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Law, Social Change and Legal Positivism.
Some Remarks to Marmor on Constitutional Legitimacy and Interpretation

We have also granted to all freemen of our kingdom, for us and our heirs forever,
all the underwritten liberties, to be had and held by them and their heirs,
of us and our heirs forever.
Magna Charta (1215)

A people has always the right to review, to reform, and to alter its constitution.
One generation cannot subject to its law the future generations
French constitution of 1793, Article 28

1. *Marmor's Questions*

The last chapter of Marmor's book *Interpretation and Legal Theory* is devoted to the topic of constitutional interpretation. Marmor deals with two normative questions concerning the criteria for evaluating the moral legitimacy of a legal practice.

The first one is a question of political morality. It concerns the moral legitimacy of "written constitutions", i.e. constitutions which are endowed with supremacy and rigidity. Contemporary constitutions are distinct from statutory law and are binding on the legislator: they are, as it is commonly said, "rigid" and "supreme": the ordinary legislator is not entitled to depart from them and can modify this kind of constitutions solely by means of a special procedure. In enacting such constitutions, Marmor says, "the political leaders of one generation [claim] the power to bind future generation to their conceptions of the good and the right". (ILT, p. 145) He wonders whether such claim is justifiable and, by doing so, he casts some doubts on the moral legitimacy of rigid constitutions.

A strictly related question concerns the moral legitimacy of judicial review. Written constitutions may not only be supreme and rigid, but also legally enforceable by the courts. This occurs whenever judges have the power to declare null and void any law that they deem unconstitutional. Marmor wonders whether such a power is justifiable. Should judges have the power to strike down laws which were enacted by the majority of the citizens? By interpreting the constitution in hard cases, when its meaning is uncertain – for instance because the constitution has been drafted in general and abstract terms, as it is often the case – judges exercise a broad discretionary power which is difficult to justify from the viewpoint of democratic theory.

In the second part of the chapter, Marmor deals with a question of judicial deontology. Assuming the existence of a rigid and enforceable constitution, as it is the case in many contemporary legal systems, how should the judge interpret the constitution? The judge faces several alternatives. She may believe that she is bound by the intentions of the constitution's framers and attribute to the text the same meaning it had at the time it was enacted. The judge may decide to take into consideration the will of the majority of current citizens and decide to comply with the decisions of their representatives, to the will of the democratically elected legislator, or to the "conventional morality", the "living constitution" of contemporary society. Finally, the judge may decide to interpret the constitution according to her own moral judgment, on the basis of her best understanding of the case.

These are, on a swift survey, the questions posed by Marmor. According to him, they stem out of the "uniquely problematic nature of constitutional interpretation": constitutions sometimes are ancient, they often are vague, and there is a "tension" between the scope of the power of the constitutional interpreter and the "paucity of constraints" (ILT, pp. 143-144):

In most constitutional democracies, the interpretation of the constitution involves the power of the judiciary (...) to determine issues of profound moral and political importance, on the basis of very limited textual guidance, resulting in legal decisions that may last for decades and are practically almost impossible to change by regular democratic processes. This unique legal power raises two main normative questions: One is about the moral legitimacy of the practice itself, and the other is about the ways in which it ought to be exercised. (ILT, p. 141)

2. *A First Problem*

Marmor focuses on two main normative questions – the question of the legitimacy of written constitutions and the question of the best criteria for guiding their interpretation. I will discuss in some depth only the former. However, it is the case to consider firstly the problem of the consistency between Marmor's conclusions. It is a problem that can be posed and discussed without taking into account the underlying arguments.

On the basis of arguments that by now may be omitted, Marmor reaches the following conclusions. None of the reasons supporting judicial review is convincing, and also the moral legitimacy of written constitutions is highly questionable. Judicial review is a wound to democracy which can hardly be justified. Nevertheless, provided that there is a written constitution, according to Marmor it is better that judges do not overrate the intentions of its framers, and engage in sound moral deliberation in order to justify their decisions in constitutional hard cases. In order to exercise their morally questionable power in a morally correct way judges cannot but rely on their best moral understanding of constitutional issues.

In a passage that is worth quoting at length, Marmor admits that there is a “tension” between the conclusions he reached:

I have been arguing here that in the realm of constitutional interpretation, there is hardly any alternative to sound moral deliberation. Constitutional issues are mostly moral issues, and they must be decided on moral grounds. On the other hand, I have also raised some doubts about the moral legitimacy of judicial review and, to some extent, about the very legitimacy of long lasting constitutions. So isn't there a tension here? Yes there is, but it does not necessarily point towards a different conclusion. It would be a mistake to maintain that because the very legitimacy of constitutional interpretation is clouded in some moral doubts, judges should adopt a strategy of self-restraint, refraining from making the right moral decisions just because they might be considered bold, unpopular, or otherwise potentially controversial. Perhaps it is true that constitutional courts have too much political power in the interpretation of the constitution. But since they do have the power, they must exercise it properly. If the best way to exercise the power is by relying on sound moral arguments, then moral considerations are the ones which ought to determine, as far as possible, the concrete results of constitutional cases. Sometimes moral considerations may dictate caution and self-restraint and at other times they may not. But what the appropriate moral decision ought to be is rarely affected by the question of who makes it. (ILT, p. 168)

This is really a surprising passage. If, as Marmor concludes, the legal power to interpret and enforce a rigid constitution is in itself immoral or, at least, is hardly justifiable from the viewpoint of political morality, then judges should abstain from exercising such power, or at least should exercise it in the most cautious way. They should pay the utmost deference to the will of the majority of current citizens, as it is expressed by the democratically elected legislator.

My point is that it is not true that “what the appropriate moral decision ought to be is rarely affected by the question of who makes it.” (ILT, p. 168) To clarify this, one may think at the authority of the slave owner upon her slaves. If one assumes that such an authority is immoral – for instance, because it violates the moral autonomy of the slaves –, it would be difficult to maintain at the same time, without any apparent contradiction, that the slave owner should nonetheless exercise her authority for the good of her slaves, by relying solely on her own understanding of what is morally correct. On the contrary, one would be compelled to conclude that the slave owner should refrain from binding the slaves to her morally illegitimate authority. The same applies to the legal power of constitutional judges: if such a power is really morally unjustifiable, because it contravenes the democratic principle of self-government, judges should abstain from binding the political community to their own conceptions of what is good and right; they should leave the legislator unfettered, so that the political community would be able to decide for itself what is good and what is right.

Perhaps one might reply to this argument by transposing the juridical distinction between “title” and “exercise” into the moral domain. From this perspective, Marmor is arguing that the constitutional judges' interpretative power is morally

illegitimate as far as its title is concerned, but that it can nonetheless be exercised in a morally right way. There is no inconsistency here. It is doubtless that an interpretation of the constitution can be more or less good, and it is also obvious that the authority of constitutional judges can be exercised more or less wisely. Such evaluations do not commit anybody to accept the moral legitimacy of judicial review: I am not obliged to acknowledge the moral legitimacy of an authority on the sole base of having assessed the way in which it has been exercised. I may believe slavery to be morally illegitimate, but I can still reckon that one slave owner exercises her authority better than others. There is more: I may believe slavery to be morally illegitimate and engage in addressing the issue of how the slave owners should behave with their slaves; I may formulate directives for the slave owners and require them to exercise their authority in a humanitarian way – by avoiding exploitation and humiliations of the slaves and by taking into consideration their will. Apparently this is exactly what Marmor does: he doubts the moral legitimacy of judicial review and engages in addressing the issue of how constitutional judges should exercise their power; he formulates directives for the judges and requires them to decide according to their best moral understanding of the case, without overrating the intentions of the framers, obscure and formalistic legal concepts and doctrines, the settled case-law, the conventional morality of a given society at a given time, etc.

This reply is, I think, only partially convincing. Surely I might engage in addressing the issue of how the slave owners ought to exercise their legal authority and I might formulate directives for the slave owners. But would such directives be coherent with my condemnation of slavery, if they merely require the slave owners to exercise their authority in the way they prefer, according to their own moral understanding of what ought to be done? If I believe slavery to be illegitimate because it violates the moral autonomy of the slaves, my directives for the slave owners ought to be coherent with this judgment and therefore they should take in due consideration the need of protecting the moral autonomy of the slaves. I cannot simply say to the slave owners: “do what *you* think it’s just”. The same reasoning applies to the issue of judicial review. If I assume that judicial review is illegitimate because it narrows the scope for self-government, my directives for the judges should aim at defending self-government by urging the judges to defection or, at least, by requiring them to exercise the utmost self-restraint¹.

¹ During the Seminar at Bocconi University, Marmor replied that my counter-example of the slave owners does not hold. Slavery is the paradigmatic case of a clearly unjust social institution, while judicial review is, according to him, merely an institution whose legitimacy can be morally questioned. He seems to claim that a distinction of degree (utterly unjust/merely questionable) may turn, to a certain extent, into a distinction of quality, and a conclusion which applies to the constitutional judges (“do what *you* think it’s just”) may lose its validity with regard to the slave owners. However, this reply is not persuasive. The distinction of degree between slavery and judicial review simply helps us to better

This conclusion deserves perhaps some further consideration in the light of Marmor's arguments on self-restraint and the possible alternatives to sound moral deliberation – originalism, deference to the will of current legislator, deference to conventional morality. However, the point I would like to make is that if judicial review conflicts with democracy and democracy is a value for political morality, then constitutional interpretation ought to take into account the need of protecting democracy. Obviously, the ways of conceiving such “serious account” – and therefore the criteria for guiding constitutional interpretation – depend on which conception of democracy one adheres to.

If, for instance, I believe that constitutional judges' interpretative power is intrinsically anti-democratic, I am left with two options. The first one would be to regard such a power as morally unjustifiable and urge the judges to give effect only to the will of the democratically elected legislator. This would be equivalent to requiring them to abstain from exercising their authority and omit any check on legislation. The second option would be to regard the constitutional judges' interpretative power as enjoying of a dubious legitimacy, without being utterly illegitimate from the viewpoint of political morality. In this case, there is still some room for judicial review, but the standards for its exercise would be very strict. Constitutional interpretation should be conservative: judges should follow the intentions of the framers of the constitution and should not overrule the settled case

highlight the flaw at the heart of Marmor's reasoning: there is a *non sequitur* between his premises and his conclusions, which is due to the fact that the question on “who decides” can, by all means, be morally relevant. A second counter-example – provided by Marmor himself during the Seminar – may help to clarify the point. Let us take the case of the Faculty Dean's power to appoint professors; let us assume that such power is academically questionable – other appointment procedures would be preferable – although it is not utterly unjust. Suppose that I have been asked by the Dean to give some suggestions regarding the criteria to be followed in order to appoint new professors. It seems to me that I may put forward a suggestion of the kind “choose those researchers who have gained award and prestige within the scientific community”: the Dean should pay attention to the opinion of the academic community, as the constitutional judge should safeguard the will of the majority of current citizens. Perhaps, I may even give a substantive answer to the Dean, of the kind “appoint Professor X” – as I could say to the constitutional judge “give precedence to individual rights or to government's interests”. What I could not answer to the Dean, however, is “do what you think it's just, according to your scientific evaluation of the candidates”. Firstly, such an answer would be of no help to the Dean. Secondly, and most importantly, such an answer would be in contradiction with my disapproval of the Dean's appointment procedure. Finally, such an answer would be in contradiction with my scepticism on the Dean's scientific expertise – as Marmor's answer seems to contradict his scepticism on the existence of a “moral expertise”. To sum up: if I do not regard the Dean as the authority best suited to make such scientific evaluations, then I cannot rely on the Dean's best scientific understanding of appointment issues. Similarly, if I do not regard the constitutional judge as the authority best suited to make moral evaluations, then I cannot rely on the constitutional judge's best moral understanding of constitutional issues.

law. By doing so, they would guarantee the capacity of the democratically elected legislator to know which are the binding rules of constitutional law and to change them, if he wants and has the political power to do it.

By contrast, if I hold a conception of the political community's self-government that regards judicial review as an essential feature of democratic life, and therefore I consider judicial review to be fully legitimate, I would be disposed to different conclusions. I might invite judges to interpret the constitution according to their best moral understanding of the case, or I might invite them to take into consideration the conventional morality, the "living constitution" – the constitution as it is understood and practised in contemporary society.

However, the central point is that if democracy is a value of political morality and if judicial review violates the principle of democratic self-government, then constitutional judges should exercise their morally questionable authority in a way that respects, as far as possible, such principle. If I admit that there is a tension between democracy and judicial review and at same time I hold that democracy is a valuable principle, then the democratic principle should not disappear when I formulate a directive for the judges on how to interpret the constitution.

3. *The Inter-generational Issue*

Let us now focus on the issue of the moral legitimacy of written constitutions. Marmor discusses a well known problem of constitutional theory and policy: the so-called inter-generational issue². "[W]hy should the political leaders of one generation – Marmor asks – have the power to bind future generations to their conceptions of the good and the right?" (ILT, p. 145) Marmor analyses and rejects four possible solutions. (1) The moral legitimacy of the constitution derives from the moral soundness of its content. (2) The moral legitimacy of the constitution derives from the moral expertise of its framers. (3) The moral legitimacy of the constitution derives from the flexibility of constitutional interpretation: "[C]onstitutional documents typically allow *enough interpretative flexibility* that makes it possible to apply their morally significant provisions in morally sound ways." (ILT, p. 148) (4) The moral legitimacy of the constitution derives from the fact of the practice itself: constitutions are self-validating.

The general lines of Marmor's arguments on the subject are the following.

(1) The moral legitimacy of the constitution does not derive from the moral soundness of its content. Provided that the content of the constitution is morally

² For an insight into the inter-generational issue from the viewpoint of the history of political and legal thought, see S. Holmes, *Precommitment and the Paradox of Democracy*, in J. Elster, R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge, Cambridge UP, 1988, pp. 195-240.

sound, what will be the reason for having a constitution? This question may sound somehow puzzling and paradoxical, but it reflects an interesting insight into the nature of authority. The underlying argument, which I will discuss later, runs as follows. The only reason for having a constitution is that it makes a practical difference. However, if the reasons for action provided by the constitution were to be the same ones that we would have in any case, then it becomes difficult to explain the practical difference between having a constitution and not having it. Since the written constitutions make a practical difference, we are left with the problem of justifying the moral legitimacy of such difference.

(2) The moral legitimacy of the constitution does not derive from the moral expertise of its framers. In the realm of morality there is no privileged access to moral truth and therefore no technical expertise. The very concept of moral expertise is intrinsically immoral: “[T]here are good epistemic and moral reasons to hold that no one can possess expertise in the realm of basic moral principles.” (ILT, p. 146)

(3) Does the moral legitimacy of the constitution derive from the flexibility of constitutional interpretation? Constitutional interpretation could be capable of adapting the normative content of the constitution to evolving social needs. Marmor does not explicitly reject this line of argument, but he remarks that it presupposes a positive solution to the problem of the moral legitimacy of judicial review:

[G]reat deal of the burden of moral legitimacy is shifted by these arguments to the application of the constitution, thus assuming that the constitution is legitimate only if the courts are likely to apply the constitution in a morally desirable way. This brings us to the second question about the legitimacy of constitutions, namely, the question about the legitimacy of judicial review. (ILT, p. 149)

(4) The moral legitimacy of the constitution cannot derive solely from its effectiveness, i.e. from the fact of the practice itself. This justification strategy has been proposed by Raz³:

As long as they remain within the boundaries set by moral principles, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there. (...) [P]ractice-based law is self-vindicating. The constitution of a country is a legitimate constitution because it is the constitution it has.

³ J. Raz, *On the Authority and Interpretation of Constitution: Some Preliminaries*, in I. Alexander (ed.), *Constitutionalism, Philosophical Foundations*, Cambridge, Cambridge UP, 1998, p. 173.

Marmor's objection is fully convincing. It is far from obvious that a moral duty can arise from the mere fact that the constitution "is there". It is true, according to Marmor, that social conventions create reasons for action only if they are practised – we would have no reason for driving on the right side of the road or for greeting our acquaintances if other people would not generally behave in the same way. However, our reasons to engage in a social practice are not entirely derivable from the fact that the convention is generally followed: "[T]here must be something valuable in the practice of following the convention for it to give rise to reasons for action, beyond the fact that the convention is there and just happens to be followed" (ILT, p. 147) – for instance, it must be valuable to avoid road accidents or to show respect for the acquaintances.

Argument (3) leads to the topic of the moral legitimacy of judicial review, which in turn introduces the subject of the criteria for exercising constitutional adjudication. As I said, I will not discuss Marmor's arguments as to this issue. I prefer to focus on a specific topic and to analyse in some depth the issue of the legitimacy of the constitution.

4. *Critique to the Inter-generational Issue*

According to Marmor, none of the possible replies to the inter-generational issue is fully satisfactory: the moral legitimacy of written constitution is at least doubtful. I think, however, that it is possible to propose a justification of the written constitutions that is more convincing than those taken into account by Marmor. Before that, I would like to analyse the inter-generational issue. If the inter-generational issue proves to be unsound and fallacious, this would not necessarily lead to the resolution of the problem of the moral legitimacy of written constitutions and judicial review. Nonetheless, the inter-generational issue bears a high theoretical and normative interest and deserves careful consideration.

First of all, let us wonder whether the inter-generational issue can be reconstructed by abandoning the concept of generation. The written constitution arises problems of moral legitimacy because the past generation binds the future generations. I think that this argument can be reformulated by saying that the written constitution arises problems of moral legitimacy because some individuals – the future generations – find themselves bound by a set of norms to whose enactment they did not participate in and whose content is totally independent of their will. This seems to me the point of the inter-generational issue: it counts as an objection to the moral legitimacy of written constitutions because we assume that it is morally unacceptable that someone finds herself to be bound by a rule which is totally independent of her consent and powers of influence.

However, this is a common situation in every political regime, be it endowed, or not, with a written constitution: there are always several laws whose content is fully independent of our preferences, because we did not have the opportunity to

participate in their enactment or to exercise any influence whatsoever on the people who enacted them. By enacting a statute, the legislator binds the current citizens to it, but he also binds future citizens *as long as the statute is not modified*. The future citizens will find themselves to be bound by a rule which does not necessarily reflect their opinions and desires, or their conception of what is good and what is wrong. The difference with the case of the written constitution seems to be only a matter of degree: in a democracy we can always cooperate in order to modify a rule which has been enacted by past generations, but if that rule has constitutional force, then its amendment requires a broader consensus than it is required in the case of ordinary statutes.

The inter-generational issue can thus be posed also with regard to statutes and binding precedents. In the case of statutes and binding precedents we face decisions which aim at binding not only those who enact them here and now, but also future generations. This applies generally to every heteronomous legal source. Unlike the sources which are expression of autonomy – contracts, treaties, etc. –, heteronomous legal sources are binding upon subjects who did not enact them. In the case of heteronomous legal sources – statutes, regulations, binding precedents, etc. – the situation at the core of the inter-generational issue is in no way exceptional. Following a line of thought which is familiar to the so-called exclusivist legal positivists, we may say that this situation is intrinsic to our concept of authority: an authority is binding upon subjects who are not endowed with authority; it creates reasons for action which do not necessarily reflect the preferences of the people who are called to act accordingly.

By saying that, I do not justify written constitutions: I am simply claiming that if written constitutions are morally illegitimate for the reasons provided by Marmor, then also statutes and the precedents of case law are morally illegitimate, as well as every other heteronomous legal source. I doubt that Marmor would be willing to accept this conclusion.

One may object, however, that there is an important difference between the written constitution and other legal sources: constitutional norms, unlike statutes and precedents, are difficult to amend and to abrogate. In order to modify them it is necessary to reach a broader consensus. The written constitution derogates to the ordinary legislative process. One can stress that such a difference is relevant from the viewpoint of political morality and wonder whether the written constitution violates the democratic principle.

It is far from obvious which theory of democracy provides the background of Marmor's arguments, but one thing seems clear to me: a political regime where the majority of the 2/3 of the representatives, or even their unanimity, is required in order to modify the law, would be rigid and perhaps inefficient, but it would still be considered a "democratic regime". There seems to be no compelling reason for considering undemocratic a regime where certain kinds of collectively binding decisions must be taken with a different and higher majority than that required for other kinds of decisions. This is exactly the situation of a political sys-

tem endowed with a written constitution. In general, one can argue that the multiplication of normative procedures is not by itself an injury to democracy, so far as such procedures have a democratic nature. In order for the normative procedures to have a democratic nature, the citizens or their representatives should have decision-making, or at least control power. It is not necessary for the final deliberation to be taken with a relative, absolute or qualified majority, or unanimously. We can hold different conceptions of democratic self-government, but relative majority cannot be an essential feature of democracy.

Moreover, one can also assume, following Kelsen, that the point of democracy is not the unlimited power of the majority, but it is the ongoing bargaining and compromise between majority and minorities. In this perspective, written constitutions and every normative procedure which requires qualified majority or unanimity, can be considered as being directed to pursue such ideal: written constitutions impose some constraints on the majorities and compel them to seek the consensus of the minority when it is necessary to amend the constitution in order to realise some audacious reform.

This is a sensible justification of rigid constitutions, a justification which is easily understandable for every political actor: it is surprising that it is missing among the possible justifications taken into account by Marmor. To put it roughly, the point is that in complex and differentiated societies the political system can sometimes simply go mad: powerful economic and social spurs, but also war and today terrorist attacks, can determine a sudden and abrupt increase of the normative expectations towards politics. They can therefore stimulate the political system to take over every autonomous field of social life – and from the viewpoint of the legal system this can mean a tendency towards the destruction of the rule of law. Although written constitutions are fallible and perhaps of limited effect, they are a tool for preventing such events, or at least for hindering their development: written constitutions can have the effect of slowing down and stabilise the political process.

The above argument does not exclude that written constitutions may also play other valuable functions. They may create the sense of a shared identity in a heterogeneous society which undergoes rapid change – a sort of “educational function” of the constitution which has often been stressed and overemphasised in regard to the recent European constitutional momentum. Moreover, the written constitutions lay at the base of judicial review which, in turn, can serve other valuable functions. I would like to rapidly recall some of them. Judicial review can protect the value of legal system’s coherence by removing those normative inconsistencies which do not depend on some conscious decision of the political community but merely result from accidental shortcomings of the legislative process. Judicial review can be a forum of public discussion relatively detached from the pressures and emergencies of the democratic political process. Therefore, judicial review may open up the political process to some social interests which otherwise would be structurally unable to have access to the democratic decision-making

procedure: judicial review can permit to such social interests to benefit from due consideration in the public domain by allowing the decision-making process to be more sensible and inclusive. As a result, written constitutions and judicial review do not work necessarily only as a restraint and stabilization device for the political process, but they can also be an incentive for the political process, a mean for its enrichment and broadening: written constitutions can be a brake as well as a spur for democracy and legal change.

Therefore, judicial review may be regarded as a limitation on power and as a means of broadening the decision-making process, and there is not necessarily a conflict among these functions, which are incompatible only at first sight. Both, in fact, respond to different social needs – conservation and innovation – but derive their validity from the same idea of constitutional common sense: in divided societies – societies where there is a plurality of conflicting interests and incompatible normative expectations – the power must also be divided. Thus, in the case of a clash, the power is able to balance the power: it can slow down its pace and stabilise it. In turn, in the case of the normal social and institutional cooperation, sectional and minority interests – such as the purely legal interest to the coherence of the legal system, or the interests of minorities of those who are excluded – may find an authority which represents them in the public domain⁴. On the contrary, a conception of democracy which identifies it with representative democracy and reduces it to parliamentary sovereignty would be today a poor conception of democracy, and perhaps also a dangerous one.

However, we can set aside these further considerations and maintain that the argument of the minorities' protection preserves its validity and appeal. The moral legitimacy of the rigid constitution lies on the assumption that it is right that a broader consensus of the citizens is required in order to modify the most important rules of a political community.

It is a task for the citizens or, better to say, for their representatives, to define what those most important rules are. They have the opportunity to give constitutional force to their choices of political morality. If, for instance, the (representatives of the) citizens believe that it is of utmost importance that the colours of the national flag are green, white and red, they can establish such a rule (Article 12 Italian Constitution). If they believe that it is of utmost importance that the road's speed limit is 100 km/h, they have the opportunity of approving a constitutional amendment enshrining such a rule. I pinpoint these trivialities because it is mis-

⁴ Note that here I am not referring solely or primarily to the interests of ethnic minorities and of other culturally characterized social groups. Every sectional interest, even interests of no political impact – such as the interests of the civil servants of a certain branch of the government, or the interests of the visa-holders who applied for renewal – may find due consideration within the judicial process. Such interests may even prevail, when their claims, for purely juridical reasons – for instance, coherence with prior jurisprudence – reach the status of “constitutional right”.

leading, though it is not wrong, to say, as Marmor does, that an essential feature of written constitutions is that they have a “moral content”. They have a juridical content, they express legal norms. It is totally contingent and trivial that, according to somebody’s judgment, these legal norms overlap with morality by conflicting with or by matching it. On the other hand, it is neither contingent nor trivial that the constitution’s normative content includes some of the most important rules of a political community. These rules are included in the constitution precisely because they are regarded as being the most important ones.

In short and to sum up my argument, I hold that (1) from the viewpoint of the inter-generational issue the difference between constitutions and statutes is merely a matter of degree. The enactment of an authoritative norm implies that other people, who were not involved in the process of its enactment, find themselves bound by it, until they do succeed in modifying such norm according to the procedures prescribed for its amendment. (2) Provided that there is a procedure for amending such norm, the kind of majority required does not affect the democratic nature of the political regime. (3) On the contrary, the provision of qualified majorities and differentiated procedures can contribute to the realization of the democratic ideal, if the latter is conceived as a form of government which compels the majority to bargain with the minorities.

5. Constitutional Rigidity, a Matter of Degree. The Problem with the Petrified Constitution

The arguments presented in the last paragraph still do not offer a fully satisfactory solution to the inter-generational issue. Its further investigation can elucidate an important aspect of legal positivism. Let us begin by questioning whether it is possible to provide a positive solution to the issue in the case of a constitution which is not merely rigid, but absolutely “petrified”, i.e. unamendable. It goes without saying that in the case of the petrified constitution future generations are bound by a set of legal rules which have been enacted without their consent. Unlike the case of rigid and amendable constitutions, however, no legal instrument has been devised in order to get rid of such bounds. Is such a situation morally justifiable?

This is not a purely speculative question. After all, the distinction between rigid constitutions and petrified constitutions is only theoretically clear-cut; in practice, it may be a matter of degree. What to say of a constitution which is amendable by a 99% majority? Is it still a democratic constitution? The (2) assumption of my reply to the inter-generational issue – that the democratic nature of a political regime is not affected by the kind of majority required for amending its constitution – is highly questionable. Moreover, what to say of those constitutions, such as the Italian or German constitutions, which contain unamendable norms – norms which are generally believed to be so fundamental as to be un-

changeable even through constitutional amendment? Are they morally justifiable?

It seems to me that the only way to justify “petrified” constitutions is to assume that these constitutions and unamendable constitutional norms derive their legitimacy from their content, and that their content coincides with that of the supreme moral norms. It is an argument which Marmor takes into consideration and rejects perhaps too hastily. He assumes that if the legitimacy of the constitution derives from the moral soundness of its content, then we would face the problem of explaining the practical difference between having a constitution and not having it.

What would be the point of having a written constitution unless the constitutional document makes a normative-practical difference? It can only make such a difference if it constitutes reasons for action. But according to the argument under consideration, the only reasons for action the constitution provides are the kind of reasons we have anyway, regardless of the constitution, namely, that they are good moral reasons. (ILT p. 146)

Marmor’s line of argument, however, is not fully satisfactory for two reasons. The first is that it rests on questionable grounds: it presupposes that everybody has always a perfect knowledge of the moral reasons for acting in a certain way and it presupposes that no reasonable disagreement can rise on the content of such moral reasons. If we do not accept these two assumptions, then the written constitution, by being *ex hypothesis* morally good in its content, can have the practical effect of announcing the moral norms for the benefit of those who otherwise would ignore them.

The second reason perhaps is more compelling. The enactment of a “morally good” written constitution has the practical effect of transforming the moral norms into legal norms. Suppose that everybody has a moral right to free speech; suppose that the constitution states “Everybody has a right to free speech”; and suppose that the legislator enacts a law which clearly abridges free speech and therefore conflicts with the constitution. In that case, if the constitution has the features which Marmor identified – supremacy, rigidity, etc. – the judge would have not merely the moral duty, but also the legal power of refusing to enforce such a law. After all, the written constitution makes a practical difference, and such a difference can be justified by recurring to the moral soundness of constitutional norms.

For these reasons, I think that it is possible to maintain that petrified constitutions can derive their legitimacy from the moral soundness of their content. However, this view would contradict two widespread assumptions.

The first one is the idea of the moral value of democracy. This idea may be formulated in turn either as an ideal of community self-governance or it can be cast in individualistic terms: everyone has a moral right to participate in making the decisions that affect her own life and a moral right to attempt to modify such decisions with a fair chance of success. It is possible to defend the moral value of

democracy in several distinct ways which are largely dependent on the underlying concept of democracy – it is now not necessary to discuss this issue at length.

The second assumption which conflicts with the content-based legitimacy of petrified constitutions is the idea that moral values are not independent of people's desires and beliefs: desires and beliefs change in the course of time and therefore what is right or wrong changes in the course of time. In order to maintain the moral legitimacy of an unamendable constitution it is necessary to assume that the moral values which are petrified into the constitution cannot – or, better to say, must not – change, because every change would be a deviation, a departure from the moral truth codified in – or “described” by – the constitution.

Therefore, the moral legitimacy of a petrified constitution can be defended only if one assumes that its normative content is morally just, that democracy is not a moral value and that moral values are not historically contingent. There is no need to say that these three ethical and meta-ethical assumptions are highly questionable: few would endorse them and surely I would not. If only one of them were to be wrong, the petrified constitution would be morally odious and probably it would also be unstable: the only way to change it would be to overthrow it, or resort to constitutional interpretation, which would be the only available outlet to satisfy the demands for legal change.

Should we therefore conclude that petrified constitutions are morally illegitimate? I think we should. However, we know that for centuries and perhaps millennia political communities have been governed by constitutions which were generally conceived as being unchangeable and legitimate. Indeed, every “religion of the book” can originate a political community governed by a petrified constitution: it is sufficient for the political regime to be a theocracy, or for religion and politics not to be yet clearly differentiated into specific domains, in order to have something like a petrified constitution. God's will, as it is expressed in the words of the book, is necessarily just – and we can only speculate whether what God wants is just simply because God wants it, or whether God wants what is just because it is just. Nobody believes that the fundamental principles of a religion can or should be a matter of democratic decision-making; even the membership to a church is usually not a matter of free choice, but of birth. Moreover, the content of divine law does not change in the course of time: on the contrary, time is regarded as a mission which God has given to humanity, as the path which humanity must follow in order to accomplish his will.

Not only the theocratic “constitutions”, but also medieval “constitutions” and the constitutions of every traditional society can be equated to the petrified constitutions. Sometimes those constitutions were of a purely customary kind, sometimes they were partially codified. What they had in common, however, was that they were valid not despite their being ancient, but because they were ancient: their legitimacy principle was of a traditional kind, it was the “authority of the eternal yesterday” (Weber).

Bearing in mind the above considerations, we can clarify some implicit prem-

ises of the inter-generational issue, and we can also pinpoint an important, although often neglected, aspect of legal positivism. In doing so, I will take the liberty of departing from Marmor's text by advancing an argument which is at least partially alien to the problematic scope of his investigations – although it will not necessarily be in contrast with his views.

6. *Law and Social Change. Legal Positivism and Natural Law Theory*

Marmor questions the right of binding future generations to our conceptions of what is good and right. The claim of a past generation to bind future generations can be considered as being over-confident, arrogant – and therefore morally ungrounded and condemnable – and doomed to failure. However, the historical excursus on petrified constitutions has demonstrated that also the opposite question has been posed: what right does the present generation have to free itself from the moral conceptions which has inherited from its fathers? The claim of the present generation to free itself from the law of past generations has also been considered over-confident, arrogant, dangerous and, ultimately, doomed to failure or to catastrophe. The justification of such a claim has been a difficult task for legal and moral theory. The power of present generations to get rid of the well-settled law has been considered, if not morally illegitimate, of dubious political and moral legitimacy.

We may assume as hypothesis that one of the tasks of legal theory is – as Raz put it – to clarify “the conditions, if any, under which the law is morally legitimate and (...) the consequences that follow from the assumption that it is morally legitimate”⁵. Of course, this is a highly questionable hypothesis – on this point, I will say something later. However, it is the research program of Raz, Marmor and of many others post-hartian legal philosophers. The last paragraph has reached a conclusion on the inter-generational issue and the problem of the moral legitimacy of petrified constitutions: the inter-generational issue can only be posed on the background of some ethical, meta-ethical and theoretical assumptions, and these assumptions are characteristic of modern legal and political thought. Without such background, the authority of the “eternal yesterday” reigns and the ultimate source of authority is either tradition-based, or it is found in the book which announces the divine will. In that context, we face an opposite and “reversed” problem: what right do we have to free ourselves from the authority of laws which have been delivered to us by our fathers – or by our Father?

I think that it is possible to identify two distinct ways of dealing with the issue of the legitimacy of authority and the law; two justificatory strategies which are distinct in their underlying problems and which are distinct in their theoretical,

⁵ J. Raz, *On the Authority and Interpretation of Constitution*, cit., p. 159.

ethical and meta-ethical foundations. Let us call the first “natural law theory” and the second one “legal positivism”.

According to the former, the law is morally legitimate, if it is legitimate at all, because it corresponds to the principles of justice which were commanded by God, crystallised in the tradition or rationally knowable by everyone. The law is morally justified because it is morally correct; morality is objective and capable of being known through reason or revelation. In this perspective, the main problem is surely not the inter-generational issue. The problem is to justify the temporal power, the legislations and, in general, the legal innovation: why and with what limitations is it morally justified to change the law?

It is a problem that we may find in Aristotle⁶, in the Patristic⁷ and in Scholasticism. Thomas Aquinas’s solution is the best known one: legal change abolishes custom, and custom, as Aristotle taught, “avails much for the observance of laws”; therefore, “to a certain extent, the mere change of law is of itself prejudicial to the common good”; “human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect” – as it occurs, for instance, when the new law bears “some very great and every evident benefit”, or when the old law is “clearly unjust.”⁸ It is manifest that the problem here is not, and cannot be, the inter-generational issue, or, better to say, the inter-generational issue can here only be posed in reversed or upturned terms. See, for example, the Gratian’s Decree (1140): “It is absurd, and a detestable shame, that we should suffer those traditions to be changed which we have received from the fathers of old”. (*Corpus iuris canonici. Decretum Gratiani*, I, 12, V).

We find again this kind of “reversed” inter-generational issue even in modern time, in the counter-revolutionary and anti-Enlightenment literature, be it or not inspired by political and legal romanticism. Savigny, for instance, condemns what he calls the “historical egoism”, that is the undue concentration of present on itself: a sort of “separation between the past and the present” which makes people believe that every historical epoch “creates by itself, in a boundless and discretionary way, its existence and world”⁹. The writings of Edmund Burke are even

⁶ According to Aristotle, changing the law may be just, but it has to be done with the utmost prudence and caution, because legal change undermines the effectiveness of the law: “For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.” (*Politics*, II, 8, 1269a, 21-24)

⁷ Augustine of Hippo, *De libero arbitrio*, I, 6, 14-15, calls “temporal law” the law that “although it is just, it can be changed in a just way as time passes”, and distinguishes it from the “eternal law”, which is “unchangeable”. However, “there is nothing just and lawful in that temporal law that human beings have not derived from this eternal law.”

⁸ Thomas Aquinas, *Summa Theologiae*, I-II, q. 97, a. 2.

⁹ F.K. von Savigny, *Über den Zweck dieser Zeitschrift* (1815), Italian translation in Id.,

more explicit and polemic: “The very idea of the fabrication of a new government is enough to fill us with disgust and horror. We wished at the period of the Revolution, and do now wish, to derive all we possess as an *inheritance from our forefathers*”¹⁰.

Let us now consider the problem of the justification of law’s legitimacy from the viewpoint of legal positivism. What kind of legal positivism? With good reasons, one may hold that the problem of Raz and Marmor – the justification or critique of law’s authority – is alien to the tradition of legal positivism. If we take as exemplars of legal positivism authors such as Kelsen, Ross and Hart, we see that legal positivism abandons any attempt to investigate the problem of the justification of authority and it shifts such problem to other disciplines conceived as distinct from legal science and jurisprudence. The problem of the justification of authority is abandoned to speculative enterprises which are considered as totally separated from legal theory – moral philosophy, psychology, etc. Law’s binding force is radically contested (Ross), or is identified with legal validity (Kelsen), or is regarded as depending on a not-necessarily moral evaluation which is accomplished from the internal point of view of the legal system (Hart).

In particular, Kelsen’s solution to problem of law’s binding force – the theory of the fundamental norm – is highly sophisticated, coherent and elegant and, at same time, it is highly frustrating. The fundamental norm is the mere hypothesis of the validity of the legal system and it is based on epistemological, pragmatic and even moral considerations, but it cannot be justified through legal arguments. The theory of the fundamental norm, more than resolving the problem of the foundation of legal validity, dissolves and abandons such problem: it excludes that such problem belongs to the domain of legal science *qua* science and to the province of jurisprudence. Kelsen simply says: let us assume that a legal order can be regarded as valid if its norms are by and large effective, and we will then be able to see what consequences derive from this assumption in regard to the conditions under which the state is legitimated to apply sanctions.

In short, broad sectors of legal positivism considered the problem of the moral

Antologia di scritti giuridici, Bologna, Il Mulino, 1980, pp. 78-79. On the contrary, according to Savigny, “every epoch must [...] acknowledge something pre-existing, which is at the same time necessary and free: it is necessary because it does not depend on the choice of present time, and it is free because it does not derive from some particular alien force [...], but instead it derives from the superior nature of the people.”

¹⁰ E. Burke, *Reflections on the Revolution in France* (1790), London, J.M. Dent & Sons, 1960, p. 29. See also *ivi*, p. 31: “it has been the uniform policy of our Constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity – as an estate especially belonging to the people of this Kingdom (...). A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors.”

legitimacy of the law to be totally alien to their area of theoretical investigation. Moreover, some of the leading legal positivists who dealt with such problem gave to it profoundly different solutions – we can think, for instance, to Hobbes (security), Savigny (popular spirit), Bierling (recognition), Raz (service), etc. Therefore, one can wonder whether there is a typical legal positivist solution to the problem of the justification of authority.

An answer can be found, I think, in the characteristic legal positivist distinction between legitimacy and legality. The distinction had already emerged in the context of natural law theory. In regard to the right to resistance, Thomas Aquinas had already distinguished two kinds of tyrants – we can call them “tyrant in title” and “tyrant by exercise”. The former is a usurper, as he seized a power to which he is not entitled, while the latter has a legitimate power but exercises it in a wrong way; the former may be lawfully repulsed, while against the latter there is no right to resistance¹¹. Modern legal positivism turned the problem upside down. The issue of the legitimacy – binding force – of sovereign power was no more admissible or interesting: the major problem was now the legality of the exercise of such legitimate power – i.e. its validity. The power of the state, which was in principle legitimate, could be exercised according to the law or by violating the law, in a legal way or by illegal means. From the right to resistance the problem shifted to the objective legality of the state based on the rule of law. The natural law issue of the political obligation and its rational or theological foundation was replaced with other kinds of problems: the question of the validity of norms enacted according to certain given procedures and the question of the legality of their enforcement. The issue of the legitimacy of power was resolved by translating it into the problem of its legality: as Weber put it, the state power was accepted as legitimate – and therefore it had to be obeyed, it had binding force – because it was legal.

This last statement, which is characteristic of so-called “ideological” legal positivism, may appear surprising at first sight. Apparently, it denies the conceptual distinction which makes it possible, that is the distinction between legitimacy and legality. But the weight of this observation must not be over-estimated. Following Bobbio, it is possible to distinguish between a radical version and a moderate version of ideological legal positivism¹². The former collapses the distinction between legitimacy and legality: what is legally required is, for that sole reason, also morally compulsory. We can neglect this view, as it is marginal or even fictitious – it is difficult to find someone who actually endorses it. The moderate version maintains the distinction between legitimacy and legality and it simply holds that the will of the legislator must be taken into fair consideration in practical reasoning. The moderate version of ideological legal positivism generally assumes that the laws, although they are not necessarily just, help to ensure order and peaceful social cooperation.

¹¹ Thomas Aquinas, *Scriptum super libros Sententiarum*, lib. 2, d. 44, q. 2 a. 2c.

¹² N. Bobbio, *Il positivismo giuridico*, Torino, Giappichelli, 1996, pp. 236 ss.

It is not my aim to defend some version of ideological legal positivism, not even in its moderate version. The only point I would like to clarify is the frame of theoretical, ethical and meta-ethical assumptions which made ideological legal positivism appealing and for a long time hegemonic in Western legal culture. It is a set of assumptions which are typically modern and opposite to those that we may find at the background of the “reversed” inter-generational issue of Thomas Aquinas. I would formulate them in the following way.

First of all, there is the idea that there is no objective moral truth or, if there is, it is difficult to ascertain. If there were some objective moral truths which were accessible to everyone through reasoning or revelation, then the legitimacy of the law could depend on its conformity to them. But this cannot be the case if we lack an objective and knowable moral reality. If the law must decide the controversies between its subjects, then its legitimacy cannot depend on moral truths which can be object of controversy (Hobbes). Law’s legitimacy must depend on a formal principle: a principle that is void from the viewpoint of its content and that can therefore be accepted without taking into account the underlying moral conceptions.

Secondly, there is the idea that moral conceptions are not only controversial and essentially contested, but they also change in the course of time. Society changes and such transformation is in itself good (“progress”) or at least inevitable. For this reason, also the legal rules must be capable of changing in response to new priorities.

Finally, there is the idea that it is possible and necessary to distinguish between the law as it is and the law as it ought to be. How the law should be can be subject to controversy and disagreement, but how the law actually is should be in principle knowable, assessable and predictable. Everything changes, but the law remains what it is, at least until it is changed according to the prescribed procedures. This makes it possible to plan one’s own activities, by reducing uncertainty in a rapidly changing society. On the contrary, if this distinction breaks down, and the law is as it ought to be because otherwise it would not be law, then it would not be possible to consolidate any normative expectations. Indeed, if there were no agreement on how the law ought to be, there would also be no agreement on how the law actually is. If, on the other hand, there were some general agreement on how the law ought to be – and that is highly improbable – then it would be impossible to institutionalise any expectations of legal change: if the law is as it ought to be, then it must not change.

In short, the fundamental idea is the following. Only a “closed” legal system – a system which rests its legitimacy on itself, on its own rules of recognition and change, on its internal legality – can be sensitive to social interests which rapidly evolve; it can develop responsiveness to changing social needs (Luhmann). This cannot be the case with an “open” legal system: a legal system which rests its claim to authority on an external norm, as it is a natural law-based legal system, is essentially static (Kelsen). The norms which belong to such system are valid and

binding because they correspond to the ultimate founding principle; they are valid because of their content, not because of their form – or pedigree. As a consequence, such norms would not be capable of changing. Moreover, if there were some deep disagreement on the content of the ultimate founding moral norms, the legal system would be unstable. These are two faces of the same coin: an “open” legal system is too rigid and therefore also unstable.

To summarize: on the one hand, we have the natural law problem of justifying legal change – let us say, “The law is legitimate although it is changing”. On the other hand, we have a plausible legal positivist solution – or dissolution – of such problem: by virtue of the possibility of legal changes, legal positivism can abandon the problem of law’s legitimacy – let us say, then, “legitimacy through change”, *Legitimation durch Wandel*¹³. It is a legal positivist answer to the problem of law’s legitimacy: the law is legitimate not despite the fact that it changes, but because it is able to change; legitimacy through change, not in spite of change. Notice that this is an answer which is almost neutral from the moral point of view – the label of “ideological legal positivism” can be misleading. It does not pretend to say how we ought to behave – by obeying to the law – but it merely explains how it is possible for the law to be generally obeyed although it changes: it is generally obeyed because it changes. The legal positivist (dis)solution of the problem of law’s legitimacy identifies a condition of possibility of a legal system in a rapidly changing society. It is obvious that a changing law – a legal system that regulates also its own transformation – can be “morally just” only in a contingent way. It is not always the case that the people who are entitled to decide, do also decide in the right way. A changing law can justify an unjust decision solely on the basis of its being legal; it can accept “morally illegitimate” decisions because they are “legally valid”. Legal positivism can explain why such a law can successfully uphold a claim to be obeyed. Although it is from time to time unjust, according to somebody’s judgment, and although it is essentially unfounded, or it is founded only on an internal principle of legality, positive law can successfully uphold a claim to be obeyed because it can be modified – or, at least, it is held to be modifiable¹⁴.

¹³ T. Osterkamp, *Legitimation durch Wandel. Zur Philosophie des Rechtswandel*, in “Humboldt Forum Recht”, 2, 1999, <http://www.humboldt-forum-recht.de/deutsch/2-1999/seite1.html>.

¹⁴ This way of drawing the distinction between natural law theory and legal positivism is, of course, one of the many ways, and not necessarily the best one. Note that it considers both theories as normative theories – or, if one prefers, critical theories. Because of the subject of Marmor’s investigation – the criteria for evaluating the moral legitimacy of a legal practice –, this is inevitable, and I will say something on this point in the next paragraph. Moreover, note that this way of drawing the distinction between natural law theory and legal positivism is at the base of one of the most simple, insightful, and sharp definitions of these two traditions of thought. According to W. Benjamin, *Zur Kritik der Gewalt* (1920-21), It. trans. in Id., *Angelus Novus. Saggi e frammenti*, Torino, Einaudi, 1995, p. 6,

7. Conclusions. On Method

In the last paragraph I have identified some theoretical and normative premises of the inter-generational issue. These premises are characteristic of modern legal and political thought and they lay at the foundations of a legal positivist approach to the problem of the legitimacy of the law and legal change. In this perspective, the constitution is legitimate because it establishes the procedures according to which the law can be modified – and, all things considered, this is not something negligible. Obviously, every rule of change is also a rule of non-change: it establishes the procedures according to which the law can be modified and therefore it also prohibits modifying the law in violation of such procedures; it grants future generations the right to lawfully change the law and therefore it also forbids future generations from changing the law unlawfully. Moreover, in this essay I have also argued that written constitutions and judicial review are legitimate because, on the one hand, they ensure the autonomy of the legal system, by operating as a restraint and stabilization device for the political process, by functioning as “checks and balances”, and on the other hand, they institutionalize further procedures for changing the law lawfully. The autonomy of the law and its modifiability are not conflicting values; on the contrary, they imply each other, and they lay at the core of a positivist approach to legal theory, as it is made clear by the works of authors like Kelsen and Luhmann. In short, the inter-generational issue is a serious question, but its polemical targets – constitutional rigidity and judicial review – are ill-chosen. Constitutional rigidity and judicial review do not endanger, they rather protect, those values which rest at the basis of a certain tradition of legal positivism and of the same inter-generational issue: legality, law’s modifiability and democracy.

Perhaps, a danger for such values arises within the domain of legal theory – and therefore on a small scale – from moral objectivism and the revival of natural law theory. This cannot be considered in detail here, but I simply want to stress one last point. In much of the post-hartian legal theory, the abandonment of methodological legal positivism is the premise for a strong normative turn. As we know, Marmor investigates the moral legitimacy of the constitution and looks for

natural law theory is the doctrine which neglects the question of the legitimacy of law’s “means” – i.e. the *Gewalt*, authority/violence – by considering only the question of the rightness of law’s ultimate ends, while legal positivism is the doctrine which identifies the problem of the legitimacy of the means with the problem of the legality of the forms, and which is therefore indifferent to the problem of the rightness of the ends. “If natural law can judge all existing law only in criticizing its ends, so positive law can judge all evolving law only in criticizing its means. If justice is the criterion of ends, legality is that of means.” (my italics) In this definition we find some perspicuous oppositions: justice vs. legality, ends vs. means, existing law vs. evolving law, and the verb “to judge” to characterize the operation which is common to legal positivism and natural law theory.

the criteria of its interpretation. Notice: the moral criteria according to which the constitution ought to be interpreted, not the criteria according to which, as a matter of fact, it is interpreted, nor the criteria which positive law establishes. Marmor, Raz, Waldron and several others maintain the distinction between the law as it is and the law as it ought to be, but they investigate above all how the law ought to be: they are interested in the justification and critique of the law.

In this respect, their approach resembles natural law theory. Modern natural law theory too focused on the problem of law's legitimacy: it set out a peculiar foundation for political obligation and the right to resistance; it carried out a speculation on the authority of temporal institutions. Legal positivism, on the contrary, removed these problems from its scope of theoretical and normative observation, by distinguishing more clearly between title and exercise of power, between legitimacy and legality, between sovereignty and governance. The question of the legitimacy of power was banished from the province of jurisprudence and legal positivism attributed to itself the task of checking the legality of power's exercise. And, in order to check the legality of power's exercise, legal positivism needed and wanted to distinguish between the law as it is and the law as it ought to be.

Although Marmor maintains such distinction, he clearly follows a different approach, an approach which is opposite, for instance, to the one adopted by Kelsen. For Kelsen the task was to dissolve the question of the ultimate foundation of law's normativity in order to free legal science from every political, moral and sociological consideration, which would have jeopardised its "purity". What was the reason for this theoretical operation? A legal science that deals with the question of the foundation of law's legitimacy cannot but have recourse to political, moral and sociological arguments. For Kelsen it was a matter of defending the autonomy of legal reasoning against the injunctions of politics, moral philosophy and social sciences. He knew well that a politicised legal science could have jeopardised the autonomy of the law – its inner legality, the rule of law – and, by doing so, it could have encouraged the emptying out and destruction of representative democracy.

Marmor's problem is different. It is the moral critique or justification of the law and the consequences – moral consequences, of course – that follow from such critique or justification with regard to the methods for interpreting and applying the law. It is much more a matter of defending the autonomy of morality against the law: it is a matter of asserting that morality – or, better to say, the moral philosopher – has a right to reason about the law by ignoring what the law disposes in this regard. In dealing with the various questions – for instance, the question of the standards of constitutional interpretation – the only thing which is irrelevant is the existing law. Every norm on constitutional or statutory interpretation as well as judges' opinions in this regard are far less interesting than Dworkin's ideas. Marmor simply states that in some legal system the question of how to interpret the constitution can be "trivially a matter of law", but that in

common law's countries there is no established social convention regarding judicial interpretation. (ILT, p. 121, p. 123).

Of course, all this is not only theoretically legitimate, but it is sometimes also very stimulating and thoughtful. Moreover, it is fully compatible, if not with the method, at least with the theory of legal positivism: Marmor maintains the distinctions between the law as it is and the law as it ought to be, between law and morality, between legality and legitimacy. However, the result of his operation cannot but be, as Kelsen knew, a moralization or politicization of legal reasoning. So, according to Marmor, "in constitutional interpretation on matters of moral or political principle, there is no substitute to sound moral reasoning." (ILT, pp. 159-160) Marmor urges the constitutional judges to engage in an explicit, exposed, transparent moral reasoning¹⁵.

¹⁵ At the margin, I would like to stress that Marmor limits the validity of his conclusion – the sound moral deliberation – to constitutional interpretation, but the reasons for such limitation are far from being clear. Even a trivial case for eviction, dismissal, divorce, civil liability, etc., may (a) involve issues of utmost moral relevance, (b) be decided applying a moral standard – or, better to say, a general clause – such as "good faith", "just cause", "diligence of a *bonus pater familias*", "unjust damage", etc., (c) imply the broadest discretionary power of those who settle it.

