Interviste / Interviews

From Concepts to Metaphysics: A Conversation with Andrei Marmor

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Abstract: In this interview, Andrei Marmor offers a few personal insights on the relation within social ontology and philosophy of law, addressing main issues of his interest – such as the nature of the relation between rules and practices. Moreover, he reflects about the metaphysical turn in jurisprudence, Hart's internal and external points of view and the contemporary impact of Kelsen.

Keywords: Andrei Marmor, Jurisprudence, Social ontology, Metaphysical turn, Hans Kelsen, Foundations of institutional reality.

Introduction

Good afternoon, Andrei. It is a pleasure to have this opportunity to ask you a few questions after a week during which we stayed together discussing legal theory and social ontology. In particular, during this week (26th-29th November 2024) you have done a seminar about *Rationalizing Practices: A Dialogue with Andrei Marmor*, and then you opened the *1st PHILAWSON Workshop: Contemporary Views on Social Ontology and Philosophy of Law* with a plenary section titled "*How Art is Like Law*". We would like to retrace together a few important points which arose from your talks and taking take them into consideration within a proper scientific space. However, let's first start with your academic career. In Tel Aviv, you obtained a degree in Law, but also in Philosophy, and then you moved to Oxford to obtain a D.Phil, working mostly with Joseph Raz. After being a Professor at Tel Aviv University, you moved to

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the United States and worked at the University of Southern California to finally arrive at your current position as Jacob Gould Schurman Professor of Philosophy and Law at Cornell University.

1. **AL:** How Raz has influenced your academic life and career?

AM: Raz had an enormous impact on anyone who did philosophy of law, political philosophy, practical reasons, and things like that in Oxford. Most of my work was a critique of Dworkin (with whom I also worked), but Raz was tremendously influential. He was a fierce critic of people's work – including his own, but I found it intellectually super challenging, and I had a great time working with Joseph Raz. Some people did not. Some of my friends have more traumatic memories about being tutored by Raz, but I had a great time. And we kept in touch and Raz kept being an influence on my work for a very long time.

2. **AL:** So far you have published seven books and edited six collective books that count with international legal scholars from all over the world. You have challenged the central authors of philosophy of law – e.g., Kelsen, Hart, Dworkin and Raz. You have written about almost any topic that could be considered central to our field: positivism, interpretative theory, reasons for action, authority, rule of law, constitutional values, distributive justice, meaning, vagueness, reasoning, legislative intend, institutions, games or conventions, to only notice some of them. However, we cannot help but notice that along your more than thirty-four years of experience, there is always a question that is on your mind: What is the nature of law? Could you explain to us why you think this is the central question of the philosophy of law, why we haven't yet achieved an agreement about its answer, and, especially, if you think that agreement is possible?

AM: No, it is not possible. If there is something we can agree on in philosophy then perhaps the question was wrong. Good questions in philosophy are not the kind of questions people can agree on. I think it is very rewarding that there is no agreement to that question, there is not even an agreement on the question on how exactly to define the question. And there is no agreement certainly on what could count as a good answer. So, we had this discussion yesterday in the workshop about the method[1], and it was evident that some people thought that analytical philosophy cannot give any kind of plausible answers to these questions, some people thought that the right answer could all be Wittgenstenian analytical philosophy, even if it is call under different names these days, and others think that an adequate answer is more along the lines of social ontology or analytical metaphysics. So, we can't even agree on that.

Now, one thing that has happened for more than a decade I guess, is that many legal pilosophers got a bit tired of debates about the nature of law, understood as it has been traditionally understood in analytical philosophy, mostly surrounding the so-called "Hart-Dworkin debate". Some legal philosophers published articles saying "enough of that", and there is not much more progress to be done. I published arguments against that. I think that it is way too fast! They just got lazy. I think they failed to see what the interesting questions are still there. You do not have to phrase them in terms of "let's go back to the Hart-Dworkin debate", it is not required. But questions about the

nature of law are still very much open, and I think analytical philosophy has a lot to contribute to that. Does it take some methodological shifts? Well, yes, I do believe so. I think that there is room for more metaphysics and less obsession with concepts. But regardless of the methodological issues, I think there are serious questions still open and, I think that people are also hopefully getting tired of the Hart-Dworkin debate now, and that is good.

3. **AL:** Throughout your work the development of your central concerns is clear: starting from philosophy of language (first focusing on semantics, and then in pragmatics) with your books *Interpretation and Legal Theory* (1st ed. 1992, and revisited edition from 2005) and *The Language of Law* (2014), you have developed a central account of conventions and positivism on your books *Positive Law and Objective Values* (2001), *Social Conventions: From Language to Law* (2009) to finally arrived to metaphysics in jurisprudence with your last book *Foundations of Institutional Reality* (2022). According to this change in your approach to the central problems in legal philosophy, we would like to know, in general, what you think about the recent "metaphysical turn" in jurisprudence, and, in particular, what you think is the philosophical basis for this change to have happened now, maybe evolving from a flexible concept of conceptual analysis to the general use of metaphysical relations as the new methodology in legal theory.

AM: Just a small autobiographical correction: I had doubts about conceptual analysis a long time ago, and I started expressing those doubts in writing many years ago, long before I wrote this book. I have been arguing that the way to see the debates about the nature of law is essentially about reductionism, metaphysical reduction. There is an argument that I made about fifteen years ago probably, in the paper *Farewell to Conceptual Analysis (in Jurisprudence)* (2012), by that time it was already very much on my mind that we need to shift the focus and see the debates about the nature of law as mostly about metaphysical reduction. That's just about myself.

But, what brought about that change? Well, partly I think, due to more European influence on jurisprudence. I think that Europeans have not warmed up all that much to conceptual analysis, Wittgenstein did not have that kind of influence. The thing is most of the Anglo-American legal philosophers come from the Oxbridge tradition, we were all educated in Oxford or Cambridge – mostly Oxford. Oxford and Cambridge were heavily dominated by the ordinary language school of philosophy with people like Gilbert Ryle, Wittgenstein, Hart to some extent, Hare on moral philosophy. But the continental philosophers have none of that, so the linguistic aspect was never very strong. So, I think more contact with Europe and more influence of continental philosophy is one factor.

And the other factor, which at least for me was important, but I suspect not only for me, is the recent work in metaphysics on grounding. That had an enormous impact because it showed us that there are tools in metaphysics that we can use. And not just arguing about Quine's "two dogmas" – that's not helpful for legal philosophy. So, I think the interest in grounding in the literature helped a lot. I think these are the main factors and, well, there is also fashion in philosophy, things come and go, and interests change according to what seems fashionable.

3.1. **AL**: Just one specification: Do you think it is most correct to speak about grounding turn instead of metaphysical turn in jurisprudence?

AM: No, I think that the interest in metaphysical analysis, in metaphysical issues about law and related issues, was helped by the literature in grounding in metaphysics because it showed us that metaphysics has something to offer.

4. **VP**: Which is the new direction of the debate in jurisprudence, then? Do you think we are getting back to being interested in (and not bored of) similar questions that arose by Austin, Kelsen and Hart? I am asking this because our next question will be about Hans Kelsen in order to understand if, according to you, this contemporary metaphysical turn will take us in another direction rather than the one of Hans Kelsen, or if, according to you, there is still an interesting part in Kelsen's analysis of law. In fact, against the background of anglophone jurisprudence, it is your merit the defence of a few insights drawn from the theory of the Austrian legal theorist Hans Kelsen. As a matter of fact, during your career, you have deeply analysed his thought. Just to quote a few important works you have written about Kelsen's pure theory of law, you focused the first chapter of your volume *Philosophy of Law* (2011) on it, and it is well known your entry for the *Standford Encyclopedia* titled *The Pure Theory of Law* (First published Mon Nov 18, 2002; substantive revision Mon Jul 26, 2021). During the seminar *Rationalizing Practices: A Dialogue with Andrei Marmor* held this week, you stressed the importance of considering the nonreductive (so to say 'pure') approach Kelsen had to reply to the question on the nature of law, as an important alternative way to the reductive account of John Austin. What can we still learn from the nonreductive Kelsen's account of law, namely, that law is irreducible to anything other than law?

AM: Well, there is a lot to think about this issue. So, let me preface that there has always been a huge academic cultural gap, academic cultural divide, between how Kelsen was perceived by, and received by, the Anglo-American jurisprudence and others (like European and Latin American). And it is an interesting question *why* – I'm not sure I have the answer. I think partly because Kelsen had an idealized conception of how legal systems are structured that just didn't fit the American model. Americans read this stuff and said: "That is not how we think about the law here". So, it is also a matter of how Hart's philosophy of law became much more well-known, partly because it was in English, I don't know, but it is a fact. So, there isn't much of a Kelsen scholarship in the US and the UK, while there is a huge amount of Kelsen scholarship in Latin America and Europe. I think a lot of it has been corrupted by Alexy, but Alexy made Kelsen's work extremely popular. Alexy is very popular because he provides the normative justification for the kind of constitutionalism that Latin American countries find appealing because it is ok for them to develop natural law and tell politicians what to do. So, it is kind of a political-cultural issue.

So, abstracting away from all of that, what can we still learn from Kelsen that fits with contemporary philosophy in general? I think that some of his insights are very powerful still, very useful in ordinary theorizing about the nature of law. I think that his conception of the legal system is very good, his conception of how to think about

the creation of legal norms, his conception about the relation between revolutions and normative systems, lots of good stuff there. I think that his theory of the *Grundnorm* (basic norm), the idea that the *Grundnorm* has to be presupposed is mistaken. So, my views about it are very unorthodox. The orthodox view tries to account for it in a kind of neo-Kantian terms: I think that is totally wrong, there is nothing neo-Kantian there. It is very Humean actually, very anti-Kantian, no neo-Kantian. Kelsen was really deeply convinced by the impossibility of deriving ought from is. He saw that the theory that commits you to the idea that you somehow derive ought from is, it is just logically impossible, logically incoherent. So, he thought: How do you get an ought? Well, you need to presuppose it! There is just no way to derive it from anything. Then he constructed this idea of normative derivations that has to end at some point, but then: Where does the ought of the basic norm come from? Well, it has to be presupposed. That is not Kantian; it is absolutely the opposite of Kant. For Kant, rationality dictates the ought in and of itself, it is not something presupposed. Furthermore, Kelsen quite explicitly committed himself to an extreme version of normative relativism, including about morality, because when he asked what reasons do we have for accepting this basic norm and not that basic norm, he refuses to answer, he said there is no such thing as a "reason for" it. But if there is no reason for accepting this or that basic norm then just any normative system is normatively on pair with any other norm's system, which it simply means extreme relativism. That is not Kantian, that is the opposite of Kant.

So, in terms of his contemporary impact, the interesting thing is – that I think legal philosophers don't buy that – this whole idea that we need to presuppose a basic norm in order to account for the normativity of law and all of that, it doesn't fly, at least, with Anglo-American legal philosophy. But it started to interest people who do metaethics and want to salvage some version of relativism that would still make sense and not be vulnerable to the most obvious objections to relativism. Some people are working on that. (Steve Finlay for example got very excited about Kelsen when we told him about it, and he started working on it and some others followed suit). In my view, his theory of norms is totally dated and not useful, we moved on ages ago. A whole bunch of insights about the law are very cool. Parts of Kelsen's views are also very dogmatic, His theory of legal systems is very dogmatic because he assumes that every legal system has one basic norm: this is just empirically not true (as Raz has shown a long time ago). So, we have to be a little bit more relaxed even about this to gain better insights from Kelsen.

5. **VP:** You mentioned "reason for accepting this or that basic norm". I would like to know more about it from you as this is a tricky issue among the consequences of Kelsen's theory – in particular, the critical match between the logical presupposition of the basic norm and the people's reasons for accepting it.

What you just said reminded me of the perspective of analysis of Uberto Scarpelli, the Italian philosopher of law belonging to the School of Milan, to whom the Room of the Philosophy of Law is entitled – your seminar was held in this Room ("Aula Scarpelli"). In his production regarding the concept of validity and effectiveness (I'm

referring to the paper *Validità, legittimità, effettività del diritto e positivismo giuridico* [1965], in *Al di qua della siepe. Scritti di filosofia del diritto,* Pisa, ETS, 2024, pp. 17-42), Scarpelli pointed out a gap between the validity of the basic norm, the legitimacy of the legal system and the effectiveness of people's actually conforming with it; he said that this gap could be fixed if we qualify the point of view of people as a political (simply ideological) choice, the choice of accepting the fundamental principle of the legal system as their reason for action. I should tell you more about this, but that was just to say that it reminded me of your words, and I found it compatible.

Moreover, in the entry of the *Standford Encyclopedia* about *The Pure Theory of Law* you write:

> To regard something as normative is to regard it as justified, as a warranted requirement on practical deliberation. However, the difference resides in the difference in points of view. Each basic norm determines, as it were, a certain point of view. So it turns out that normativity (contra Kant) always consists of conditional imperatives: if, and only if, one endorses a certain normative point of view, determined by its basic norm, then the norms that follow from it are reason giving, so to speak. This enables Kelsen to maintain the same understanding of the nature of normativity as Natural Law's conception, namely, normativity qua reasons for action, without having to conflate the normativity of morality with that of law. In other words, the difference between legal normativity and, say, moral normativity, is not a difference in normativity (viz, about the nature of normativity, per se), but only in the relevant vantage point that is determined by their different basic norms. What makes legal normativity unique is the uniqueness of its point of view, *the legal point of view*, as it were [emphasis added].

So, would you mind telling us more about the "legal point of view" you are describing in this passage? To what extent could it be a reason for action?

AM: Ok, it is a bit complicated. The passage you read from the *Stanford Encyclopedia* is not my view, I am trying to explain Kelsen's view, which I think is a problematic view. But let me try to explain where it comes from.

This is one of those points about which there is a clear difference in views between Hart and Kelsen, and perhaps Kelsen got the better view, in this sense. Let's suppose that a legal norm gives people a reason for action. The question is what kind of reason is it? Well, one thing that both Hart and Kelsen agreed on, as they should, is that is not a moral reason. If there is a moral reason to do what law gives you a reason to do is a separate question. And in that respect, they both reject natural law's view. Now, what it's instead? Here Hart's answer is much more reductionist and kind of sociological, he has a *quasi*-sociological view of obligations in terms of social pressure. Hart tells us essentially what is going on socially when people regard the law as normative. And he thinks that this has nothing to do with moral normativity. Kelsen agrees that it is not moral normativity, but he thinks: It is exactly like that! It is just from a different point of view. So, it is also exactly like religious normativity: if you think that you ought to do what God tells you to do, then when you think that God told you to do X, then you think you have a reason to do X, and when morality tells you to do X, etcetera. So, Kelsen's view is – and there is a lot going for that view – that the idea of normativity

is the same, it just means you have a reason for action: it is obviously of a certain kind, more than an ordinary reason, some kind of compelling reasons for action. But then the question is: If you have reasons for action whether is moral or legal then, what is the difference? Does it mean that every time that the law tells you to do something you have a moral reason to do it? Oh no, of course not! So, what's the difference? Well, Kelsen's solution is that the difference is the *Grundnorm* (basic norm); the difference is: What is the normative system you adhered to by accepting or not accepting the *Grundnorm?* For example, if accept the *Grundnorm* of "what the Pope tells you to do is what you need to do", then the Pope's directions give you reasons for action; they would not give you any reason if you reject Catholicism's *Grundnorm*. And the same goes for any normative system, including morality.

But that's the problem when we get to the point where we ask what reasons do we have to accept or not accept any particular *Grundnorm*? Is it just a matter of how I wake up in the morning or the throw of a dice? Kelsen says: Don't ask, that is not a question we can answer philosophically. But that leaves the whole idea of normativity totally unexplained, it leaves unexplained what is the difference between a moral reason and a legal reason, and I think that legal philosophers have to come up with an explanation – I think that there are perfect sensible explanations that don't need the *Grundnorm* to explain what is the difference. Now, it is also true – I mean it is not that Kelsen's theory is totally useless, in that respect – that the idea of normativity *from the point of view* is important, the idea that actually goes back to Kelsen that Raz adopted many years later, namely the idea of detached normative statements that you can talk about normativity from a point of view without actually endorsing that point of view, all these are very important tools, Kelsen offered but making everything depend on the *Grundnorm* is not a solution.

6. **VP**: One last curiosity about Kelsen and the reception of his nonreducible theory of law. During the seminar, you argued that Hart's famous distinction between internal and external points of view was not against John Austin but against Hans Kelsen. Would you mind saying a little bit more about it?

AM: Hart says we can talk about the normative system, any kind of normative system, in two kinds of external points of view: one is extreme, which is this that by looking at it from above, like a Martian sociologist seeing what happens, reporting what happens, and trying to figure out what's going on. That would be extremely partial and inadequate because we would not understand why people are doing things, what is it that they regard as giving them reasons for action or obligations or anything like that. So, from an external point of view, theoretical point of view, we need to take into account what are the attitudes people have towards the rules that they are following; that is the ordinary external point of view by which we just report on people's conduct and attitudes. And then we can be participants, think about ourselves as participants, and then regard the rules etcetera as reasons for action for us: from an internal point of view I would regard law as giving me a reason for action. Now, why did Hart say that? We knew that from Kelsen, Kelsen has a much more elaborate account of this distinction, for example, his idea of detached point of view, he has

already very clearly stated in *The General Theory of Law* and Hart knew all of that, I know that for a fact, Hart was very – very – aware of Kelsen's work, very detailed. I don't think Hart took himself to be telling the world anything new here. Here is what his point was, his point was partly against Austin: if Austin thought that we can make progress with the extreme external point of view, it is just wrong. But Hart's point in this whole passage is to justify a reductive account of law, of normativity of law. So, what he tells Kelsen: Dear Kelsen, we do not need this presupposition to account for people's internal point of view, we just need to report their attitudes. We need to find out what it is that they believe, and report on that accurately saying: "Look: these people believe that *'Rex I bla, bla, bla'*, no need for presupposition!". That's why he brings up the distinction. So, his main point is not against Austin, it's against Kelsen and I think it's one of the only places in *The Concept of Law* he actually refers to Kelsen, when he says: "No need for presupposition". Almost as if he says: "Dear Hans, I'm talking to you".

That is really important because that's the main disagreement, methodological disagreement, between them. Hart is offering a reductive account, saying: we can explain the law by explaining people's patterns of conduct, their attitudes and dispositions, etc. Whereas Kelsen says: "No, this is totally wrong. We need a non-reductive account of law etcetera, and therefore we need to presuppose the basic norm". That's the main difference between them; the rest is just little details.

7. **AL:** We also want to take this opportunity to focus a little bit more on your last book, *Foundations of Institutional Reality* (2022), and one of the central points of the theory you developed in this book is how you understand the relation between rules and practices – which, you said, it is metaphysical grounding relation, but a functional one. How do you understand this functional aspect? Are you signalling a new type of grounding relation?

AM: It is not meant to be a new type of grounding; it is just a possible form of grounding. Grounding is an "in virtue of" relation, something is X in virtue of being Y. When we say that the function of this [he points with his finger a glasses case on the table, *ed*] is a paperweight, because I use it that way, then, it is ok to say that it is a paperweight in virtue of the fact that I use it in certain way, namely, that it has certain function. So, function is just one way in which something can ground something else. It is not a new form of grounding, there are, also, other ways in which something can ground something else. It can be physical constitution, it can be function as use, it can be also other things. The only constraint here is that grounding needs to take worldly facts as its *relata*. So, if you want to say that one way in which A can ground B is by way of function, you have to give an account of function that takes worldly facts as its *relata*, and I think the "function as use" does that. You do not need any conceptual apparatus to explain that if you have a bunch of people who are using something in a certain way, then that is a worldly fact: it's not conceptual, it's not theoretical, etc. Whereas function in theoretical explanations is much more iffy. The sense in which the function of the heart is to pump blood is much more difficult to explain in terms of worldly facts. Anyway, that is complicated.

7.1. **AL:** Only to pressure you a little bit more: Do you think the function plays a role as grounds of the "in virtue of" relation, or it is a way to add a property to the "in virtue of" relation?

AM: It plays a role as grounds. It is not that one sense in which A is "in virtue of" is function. No, that would be totally wrong. And I think that it is a helpful way to put it in because I think people who talk about functions in biology often assume that, they actually make that mistake. So, no. Exactly: function is just a ground.

8. **VP:** To conclude, today finishes our week of events in understanding the contemporary views on the intersection between philosophy of law and social ontology. We can say that you are the perfect example of a scholar whose interests are at the meeting point of these two disciplines: your themes, your methods and your authors are at the intersection of both. In short, what do you think of the relation between the newborn-ish social ontology and the more structured philosophy of law? What are according to you the most relevant and interesting further developments?

AM: So, in my view, some of the questions about the nature of law which are central to jurisprudence, just are questions in social ontology. They are questions about metaphysics of sociality. Now it doesn't mean that I think all questions are like that, there is plenty of room in jurisprudence for other kinds of questions. And I think their connection to social ontology is much more flimsy – or not flimsy, but more remote. One of the questions that comes up, for example, in jurisprudence quite frequently is the question of legal normativity. What kind of normativity is this? And questions like that. There I don't see social ontology to be super helpful, at least not at the first stage of analysis. Maybe at some later stage. There are also lots of moral normative questions about the law, which also form part of jurisprudence. And again, the connection to social ontology is very remote. So, I think that some part of philosophy of law is about metaphysics, it is a metaphysical debate. But not everybody agrees with me! We saw that yesterday, right? That's fine. Not everybody agrees and I think we're going to have these methodological debates. My way of doing philosophy is not to waste too much time on debating methodology, but just doing it, and if it works great if it doesn't work, it doesn't work, but you need philosophical arguments to show why it doesn't work, not complain about the method. But it is going to remain a methodological debate, I'm sure.

Note

[1] Andrei Marmor is here referring to the section 'methods' of the *1st PHILAWSON WORKSHOP: Contemporary Views on Social Ontology*, held at the University of Milan (Italy) the 28th and 29th November 2024. The Workshop had three sections: themes, methods, and authors.