying to elucidate is more related with IIa.

The conceptual task here seems to be the elucidation of a concept that some group of people has been *using* for a long time by now *in the world*. Whether they called or call it “law”, “droit”, “recht”, “diritto” seems, in principle, not so relevant<sup>18</sup>. To say that we are trying to elucidate a concept that is used in the world, and is related to the world, means in this case that it is related to our history. The human history. It seems that in that context the concept of authority and law has *always* been used and thought together with the concept of political pressure (wars, personal interests, market interests, political parties, and so on). The reasons that persons have, in themselves, (whether they pursue a personal or a collective goal) could be seen in that way, and could reach the point of pressure when certain situations obtain. Reasons for action seem to be inherently political. It seems always to be the case that political pressure is around. I cannot represent myself how a world without political pressure would look like. Once we have abandoned the *domestic world* (small groups, country life, so call “primitive life”, etc.) authority and pressure go hand with hand. And I think that the concept that we use includes rather than excludes the pervasive presence of political pressure.

## 6. Final Remarks

The argument of ILT’s Chapter VI (and perhaps the argument of the whole book) is that we have reasons to think that the law is a practice in which it is *possible* and *makes sense* to follow the words of some human authority. If further conditions are met, the practice or the game not only is possible and makes sense, but is also a good game (i.e. there is legitimate authority). We can assume for a moment that such a game is *possible* and *makes sense*, but it remains to be proved that the law is such a game. In order to prove that, Marmor’s proposal faces an important challenge. There are cases in which the participants say the opposite. They deny that the practice (or the game) is “follow the authority’s words”. That leads to a dilemma (Marmor’s dilemma). In order to reject the dilemma we are asked to assume that certain persons, under certain conditions (political pressure) just don’t deserve to be listened. The persons who don’t deserve to be listened are the judges chosen by Dworkin (or the judges *in* the cases chosen by Dworkin). The argument which serves to dismiss the linguistic reports of those judges seems

<sup>18</sup> A conceptual analysis that concentrates just in words is defective, and even theorists that take the analysis of language as useful have never thought that the analysis of the word “law” is sufficient to understand the concept. See Raz, J. “Two Views of the Nature of the Theory of Law: A Partial Comparison” in Coleman, J. (ed.) *Hart’s Postscript. Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001) pp. 1-37.

to be circular. Marmor invites us not to take into account what participants say if what they say goes contrary to his theory about the law. Nevertheless, we can forget this problem for the moment and accept that when persons are under political pressure, they are not reliable. For the same argument, the game which was *possible* and *made* sense, does not make sense anymore. It just does not make sense anymore not to revise the words of the authority, and, sadly and paradoxically, that was what enabled the game to make sense.

