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Whose Intentions and Authority? The Legislature's or the Interpreter's?

1. *Essential Points of the Paper*

My aim in this paper is to analyze Chapter 8 of Andrei Marmor's *Interpretation and Legal Theory* (quotations are from this book). The issue I'm going to deal with is the role of the legislature's intentions in legal interpretation[1].

In my opinion, the role of the legislature's intentions is linked up with Marmor's general idea of legal interpretation and the distinction between hard and easy cases. I think that above all it is concerned with the notion of authority and the idea of authority's intention. This last point is stressed in other papers published in this volume[2].

In the following pages, I'm going to give a brief statement of the main points of Chapter 8 and I'll try to make a query about each point. I think that, all things considered, the ideas of Marmor on legal interpretation give to the interpreter a very big amount of freedom to determine the legislature's intentions. So the relevance of the legislature's intentions to find a solution to a dispute risks to become the relevance of the judge's intentions.

At the beginning of the chapter (p. 119), Prof. Marmor identifies the following points. First, he wonders if the legislature's intention plays a certain role, or whatever one, in statutory interpretation. Marmor discusses this topic without considering constitutional interpretation, faced up in the next and final chapter[3]. This first and general question is divided by Prof. Marmor into two specific points that are a sort of cornerstone in the diatribe between 'intentionalists' and 'skeptics about intentions'. Marmor asserts that a) laws are promulgated, in certain cases, with 'relatively specific intentions' (p. 120) and that b) in some circumstances – once point a) has been ascertained – a law promulgated with 'relatively specific intentions' provides the judge a reason to decide the dispute in accordance with the legislature's relevant intention.

[1] A. Marmor, *Interpretation and Legal Theory* (first edition 1992), revised second edition, Hart Publishing, 2005, pp. 119-139. For some comments on this chapter see J. Goldsworthy, *Marmor on Meaning, interpretation and Legislative Intent*, in *Legal Theory*, 1995, pp. 439-464; J. Waldron, *Law and Disagreement*, Oxford, Clarendon Press, 1999, pp. 119-146.

[2] See especially A. Schiavello, *Law, Interpretation and Authority*, in this volume.

[3] See on this topic G. Itzcovich, *Law, Social Change and Legal Positivism. Some Remarks to Marmor on Constitutional Legitimacy and Interpretation*, in this volume.

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2. *Whose Intentions and What Kind of Intentions?*

In the chapter, the author moves through recurring cruxes in the Anglo-Saxon debate about the relevance of the legislature's intention in statutory interpretation, rejecting some of the options on the table, for example by means of an employment of counterfactuals. In so doing, Marmor arrives to the main two issues we face: whose intention is predicated (that is: who is the legislature that is considered); which intentions are at stake (the types of intentions).

About the first point, Prof. Marmor says – if I am not wrong – that what matters is simply the fact that there is a legislature, that is, a subject that promulgates legal norms according to certain procedures. As claimed by Marmor, legislative power is a complex entity and the same we can say about his activities (namely, the fact that 'legislation in legislative assemblies is a complex and concerted action involving elaborate procedures', p. 126). Mainly, Marmor rejects the idea that we may not ascribe any intentions to the legislature and he states that it is possible to do so ('The conceptual doubts about the possibility of ascribing intentions to the legislature do not seem to be well founded', p. 126). On this topic I wonder whether the legislature we are concerned with is the real or the ideal one. I mean that it's not clear if the intentions we are concerned with are data that we find analyzing the legislature in its real mood or if they are the characteristics the legislature has by definition. I add that the presence of them, frequent or rare as it might be, could justify not only a theoretical study of Marmor's book, but also an empirical analysis about the functions of the legislation. According to Marmor, denying this last aspect would involve denying the idea of 'legislature that legislates' itself.[4]

About the second issue, the author identifies three types of legislature's intentions legally relevant: 1) those intentions that have been made manifest by the formulation of the rule itself ('the intentions that are manifest in the language of the law itself'); 2) the so-called 'further intentions'; 3) intentions concerning the application of the law, that is to say, intentions 'about its proper application' (a sum up is at p. 132). In my opinion, this classification is of paramount importance.

As to the identification of the intentions involved in the law, manifest by the formulation of the rule itself, the author says that it is a matter of logic; as he writes, this is 'a rather trivial point'. Actually the question sounds too easy. I wonder whether here 'logical' means 'tautological' or rather obvious and reasonable. I would thus understand more easily the characterization of such question as logical and 'trivial'. On the other hand, if the intentions of the legislature were identifiable as obvious and reasonable, they would constitute the basis of a defeasible interpretation. I think that this is a plausible assumption (as Marmor shows

[4] A. Marmor, *Interpretation and Legal Theory*, p. 125.

with the example in the book)[5]. But I try to present a third hypothesis. In the model of Marmor, the intentions that are manifest in the law are a sort of data which we can regard as the ground of comprehension: so, Marmor states a topic that sounds perfectly consistent with the rest of his work. The problem is grounded in his general theory of legal interpretation, but this is a subject I cannot deal with here[6].

About further intentions, as Marmor calls them, the issue is more articulated (see pp. 127-129). He maintains that the legislature, promulgating norms, is usually endowed with other intentions in addition to those ones that rules manifest through their formulations; moreover, it is difficult to keep distinct the further intentions from the motivations that might have driven the legislature. In fact, both intentions are often not declared; enquiring on motives means identifying further intentions ('there is often a substantial overlap between motives and further intentions', p. 128).

In my opinion, the distinction between further intentions that are legally relevant and further intentions that are legally irrelevant is an issue that should be stressed. According to Prof. Marmor it is difficult to find a criterion to distinguish between them and to keep up with this couple in the legal cases, but the distinction we are concerned with is useful. The author maintains that 'certain types of speech-act, such as insinuating, deceiving, showing off, etc. have the rather unique feature that the speaker's further intention is essentially *non-avowable*', because 'rendering it explicit would be self defeating'. Marmor says that this situation might happen with regard to the legislature too. His idea is that further intentions really are legally relevant if it's not a trouble that they become explicit ('On the contrary, there is a strong element of self defeat in rendering such intentions explicit'; this and the previous quotation come from p. 129).

On this point it is possible to develop some considerations. I wonder whether the analogy between a speaker's non explicitable intentions, performing certain speech-acts, and the legislature is well conceived or not. The two situations look similar if the legislature is characterized as a real man. But, a subjective and individual characterization as such gets becoming unreal. All things considered, sharing the analogy is not the last step of the argument: in fact, the criterion that Prof. Marmor's states, as he writes, 'is only a partial criterion, which will often require supplementation by other, primarily moral, considerations' (p. 129). I think that this supplement of moral considerations throws a rather wide shadow on the distinction, since it becomes too much difficult to identify the legally relevant further intentions. In other words: if this distinction is important, or, better, essential, the criterion on which it is grounded cannot be indeterminate, or in any case partial and in need to be integrated with moral criteria. On this way, would further intentions be legally relevant even so?

[5] On the topic see G.B. Ratti, *The Consequences of Defeasibility*, in this volume.
[6] I agree with the most part of the argument developed by F. Poggi, *Semantics, Pragmatics and Interpretation*, in this volume.

In my opinion, Marmor has in mind the real legislature but in his book he refers to the real legislature that someone wishes, or, we can say, the ideal legislature[7]. Instead of referring to the real legislator, Marmor's legal theory has an implicit reference to a model; he assumes a legislature's model on which he builds up the types of intentions I am analyzing. This is not necessarily a problem, but maybe it is for this chapter, at least when intentions are investigated with reference to a real legislature and not in counterfactual terms[8].

That the legislature might harbor some expectations about the application of the promulgated law seems a reasonable idea, I would say, close to common sense. The question is, as usual, how one could detect such expectations and translate them into means for the interpretation of law. The most difficult aspect is how to distinguish them from further intentions, because it seems that application intentions are, in some sense, always further intentions; but even granted such aspect, it is important to analyze the assumption for which 'application intentions are potentially relevant only when, as a matter of fact, the legislature has had a determinate intention bearing on the issue before the court' (pp. 129-130). This is an assumption whose explanatory force is not so clear and should be motivated in a more strong way.

With reference to the three types of intentions, Prof. Marmor's position could be summarized as follows: the intentions that concern the application could be taken into consideration by the interpreter only if not inconsistent from a logical point of view with the further legally relevant intentions, but it does not hold the opposite, that is, the further intentions can override the intentions relative to the application. In this last case, the charge to the legislature, if this is the case, is an error de facto. It's not clear if Prof. Marmor has a normative approach to the relationship between further intentions and intentions which are relative to the application or he is making a conceptual analysis. In any case, the asymmetry drawn in the relationship between further relevant intentions and intentions relative to the application is the trickiest point of Marmor's analysis. According to me, the legislature will make a mistake, as Marmor says 'an error of fact', if he takes into account some means not fit to achieve his ends. The charge to the legislature of an error of fact, in the case in which the further intentions override on those resting upon the application, could be defended attributing to the legislature a mistake in the choice of the means-ends relationship, because there are further intentions that don't satisfy some expectations. But in this case there is no more relationship among different intentions (aims) and the relationship between further intentions and intentions that are relative to the application is not among homogeneous entities, but rather among heterogeneous ones.

[7] The good legislature, like Bobbio said; see N. Bobbio, *Le bon législateur*, in *Logique et Analyse*, 1971, pp. 243-249.

[8] For some critical remarks about the use of counterfactuals in legal interpretation see J. Stoljar, *Vagueness, Counterfactual Intentions, and Legal Interpretation*, in *Legal Theory*, 2001, pp. 447-465.

3. *The Expertise-problem*

At the end of this paper, I make some commentaries about the following quotation[9]:

> People are morally responsible for their choices and actions only if they are based on their own moral deliberation and ethical choices. So there seems to be host of epistemic and ethical considerations which count against the possibility of recognizing expertise in the moral domain. Therefore, it seems that laws which are based on moral reasons cannot be associated with the expertise branch of the normal justification thesis, and thus would not call for any particular deference to legislative intent.

This is a normative thesis, as Marmor says, so it should be evaluated as such, for its perspicuity. Now I try to present an argument based on the observation of the legal experiences of coexisting continental (and not only) legal systems, which have a rigid constitution and a system of checks and balances in order to control the legislature's activities: my aim is to demonstrate that Prof. Marmor's thesis does not fit well with such experiences and could be self-defeating, forbidding the realization of its purpose.

In these legal systems, the legislature acts in the constitutional domain, but not only: the institutional task of the legislature is exactly that of taking into consideration morally irrelevant issues, not only that of assuming the responsibility to regulate delicate and controversial social issues at the moral level. If this is the legislature's task, it does not imply that one should make the legislature's intentions mandatory on morally relevant issues. But we don't need to do the opposite either (as Marmor argues instead).

Let me expand on this point.

The existence of a rigid constitution and of a check of constitutionality drives towards different considerations. On the basis of the tasks that the legislature has to pursue, he is in some sense previously expert with respect to all those things on which he could legislate. The point is that the legislature could be a bad expertise, and this occurs, for example, when he acts against the (rigid) constitution, and his activities could be badly considered. To understand whether the legislature has been a bad expertise might be useful, and it is rather sometimes necessary, to return to his intention, 'lay it bare', and this becomes especially important when one is concerned with delicate questions from a moral point of view. In short, if the expertise does not imply a positive connotation, then there is no reason to exclude the consideration of the legislature as an expert subject on moral issues, until proved otherwise, and use the appeal to the legislature's intention precisely in order to provide such proof. I know that this is a criticism to Raz's 'normal justification thesis' more than a criticism to Prof. Marmor[10].

[9] A. Marmor, *Interpretation and Legal Theory*, p. 139.
[10] Perhaps, but I'm not so sure.