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DEATH OF THE AUTHOR AND THE QUESTION OF THE LEGISLATIVE INTENT

There is an obvious tension between the authoritative character of legal norms and the fact that some of those norms are ambiguous and controversial in their application, purpose and meaning. How can a legal norm make a practical difference when the subjects of law do not know what it means? It is a common strategy among lawyers and judges to solve this tension by referring to the legislative intention. Supposedly, the ambiguity can be overcome and authority regained by deciphering the original intent that lies beyond textual evidence. However, the conceptual possibility to distinguish between the intentions of the legislator and their textual expression as well as to believe that the interpreter has access to both spheres is philosophically problematic. In legal philosophy the aforementioned position came under attack both in Hart's and Dworkin's writings. And yet, the question whether interpretation of ambiguous legal norms can be directed toward the intentions of the legislator is still open to diverse philosophical commentaries. The lack of consensus is most clearly exemplified in the Marmor-Waldron debate over the relation between authority and authorship¹.

While addressing this debate I do not aim at counting and evaluating the differences between

Marmor and Waldron. My purpose is rather to uncover what both approaches share. I will argue that both Marmor and Waldron presuppose, though never question, the conceptual possibility to decipher the authorial intent. Furthermore, this presupposition is not only ungrounded in their works; I will argue that it is *conceptually impossible* to question the intentions of the legislator. I will also show that the possibility to address the legislator's intent is not, contra Marmor, implicated by Raz's argument from authority. On the contrary, the normal justification thesis undermines the possibility to question the authorial intention.

Does the authority of legal norms necessarily derive from the authority of the legislators? Marmor believes a positive answer to this question is a necessary implication of Raz's normal justification thesis². If the person subject to authority will do better by complying with the authoritative provisions and not by relying on her own judgment, in some cases „it does make sense to consult the authority's intentions when questions of interpretation arise“³. Waldron challenges Marmor's analysis by pointing out that „intentional interpretation“ is hardly likely in the modern democratic situation which is characterized not by a single person having

¹ See MARMOR, Andrei. *Positive Law and Objective Values*. Oxford UP, 2001, and WALDRON, Jeremy. *Law and Disagreement*. Oxford UP, 1999.

² According to this thesis, the primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and follows them, rather than if he tries to follow the reasons which apply to him directly. See RAZ, Joseph. „Authority Law and Morality“. In *Monist* 68, 299.

³ MARMOR, 1, 90.

authority but rather by a group of people sharing authority. Hence, even if one deciphers the intentions of a certain legislator, this will disclose only a part of a legal norm's meaning and therefore the enigma of the latter will remain whole.

Already this preliminary glance seems to indicate that we are dealing with two diametrically opposite approaches. However, they are not radically distinct. Both Waldron and Marmor are perfectly content with the following argument: When the norms in question are ambiguous, it is conceptually possible to question the legislator's intentions, *as far as those norms have only one author*. The conceptual possibility of attributing intentions to the legislative body is not doubted by either of them. But when so much is admitted, the disagreement boils down to the issue of numbers: Is the legislative structure the same, under normal circumstances, when we are dealing with one and many legislators⁴? It is to this question that Marmor offers a positive and Waldron a negative answer. But is the conceptual possibility to question the author's intentions as obvious as Marmor and Waldron concede?

According to Waldron, interpreting literary texts is always a matter of determining what the intentional being who produced it meant⁵. This factual basis seems to indicate the conceptual possibility to address the author's intentions. On Waldron's account, the text itself, when it presents itself to the reader as a riddle, leads the interpreter beyond its narrow scope to the rich sphere of the author's intentions. But is that really so? *What is a text?*

Death of the author

In "What is a Text? Explanation and Understanding" Paul Ricoeur revisits two fundamental approaches toward a text, namely, those of understanding (*Verstehen*) and explanation (*Erklären*). We encounter the distinction between the latter two in Dilthey's writings: Following Kant's bestowal of a philosophical grounding for the natural sciences, Dilthey sought to provide *epistemological* foundations for the new human sciences. While natural sciences aim at *explaining* phenomena in a causal manner, human sciences, Dilthey argued, attempt to *empathetically understand* their objects. As one interpreter summed up Dilthey's project, "understanding is a matter of *interpretation*, and interpretation (*Deutung*) is the means whereby human science researchers can penetrate the outward 'expressions' of an alien or distant life experience...so as to achieve a reproductive or reconstructive understanding (*Nachbildung*) of these subjective life experiences and world-views (*Weltanschauungen*)"⁶. This approach is customarily referred to as romantic hermeneutics. Therefore it is surprising that Marmor, who seems to fully share the underlying foundations of this position, ends his response by accusing Waldron of romanticism and by suggesting that the latter should be just as unattractive to Waldron as it is to Marmor himself.

Philosophical hermeneutics (Ricoeur is one of its leading proponents) is characterized by a rejection of the guiding principles and concerns of the romantic tradition. Ricoeur is quick to point out that his interest lies in the *fate* of this opposition: The notion of explanation has since

⁴ I write "under normal circumstances", for to the question whether it is possible to *imagine* a text without an author Waldron offers a positive answer (WALDRON, 126, 132). To my mind, Waldron unnecessarily complicates the issue by confusing two different questions, namely, that of a text having an author and that of the possibility on the part of the reader to address the intentions of the author. A reference to, for example, the Wollheim machine can only show that some texts do not have an author. To be sure, this is an exception and we cannot prove the norm by it. In contrast to Waldron, I will show why in the case of each and every text the reader cannot appeal to the authorial intent.

⁵ WALDRON, 1, 125.

⁶ MADISON, Gary Brent. "Philosophical Hermeneutics: Origins, Tenets, Implications." In *Between the Human and the Divine: Philosophical and Theological Hermeneutics*, ed. by Wiercinski, A. Toronto: The Hermeneutic Press, 2002, 33.

been displaced, so that now it derives from linguistic models, while the concept of interpretation has distanced itself from the psychological notion of understanding. Instead of offering an analysis of Ricoeur's re-interpretation of the relation between understanding and explanation – what Ricoeur terms *dialectical appropriation* – I will limit myself to a more modest theme, that of a *text*, for it is this issue that is most significant in relation to the question of the legislator's intent.

If one initially defines a text as any discourse fixed by writing, one immediately encounters the question of how texts relate to speech. The initial temptation to say that all writing is added to anterior speech is strengthened if speech is understood in a Saussurian manner – as the realization of language (*langue*) in an event of discourse or as an individual utterance by an individual speaker. Furthermore, (1) writing as an institution is subsequent to speech, and (2) the fact that attention is almost exclusively given to phonetic writing gives rise to the conviction that writing is fixed speech, that the inscription of speech merely guarantees the persistence of speech. And yet, "what is fixed by writing is a discourse which could be said, of course, but which is written precisely because it is not said"⁷. The fact that writing takes the very place of speech suggests that a text cannot be limited to a *transcription* of anterior speech, that *a text directly inscribes in written letters what the discourse means*.

The significance of this claim is to be witnessed in the relation between reading and writing. Just as writing takes the place of speaking, reading takes the place of listening. Therefore, the writing-reading relation does not share the structure of the speaking-answering relation. But if writing-reading relation is not a

case of interlocution, „it does not suffice to say that reading is a dialogue with the author through his work, for the relation of the reader to the book is of a completely different nature“⁸. This is the fundamental difference: While in the case of dialogue one can always question the intentions of the speaker, the writer does not respond to the reader. The book divides writing and reading into two sides and there is no communication between them. Just as writing escapes the reader, the actual act of reading escapes the writer. Ricoeur terms this structure "a double eclipse" and insists that the latter replaces the dialogical relation.

The substitution of reading for a dialogue which has not occurred is so manifest that when we happen to encounter an author and to speak to him, we experience a profound disruption of the peculiar relation that we have with the author in and through his work. Sometimes I like to say that *to read a book is to consider its author as already dead and the book as posthumous*. For it is when the author is dead that the relation to the book becomes complete and intact. The author can no longer respond; it only remains to read his work⁹. (My italics – S. G.)

It is not the dependence of writing on speech, but rather the emancipation of writing from speech that gives birth to a text. Therefore writing does not merely signify the preservation and increased efficacy of speech. This emancipation indicates two fundamental characteristics of a text: (1) a text no longer has a speaker; (2) a text cannot be understood as a mere case of a referential function. Both these aspects are of crucial significance to the Marmor-Waldron debate.

In contrast to spoken discourse, the text indicates the disappearance of a speaker, as long as the latter is understood as a self-designation of the one who speaks¹⁰. We witness the replace-

⁷ RICOEUR, Paul. *Hermeneutics and the Human Sciences*, Cambridge UP, 1998, 146.

⁸ RICOEUR, 7, 146.

⁹ RICOEUR, 7, 147.

¹⁰ To put it in Benveniste's words, the subject of speech is what designates itself in saying „I.“ It is this self-referentiality that is lost in writing. This is the case not only because the „I“ of a novel is no longer its author, but rather its protagonist. The actual act of reading requires of the reader to "reconstruct the author" who, as I have argued, is not to be found outside the text by means of a certain form of psychological introspection, but rather by elucidating the meaning of the text itself.

ment of the proximity of the speaking subject to his own speech by „a complex relation of the author to the text, a relation which enables us to say that the author is instituted by the text, that he stands in the space of meaning traced and inscribed by writing“¹¹. The writer, *as an author*, does not precede the textual space, but rather the latter is the very place where the author appears. Hence the impossibility to find out the authorial intentions when the text presents itself in an ambiguous manner: Where else can we look for the source of meaning of the text if not in the text itself? It is only possible to speak of the distantiation between the author and the text in the following way: “[D]oes the author appear otherwise than the first reader? The distancing of the text from its author is already a phenomenon of the first reading”¹². Even when the author is questioned, his answers indicate not his intentions that lie beyond the text, but rather they refer to the possible meaning of the text.

The text breaks with the referential function that we encounter in speech¹³. The actual movement toward reference is *intercepted* when dialogue is interrupted by the text. However, interception does not mean suppression: Ricoeur distances himself from “the ideology of the absolute text.” While within the limits of the latter reference is lost forever – for the suspense of reference leaves the text „in the air“ – for Ricoeur the reference is lost only to be regained in the act of reading. The task of reading is precisely to *fulfill* the reference. If the eclipse of reference leaves the text „outside the world,“ the act of reading is to place the text „back in the world.“ And this is what is

called *interpretation*. That is to say, the question that the interpreter encounters is not that of the intentions of the author, as Marmor and Waldron have it, but rather that of the meaning of the actual text. The aforementioned „double eclipse“ does not indicate that the text loses all possible meaning and reference, but rather it indicates the *autonomy* of the text’s meaning and necessitates the interpreter to give this sphere of meaning possible referential functions.

Hence, there are two ways of reading. On the one hand, we can prolong the suspense of the text’s reference and that is the explanatory attitude. On the other hand, we can lift the suspense, fulfill it in the present speech, and this is the interpretative attitude. The latter is the real aim of reading, but, according to Ricoeur, it can only *follow* the first model of reading. The two outlined attitudes are not alternatives between which one must choose, but rather necessary components of understanding. Immediate grasping of the text is superficial: Understanding must pass through the detour of explaining the cultural signs in their relation to each other. And yet, explanation amounts to nothing, for it lacks meaning, if it is not incorporated in the process of understanding.

The double eclipse of the reader and the writer directly challenges Marmor’s and Waldron’s presupposition. By claiming that in the case of one legislator it is conceptually possible to question the author’s intentions, both Marmor and Waldron unnecessarily complicate the question of the authorial intent. If this possibility is lacking, as I have been arguing, the question that Marmor and Waldron address loses its ground.

¹¹ RICOEUR, 7, 149.

¹² RICOEUR, 7, 149. Therefore the disappearance or death of the author is not to be seen as a psychological claim: I can still meet the author and address the question of the text to him. However, strictly speaking, I address him not as an author, but rather as the “first” reader.

¹³ I cautiously use the expression “that we encounter in speech” in contrast to Ricoeur’s claim that all speech is referential. According to Ricoeur, in spoken discourse the “real reference tends to merge with an ostensive designation where speech rejoins the gesture of pointing” (RICOEUR, 7, 148). I find this claim to be too reductive: Not all speech is referential, the sphere of oral discourse cannot be reduced to an ostensive function. Cases of, for example, philosophical discourse share more affinities with textual structures than with referential speech. And yet, I believe Ricoeur is right when he argues that discourse fixed by writing loses the referential function and therefore asks for new structures of understanding.

What is interpretation?

The double eclipse, or the disappearance of the author, shares quite a few similarities with the creative interpretation that Dworkin presents in *Law's Empire*. Just as Ricoeur, Dworkin challenges the traditional approach to texts as sub-species of oral discourse: Creative interpretation is not to be seen as a special case of conversational interpretation *precisely because it does not aim to decipher the authors' purposes or intentions*¹⁴. However, here similarities end, for Dworkin immediately points out that if creative interpretation is not conversational, it is *constructive*: "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the forms or genre to which it is taken to belong"¹⁵. The crucial difference between these two approaches boils down to the fact that the term "interpretation" has a different meaning for Dworkin and for Ricoeur. While Dworkin's constructive interpretation is a *projection* of meaning in an attempt to present the interpretative object in the best possible light, Ricoeur attempts, as I will show below, to emancipate interpretation from the subjectivistic connotations that underlie this position.

"We must first notice Gadamer's crucial point," writes Dworkin, "that interpretation must *apply* an intention"¹⁶. Dworkin, however, understands this claim in a specific manner. Strictly speaking, what interests Dworkin is not the intention of the text, but the intention of the interpreter. For Dworkin, applying the purpose of the text is far from a neutral exercise: The application of the intention "inevitably engages the interpreter's own artistic opinions in just the way the constructive account of creative interpretation suggests, because it seeks to find the best means to express, given the text in hand, large artistic ambitions that Shakespeare never

stated or perhaps even consciously defined but that are produced for us *by asking how the play he wrote would have been most illuminating or powerful to his age*"¹⁷. (My italics – S.G.)

This tight connection between the author and the *Weltanschauung* of his time is open to a hermeneutic critique. In contrast to spoken discourse, which addresses only those who are *hic et nunc*, texts escape the spatiotemporal boundaries and address anyone who can read¹⁸. To be sure, any written text carries certain pre-suppositions of his time and the interpreter is to consider them seriously. But this does not mean that the aim of, for example, interpreting Shakespeare is to find out how his plays would be most illuminating *for his age*. Furthermore, it does not mean that the aim of interpretation is to reconstruct the text in the best possible light *by infusing* the text with the never stated and consciously defined authorial ambitions. It seems to be the case that Dworkin missed what he named "Gadamer's crucial point." So what is the aim of interpretation?

Interpretation is never merely reproductive, it always is productive or transformative. The negative side of Gadamer's claim is obvious: "[N]ot occasionally only, but always, the meaning of the text goes beyond its author. This is why understanding is not merely a reproductive, but always a productive attitude as well"¹⁹. That is to say, the meaning of a text always involves "application." But if the meaning cannot be reduced to the authorial production, does it necessarily mean that the interpreter must produce it himself? This is not the case, for one of the leading hermeneutical ambitions is to overcome the traditional binary opposition between externality and what is internal. All hermeneuticists share the view that „the meaning of the text is not something that exists 'out there' (like the 'external world' of modern

¹⁴ DWORKIN, Ronald. *Law's Empire*. Harvard UP, 1986, 51-52.

¹⁵ DWORKIN, 14, 52.

¹⁶ DWORKIN, 14, 55.

¹⁷ DWORKIN, 14, 56.

¹⁸ Hence we are wrong to believe, contra Dworkin, that the play-writer addresses only the audience of his time and that in order to „place the play in the best light“ one must reconstruct the lost days.

¹⁹ GADAMER, Hans-Georg. *Truth And Method*. II Edition, New York: Continuum, 2002, 264.

philosophy) and is timeless and invariant; textual meaning is nothing substantial in itself but exists rather in the form of an *event*, this event being the act of reading²⁰. Reading is not a constructive infusion of meaning into a text, but an activity that involves *translating* the language of the text into our own historically conditioned language. The meaning of the text is not merely an amalgam of the constructive attitude on the part of the author and on the part of the reader. The reader/author alternative misses the crucial element that is always present in translation — the latter does not signify an infusion of meaning into a text but rather is always *guided by* the original text: The autonomy of the text escapes this alternative.

Gadamer's claim that „interpretation must apply an intention“ can have a different meaning: We can think of it as an intention not on the part of the interpreter, but on the part of the text. Within this realm, the meaning of the text is no longer the intention of the author or the meaning it has for its immediate audience, but rather what the text means for whoever complies with its injunction. But how is the intention of the text to be understood? This is Ricoeur's suggestion: „to explain is to bring out the structure, that is, the internal relations of dependence which constitute the statics of the text; to interpret is to follow the path of thought opened up by the text, to place oneself *en route* toward the *orient* of the text“²¹. This suggestion is an invitation to think of interpretation beyond its subjectivistic connotations: Interpretation should not be understood as an act *on* the text but rather as an act *of* the text. Interpretation loses its subjectivistic connotations for it is a

recovery of *what is at work within the text*: „what the interpreter says is a re-saying which reactivates what is said by the text“²².

This points out a double problem that Marmor's account of interpretation faces. Marmor rejects Dworkin's claim that jurisprudence is necessarily an interpretative exercise, for he believes that the latter directly challenges the separation thesis. Marmor's worries seem to be well grounded, for the separation thesis maintains that the determination of what the law is does not conceptually depend on moral-political considerations about what the law should be. However, if interpretation is not a subjective projection of meaning into a text, Marmor's worries lose their basis. Therefore, (1) Marmor is wrong to assume, as he does, that interpretation is by definition subjectively evaluative²³. Furthermore, (2) his constant struggle with the claim that jurisprudence is a matter of interpretation is problematic as well: the semantic argument, the epistemic one, as well as the argument from legal principles²⁴ only attempt to show that jurisprudence does not necessarily require interpretative judgments *in the subjectivistic sense of the term*. However, if interpretation is not a subjectivistic exercise, as I have argued, even if Marmor were successful in his undertaking, one could not conclude that jurisprudence is not an interpretative exercise.

Why is Marmor so reluctant to afford jurisprudence interpretative character? We have already given a partial answer: Marmor believes that jurisprudence, when seen as a matter of interpretation, challenges the separation thesis, whether the latter is understood in the strong or the weak sense²⁵. Marmor's worries lose their

²⁰ MADISON, 6, 38.

²¹ RICOEUR, 7, 161-162.

²² RICOEUR, 7, 164.

²³ See MARMOR, 1, 73.

²⁴ See MARMOR, 1, p. 73-78 for the semantic argument; p. 78-81 for the epistemic one; p. 81-88 for the argument from legal principles.

²⁵ The Strong Separation Thesis maintains that, as a matter of conceptual necessity, the legal validity of a norm can never be a function of its consistency with moral principles or values. According to the weak separation thesis (or what is commonly known as the Separability Thesis), it is conceptually possible, but in no way necessary, that the legal validity of a norm might in some way be a function of its consistency with moral values or principles.

ground as soon as interpretation is understood in hermeneutical terms: Interpretation, as an act of the text, is not to be equated with a projection of moral-political considerations. But Marmor has yet another concern: The conceptual impossibility to reach the legislator's intent challenges Raz's argument from authority. In the final section of this text, let us confront this position and ask whether this belief is justified.

The intentional thesis and the argument from authority

Just as interpretation (understood in hermeneutical terms) does not challenge the separation thesis, similarly, the conceptual impossibility to decipher the legislative intentions does not challenge Raz's argument from authority. In fact, I would like to suggest, if we had a conceptual possibility to question the legislator's intent, Raz's argument would lose its basis.

Raz distinguishes between de facto authority and legitimate authority²⁶. The latter can be either theoretical or practical, depending on whether it is characterized by reasons for belief or reasons for action. De facto authority, on the other hand, only *claims* to be legitimate, and therefore is either legitimate or illegitimate, for it is only "believed to be [legitimate], and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognized by many of its subjects"²⁷. Every legal system need not be legitimate, but it must be a de facto authority. However, to claim authority means to be capable in principle of having authority. There are two necessary features that anything that claims to be authoritative must possess: (1) only those directives that are presented as someone's view can be authoritatively binding; (2) the directives must be recognized as authoritative without relying on the „considerations on which the directive purports to adjudicate“²⁸.

Marmor's claim that in cases of ambiguous legislation a resort to the intentions of the legislator is possible, derives from the first characterization of authority, or what Marmor himself terms the „communicative insight“: Law is a product of communication, hence „on this basis, namely of the communication model of law, I will strive to defend the conceptual ties between authorities and persons“²⁹. But does this conclusion necessarily follow Raz's argument? Are we justified to regard the intentional thesis as the Marmor-Raz account? I believe this is not the case. Marmor confuses *aspects* of authority with *conditions* of authority. By ruling out trees and stars from being capable of having authority, Raz indicates the necessary condition that anything that has authority must possess. But the *conditions* of law are not by necessity *aspects* of authoritative law and therefore they need not be authoritative themselves: Acceptance of the authority of law does not require that one accept the authoritative character of its legislators (or their intentions), any more than to place oneself *en route* toward the orient of the text means to decipher the psychological meaning of the text's author. Unfortunately, Marmor confuses these two different claims.

However, what is most important, Marmor's persistence regarding the intentionality thesis directly contradicts the second qualification of possible authorities. *In order to regard a certain directive as authoritative, I am not to rely on dependent reasons for action.* But what is an attempt to decipher the legislative intent if not a desire to decode, hence rely upon, the reasons and considerations on which the directive purports to adjudicate? If one's search for the legislative intent were successful, one would see in a clear light how the arbitrator's decision reflects the reasons of the disputants on which it depends. But this imaginable outcome directly contradicts Raz's position:

²⁶ RAZ, 2, 296.

²⁷ RAZ, 2, 296.

²⁸ RAZ, 2, 303.

²⁹ MARMOR, 1, 90.

Because the arbitrator is meant to decide on the basis of certain reasons the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then reject those reasons as possible bases for their own action they defeat the very point and purpose of the arbitration. The only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide³⁰.

The distinction between preemptive and dependent reasons³¹ can no longer stand when one questions the intentions of the legislator: I cannot address the latter with dependent reasons, not only because they do not by necessity underlie the authoritative decision, but also because I am to exclude the dependent reasons once the arbitrator's decision is reached. It seems to be the case that Marmor is suggesting the following: In cases of ambiguous legislation, the authority of legal norms can be regained by blurring the distinction between dependent and preemptive reasons, i.e. by blurring the distinction that itself makes authority possible. Marmor's arguments, if successful, undermine the mediating role of authority that both outlined features are supposed to explain. Therefore, if Marmor's arguments were successful, his position would not be a defense of Raz but rather an argument that proves Raz wrong. Therefore Waldron is wrong in regarding Marmor's arguments as the Raz-Marmor position.

However, one might always argue that what is so far shown regards *adjudication* while Marmor's question is that of the *legislative* intent. Indeed, not only is a distinction between how the latter two relate to authority possible, it is attractive and popular as well.

Adjudicative authorities, one might say, are precisely those in which the role of the

authority is to judge what are the reasons which apply to its subjects and decide accordingly, i.e., their decisions are merely meant to declare what ought to be done in any case. A legislative authority on the other hand is one whose job is to create new reasons for its subjects, i.e., reasons which are new not merely in the sense of replacing other reasons on which they depend, but in not purporting to replace any reasons at all³².

It is important to keep in mind that Raz himself calls this attractive distinction misguided. His conception of authority attempts to show those features that are present in all practical authorities³³. Therefore Marmor's sharp distinction between adjudicative and legislative authorities is not so much an explication of what lies implicit in Raz's argument, but rather an abandonment of Raz's project.

Secondly, Raz summarized his conception of authority in three theses, those of dependence, normal justification, and preemption³⁴ and therefore anyone who tries to uncover the meaning of the Razian authority is to reveal the indications of the latter. However, Marmor's search for the legislative intent undermines the normal justification thesis, according to which authority "involves showing that the alleged subject is likely better to comply with reasons which apply to him if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly"³⁵. Marmor's argument undermines this thesis, for (1) intentional interpretation can only be based on those reasons which apply to the subject of law directly, i.e., on those reasons which authority is supposed to replace; (2) intentional interpretation replaces the authoritatively binding directives, i.e., those directives that make authority possible. Therefore, Marmor's intentional thesis is self-defeating.

³⁰ RAZ, 2, 298.

³¹ RAZ, 2, 297.

³² RAZ, 2, 298.

³³ See RAZ, 2, 298.

³⁴ See RAZ, 2, 299.

³⁵ RAZ, 2, 299.

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Although I have presented the death of the author in specifically Ricoeurian terms, this theme is certainly not confined to his writings. The death of the author belongs to those widespread tools with the help of which philosophical hermeneutics overcomes the guiding preconception and concerns of the Romantic project. The death of the author, however, is not only a hermeneutical theme. In different form and content we encounter it in structural and poststructural narratives. It is not even a theme that can be encountered only in philosophical literature. As Marcel Proust tells us in one of the most revealing passages at the end of *Le Temps Retrouvé*,

...I had a more modest opinion of my book and it would be incorrect to say even that I was thinking of those who might read it as "my readers." For, as I have already shown, they would not be my readers but readers of themselves, my books serving merely as a sort of magnifying glass, such as the optician of Combray used to offer to a customer, so that through my book I would give them the means of reading in their own selves³⁶.

Moreover, in philosophical circles the death of the author is not a theme that can be encountered only at the end of the twentieth century. As Nietzsche argued in 1879, in bringing the text into the public domain, the author relinquishes all authority over what it is to mean: "When his work opens its mouth, the author must shut his"³⁷.

Keeping in mind the pervasive character of this theme, it is surprising that neither Marmor nor Waldron inquires whether it is conceptually possible to question the author's intentions. Not only does the argument I have presented question this possibility; it as well shows why intentions of the author always lie beyond our

reach and that this lack of access is not a weakness on our part, but rather a necessary condition without which no texts would be possible. That is to say, the leading presupposition at work in both Marmor's and Waldron's positions is *fake*. But how are fake problems to be addressed? Nietzsche, who took the death of the author to be an implication of the death of God, makes the following suggestion:

In former times, one sought to prove that there is no God – today one indicates how the belief that there is a God could *arise* and how this belief acquired its weight and importance: a counterproof that there is no God thereby becomes superfluous. When in former times one had refuted the "proofs of the existence of God" put forward, there always remained the doubt whether better proofs might not be adduced than those just refuted: in those days atheists did not know how to make a clean sweep³⁸.

That is to say, there are two possibilities open. On the one hand, one can offer a "genealogical" analysis of the belief in the possibility of access to the authorial intentions. This is what I have tried to do, taking genealogy in a general sense to be a project of critical interpretation that sees its task in locating and taking apart the axioms which command the unfolding of any text. A merely thematic critique of Marmor can be likened to "tossing a coin," for there always remains a doubt whether better counterproofs can be given. The second possibility consists in re-interpreting the themes within a new context. What happens with the Marmor-Waldron debate when it loses its ground? The debate can be rephrased in the following manner: What are the structural differences between texts that have one author and those that have multiple authors? But this, however, is already a different question.

³⁶ PROUST, Marcel. *Remembrance of Things Past*. New York, 1932, 1113.

³⁷ NIETZSCHE, Friedrich. *Daybreak*. Cambridge UP, 1982, 140.

³⁸ NIETZSCHE, Friedrich. *Human, All-Too-Human*, Cambridge UP, 1986, 95.

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DEATH OF THE AUTHOR AND THE QUESTION OF THE LEGISLATIVE INTENT

Summary

This paper is a hermeneutical investigation of a popular strategy among lawyers and philosophers of law, according to which an ambiguous legal norm can be resolved by reference to the legislative intention. Taking as its focus the way this theme unfolds in exclusive and inclusive legal positivism (more particularly, in the Marmor-Waldron debate), the paper calls for an abandonment of this strategy. The philosophical core of the paper is a discussion of the hermeneutical notion of the death of the author, which reveals the conceptual impossibility to question the intentions of the legislator. By bringing to a confrontation Ricoeur's and Dworkin's notions of interpretation, the paper shows why legal positivists are not to fear the separation of textual and psychological meanings: interpretation is not a subjectivistic projection of moral-political considerations and therefore it does not challenge the separation thesis. It does not contradict Raz's argument from authority either. On the contrary, a conceptual possibility to question the legislator's intent would render a number of Raz's arguments baseless. A brief comparative analysis of Raz and Marmor reveals why, contra Waldron, there is no Raz-Marmor position: Marmor's intentional thesis is self-defeating, for it does not work out the implications of Raz's position but rather signifies its abandonment. In the final analysis, the hermeneutical theme of the death of the author reveals the fake nature of the never questioned presupposition in the Marmor-Waldron debate – the intentional thesis.

KEY WORDS: authority, death of the author, exclusive and inclusive legal positivism, hermeneutics, legislative intent, textuality.

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AUTORIAUS MIRTIS IR ĮSTATYMŲ LEIDĖJO KETINIMO PROBLEMA

Santrauka

Tai yra strategijos, paplitusios tarp teisininkų ir teisės filosofų, hermeneutinis tyrimas. Šios strategijos esmę sudaro tai, kad teisinės normos dviprasmiškumas gali būti išsprędžiamas pasiremęs įstatymo leidėjo ketinimu. Pažvelgus, kaip šią temą atskleidžia ekskluzyvinis ir inkluzyvinis teisinis pozityvizmas (tiksliau Marmoro-Waldrono debatai), šiame darbe siūloma atsisakyti minėtos strategijos. Darbo filosofinę esmę sudaro hermeneutinės sąvokos *autoriaus mirtis* svarstymai, kurie atskleidžia, kad konceptualiai svarstyti įstatymo leidėjo ketinimų neįmanoma. Sugretinus Ricoeuro ir Dworkino sąvokų interpretacijas, darbe parodoma, kodėl teisės pozityvistai neturi bijoti tekstinių ir psichologinių reikšmių atskyrimo: interpretacija nėra subjektyvistinė moralinių-politinių svarstymų projekcija ir todėl ji neprieštarauja atskyrimo tezei. Ji taip pat neprieštarauja Razo valdžios argumentui. Priešingai, konceptuali galimybė svarstyti įstatymo leidėjo ketinimus paverstų daugelį Razo argumentų bereikšmiais. Trumpa lyginamoji Razo ir Marmoro analizė atskleidžia, kodėl, priešingai Waldronui, nėra Razo-Marmoro požiūrio: Marmoro ketinimų tezė sunaikina pati save, kadangi ji neplėtoja Razo požiūrio implikacijų, netgi dar daugiau – ji jas atmeta. Galutinėje analizėje hermeneutinė autoriaus mirties tema atskleidžia sufalsifikuotą niekuomet nesvarstyto presupozicijos prigimtį Marmoro-Waldrono debatuose – ketinimų tezė.

REIKŠMINIAI ŽODŽIAI: valdžia, autoriaus mirtis, ekskluzyvinis ir inkluzyvinis teisinis pozityvizmas, hermeneutika, teisinis ketinimas, tekstualumas.

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