## Articles

# The Pragmatic and Functional Indeterminacy of Law[*]

*By Klaus Günther*[*]

### A. The Ambivalence of Indeterminacy

Durkheim considered the existence of *indeterminate* norms to be a characteristic of modern societies organized according to the division of labor. Contrary to what one might readily assume, he did not see the increasing complexity of the matter regulated as the sole reason for this. Rather, he regarded the indeterminacy of norms to be a phenomenon, which complemented the individual autonomy of that society's members – however unusual this may sound. The determinacy of the rules diminishes to the same extent that the networks of societalization become increasingly dense: rule application becomes "free."[1] It is assumed that the addressees of indeterminate norms can make use of their autonomy instead of merely exhibiting mechanical obedience. It is hardly compatible with the ideal of individual autonomy that a society only deploys such rules as prescribe every single action in every situation down to the last detail, until they could be applied just as unconsciously as the highway code.

By contrast, Max Weber regarded the indeterminacy of *legal* rules as a sign of the decline of modern society. The greater the number of arbitrarily selected ideals and irrational valuations which find their way into law, the less predictable the application and enforcement of that law. This significantly disturbs the rationalization process of a society

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[1] EMILE DURKHEIM, ÜBER DIE TEILUNG DER SOZIALEN ARBEIT, 331 (1977)

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whose members act above all in purposive rational terms.[2] Franz Neumann, who held indeterminate norms to be indicative of the transition from a market-based and competition-oriented economy to a monopoly-capitalist economy, is also to be included in this tradition.[3]

These two diametrically opposed positions conceal an ambivalent experience that we may make in dealing with indeterminate norms. Such an experience fluctuates between the two extremes of autonomy and arbitrariness. When Durkheim observes increasing indeterminacy this does not of course imply that he notes growing arbitrariness. Rather, just the opposite is the case. Norms become indeterminate *because* we can make use of our autonomy and determine our will in every situation according to rules that every individual person would equally recognize and observe in the same situation. Autonomy manifests itself precisely in the fact that we no longer have to adhere rigidly to such prescribed rules as would collide with the accelerated complexity of organically differentiated societies. Rather, we are capable of perceiving differences and determining our will according to the given situation in a universally valid manner. Conversely, Max Weber does not fear the increasing indeterminacy of legal norms because it could liberate us from an ossified system of norms that is helpless in the face of "social questions". On the contrary: Weber warns us precisely of the danger of a loss of autonomy which would ensue, should one no longer be certain of which of the means for pursuing self-set goals are legally permissible or forbidden. If norms become indeterminate because their contents or interpretation of them is tied to abstract notions of value and abstract ideals, then law can no longer be understood as a system of rules coordinating the freedom of actors who behave in line with a purposive rationality; rather, the law is then itself prescribing purposes in an unpredictable manner. Because purposes, according to Max Weber, are only set on the basis of an irrational individual decision, indeterminate norms bear the stigma of arbitrariness.

One could attempt to reconstruct two ideals that are hidden behind this ambivalent experience with the indeterminacy of norms. One of them is a skepticism toward rules; there is in fact no such thing as rules, but only ad hoc norms, that are independent of the situations to which they are applied. One German judge put it in a nutshell: "The law is and becomes what it is by virtue of interpretation."[4] H.L.A. Hart has suggested that the skeptic is actually a "disappointed Platonist."[5] The latter judges the possibility of rules against an ideal which is a perfect norm. Such a norm could lay out how it is to be applied in each and

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[2] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT, 507 (5th ed., 1976)

[3] Franz Neumann, *Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft* (1937), *in* DEMOKRATISCHER UND AUTORITÄRER STAAT, 39 (1967).

[4] Walter Ecker, *Das Recht wird in und mit der Auslegung*, JURISTENZEITUNG 477 (1969)

[5] H.L.A. HART, DER BEGRIFF DES RECHTS, 105 (1973)

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every individual case. Wittgenstein's insight that no rule can regulate its own application would no longer apply here. Because there are no determinate norms of this kind, the skeptic draws the hasty conclusion that actually there are no rules whatsoever or that every rule consists only of the respective interpretation given to it by the user in the individual case.

Most theories of law lie somewhere between these two poles of ad hoc-norm or perfect norm. The indeterminacy of norms appears to be either a more or a less serious problem, depending on how far they diverge in one or the other direction from the point midway between the two extremes. Hart's solution is an example. Although norms do exhibit an "open texture", this is, he maintains, not the case with every norm. Moreover, he claims, one can distinguish between "core" and "periphery". The information is, in other word, that the problem is not as dramatic as it looks; we always have to move about between the worlds of Platonism and skepticism and the only thing we must not do is to make the mistake of considering one of the two to be the only one possible. What is important, he continues, is to state clearly *when* one *ceases* to apply a legal norm and instead adopts a moral or political line of argumentation.[6] In other words, no one disputes either that a black box spans rule and situation or that a society's political, moral, economic and legal positioning has an effect on this black box.

Since its inception, this view has led to various competing interpretations that can be arranged somewhere in the broad spectrum between positivism and realism. I would like to characterize briefly the two poles of the argument: at the one end, the conclusion drawn from indeterminacy is that overcoming the chasm between the facts and the norm can in no manner be rationally reconstructed. This leads to a skepticism of rules. The justifications given for the interpretations of a norm are, from this perspective, "actually" or "in truth" but self-deceptions. The deceptive maneuver serves different purposes, namely, to assert the primacy of a hegemonous discourse, to perpetuate a certain "style" and the power symbolized therein, to woo consent for an existential decision, or to perpetuate the self-referentiality of the system. In each of these cases the analysis of the argumentation belongs in the domain of *rhetoric*. Lines of argumentation "serve" a purpose extrinsic to the application of norms to situations. Functional determinacy then takes the place of indeterminacy. The law serves the enforcement of X.

On the other end one finds those theories which hold that legal argumentation serves some form of practical reason or ethical wisdom – a form of justice understood in utilitarian or deontological terms, or instead serves the realization of "values", goods, collective goal-setting. In the Federal Republic of Germany there are, moreover, a number of "mixed variants", according to which Values and goods have always been embedded in an institutional frame and already inherently bear to forms of their realization.

[6] *Id*., 175, 183

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All of the theories refer to the problem of overcoming the chasm between situation and role, given the presence of indeterminate norms. In the following I will suggest that these theories should be ordered at a general level depending on whether they examine the problem of indeterminacy from the point of view of the observer or the participant. It will emerge in the process that from the participant's point of view a distinction can be made between a semantic and a pragmatic form of indeterminacy, whereas the observer's point of view has to do with the problem of functional indeterminacy (B). I shall subsequently attempt to show that pragmatic indeterminacy can only be overcome by means of a line of argumentation geared towards the moral principle of impartiality (C), whereas the institutionalization of a legal system is a prerequisite for overcoming functional indeterminacy (D). This will provide the basis for a proposal as to how the pragmatic indeterminacy of *legal norms* can be overcome through rational argumentation (E). Finally, via a commentary-based discussion of the functional concept of law, I shall show that any reduction of the problem of the indeterminacy of norms to its functional aspect is a one-sided approach (F).

## B. Various Types of the Indeterminacy of Norms

A norm is, semantically speaking, indeterminate in the same way as the majority of other linguistic utterances made in a community of speakers. With the exception of proper names, deictic and indexical expressions, descriptive expressions exhibit phenomena of semantic vagueness or porousness. Norms inasmuch as they can be indeterminate, harbor a propositional content. This indeterminacy can be resolved by introducing additional roles that determinate the meaning of disputed expressions. How one should characterize these rules is a matter for semantic theory. Their justification, on the other hand, is not.

The history of indeterminacy commenced with trust in the word. The rule of law was supposed to guarantee the presence of an unequivocal authority. This was founded on a determinate notion of the potentiality of language. It was less important whether *auctoritas* or *veritas facit legem*. Despite all relativism vis-à-vis the conditions under which legal rights arose, law was at the least supposed to guarantee one thing, namely, similar cases be treated in the same way, *i.e.* the principle of formal justice. In terms of the general principle of the rule of law, it proved possible to find an equivocal position for this principle in the form of the rule of a semantically consistent application of language. The predicate T that is applied to an individual a has also to be applied to every other individual who is similar to a in all pertinent respects.[7] This principle is valid not only for the application of laws, but also for dealing with precedents. The respective norm must also be applied precisely in such instance where a linguistic rule demands that a word be applied to an object.

[7] ROBERT ALEXY, THEORIES DER JURISTISCHEN ARGUMENTATION, 237, 279 (1978)

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In this respect the "rule of law and not by men" was supposed to ensure that the individual case would be decided impartially and not according to the respective advantages accruing to one or the other of the parties. Yet this could not be meant to read that laws could, as it were, apply themselves, without mediation by a norm-applying power. This gave rise to the problem of how this form of "rule by men" can in turn be subjected to normative control.

The link between the rule of word usage and the norm reveals the moral meaning of the rule of law. It did not have the purpose of observing a determinate semantic theory. The commitment to administer equal treatment was supposed to ensure that a reciprocity principle be realized. For, the impartial application of a norm differs from the continuation of a series of numbers by the fact that I am obliged not to make an exception even if I find myself in the situation of the person affected by observance of the norm. This is the *normative* meaning of the universalizing principle that has been emphasized repeatedly by everyone from Kant to Hare: Do unto others as you would have them do unto you.

The semantic indeterminacy of norms is relevant only for this *normative reason*. How the rule by men is to be judged by applying norms depends on whether and how the semantic rules used to fix the meaning of a vague expression can be justified. In order to focus on this aspect we must look more closely at the relationship between the propositional and illocutional content of normative judgments and turn our attention to pragmatic indeterminacy.

*Pragmatic indeterminacy* results from the use of norms in speech acts. Under normal circumstances we do not use norms in speech acts directly, but rather in the form of singular judgments that we express to another person in a situation. We do not say "It is imperative that p" or "If q, then p is imperative", but rather "I demand/prohibit/permit you to do p", or quite simply "You shall do p here and now".

In regulative speech acts with which we order someone else to do something or demand that they do so we are admittedly supported by norms, but always in the sense that we have already used them in completing the speech act. There are, accordingly, two different ways in which the hearer can react to the speech act addressed to him. On the one hand, he has the option of disputing that the norm supporting the speaker in the completion of his speech act is in itself correct. In this case he rejects the validity claim that the speaker raises *for the norm*. In this kind of statement the situation in which the speaker completes the speech act plays no role. The claim to validity "resides" in the norm, and by referring to the validity claim, the hearer abstracts away from the situation. Although the validity claim depends on its being *performed* in speech acts, we nevertheless *thematize* it independently of the speech acts in which it can be performed. In this respect asymmetry exists between regulative and constative speech acts. In the latter, a direct claim to truth is made with respect to the propositional content of the assertion.

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The hearer can, on the other hand, also acknowledge the validity claim of the norm, yet contest the regulative speech act resting on an appropriate application of the norm to the situation relevant for the speaker and hearer. In accomplishing the speech act the speaker "situates" the underlying norm in relation to the hearer. There is no other way in which we can succeed in addressing the validity claim to another person. In so doing he selects certain features of the situation. It depends on the respective norm chosen and the interpretation he gives it which features are regarded as significant. By deciding on a specific interpretation we establish vis-à-vis the hearer which features of the situation are significant. This act of selection is unavoidable if we want to carry out the regulative speech act. If the hearer disputes that the valid norm was applied appropriately, he is directing his objection against this act of selection. In this case, he has a different perspective on the situation, and consequently other features are relevant and other norms applicable.

Pragmatic indeterminacy arises from the fact that we cannot infer from the validity of a norm the appropriateness of its application to all situations. This occurs less frequently in situations of conflicting morals than in legal conflict situations because we often formulate moral norms used to support a regulative speech act in the same language as the description of the situation from which we select the relevant features. Nevertheless, even when applying a clear and unequivocally determinate norm, we are completing an act of selection that requires justification. Therefore, it is less the semantic and rather more the pragmatic indeterminacy that makes the problem of indeterminacy virulent. Of course a controversial interpretation of the norm must also be semantically possible. But whether or not the individual constant "a" that appears in the description of the situation is to be part of the extension of the predicate "T" that appears in the norm depends on which other norms the corresponding singular judgment would collide with in this situation.

Valid and appropriate norms are *functionally indeterminate* if their *realization* or *observance* is not foreseeable. Legal realism understood norms to be prognoses about behavioral expectations in social interaction and discovered in the process that the rule of law does not suffice to erect accurate prognoses with regard to the behavior of the institutional staff charged with applying the law. A wealth of various motives that have a bearing on the observance of norms were discovered. This resulted in the theory that these motives also determine the content of legal norms and their application. The problem of functional indeterminacy already arises, however, in connection with norms as such. Just as a norm cannot ensure the normativity of its own application, no norm provides information about the motives involved in its observance. I shall return to the question of how the attempt to solve the problem of functional indeterminacy is being made in institutionalized legal orders in part D. For the time being it is only a question of distinguishing this type of indeterminacy from pragmatic indeterminacy: whereas the latter only occurs given participation in argumentation about norms, functional indeterminacy can only be perceived from the perspective of the observer. We must first expect behavior,

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which conforms to the norm, and subsequently be disappointed before we can enquire as to the motives for not observing a norm.

## C. Resolution of Pragmatic Indeterminacy through Application Discourses

Pragmatic indeterminacy arises because a norm's validity does not allow us to draw any conclusions with regard to the appropriateness of the regulative speech acts with which we apply one norm as opposed to another in a given situation. In the following I shall briefly argue that this indeterminacy can only be overcome by means of a separate line of argumentation in which the validity of norms is presupposed, because all that is of consequence is appropriateness to the situation. It is my hypothesis that discourses of application are apart of the universal structure of moral argumentation as such; without them, moral lines of argumentation would be incomplete.[8] In order to show how we can use rational arguments in situations subject to application, and for the sake of simplicity, I shall initially limit myself to the problem of the application of *moral norms.* That discourses of application can also overcome the pragmatic indeterminacy of *legal norms* presupposed that I justify a second hypothesis. I will show that moral lines of argumentation have a decisive impact on institutionalized systems of law. The role of discourses of application in institutionalized systems of law is albeit more complicated than in the case of moral considerations, yet they exhibit the same structure.

We accept norms as valid, although we know that they collide with other valid norms. If we enquire as to the validity or moral rightness of a norm, the question of situations to which it may be applied interests us only with respect to the extent to which it expresses a universalizable interest that remains the same in all situations.[9] In so doing we refer only to the unchanging circumstances and abstract away from the additional circumstances that obtain and which may be different, *i.e.* contingent, in each situation.

Every person who finds him or herself in an emergency has an interest in receiving help. Every person who has been promised something by another has an interest in being able to rely on that promise. This does not mean, however, that every person who relies on a promise also has an interest in a third party, *for this reason*, not being helped in an emergency. The principle of universalizability does not exclude these reasons, but only such as we would not accept in any situation, indeed independent of what other circumstances may additionally exist. Every person has an interest in not having a promise broken owing to an arbitrary reason, a mood or for the sake of some advantage. Every

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[8] KLAUS GÜNTHER, DER SINN FÜR ANGEMESSENHEIT. ANWENDUNGSDISKURSE IN MORAL UND RECHT (1988)

[9] Jürgen Habermas, *Diskursethik – Notizen zu einem Begründungsprogramm, in* MORALBEWUßTSEIN UND KOMMUNIKATIVES HANDELN, 76 (1983)

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person has this interest in every situation. It would thus not be possible to generalize a norm that would accordingly permit such a breach.

With regard to the question of validity, it is only a matter of what all parties in every situation have an interest in. This abstraction is necessary in order for the one question to be brought clearly to light in the discourse, namely, whether the norm constitutes a reciprocal interest. The consequences and side effects of a norm's general observance have to be mutually acceptable to everyone from the perspective of every individual person.[10] Let us assume the existence of a deontically perfect world in which all other valid norms have been fulfilled. In this case the question is whether every individual person can still desire that the controversial norm be universally observed, even if all other valid norms are fulfilled. If we acknowledge the prohibition of lying to be a valid norm, we assume that we are not at the same time also legally obliged to offer help. If this were not the case, then we could not even identify what truly lies in our common interest. To do so it is necessary to know which interests are affected in every situation. Otherwise it would not be possible to ascertain what is of real significance with respect to the test of universalizability, namely, whether or not every individual person can still want to observe the norm if that person puts him- or herself in the position of every other person. This change in perspective only makes sense if we presuppose that the circumstances of the situation remain constant. The interests of every individual person have to be taken into account under unchanging circumstances. It is only a question of the social, not the substantive and temporal dimensions. We can therefore *hypothetically* presuppose that the unchanging circumstances are identical with the sum total of all situations of application.

This presupposition is not fulfilled if we have to do with the application of a valid norm in a situation. It is clear that we are not allowed to apply a valid norm in the same manner as we have done in the discourse of validity, namely, by presupposing unchanging circumstances. This, after all, only served the purpose of identifying the interests that are equally affected in every situation. This requirement falls by the wayside with regard to the application of norms. The circumstances which, in the discourse of validity, were assumed to remain unchanged now prove to be circumstances alongside the other circumstances of a situation, which, taken as a whole, would together comprise an exhaustive description of the situation. Only now do those interests, which are different in every individual situation also become relevant. If one were to continue to limit oneself to the unchanging circumstances, the application would be partial in nature. Because the unchanging circumstances are not the same as *all* of the circumstances in every situation, *i.e.* are not identical with an exhaustive description of the situation, any corresponding restriction would be selective – we know this as moral rigor or the "terror of virtue". The validity of a norm does not prevent its being applied selectively.

[10] *Id.*, 75

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However, the analysis of the use of regulative speech acts showed that in accomplishing a regulative speech act we cannot help but select a few features of the situation as relevant with respect to the hearer if we are to succeed in the first place in calling on the other person to commit or refrain from committing a certain deed. How is it possible to avoid the dilemma that now arises whereby we either have to apply a valid norm by carrying out the speech act in a partial manner or we have to dispense with "situating" a valid norm vis-à-vis the hearer? We can only get around this dilemma by making precisely that act of selection which is inevitably necessary in effecting the regulative speech act the subject of a justification. The communicative form in which we reflect on the judiciousness of the act of selection is the discourse of application.

The application discourse is a communicative form of reflexion engendered by the act of selection. The features deemed to be relevant are juxtaposed to an exhaustive description of the situation. It is only on the basis of an exhaustive description of the situation that reveals with which other valid norms the applied norm collides in the particular situation. If it is now argued that a certain interest has not been taken into consideration, then this is no longer directed against the validity of the norm, but rather against the appropriateness of its application with a view to an exhaustive description of the situation. It is only in the light of an exhaustive description of the situation that we know which reason is truly decisive. For only then do we know which valid norms are applicable to the respective situation.[11]

Can we now, however, also identify a criterion for assessing when an act of selection is justified and the norm applied therein is appropriate in view of all circumstances pertaining to the situation? An exhaustive description of the situation is not "objectively" given. It is well-known hermeneutic knowledge that, especially in practical contexts, descriptions of situations depend on the respective normative perspective of the person who applies the norm. This hermeneutic insight is presupposed in discourses of application. One can only speak of an exhaustive description if every party has the right to bring his point of view to bear on the respective situation. This is the only way of ensuring that all circumstances relevant with respect to valid norms are taken into account.

We have not, of course, thus enumerated all the necessary, sufficient conditions for the use of the predicate "appropriate". Even if all circumstances have been taken into consideration, we still do not know which act of selection is justifiable in this situation. This cannot depend on which norm is valid. The application discourse is itself subject to precisely the premise that the normative reasons employed in it have already been acknowledged as valid by the parties involved. The result can therefore not consist of only the appropriate norm being valid, whereas all other applicable norms are invalid. The obligation to keep a given promise is not invalidated by our neglecting to commit the

[11] GÜNTHER, *supra*, note 8, 287

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required deed in a specific situation because we are helping a third party who is in deep distress. Validity cannot therefore be a criterion for ascertaining which norm is to be applied in which way. The only avenue that remains is a mutual interpretation of all valid norms applicable to an exhaustive description of the situation which allows them to be reconciled with one another. This reconcilability will emerge within a coherent system of valid norms. We orient ourselves towards this coherent system when laying down the meaning of a norm in a situation.

A further consequence of the distinction between justification and application proposed here is that a valid norm can have no "objective" meaning. We cannot envisage what meaning a norm will assume in a situation where it is possible to apply it. Rather, we exhaust the possible meanings of valid norms in various situations by striving to arrive at a mutual interpretation of all norms that collide with each other, given an exhaustive description of the situation. As soon as we engage in an application discourse, all we have are various readings of a valid norm that is applicable prima facie, and each reading has then to be justified in an application discourse. Conversely, no reading can be expected to represent the sole and objective meaning of the valid norm. The claim that we make with a coherent interpretation consists only in our having applied the valid norm to this situation impartially. We then go on to assert that the applied norm was the only one appropriate.

We can hypothesize on the basis of this characterization of the application discourse that laying down the meaning of a norm is the resolution of a problem of collision. Of course the semantic variant that we select by designating specific features of a description of a situation as relevant has itself to be semantically possible. And the existence of semantically indeterminate norms is not to be doubted. Semantic vagueness arises in normative contexts because the selection of a few semantic variants of a descriptive expression would result in the norm colliding with other valid norms (or one of their semantic variants) in the situation to which it is applied. Vagueness is after all not inherent in the expressions. It does not arise until we sense a norm's inappropriateness when applying it because we might be violating other valid norms. In view of the events in a Gestapo torture chamber we know quite unequivocally what is meant by a norm that is apparently as vague as the commandment to respect the inviolability of human dignity. If a television network wishes to broadcast a film about the crime of a prisoner who has undergone rehabilitation and is about to be released, then it is no longer so clear – this might conceivably violate the freedom of the press.[12] Problems of interpretation arise in a normative context determined by the respective situation. It goes without saying that an interpretation has to be semantically possible. But not everything that is semantically possible is also called for in normative terms.

[12] *Bundesverfassungsgericht*, 1973 BVerfGE 35, 202; Robert Alexy, Theorie der Grundrechte, 84 (1985)

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Does this not contradict the principle of equal treatment contained in the semantic rule that a predicate "T" applied to an individual constant "a" must also be applied to every other individual who is like "a" in all relevant respects? It is important that we bear in mind that a coherent interpretation does not contradict semantic rules. *If* "a" is indeed a "T", the predicate must also be applied to every other object, the description of whose features coincides with that of "T". *Whether or not* "a" is a "T", however, can only be clarified by means of a coherent interpretation. And this hinges on every party himself being able to select those features that are "the same" from his perspective.

Finally, we must still answer the question of how we should characterize the claim that we associate with coherent interpretations. The claim cannot be the same as that of the validity claim pertaining to the norm itself, for if this were the case, either we would never argue about norms – but rather always only about interpretations alone – or we would restrict the meaning of a norm to a respectively given horizon of application. In other words, it must be a claim sui generis. It is this that Dworkin means by the "soundest theory" – but, and this is not conceived of by Dworkin, a *pragmatic* element is brought to bear in the process. The ideal coherent system of all applicable norms cannot result from monological considerations alone. There is as a consequence also no need for an idealized designer of theories such as Dworkin's Hercules.[13]

Rather, the claim to coherence is internally linked to the pragmatic meaning of the claim to appropriateness. Only in this way is it possible for every individual person to be able to bring his interests to bear in the form determined by the situation – to the extent that he can refer them to valid norms. It is a question of how every individual person sees himself in the particular situation *after* he has already determined his will through rational insight, *i.e.* by means of valid norms. In the discourse of justification it is only a question of whether the norm I have selected can in itself be universalized. Only by expanding the argumentation to include that constellation of valid norms which results from a concrete situation does it become possible to take into consideration the respectively non-substitutable interest perspectives, the individual differences which can only find expression in view of a particular situation. I have to expand my own perspective to incorporate this situation-related aspect of the other's perspective.

## D. The Problem of the Factual Observance of Valid Norms

Moral lines of argumentation as a whole, regardless of whether they focus on the validity or the appropriateness of norms, do not extend to the empirical motives that determine our actual behavior. If there are good (in other words, correct and appropriate) reasons for doing p here and now, and the actor fails to do p, this only means that there are no good

[13] RONALD DWORKIN, LAW'S EMPIRE, 225 (1986)

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reasons for this failure. Although valid and appropriate norms *call for* their factual observance, validity and appropriateness are not a sufficient condition *to ensure that* they are factually observed.

Yet, the non-observance of a valid norm violates the principle of reciprocity. We can hold the validity of a norm to have been recognized, if we can presuppose that it is generally observed. Only under this condition can one assert that the norm embodies a common interest. Whoever exempts himself from the duty to uphold the universal factual observance of a valid norm violates this validity condition. In so doing he infringes on the interest of each individual person as is expressed in the norm embodying that common interest. He gives other motives priority over the rational. Then, however, no one else can be expected for their part to base their behavior exclusively on rational motivations and factually to observe the valid norm. This expectation is only justified if every individual person can be sure that all others will observe the valid norm in their behavior towards him. Ego has to at least be able to observe Alter behaving in accordance with the norm and to expect such behavior.

To this end it is sufficient if Ego can firmly expect that Alter's violation of the norm will not compel him, for his part, to now follow other than rational motives. This is the case if it is permissible to induce Alter's observance of the norm empirically. The principle of reciprocity gives rise to the permission to use means of bringing a decision about empirically.

It would be inaccurate to conceive of this as if it were only a matter of outfitting a specific set of valid norms or a specific system of principles with a sanctioning potential which would secure universal factual observance. The principle of morality can only be applied in procedural terms. It establishes several conditions for procedure, conditions in which contents are produced, rather than for the contents themselves. The principle of morality demands that valid norms be factually observed, but it does not state *which* norms are valid and *how* they are to be observed; as distinct from natural and contractarian law, no individual norms can be deduced from the principle of morality.

However, the factual observance of a norm can only be expected if at some time and in some place it has been *decided* that this norm *is positively valid* if a singular judgment can be *taken* with regard to the situation in which the valid norm is to be applied by which addressees in which manner, and if the motive for the factual observance of the singular judgment can be brought about empirically. Institutionalization must not, therefore, be limited to enforcing the factual observance of random norms, but must rather relate to the setting and application of norms. It has to be possible for laws to become effective, for judgments to become legally entwined, and for measures to be taken.

On the other hand, however, the mechanism that can prompt decisions on the various levels of setting, applying and enforcing norms must not be allowed to absorb the

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procedural content of the principle of morality. Most legal norms are directly geared towards the authorities empowered to deploy decision-effecting mechanisms or they refer from the outset only to the addressees' strategic motives. It is then irrelevant what the reasons are for observing a norm, be they good, bad or neutral. However, this must not deceive us into thinking that positively valid legal norms and legally binding judgments furthermore lay claim to their *potentially* being observed by every individual person due to rational motives. This would only be the case if every individual person could come to the conclusion, based on a moral line of argumentation, that there are good reasons for granting the norm recognition. This is why the institutionalized procedures do not exclude moral argumentation with regard to the validity and appropriateness of norms. The empowering of the institutional staff who will enforce the norms can only refer to valid norms and legally binding judgments.

## E. The Procedural Application of Legal Norms

Following the discussion of the distinction between the justification and the application of valid norms as well as the supplementation of the principle of morality by institutionalized legal systems, it remains to clarify the final point, namely, how a procedural application of legal norms is possible.

How is the statement "p is a correct interpretation/a correct application of the law of the land X" to be understood? Legal application discourses do not differ from moral discourses because the norms for them are "prescribed". They evidently differ with respect to the mode of validity involved; legal norms have to be positively valid and their validity depends on their having been the result of legitimate procedures.

In examining the application of morally valid norms we found that the only appropriate norm has to be accorded recognition as the result of an ideal coherent system of all norms applicable to an exhaustive description of the situation. This ideal coherent system can, however, only be ascertained if we can assume that we have unlimited time and an exhaustive knowledge. In most application situations, however, we are compelled to make a judgment. This can give rise to a moral problem: if we hesitate too long, as Hamlet did, because we want to know exactly *what* should be done in this situation, we run the risk of missing the right time and, owing to not having reached a judgment, violating another valid norm. In order also to be able to observe a valid norm factually, we have to arrive at a singular judgment that tells the addressee what should be done here and now. A norm can after all always be observed only by specific persons in specific situations at a specific point in time. However, the singular judgment "You shall do p here and now" is virtualized precisely in the application discourse and made subject to the appropriate application of the norm. Yet, time is short and knowledge scarce. Application discourses are thus also in need of institutionalization if singular judgments are to be made, and in the absence of the latter, factual observance of the norm cannot be brought about.

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The solution to this problem of functional indeterminacy can, however, not consist of prompting some decision or other because such is always better than none at all. From the outset, the application of law was institutionalized as a form of communication, especially in the procedures for the administration of law. As in the institutionalized procedures of legislation, the institutions of legal application also have a twofold task to solve at one and the same time. They have to produce singular judgments and thus enable us to expect such to be forthcoming, and they have to make lines of argumentation possible in which the appropriateness of the norm applied can be thematized.

A specific type of reason plays a special role in such forms of communication. Rules and rule systems (theories) take shape in which specific application situations are linked from the start to specific meanings of the norm. A few features of possible descriptions of situations that will foreseeably be repeatedly relevant in various situations are linked in such theories with a few semantic variants of a norm. This thus lays down that the predicate arising in the norm can be applied to a specific class of individual constants. That act of selection which is justified by means of such rules and rule systems no longer requires justification of its own in an explicit application discourse. This obviates the need both for an exhaustive description of the situation to be generated and the coherent interpretation of all applicable norms. It can be assumed that the extent to which this is true grows in inverse proportion to the number of the situations in need of a decision that implicates legal norms in which moral principles are given a positive value. These are given a stable form by means of a "constant administration of justice" and professionally administered expertise. The function of such theories resides in their enabling the decision for specific constellations of cases to be predicted. To this extent, the pragmatic indeterminacy is neutralized.

The administration of justice and jurisprudence produce "advance interpretations" which bring the sum total of all valid norms into a coherent "system" and tailor them to specific types of application situations. These include the legal "doctrine" and the corpus of rules used in the canons of interpretation. For one thing, this corresponds to the need for stable forms that law, as a sub-system of society, has. At the same time, however, coherence theories with a moderate scope must not be reduced to this function; on the one hand, they cannot completely replace the procedure of argumentation over the appropriate application which has to begin anew in every situation. They are, therefore, on the other hand, subject to *it being possible to justify* by means of an application discourse the pre-determined act of selection as the only appropriate option in the given situation in every individual case. Only *against this background* do such theories remain subject to rational criticism. This possibility ceases to exist if an attempt is made to equate these theories with the exhausted semantic contents of a valid norm by assigning them a special status and thus implicitly blurring the pragmatic difference between justification and application.

It is logical to assume that this danger exists owing to the functional advantage of such theories, namely, their high degree of self-applicability. They acquire this quality because

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the semantic contents of a specific set of norms are combined in them with specific types of similar application situations. Such theories can replace the procedural application that has to be conducted in every individual case inasmuch as they anticipate the selection of relevant features of the situation and the clarification of the respective priority attached to colliding norms.

The exhaustion of semantic contents is itself procedural in nature. If moral argumentation can now be characterized as only being procedural in nature, then it cannot cease at the result of a justification procedure. The indeterminacy that arises as a consequence of the distinction between justification and application makes a further procedure necessary. Someone who relies on a norm (*e.g.* wants to exercise a subjective right) can do so only on the precondition that he concurs with a procedure which elaborates the other norms with which the propagated norm would collide in the given situation and in which a mutual solution to the collision is sought. To this extent, every valid norm is only applicable prima facie and holds a potential for collision. There is no argument with which priorities can be established presumptively between any and all norms that are in themselves valid. Such a limitation would prevent the parties from appropriately being able to bring to bear the respective differences in the combinations of features of a situation. They would then always be bound to a certain interpretation and would have to accept that their respective perspective on the given situation was not taken into consideration – and indeed not because there is no valid norm that would be applicable to this perspective, but rather because the application to specific type of features is restricted.

Historically speaking, there are above all two prominent examples of this kind of theory. For one thing, there have been attempts to relate valid norms to a system of goal-setting and corresponding end-means relations. The goals are derived either from an historical legislator or from a "rational" legislator embodied in the legal order itself. The valid norm would then appear as a means towards realizing these goals. Accordingly, the collision relationship between various norms is placed in relation to specific groups of application situation.[14] Another strategy consists of relating valid norms to an axiological system, *i.e.* regarding them as integral parts of a certain "order of values". These self-applying theories, as are practiced above all in constitutional law, have the advantage of being able to depict collisions between norms in specific situations in terms of a scale of values. This permits a quasi-quantification which in turn helps to orient the solution of collision problems to the decision between a "more" and a "less" in terms of infringement and restriction.[15]

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[14] Ernst-Wolfgang Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation, in* STAAT, GESELLSCHAFT, FREIHEIT, 228 (1976)

[15] Alexy, *supra*, note 12, 146

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These examples demonstrate that we can order some of the systems of coherent interpretation, as it were, as "paradigms" and examine each of them from the perspective of the participant and of the observer.

Max Weber's description of bourgeois formal civil law, for example, adopts the observer's perspective. It would then appear to be a system of norms that regulates the transactional relationship of actors who behave according to principles of purposive rationality. It is in turn important for these actors to be able to foresee the manner in which the law works when planning and coordinating their social actions; this is why the security of the law and predictability of the law occupy such a high status. Needless to say, Max Weber at the same time assumes that purposive rationality is the pure form of rationality. From this immanent perspective the law therefore appears to be the guarantee for an individual sphere of self-determination that is to be protected against intervention, especially on the part of the state. What is important here is less how law is given a universal justification and its tasks specified in the paradigm of formal law from the perspective of a participant in moral discourses or that of a sociological observer. Rather, what is essential at this juncture is how within this paradigm the selection of relevant features of the situation is justified and how colliding norms are interpreted coherently.

Whether "materialized law", as Max Weber called it, lamenting its existence as the sign of a loss of rationality, can even be distinguished from formal law as a paradigm of its own is not a matter that needs to be decided here. What strikes the eye is that there is an ongoing trend towards the discovery and consideration of purposes in law. In the present context, all that is decisive for a theory of procedural application as a component of moral argumentation is whether a few traits of this paradigm can be traced back to lines of argumentation on appropriateness. Materialized law would appear from the observer's perspective to be a system of norms that more often than not authorizes state intervention, takes politically set goals into consideration, and weighs colliding interests (especially of an economic nature) up against each other. From a perspective immanent to it the process of materialization leads to an increasing consideration for contextual conditions under which an individual use of freedom can be granted. This presupposes that collisions between norms in the paradigm of formal law can no longer be interpreted coherently. From this viewpoint, the teleological re-interpretation of legal norms can be understood as the endeavor to integrate into the application of existing law those conditions and their normative valuation under which law is enforced. This would necessitate undoing those abstractions away from the special circumstances of the individual case, by virtue of which the formal legal paradigm had coherently resolved collisions of norms. Meanwhile, those circumstances of the individual case that were not previously taken into consideration could only become "relevant" if one was able to draw on principles or norms with which they could be identified.

This impulse was initially not understood as a collision of principles. Ihering's legend-making stylization of the sudden switch from conceptual jurisprudence to a jurisprudence

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of interests provides a basis for understanding that the immanent legal discovery of the "non-contractual prerequisites" of formal law was simultaneously accompanied by a skepticism with respect to values. From this perspective, with the discovery of social consequences and prerequisites not only did the formal legal paradigm's claim to providing a coherent interpretation of the existing norms for typical spheres of application, disintegrate, but with it the claim to rationality as such. It consequently appeared to be merely the compromise-based expression of struggles between competing interests, and this ultimately disguised irrational value decisions.

A few traits of materialized law would, however, suggest a different conclusion: these traits become more pronounced if one leaves the areas of great shadow battles and attempts to reconstruct the materialization of formal law as a process of argumentation. The paradigm of formal law would then appear to be an attempt to resolve collisions between norms in a manner oriented to individual property. If, on the other hand, objections are raised which demand that the social consequences be focused on, we do not have to do with "new" principles that have to be enforced in the power struggle against individualist values and that find temporary expression in dilatory compromise formulas adopted for the constitution, legislation, and the administration of justice. Rather, the attack centers only on the coherent interpretation accepted up to that point as being the appropriate application of those principles that had *always* determined modern law. The change vis-à-vis the paradigm of formal law is not that "social solidarity" is then newly discovered as a counter-principle to "individualist justice", or "protection of confidence" as a counter-principle to "freedom to contract", etc. Rather, the assumption determining the paradigm of formal law, namely, that *only* individualist justice guarantees social solidarity, and *only* the freedom to contract affords an effective and proper protection of confidence, proves untenable. The increase in positive obligations with respect to a service *in addition* to the negative rights designed to counteract intervention does not, therefore, imply any fundamental change in the idea of a morally founded system of law. The so-called material principles are albeit more indeterminate and more frequently exhibit a structure which can only be applied on the condition that it is translated into an end-means relation. This, in turn, makes necessary more comprehensive empirical discourse about the prerequisites and consequences of an efficient use of means given scarce resources. All of this increases the likelihood of collisions in individual cases and makes their resolution in a coherent interpretation more difficult. However, there is also no justification for a skepticism with respect to values or for a "substantialist" re-interpretation of law as the expression of an order of goods and values.

It goes without saying that a detailed examination would be in order for this suggested reconstruction of the materialization of formal law in terms of its compromising a process of argumentation aimed at revising coherent theories for the appropriate application of positively valid norms, given parameters of scarce time and incomplete knowledge. Such a re-examination would yield counter-evidence on a few points. The care that needs to be taken in putting this suggestion into practice emerges conclusively if we attempt to

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diagnose the present. It is hardly possible to ascertain what the increasing frequency of collisions and the difficulties in their appropriate resolution reveal: that we are factually only following the principle of "anything goes"; or that the law is limited to generating decisions which serve to distribute right and wrong – with random contents – for a certain period of time; or that they show the procedural meaning of the appropriate application of valid norms to be beginning only now to have an effect. Several phenomena speak in favor of the last of the three phenomena, which, however, cannot be unequivocally interpreted: the set of application situations to which a coherent theory is tailored through the administration of justice and jurisprudence is constantly contracting in size, and those features of a situation that need to be taken into account are becoming increasingly complex, and as a consequence lend themselves ever less to universalization for comparable cases. Instead, the intermeshing of rights and duties is becoming increasingly close-knit, the "application" of norms is ever more frequently becoming the opaque distribution of limited options which can be exercised under fixed conditions with corresponding "rights" and "duties", but which can also be retroactively corrected or overruled. Another contributing factor to this ambiguous obscurity is that justification and application procedures are growing ever closer because the legislature is becoming increasingly dependent on the heuristic function of court rulings. There is little that is "rational" about this phenomenon, much that is "functional" for the political and economic system; and most assuredly nothing that is both rational *and* functional.

**F. The Distinction between Procedural and Functionalist Concepts of Law**

In view of this, theories about the functional aspects of the indeterminacy of law have a far-reaching heuristic power. If normative claims to rightness and appropriateness can no longer be clearly pinpointed, then it is logical to engage in an empiricist reinterpretation of norms and their application. In common with other empiricist theories they rely on a concept of law that is observed exclusively from the perspective of the third person.

Luhmann reduces the autonomy of law to a temporary state in which a decision is made between "lawful" and "unlawful". Lines of argumentation pertaining to the appropriateness of applying a norm as well as the creation and justification of coherent theories no longer express any pragmatic contents, but serve rather as internal consistency controls that are required in order to allow law to reproduce itself from one decision to the next. Lines of argumentation internal to the law are tailored exclusively to this maintenance of its reproductive capacity; their content is arbitrary.

Luhmann explicitly distinguishes this internal aspect from the external sociological observation of the law. A sociological observer can arrive at results pertaining to the functions of the law that would be different from those reached by a juridical observer who perceives the environment through the lens of the legal system. The sociological observer sees normativity as nothing other than "contrafactual stability, that is, a

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particularly demanding kind of factualness."[16] Norms stabilize expectations by establishing that the factual refutation of a prognosis shall not lead to the correction of that expectation. Whosoever does not have to be compelled to revise his expectations for future cases, despite his expectations being dashed, is "right" of "lawful". The legal system specializes in observing events in the environment with the help of this distinction between "lawful" and "unlawful". From the sociological observer's vantage point, this makes the "processing of expectations" possible in a factual, temporal and social sense.[17]

From the standpoint of the juridical observer the use of the "lawful/unlawful" code affords an internal monitoring of consistency. This is what makes it possible for one decision to feed into the next and for the legal system to reproduce itself in the first place. Reflexive processes and self-reflexion can take this up: the system can "itself regulate regulation" and "evaluate the system as a whole in terms of its own perspectives, *e.g.* in terms of the idea of justice."[18] However, this "evaluation", by means of which the legal system submits its own monitoring of consistency to a coherent theory, does not have an evaluative or normative side to it. Since the participant's point of view is reduced to that of the observer, the internal reflexions of the theory and legal dogmatics are also merely a matter of "self-observation" and "self-description". With their help, the system of law selects from the complexity of its own possibilities those which ensure a reproduction of the code. The reason for this is "that a self-referential system can link its operations and reproduce them only through concurrent self-observation and self-description. To put it very simply, one needs »reasons« in order to be able to deal selectively with the multitude of possible internal connections and to check for consistency and inconsistency."[19] We have to do, in other words, with the internal, systemic observation of system observations and not with participation in an argumentation about the appropriate application of valid norms.

The function of such self-description, however, is not to guarantee that correct and appropriate individual judgments will be made given restricted parameters of time and incomplete knowledge, but rather to make consistent decision-making *predictable*. They effect this by increasing the redundancy in juridical argumentation. The higher the redundancy becomes, the more improbable it will be for surprising arguments to arise. Luhmann is himself therefore only consistent when he eliminates the possibility, necessary from the perspective of a participant, that coherent theories be re-examined in view of an exhaustive description of the situation. What remains is the capacity for decision-making given little time and incomplete knowledge. "Reconstructing argumentation as the management of redundancy does not grasp argumentation the way it is intended; it

[16] Niklas Luhmann, *Law as a Social System*, 83 Northwestern University Law Review 136, 7 (1989)

[17] *Id*.

[18] *Id*., 8

[19] *Id.*, 12

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understands argumentation not as a search for convincing rational grounds but as a way of mastering contingency and as a condensation of the systemic context."[20] What arguments "actually mean" remains of no interest for the sociological observer and is for the juridical self-observer an unavoidable self-deception which is only essential in terms of its contribution to maintaining and intensifying the legal system's capacity for self-reproduction.

There are evidently parallels between the functionalist model and that proposed here in their respective designs of coherent theories. This external impression, however, should not obscure the fact that two completely different modes of reflexion are involved. Whereas in the perspective of the participant the need for a coherent theory results from the need to justify an act of selection with which we apply valid norms appropriately to an exhaustive description of a situation, according to Luhmann the coherent theory only reflects the production of decisions. In these theories, adaptations to time constraints and a lack of knowledge is therefore always a built-in factor and thus already taken into consideration. They create such a capacity for adaptation by generating redundancy, whereas new, surprising arguments would require time-intensive discussions and a perfection of our knowledge of presuppositions and consequences of the argument in the current situation. Put very roughly, "coherence" in Luhmann's view serves to link one occurrence of a decision to another, whereas according to the model proposed here the claim to a coherent theory is an obligation to take each individual perspective on a situation into account.

Because the theory and dogmatic of law are limited to observing observation of the legal system – in other words, the juridical observer can only upgrade himself – the reflexion theories of law block themselves off from receiving external observations. The "sociological observation describes the system's self-description in a way that could not be incorporated into the system's self-description."[21] The reason for this is that the observer internal to the system has to presuppose the existence of the "code", the distinction between lawful and unlawful, and must not orient himself to any other distinction. If this were not the case, the distinction "lawful/unlawful" would differ from itself by means of a second distinction: just would then be what is unjust. The theory and dogmatic of law have to make this paradox "invisible" as otherwise the code's functional capacity would collapse. Phenomena such as the "materialization" described by Max Weber can therefore only be taken up by a theory of law if this regards the conditions under which the distinction between lawful and unlawful is employed as themselves becoming increasingly indeterminate. The claims of environmental systems do not penetrate the legal system as they are, but rather in the disguised form of indeterminate norms. They do not destroy the code, yet they allow its mode of operation to become less predictable and reduce the redundancy of the

[20] *Id.*, 14

[21] *Id.*

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arguments that are intended to ensure a consistent production of decision: "A legal culture of argumentation that produces a high degree of variety, that emphasizes the individual nature of each case and is content with vague general formulas like "proportionality" or "balancing interests" will tend to open the legal system to adaptation to rigid environmental systems such as large-scale organizations whose form is set by technology or capital investment; whereas a rigid, highly redundant legal system will be able to maintain itself, whatever the social consequences may be, in the face of the more elastic systems of its environment and to turn such highly elastic communications media as money or political power to its own ends."[22]

Only from the perspective of the observer does the phenomenon of materialization present itself such that the system would appear to have to "adapt" to its environmental system. Needless to say, Luhmann neglects to mention that additional problems already arise at this level. The hidden option of a "rigid" culture of argumentation without regard for the "social consequences" would, after all, also have to take into consideration the self-reproduction of the environmental systems that have to submit to the law's rigid culture of argumentation.[23] The fixing of forms of utilization for the medium of money or for political power must not be so rigid that one payment can no longer follow on from payments and the enforcement of collectively binding decisions is still ensured by the law even if the world is destroyed because of them. This touches on a major problem of the theory of social systems on account of which not only the description of the legal system suffers: it lacks an appropriate conceptualization of the relations between system and environmental system, relations which obviously have to guarantee a reciprocal consideration of the operations of the other systems respectively. In order for this to be the case, the theory of social systems would have to provide more precise descriptions than ancient European names such as God, prestabilized harmony or the invisible hand.

Luhmann's diagnosis is sound at least to the extent that an impartial procedural application of norms cannot prevent a functionalization of the coherent theories produced in the process. This will be tend to hold all the more true, the more these coherent theories break away from being subjected to re-examination in application discourses and the more they take on the form of "self-applying" theories. The typified application situations to which the theory is tailored are then increasingly described only using predicates taken over from the self-descriptions of the environmental systems. By contrast, only the abstract demand can be made that the possibility for an argumentation of appropriateness has to be institutionally secured in these cases as well. In theoretical terms, however, it is interesting to note that from the perspective of the participant the consideration for the particularities of the individual case need not necessarily lead to functionalization, but

[22] *Id.*, 13

[23] Gunther Teubner, *Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege*, *in* VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT, 285, 321 (F. Kübler ed., 1985)

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rather may prove to be the necessary feature of an impartial application of the norm. This observation is, however, only possible if instead of founding the autonomy of the legal system on the operational mode of the code, we consider the introduction of the distinction between "lawful" and "unlawful" to be morally justifiable. And it is permissible with respect to its enabling the general factual observance of valid norms. The law is only independent vis-à-vis morals in that it always formulates its norms in direct or indirect relation to securing its factual observance. Indeed, this internal connection between law and morality does not disintegrate given the application of positively valid norms and the production of coherent theories necessary for these. Inasmuch as the latter are subject to their re-examination in application discourses, the "elastic culture of argumentation" only corresponds to a morally justifiable demand.

In view of increasing indeterminacy, Luhmann radically exaggerates the perspective of the observer. The only thing that is important is that a *decision be made* and not what constitutes the contents thereof or their legitimation in justification and application discourses. This is the only way in which the problem of the uncertainty of expectations in social interactions can still be solved. "Stabilization now lies only in the positive character of legal validity, that is, in the fact that specific norms are given force by decisions (whether it is the decision of the legislator, the judge, or the current opinion of the commentators), *and have not yet been changed*. For this reason the stability of the law must be understood as something completely temporal, and objective questions come into the picture only from the standpoint of complexity."[24] This absolutization of uncertainty, which in its radicalness can no longer be understood as anything other than the expression of a – *sit venia verbo* – profoundly pessimistic anthropology, results ultimately in it being only the decision as such that promises the kind of reliability and permanence we need in order to be able to tolerate the alienness of the other in social interactions.

A theory of law that does not reduce the problem of the indeterminacy of norms one-sidedly to its functional aspect would be in a position to see in this not only an increase in uncertainty in social conflicts, but also a shift from substantive to procedural means of legitimating valid norms and the appropriate applications of norms. On this basis one could distinguish between two modes of reflexion which in themselves provide a way of reacting to the problem of indeterminacy: self-observation and discourse. If actions linked to institutions violate existing expectations, then the legal system can change its self-description in order to permit consistent decision-making and to secure the legal system's capacity for reproduction. However, it can also subject existing coherent theories to an application discourse that focuses on the coherent interpretation of all applicable norms in light of an exhaustive description of the situation.

[24] Luhmann, *supra*, note 16, 19

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Finally, the valid system of norms itself could be changed by questioning the validity of individual norms in discourses of justification or criticizing them in politico-ethical discourses. These last modes of discursive reflexion, justification and application presuppose that moral argumentation is possible within the legally institutionalized forms of communication and that there is a public sphere beyond the institutions which permits the restricted parameters of scarce time and incomplete knowledge caused by the compulsion to make a decision to be suspended. This double reflexivity characterizes all institutions which are explicable not only functionally in terms of the specialization of roles for tasks not processed elsewhere, but beyond that can be legitimated as the institutionalization of a norm of communication in which the participants make claims that can be resolved in discourse. This is at least true for the domains of politics and law, where institutions have an internal reference to moral argumentation.

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