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The Social Reality of Law

Droit (le). On ne sait pas ce que c'est.
(Flaubert-Laporte, *Dictionnaire des idées reçues*)

1. *Law as a Social Phenomenon*

Legal ontology is divided into two main topics: what is law from an ontological point of view, and what are the entities typically constituted or at least typically taken into account by the law. Both are difficult topics and the present paper will only deal with the first, commenting on some theoretical work of Andrei Marmor[1].

According to Marmor, law is a social phenomenon, not a natural one. At the very beginning of his book *Interpretation and Legal Theory*[2], he says that law "is one of the most interesting and complex social phenomena of our culture" (p. 1). Such a phenomenon is basically constituted and governed by a set of social conventions, on the basis of which the account of the law endorsed by Marmor is, legally speaking, a positivist one[3] and, philosophically speaking, an anti-realist one. "Viewed from the vantage point of contemporary theories of language, legal positivism amounts to a conventionalist, that is, anti-realist, position on the meaning of 'law'" (p. 7).

The final part of this paper will be mostly devoted to Marmor's conventionalism. Here, let me say that conventionalism about the law is a sort of received view among contemporary positivists, but neither the details of such a position nor the scope of it are perfectly clear. In what sense is law conventional? All law is conventional? All features of the law are conventional? If conventional means arbitrary[4], also what Hart called the Minimum content of Natural Law is conventional? Prohibiting homicide, for instance, is an arbitrary way of regulating social

[1] One might also wonder whether the question "What is legal?" is better than "What is law?" – but I won't presently deal with this worry.
[2] The book's first edition was published in 1992 and the second in 2005. The present paper is the related to the second, as the seminar it originated in was; such an edition is referred to, in the text and footnotes, by page numbers.
[3] "According to legal positivism, the conditions of legal validity are determined by the social rules and conventions prevalent in a given community" (p. 7).
[4] Cf. Marmor 1996, 2001, 2007 and forthcoming.

Analisi e diritto 2007, a cura di Paolo Comanducci e Riccardo Guastini

life? Furthermore, to focus on the institutional features of the law, is the judiciary an arbitrary institution of the law? Could we imagine a legal order constituted by the legislature alone?

However, my focus here is not on conventionalism *per se* but, rather, on the ontological question legal conventionalism is concerned with. The ontological question is about the nature of law. Marmor answers this question in terms of social conventions, claiming that this amounts to an anti-realist position on the meaning of 'law'. Why does he equate conventionalism with anti-realism? Simply because realism is taken to be a non-conventionalist conception of law, namely a natural law theory. The next section of this paper (§2) will be devoted to Marmor's reasons for rejecting such a position. Then, in the following, I will refer to Marmor's dismissal of realism (§ 3) and explore some accounts of the social reality of law (§ 4); finally, I will ask whether Marmor's conventionalism is a suitable account of the nature of law and my answer will be rather skeptical (§ 5).

2. *Marmor's Dismissal of Natural Law Theory*

Marmor's dismissal of natural law theory goes with his criticism of a realist account of the meaning of 'law', i.e. semantic realism about 'law'. The theory he wants to reject is constituted by three theses (p. 65).

1. The appropriate account of the concept of law is a semantic analysis of what 'law' means (and perhaps, of the meaning of other, related, concepts characteristic of legal language).
2. Such a semantic analysis of 'law' would show that the term refers to a real or natural kind of entity whose essence and constitution do not consist of social conventions.
3. Hence, the discovery of the real essence of law renders anything like legal positivism false, and a version of natural law true.

Before going into Marmor's own argument, let me point out that the wording of 2 contains a questionable phrase, namely 'a real or natural kind of entity'; because of this, the passage from 2 to 3 is, in my opinion, dubious. Does the word 'or' in that phrase express an alternative? If this were the case, the conclusion to 3 would not be justified, since the possibility of a real but non-natural kind of entity would not conflict with legal positivism. On a different interpretation, does that word express a relation of synonymy? If this were the case, the conclusion to 3 would be justified but premise 2 would be highly questionable, since, in our usage, we consider as real several things which are not natural – like cars, money, trial courts, and parliaments.

Coming to Marmor's own argument, he criticizes those (Moore in particular[5])

[5] Cf. Moore 1985, 1989, 2002. For a critique of Moore's realism see also Bix 1993, Ch. 5.

who try to provide a natural law theory *via* a realist account of the meaning of 'law' (pp. 69-71). Such a realist account is based on Putnam's view of the meaning of natural kind terms (pp. 71-74). According to Hilary Putnam's well-known argument presented in his paper *The Meaning of 'Meaning'* (1975), the meaning of a natural kind term like 'water' is determined by its reference (H_2O), that is by a way the world is, not by the content of our intentional states[6].

Some, like Moore, try to apply Putnam's account to law and morality[7]. However, such an account does not do simply because law is not a natural kind, but a social phenomenon[8]. Therefore, 'law' is not a natural kind term and one cannot make an appeal to semantic realism in order to provide a natural law theory. "The fact that law is a cultural product *par excellence* renders a realist position, and hence a Putnamian account about the meaning of 'law', incomprehensible" (p. 78). This is in my opinion perfectly correct. What I wonder about is the need of dismissing not only natural law theory but also any kind of realist account of the law.

Before going into that, let me also remark what Dworkin has claimed: political values, like natural kinds, have an essence but, unlike natural kinds, have a normative essence (2004: 10-13). No doubt this is a more ingenious and palatable position than Moore's. However, what a normative essence is, is very far from being clear.

3. *Why Dismiss Realism as well?*

Does the rejection of semantic realism imply the rejection of any kind of realism concerning the law? I agree with Marmor that realism has to be rejected not only in case it is a Putnamian one, but also if it is based on what Dummett has called *Bivalence principle*, namely the view that, for a given class of statements, each and every statement is determined as true or false, independently of our knowledge, by some objective reality independent of our knowledge (pp. 66-68).

Accordingly, Marmor claims that "contemporary legal positivism entails an

[6] Putnam's thought experiment of Twin Earth famously supports an externalist claim: "The moral we are invited to draw from imagined cases of this kind is that the significance of what we think and say depends on contextual factors; in particular it depends on causal relations we bear to our surroundings" (Heil 2003: 210). (Notice however that Heil endorses a sort of internalist account of thought and intentionality).

[7] "Overrulings […] do not change the law; they only discover for the first time what the law really is" (Moore 2002: 630).
For a naturalist approach to ethics see e.g. Railton 1986, Foot 2001, Casebeer 2003.

[8] See Schwartz 1978 against extending Putnam's approach to artifacts terms. Other classifications of kinds are of course possible; Hacking 1999 and 2002, e.g., remark the difference between *indifferent* and *interactive* kinds.

anti-realist account on the meaning of 'law'", since "law is essentially a matter of social conventions" (p. 69). This is independent from the particular version of legal positivism one supports. "Whether one prefers Hart's formulation of the Rule of Recognition or Raz's formulation of the source thesis, the result remains the same; the truth of legal propositions cannot be conceived of independently of the conditions for the recognition of their truths" (p. 69).

Other positivist authors endorse similar views. Brian Bix, for instance, has recently claimed that realist accounts "understate or underestimate the importance of authority to law, and that a proper emphasis on authority may require a correspondingly reduced role for semantic theory" (Bix 2003: 282). He takes realism to be the conception of those, in particular, who "assert that the terms we use refer to objects that exist in the world, and that existence is independent of our beliefs" (*ibid.*). This is the sort of realism pointed out (and criticized) by Dummett.

Marmor seems to suggest that all kinds of realism must endorse the theses of semantic realism (p. 70) and subscribe to the Bivalence principle (p. 71). Is this true? One may reasonably suspect it is not. Indeed (in footnote 10 at p. 71), he leaves room for a form of "sophisticated realism" compatible with legal positivism, for instance interpreting Austin as having claimed that "all statements about the law are fully reducible to statements about past events, namely, about the commands of the sovereign".

What I wonder about in the following, is exactly what kind of "sophisticated realism", if any, is compatible with positivism and the thesis of the social character of law.

4. *What Social Reality of Law?*

Law is something real, not a fiction. How could one make this claim without begging the question? Focusing on the logical values of propositions about the law, is an argumentative strategy I find convincing[9]. Propositions about the law can be true or false, even if the principle of bivalence does not hold with respect to them. The proposition that according to the law *x* ought to do *A* is true if according to the law *x* ought to do *A*. How could propositions like this be true were law an unreal or fictitious entity? Propositions about witches are false because no such entity exists in the world. Propositions about the Golden Mountain are false for the same reason. But some propositions about the law are true. When we recognize this we are committed to saying that something in the world (not necessarily in the *natural*

[9] That propositions about the law are possible and have truth values is however a disputed question. Cf. e.g. Mazzarese 1989 (Ch. 4) and 1991; Guastini 2006a and 2006b. On the Scandinavian Realists' thesis that beliefs about the law held by participants in legal practices are false, see Peczenik and Hage 2000: 326-327. See also Leiter 2001, claiming that American Legal Realism and Legal Positivism are not incompatible views.

world) makes them true. Otherwise the truth of a proposition about the law would be, to say the least, puzzling. I think that Marmor agrees on this.

Now, given that a Putnamian account does not do justice to this, what kind of alternative picture of the reality of law could we offer? I will try to sketch some possible accounts in the following, making reference to some well-known philosophical theories which seem to be promising for our purposes, even though their details are at times problematic and cannot be discussed here.

4.1. *A Kripkean Account?*

Kripke's and Putnam's theories of reference are usually taken together. However, I wonder whether we can, at least for our purposes, retain the former and reject the latter[10]. According to Kripke's challenging theory presented in *Naming and Necessity* (1970), strictly speaking proper names do not have a meaning, but have a reference. They are *rigid designators*. 'Saul Kripke' does not have a meaning, but refers to an individual (the same in all possible worlds). Such a reference is determined by an initial baptism and a subsequent causal chain in the use of the name[11].

Now, can we give a similar account of non-natural kind terms? In fact, if it is true that law is a social phenomenon, the term 'law' refers to a non-natural kind of thing. To put it differently, it refers to an artifact, like 'spaghetti' or 'madrigal'. So, to the extent that the law, qua social phenomenon, is an artifact, the question is whether we can give a Kripkean account of the meaning of 'law', that is, whether 'law' is a rigid designator.

Kripke extends his account of proper names to natural kind terms, like 'gold', claiming they refer to the same kind of thing in all possible worlds (they are rigid designators). In this respect, Kripke's and Putnam's theories are not different. But Kripke's story of baptism and subsequent use of the name might be helpful in order to extend his account to non-natural kind terms.

What 'law' refers to? With Austin, one might say that it refers to some command of the sovereign. With Kripke, one might say that the reference of 'law' is fixed by a baptism and a subsequent causal chain: something called 'law' is enacted by an authority and the relevant community continues to take it as such[12].

[10] On these theories cf. Bix 1993: 162 ff. and Stavropoulos 1996, Ch. 2. On reference, see also Searle 1969, Ch. 4 (in particular p. 77 ff. on the "axioms of reference") and Ch. 7.

[11] For a recent assessment of Kripke's views and their impact, see in particular Soames 2006. Cf. Casalegno 1998, Ch. 8.

[12] One might prefer the metaphor of childbirth to that of baptizing, claiming that a baby exists before being baptized, whereas a legal rule does not exist before being enacted. This claim would not consider that, at least in democratic systems, what exists before being enacted *as a rule* by the parliament is a sentence formulated by someone: the parliament has the power of baptizing it as law.

This is a form of realism about the law explaining our assumption that propositions about the law have truth values. A proposition *p* about the law is true when the statement expressing *p* describes the law correctly. Still, there is ambiguity in this view.

One might ask whether "describing the law" means giving an account of some norm-formulation or rather of some norm; in the former case, the description will concern some property of the norm-formulation, in the latter some property of the norm itself (conceived of as the content of some norm-formulation).

Now, bearing this in mind, is 'law' a rigid designator? If 'law' refers to norm-formulations enacted by authorities (legislatures, judges, etc.), I think it is. One can imagine some counterfactual situation in which a norm-formulation is enacted in a legal system different from the actual one and in which it is interpreted differently. Still, 'law' would continue to refer to the same kind of thing, namely to the same norm-formulation. But if 'law' refers to norms constituting the content of norm-formulations such a conclusion is no more viable, since the content of a norm-formulation changes according to the legal system and the interpretation. Once this is disambiguated, if we accept that 'law' is a rigid designator of norm-formulations we are committed to a form of realism about them at least.

This is, if you like, a form of "very sophisticated realism" explaining philosophically some intuitions, Hartian in particular, about the roles of authorities and participants in legal practices. I take it that Marmor's view is in tune with this. (But further remarks are needed on his conventionalism, which I will come back to below[13]). What is important now, is that the question "What is Law?" can be answered along these lines. It is law what

(a) an authority decided it is, and
(b) the relevant community (of officials and laymen)[14] continues to take as such.

Are there any exceptions to this? Maybe customary law is an exception to this if one thinks that it doesn't need an authoritative decision to become such; for such a law, condition (b), or a slightly modified version of it, might suffice. Also principles and fundamental rights, if conceived of as independent from authoritative decisions, may constitute an exception to this view. However, apart from possible exceptions, why not consider such an account as a realist account of the

[13] Here I notice that, in the Milan workshop on his book, Marmor suggested focusing rather on Kripke's essentialism; if also a conventional game like chess has an essence, it is unreasonable to deny that the law has an essence. I wonder whether such an essentialism is really compatible with Marmor's conventionalism. Moreover, it is not clear what is the point of a notion like "conventional essence" or similar.

[14] One can hardly imagine a legal order in which the laymen's great majority takes a certain proposition about the law to be false while the officials' great majority takes it to be true, or vice versa (even if, of course, officials and laymen have different roles in legal practices); such thing might rather occur as a pathological or momentary phenomenon.

law? I think it is indeed a kind of realism. This does not mean, of course, that it is exempt from problems. Perhaps, in addition to the reference ambiguity considered above, it is not explicit enough on the ontological commitments of claiming that law is something real along the lines of the above conditions. Are those conditions essentially behavioral or mental? If the law does not belong to the natural world, it belongs to what? Is it part of our social reality? Is it an institutional entity? To answer these questions, a different account might prove useful.

4.2. *A Searlean Account?*

In his influential book *The Construction of Social Reality* (1995), John Searle provides a picture of institutional reality (a special case of social reality) as depending on collective intentionality, constitutive rules and status functions[15]. Propositions about it are true or false even if institutional reality is not ontologically objective. A basic distinction is made by Searle between *epistemic* and *ontological* objectivity: something can be ontologically subjective (dependent on us, not belonging to the external world) and still we can have objective knowledge about it (it can be represented and described by statements having truth values). Positive law fits perfectly with this picture: it is dependent on us, it is created by human authorities, therefore it is ontologically subjective and is part of our institutional reality; still, we can have objective knowledge about it, by means, in particular, of statements equipped with truth values, expressing propositions about it. Such propositions are made true by specific institutional facts (not by brute facts) created by the constitutive rules of the relevant community. As anyone knows, Searle's basic formula for constitutive rules is "X counts as Y in context C". This applies to several domains. For instance, moving such an object in such a way, counts as moving the bishop playing chess. Or, to make a legal example, acting in such a way counts as enacting a statute in such a legal system. Constitutive rules assign status functions and, being "the foundation stone of all institutional reality" (Searle 1998: 153), determine what the institutional facts are.

Unfortunately, there are well-known problems with Searle's account, in particular with the notion of collective intentionality and the possibility of explaining in terms of it the disagreements on some particular feature of institutional reality[16]. To recall a recent example from Italian constitutional law on granting par-

[15] For a summary see also Searle 1998, and Searle 2006 for some further thoughts. Against some constructivist interpretation of Searle, notice that "the construction of *social* reality" is radically different from "the *social* construction of reality".

[16] See the papers collected in Di Lucia 2003. Cf. Tuomela 1997, Celano 1999, Heidemann 1999, Lagerspetz 1999. On Kelsen and Searle, see Comanducci 2000. Collective intentionality is, in Searle's picture, a psychological primitive in the individual heads of individual agents; thus, "We-intentions" are not reducible to "I-intentions" nor amount to some sort of Hegelian entity.

don[17], suppose that we quarrel on whether *F* is a faculty that only the President of the Republic has, or that only the Minister of Justice has, or that both the President and the Minister have, and, in this latter case, on whether it has to be exerted conjunctively, not disjunctively, by the two authorities. Here an answer in terms of collective intentionality is hardly satisfying. Apart from the metaphysical queerness of collective intentionality, how can one think that an issue like that might be settled by collective intentionality? The puzzle can be put like this: it is an issue on a feature of institutional reality and institutional reality depends on collective intentionality; but there is disagreement about it and therefore there is no collective intentionality about it. In fact, the issue I am recalling here was settled by the Italian Constitutional Court, not by collective intentionality: the Court's judgment entitled the President to grant pardon, whereas the Minister was deemed "responsible for the collection of all the necessary elements to make a decision"[18].

So, institutional reality is not independent of our beliefs and normative attitudes; but, *whose* beliefs and attitudes? Marmor is aware of this problem when he discusses the role of authors' intentions in interpretation (pp. 122-126); his answer, again, points at the social conventions governing the practice. "The performance of certain actions *counts as* an act of legislation if and only if these actions are carried out in accordance with (and as an instance of following) certain rules or conventions" (p. 123; added emphasis). Thus, the actions and intentions of authorities play a special role here. Postponing a discussion on Marmor's conventionalism and returning to Searle's institutionalism, one may think that a Searlean account might do without the notion of collective intentionality if we replace it with individual intentionality, mutual beliefs and authoritative decisions. In particular, decisions of supreme courts. Whether *F* is a faculty of the President, or of the Minister, or of both of them, is an issue that might be settled by a constitutional court. The court's decision should be deemed a baptism rather than a discovery. Nevertheless, it cannot be denied that human authorities are such only in so far as the relevant community considers them as being such. In this sense, George Mead was right in claiming, earlier than Searle, that our institutions depend at the basic level on the existence of social responses to particular acts and situations[19]. What perhaps is missing in this and in similar accounts is an emphasis on the role of authorities.

[17] See judgment 200/2006 of the Italian Constitutional Court.

[18] Of course an authority might use the verbiage of collective intentionality ("We-intend"), but that would not constitute a proof of the existence of the alleged intentionality.

[19] "There is a certain sort of organized response to our acts which represents the way in which people react toward us in certain situations. Such responses are in our nature because we act as members of the community toward others, and what I am emphasizing now is that the organization of these responses makes the community possible" (Mead 1934: 265-266). May this be interpreted as a natural law claim? I don't think so, since the "nature" Mead is talking about is essentially social.

Thus, our Kripkean and Searlean accounts might be integrated. The Searlean apparatus of constitutive rules defining status functions and institutional facts might explain conditions (a) and (b) of the Kripkean account (respectively on authoritative enactment and shared attitudes in the community), while the emphasis on enactment as a Kripkean baptism might explain and domesticate some phenomena recalcitrant to being treated in terms of Searlean collective intentionality.

Of course there are further open questions[20]. For instance: Does the existence of institutional facts imply the existence of institutional objects and properties? What about authoritative decisions conflicting with attitudes widely shared in the community? Can the participants have false beliefs on their own institutional reality (i.e. misidentify its features)? We will not attempt to discuss these issues here. Rather, we will come back to Marmor's thought and, elaborating on what has been said, I will try to sketch four models of what law is.

4.3. *Four Possible Models*

Remember that, with Austin, law amounts to a command of the sovereign, while, in our Kripkean picture, it amounts to a baptism plus a subsequent causal chain, that is, to the facts that something is enacted by an authority and it is taken as such by the relevant community. One may think that Marmor's view is in tune with this. But notice what he says in particular: "For those who claim that law is essentially a matter of social conventions, law is, *ipso facto*, what a community of lawyers and judges *thinks that it is*" (p. 7). Here Marmor seems to subscribe to a simpler picture, according to which law amounts to a shared attitude (and behavior?) in the relevant community. Still, one might consider a further possibility, according to which law amounts to a baptism or (inclusive disjunction) a shared attitude and behavior.

So, the question "What is Law?" can be answered in at least four ways – and it is not clear to me which is exactly Marmor's.

(I) *The Sovereign Model*: it is law what
  (a) an authority decided it is.

(II) *The Community Model*: it is law what
  (b) the relevant community takes as such.

(III) *The Conjunction Model*: it is law what
  (a) an authority decided it is, *and*
  (b) the relevant community takes as such.

[20] See e.g. Smith and Searle 2003.

(IV) *The Disjunction Model*: it is law what
(a) an authority decided it is, *or* (inclusive disjunction)
(b) the relevant community takes as such.

These are just models, making abstraction from further details about the relevant subjects, attitudes and behavior[21]. However, looking at them from a philosophical point of view, why not consider (I)-(IV) as accounts of the *reality* of law?[22] Why not consider them as forms of "sophisticated realism" about the law? Why not admit that some propositions about the law are true because the law is part of our *social and institutional reality*? Needless to say, labels are not important *per se*. What might be important is understanding why law is not a fiction, and also – but this paper will not try to[23] – which of these models is, in a positivist picture, the best account of what is law, at least in our legal systems.

However, we cannot ignore a couple of general objections concerning these models. First, one may claim that all of them are Hartian models[24]. Does this mean they are the same model? Does this mean that the differences between them are irrelevant? I think it is implausible to claim they are exactly the same, because they pose different conditions for something to count as law. Secondly – and this is probably the insight motivating the first objection – one may claim that all of them presuppose a sort of rule of recognition enabling us to identify the sovereign, or the relevant community, or in any case the sources of law. This is a serious challenge and leads to the objection that the above models attempt to provide a definition of 'law' but end in a vicious circle: the relevant authority or community defines what is law, but law defines what is the relevant authority or community[25].

[21] I leave aside the 20th century discussion on validity and effectiveness. I just remark that Ross 1958 (§§ 8-14) stressed the importance of a synthesis of psychological and behavioristic realism.

[22] "In a very general sense, every theory of law is realist and purports to explain the phenomenon of law in a realistic way, that is to say, it tries to describe this reality just as it is, or rather as it presents itself in the view taken by the theory" (Weinberger 1991a: 43).

[23] I just remark that model IV seems to be the most plausible, but it owes an explanation of the relations between (a) and (b). III is perhaps too demanding, while I and II have little explanatory power.

[24] This was Marmor's reaction in the workshop. (I take the opportunity of this footnote to express my gratitude to him, to D. Canale and to all the participants in the workshop for their helpful suggestions on previous drafts of this paper).

[25] A similar (but more basic) challenge concerns the "self-referentiality" of institutional concepts, e.g. the fact that being money is (in part) being taken to be money. Searle has claimed in reply that there is no vicious circularity in his theory, since, even though self-referentiality is a characteristic of institutional concepts, Y-terms are place holders. "If I say in order for something to be money, people have to believe it is money, there is no circularity because they can have that belief without using the word 'money'. The word money here just is a place holder for a large number of other functional expressions" (Searle 1998: 155). Many commentators find these replies perplexing. Cf. Celano 1999: 240-243.

A possible way out is to claim that the rule of recognition is basically a social rule. Being such, it defines what counts as law without being defined by law, since it depends solely on social conditions like regularity of behavior and acceptance (or else if these conditions are insufficient). However, a stronger reaction would be to claim that the above models are not strictly definitional; their aim is rather to explain how something is law. They answer the question "What is Law?" saying that it is what an authority or community takes as such; in so doing, they explain *how* something counts as such. If it is so, one thing is worth noting: what is missing in those models is an account *of the nature of law*. We can take them as explaining how something is (counted as) law but they are silent on the nature of that which is (counted as) law.

Imperativism, Institutionalism and Normativism are classic schools of legal thought that deal with the ontological question of the nature of law, even when they do not present themselves as such. In recent years further answers have been advanced, in particular neo-institutionalist answers[26], answers in terms of supervenience[27] and mentalist answers claiming that law is a purely mental content or intentional entity[28].

For myself, I do not have a theory of the nature of law. But, I believe, there are at least two intuitions that must be preserved and articulated. The first is this: law is an intentional entity, or, to put it differently, an intellectual artifact. The second is this: the social and institutional aspects of law resist a purely mentalist account of it. A satisfying picture of the nature of law cannot drop either of the two.

In support of these intuitions, let me recall the issue of misidentification, to which I made a brief reference commenting on Searle's picture. Of course individuals can be wrong on the community's attitudes, and in this sense also individual judges can be wrong about the law. But Marmor is right in claiming that extensive misidentification is impossible on those matters that ontologically depend on people's attitudes – "to the extent that something is a purely cultural product, its reference consists in what people take it to be, which renders the possibility of extensive misidentification a logical impossibility" (p. 77). It is impossible to be wrong about something which has no independent ontological status. This is true of art as well as of law and institutional reality: "artistic genres, like legal institutions, are *products* of culture, and hence cannot be misidentified extensively" (p. 77)[29].

[26] See MacCormick and Weinberger 1986; Weinberger 1991. Cf. also Amselek and MacCormick 1991.

[27] The idea is that legal entities supervene on non-legal entities like, e.g., beliefs, dispositions and actions. See Peczenik and Hage 2000. Cf. also Dworkin 1991: 85.

[28] "Law cannot be observed amongst the objects of the external world, or in Nature: it is confined to a quite different place, and one from which it is impossible for it to escape – the minds of men" (Amselek 1991: 15). Cf. Kalinowski 1969: 111-132.

[29] But according to Raz (1996: 4-5) "people need not be aware of rules as legal rules in order

A brief digression on this would not be unimportant here. It is worth noting that some, like Schauer (2007), do not distinguish between material artifacts (hammers, chairs, cars) and abstract or intellectual artifacts (poems, symphonies, theories) which of course have different identity conditions. Limiting artifacts to material ones and misconceiving their ontological status lead Schauer to say that, like natural kinds, "artifacts exist independently of our concepts of them, even if their initial creation was concept-dependent" (Schauer 2007: 21). It is true that, once created, material artifacts continue to exist (independently of us) *qua* material objects, but not *qua* artifacts. Suppose that all human beings suddenly disappear from the universe: it makes sense to say that (what we call) a chair continues to exist on earth as a material object, but it doesn't make sense to say that it continues to exist as a chair. As to the law, it is equally clear that, *qua* intellectual artifact, it would disappear too if all human beings were to disappear. Of course those material objects that we call codes, legal books and the like will continue to exist, but it wouldn't make any sense to claim that the law will continue to exist, for it is not identical with those objects themselves, being rather the semantic content of the marks printed in them[30].

So, what is the nature of law? Marmor's answer is in terms of conventions. However, as I will try to suggest, if one distinguishes the question of *what* is law from the question of *how* something is counted as such, one may suspect that Marmor's is not an answer to the former but only to the latter.

5. *Conventionalism and the Nature of Law*

One of the defining theses of contemporary legal positivism is the so-called Social Thesis: "What counts as law in any particular society is fundamentally a matter of social fact"[31]. For Marmor, the facts in question are social conventions.

to be guided by rules which are in fact legal". Poggi (2005: 135) remarks the difference between the question of what is the law *of* a community C and the question of what is the law *according* to a community C. To answer the first, a record of what the officials of C say might suffice, whereas it is not clear it suffices to answer the second question.

[30] "One may look at or touch an umbrella, since both this object and the ash-tray, by virtue of their composition, belong to the world of objectively perceivable things, whereas a rule is intangible and remains as a pure content of thought, within the closed intimacy of our mental circuits. It is impossible to hold a rule of conduct in one's hand. Of course, I can tear out a page of any legal code, the Civil Code for example, and I can brandish it. In doing this, I will only be waving a piece of paper, and certainly not rules of law, even if the piece of paper in question bears printed characters which represent the expression, in writing, of legal rules. These rules are not of themselves to be found in any of these materials, neither in the paper, nor in the ink printed on it, nor, besides, in the graphic characters which the ink produces on the paper. They belong to a universe quite different from that of objectively perceivable things" (Amselek 1991: 16).

[31] I take this formulation from Leiter 2001: 286. Cf. e.g. Morauta 2004: 112 ff. This is usually taken as a positivist analytic claim about law.

His theoretical work on conventions is mainly displayed in his book *Positive Law and Objective Values* (2001), to which this section of the present work will be mostly devoted[32].

Further clarification is probably helpful before going into that. Realism is often equated with externalism about content, but I take this to be an error. These are independent theses. One can be a full-blooded realist about what is law but have reservations about externalism or realism on the contents of law[33]. *Entity-realism is not Content-realism*. Consider a term like 'marriage'[34]. Does the "real" meaning of this term consist in reference to same-sex unions? Apparently, even if the status of sexual orientations is a disputed question[35], the meaning of 'marriage' is a social, not natural, affair. Nevertheless, positive law about marriage is not a fiction, but a real, institutional phenomenon. This kind of entity-realism does not commit one to content-realism. Remember that a debated question in 20th century jurisprudence was whether legal concepts have a reference[36]. On such an issue I would subscribe to some inferentialist semantics: the meaning of legal concepts is determined by the inferences they are involved in. Think again about the example of 'marriage'; or take the legal example of 'valid contract': to determine its meaning, one has to determine on what conditions something is a valid contract *for us* and what (normative) consequences follow *for us* from its being a valid contract. If this is correct, legal concepts do not have an independent reference. (Note that this does not imply they do not have any reference at all: one can say that their reference is determined by their inferential application conditions[37]). So, I do not accept semantic realism if it implies that legal concepts have a reference independent of our normative attitudes[38]. But, once again, I contend that a

[32] See also Marmor 1996 and 2001a (of which Marmor 2001, Ch. 1, is a slightly modified version).

[33] For such a debate see e.g. Brink 1988, Bix 1993 and 2003, Stavropoulos 1996, Horowitz 2000, Moore 2002.

[34] This is an example I borrow from Bix 2003: 289.

[35] On sexual orientations as either social classifications or natural kinds (essentials dispositions of persons, to be discovered by science, i.e. genetics) cf. the discussion of Stein 2002a, Nussbaum 2002, Hacking 2002 and Stein 2002b.

[36] See Hart 1953 and Ross 1957. Cf. Guastini 1990: 43 ff.

[37] Or, in Searle's picture, they refer to the X in the "X counts as Y in C" formula. Note that Searle's formula can indicate the reference of both the concept of law and a legal concept like valid contract. *Contra*, see Comanducci 2000: 114-115, where it is claimed that Y-terms, like 'Tû-Tû' for Ross, are void words, without any semantic reference.

[38] Inferentialism and contextualism are often tied to each other, but the issue is far from being clear. Some claim that contextualism is tied to externalism concerning the character of our thoughts: thoughts are not characterized by intrinsic features of thinkers, instead they owe their character to contextual factors (Heil 2003: 209). Similarly, some claim that a contextual account is not an anti-realist one: it is a referentialist account provided that the semantic value of a term is not its supposed "meaning", but its reference, which of course

proposition about the law can have a truth value, even though the legal concept applied in it does not have an independent reference. Consider, to conclude on this point, the following realist stance: "The meaning and reference of our terms is given by the way the world is – in the case of the moral and political terms found in many constitutional provisions, by certain kinds of social and political factors. We discover the meaning of these constitutional amendments, therefore, by relying on substantive moral and political theory and argument" (Brink 1988: 123). I would subscribe to this view only on condition of (i) intending 'the way the world is' as including our social reality and (ii) replacing 'discover' with 'authoritatively determine'. To sum up, I maintain that one can reject content-realism and accept entity-realism.

Returning now to Marmor, we should take into consideration his legal conventionalism. "Law is founded on social conventions. Social conventions determine what *counts as* law and how law is to be created, modified, and annulled" (Marmor 2001: v; added emphasis). Marmor criticizes Dworkin for having assumed that conventions manifest a pattern of agreement. "On the contrary, social conventions tend to emerge precisely in those cases where an agreement is difficult or impossible to reach" (Marmor 2001: 6). In this respect, Marmor accepts the *pars destruens* of Lewis' celebrated account (1969) according to which conventions are not agreements; but he doesn't accept its *pars costruens*, namely the idea that they emerge as practical solutions to recurrent coordination problems[39].

Marmor claims that conventions are *arbitrary* rules[40] and argues that there is a type of conventional rules which cannot be explicated by Lewis' account, namely the *constitutive conventions* of autonomous social practices[41].

The similarity with Searle's notion of *constitutive rules* is striking, and Marmor avows it in a footnote[42]. I think that some of Marmor's (anti-realist) considerations on conventions and the constitution of social rules are not remarkably

is fixed by the context (Bianchi 2001, Ch. XIII). In this sense, contextualism is not at variance with Kripke- or Putnam-style semantics.
On contextual and literal meaning in law, cf. Poggi 2007. For an inferentialist account of meaning and legal interpretation cf. Canale and Tuzet 2007.

[39] Marmor's aim is to revise Lewis' account in order to show that rules of recognition are conventions. This issue will not be discussed here. Cf. Coleman 2001, Lecture 7.

[40] "One of the most basic intuitions about conventions we have is that if a rule is a convention, then there must be at least one other alternative rule that people could have followed instead in order to achieve the same purpose" (Marmor 2001: 8).

[41] "It seems rather awkward to claim that the rules constituting the game of chess are solutions to a recurrent coordination problem" (Marmor 2001: 13).

[42] "Although I certainly draw here on Searle's distinction between constitutive and regulative rules, I am not sure that I want to subscribe to his basic idea that these are two separate types of rules" (Marmor 2001: 14, footnote 27). I must admit my perplexity with this remark: that constitutive and regulative rules are separate types of rules is a quite marginal detail in Searle's complex picture of social and institutional reality.

different from Searle's (realist) considerations on constitutive rules. Besides this idea, Marmor's own account focuses on the distinguishing marks of constitutive conventions (2001: 14-19):

1. they typically come in systems;
2. they have a partial autonomy from the general values and human concerns that they instantiate;
3. they are prone to change;
4. we tend to have a very partial knowledge of them;
5. they must satisfy a condition of efficacy (there is no point in following a conventional rule which is not followed in the relevant community).

These marks, that I will not discuss in detail, are common to all constitutive conventions, but of course conventionally constituted practices can have further, specific characters. Law is a conventional *normative* practice. "Unlike games and artistic genres, the law is an authoritative institution, imposing on its subjects normative demands that other, conventionally constituted practices do not seem to impose" (Marmor 2001: 25). The law differs from other conventional practices, in brief, because it claims to be a legitimate authority. This is a thesis of Raz accepted and worked out by Marmor. However, to specify the scope of his theory, Marmor remarks that conventions "should not be invoked to answer the question of why we should have law and legal systems, but only to answer the question of what counts as law in a given society" (2001: 31). So we are back to our problem. Conventionalism is not a justificatory theory of law, for it does not answer the question of *why* we should have law. Is it an explanatory theory? This seems to be the case, for Marmor says it determines "*what* counts as law and *how* law is to be created, modified, and annulled" (2001: v; added emphases). But, in this sense, it is not an account of the nature of law if it merely explains, his intentions notwithstanding, the ways in which something is counted as law[43].

This critical remark can be checked against Marmor's reflection on the sources of law. The Social Thesis brings Marmor to an appraisal of the so-called Exclusive Legal Positivism: all law is based on conventional social sources[44]. The truths of propositions about the law "are reducible to truths about social conven-

[43] Cf. Schwyzer 1969 on the idea that constitutive rules do not define the *nature* of an activity: what is missing in a rule-centered approach is the point of the activity, the aim of it and the conditions on which it is performed. Marmor (2001: 14-15) agrees on this.

[44] "The kind of exclusive positivism I have in mind would basically hold that legal validity is exhausted by reference to the conventional sources of law: all law is source based, and anything which is not source based is not law" (Marmor 2001: 49). On the disputes between Inclusive Legal Positivism and Exclusive Legal Positivism, see Schiavello 2004, Chaps. V-VI. One of the puzzling aspects of such disputes is that it is not always clear whether they concern the *contents* or the *sources* of law.

tions combined with truths about particular facts and events" (Marmor 2001: 51). This fits with the Kripkean account presented above. Still, I see more than one reason for being unsatisfied with it. In the first place, it is not clear to me what Marmor's view exactly is with respect to the four models distinguished above. No doubt it is incompatible with the Sovereign model. But it is not incompatible with the remaining three, namely the Community model, the Conjunction model, and the Disjunction model. Which one is Marmor's? In some places he stresses the role of community (e.g. 2005: 7) while in others he stresses that of personal authorities (2001: 89 ff.). Perhaps a general answer in general does not make sense: the issue depends on what is the legal order or the legal system one is referring to. But Marmor's project seems to fall under the head of general descriptive jurisprudence; in this sense, it should provide a general account of what is law. Secondly, one again can suspect that conventionalism is just an account of how something becomes law, not of what law is in a strict sense. The thesis that the sources of law depend on social conventions leads Marmor to claim that law is *founded* on social conventions; the expression 'conventional foundations of law' is used throughout his work and one may think that "what is law" and "what is law founded upon" are not exactly the same question. Furthermore, when Marmor says that rules of recognition do not settle for judges whether they should play by the rules of law, but only tell them "what the law *is*" (2001: 22), one may think that "what is law" and "what is the law according to some rule of recognition" are not the same question: the former is about the nature of law, the latter about the law of a specific legal system.

In the same book published in 2001 (Ch. 6), in order to divert his conventionalism from a realist stance without falling into the traps of subjectivism, Marmor distinguishes three senses of objectivity, i.e. *semantic*, *metaphysical* and *discourse* objectivity[45]. According to the first, a statement is objective "if and only if it is a statement about an object; and it is a subjective statement if and only if it is about an aspect of one's self" (2001: 113). According to the second, a given type of statement is objective if and only if "there exist objects of the kind purportedly described by that type of statements; and a class of statements is subjective if no such objects exist in the world" (2001: 116). According to the third, a given class of statements is objective "if and only if each and every statement in that class has a determinate truth value" (2001: 120).

[45] "First, there is objectivity and subjectivity in what I shall call the semantic sense. In this sense statements (or, perhaps more precisely, speech acts) are either semantically objective or subjective, regardless of their validity or truth. In the second sense, the objective-subjective dichotomy is a matter of metaphysical truth. The question of objectivity in this metaphysical sense in a question about the world, and not about the meaning of statements. Finally, there is what I shall call the discourse objectivity: a certain class of statements is objective in this sense if it makes sense to ascribe truth values to statements of that class" (Marmor 2001: 113).

Can this help in understanding what is law? First of all, I find Searle's distinction of epistemic and ontological objectivity more clear and useful than Marmor's, also because of the fact that Marmor's third sense does not require descriptivism (*ibid.*) but requires truth values (and I cannot see how something could be a truth-bearer without a proper truth-maker susceptible of being described). Be as it may, Marmor distinguishes metaphysical objectivity from metaphysical realism: "There is, in fact, a whole range of concepts and classes of statement about which it would make perfect sense to hold an anti-realist and objectivist stance" (Marmor 2001: 118). A list of examples follows in his text, including examples as the rules of chess and the annual rate of inflation in the UK. Taking again the chess example, we can state some truth about the bishop and claim with Marmor that the status of such truth is not that of metaphysical realism but that of metaphysical objectivity. Now, these examples are of the same kind of Searle's. So, why not simply talk of epistemic objectivity about ontologically subjective matters?[46] Then, why not accept a form of "sophisticated realism" about such matters? And, more importantly here, does Marmor's threefold distinction of objectivity help in understanding what is law?

Marmor maintains that legal conventionalism is compatible with metaphysical objectivity (2001: 139). All that legal positivism needs to substantiate an objectivist position about the law are the truths on conventional practices (rules of recognition) constituting the sources of law, coupled with specific truths "about those facts which are taken to yield legal results of various sorts according to the conventions (such as the fact that a certain act of legislation had taken place, or a judicial decision rendered, etc.)" (*ibid.*). This is in fact a quite plausible picture, susceptible of being specified, as I tried to suggest, with some insights taken from Kripke's and Searle's work. But, why talk of *metaphysical objectivity*? Those practices and facts, considered from and ontological point of view, are essentially human, subjective matters. One can accept a kind of Entity-realism explaining the truths about them and still claim that those entities are ontologically subjective. Moreover, are those truths about the nature of law? If they are about the *sources* of law and about "those facts which are taken to yield legal results" (*ibid.*), they are not about the law itself.

To conclude, one cannot avoid skepticism. If I may put it this way, for Marmor convention is the King of Law. However we may raise two sorts of doubts about his picture. First, even if it provides support for the intuition that law cannot be reduced to a purely mental phenomenon, Marmor's social conventionalism basically answers the question of *how* something counts as law, not the ontological question of *what* is law. Secondly, one may raise the doubts I referred to in the very beginning. All law is conventional? Are there any ontological constraints on what to count as

[46] Moreover, I suspect, if metaphysical objectivity is compatible with anti-realism it collapses in discourse objectivity (cf. Marmor 2001: 128 ff.). On the issue of law's objectivity, cf. Coleman and Leiter 1993, Marmor 2001 (Ch. 7), Rosati 2004.

law? Could a piece of music be counted as law? Could a frog be counted as an authority? Could being a square root be counted as a legal property?

Almost everything can become legally relevant. But being legally relevant is not being law, and almost everything is not everything. This is why legal ontology is worth studying and renewing, in my opinion. If "jurisprudence is never-ending, for the list of the essential properties of law is indefinite" (Raz 1996: 6), then also legal ontology is never-ending.

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