Justification and Application of Norms*

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Abstract. According to the author there is no doubt that one has to distinguish between the justification and the application of norms. Problems are seen only to arise if one asks what exactly the distinction is and which consequences have to be drawn from it. Recently, Klaus Günther, in particular, has searched for this distinction and connected it with far-reaching conclusions concerning the theory of norms, arguments, and morals. His theses are the object of the author's considerations.

I.

According to Günther, there is a fundamental difference between the justification and the application of a norm (Günther 1988, 25). The justification of a norm would be concerned with its validity, and only its validity, the application with its appropriateness, and with that alone. The appropriateness of a norm could only be determined with reference to a certain situation of application. In order to find out if a norm would be appropriate in a certain situation, it would be necessary to evaluate it with reference to all the situation's features and all norms which might alternatively be applied (Günther 1988, 94, 257, 271, 298). The appropriateness of a norm accordingly consists of two components: of its relation (1) to a certain situation and (2) to all other norms which might be applied in it. Günther tries to get hold of this by employing the concept of coherence (Günther 1988, 96, 304f., 307). A discourse of application would be therefore a discourse in which an attempt would be made at considering all features of a situation with respect to all norms which might be applied

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1 "Appropriateness" is supposed to mean one predicate of a "norm in a situation in relation to all other features" of the situation (Günther 1988, 75).
(Günther 1988, 257ff.). Its impartiality consists in not suppressing any feature nor any norm which might alternatively be applied. Günther calls this the "applicationary meaning of impartiality" (Günther 1988, 257).

For the discourse of justification on the other hand, a "universal-reciprocal" meaning of impartiality (ibid.) should be constitutive. While the applicative impartiality is supposed to have reference to the features of the situation and to the system of norms, the universal-reciprocal impartiality is defined by its reference to persons and procedures. A norm should be neutral in this sense if all could agree with it in a discourse determined by freedom and equality (Günther 1988, 56). If this were the case, the norm should be considered universalizable and therefore justified and should consequently be valid.

A decisive step in Günther’s argument is that in his opinion the discourses of justification necessarily lack the dimension of application. In discourses of justification, an evaluation of norms would be carried out which would be basically independent of any situation (Günther 1988, 257). This could not be different for two reasons. For one thing, the knowledge of the participants in the discourse was limited. It was not possible to know all features of all situations of application. On the other hand, both the knowledge about the situations of application and the interests to which the norms were referring could change (Günther 1988, 52). The result of any discourse of justification would therefore be relative in a double sense: with respect to the actual knowledge and with respect to the actual interests of all participants in the discourse. Günther concludes that in discourses of justification only prima facie norms could be substantiated (Günther 1988, 94). With reference to Searle (1978, 88f.) he defines prima facie norms as "norms that are valid other things being equal" (Günther 1988, 259). Each result of a discourse of justification would therefore be equipped with a ceteris paribus clause (Günther 1988, 266). Günther explains this with a remark we shall come back to: "In discourses of justification its function is to exclude artificially the consideration of different situations of application" (ibid.).

The fact that discourses of application and of justification have to be strictly distinguished is but one aspect of the matter, according to Günther. Their interplay he considers quite as important. The character of the interplay becomes obvious in front of what Günther calls the "ideal of a perfect norm" (Günther 1989, 167). A norm would be perfect if it was the result of a discourse ideal in all respects. Günther presents three features of such an

2 Habermas has recently sharpened this reservation and made it more precise: "This specific reservation with which we consider well-substantiated norms of action only to be prima facie valid in a sense needing to be complemented, can also be explained by the limitedness of our actual knowledge, but not by its fallibility. The more far-reaching reservation of incompleteness can be explained . . . by the existential provinciality in view of the historic changes of the things themselves . . . (and) finally by the fact that the social world . . . is ontologically constructed in a different way" (Habermas 1991, 141f.).

3 For the concept of the discourse ideal in all respects and the problems connected with this concept, see Alexy 1988, 48f.
ideal discourse: (1) unlimited free and equal participation, (2) unlimited time, and (3) unlimited knowledge. As the participants in a discourse ideal in all respects have unlimited knowledge, they know all situations of application with all their features. If they also have unlimited time, they can try to substantiate norms which already consider all possible situations of application with all their features and have been set in relation to all other norms. Whether they will find exactly one solution to any case may remain open here (cf. Alexy 1988, 49ff.). Günther is right in any case when he says that under such ideal conditions a special discourse of application would be unnecessary (Günther 1988, 49f.).

Günther’s idea is to compensate the fact that such an ideal discourse cannot be realized at least to some extent by the interplay of discourses of application and justification. Though it wouldn’t be possible to consider all situations of application with all their features in discourses of justification, one could at first restrict the discourses of justification to the more modest task of justifying prima facie norms and then in the discourses of application at least consider all features of the actual case to be decided.

II.

Before examining Günther’s argument by means of an example, we shall have to make some general statements. One of Günther’s central arguments first for the separation and then for the connection of discourses of justification and of application is the limitedness of our knowledge, that is our inability to foresee all of a norm’s possible situations of application with all their features. This fact, which is constitutive for all real discourses, leads indeed to a prima facie or ceteris paribus reservation by which a fallibilistic assessment of all results of the discourse is expressed. It is remarkable, however, that Günther only in part gives up the idea of a discourse of justification which is ideal in all respects. Only in the dimensions of empirical knowledge and time does it become a real discourse. In the dimension of participation, the discourse of justification remains ideal. Also, no compensation, like trying at least in individual cases to exhaust all features, is offered. It is certain, however, that unlimited participation, too, can only be realized approximately. From this it follows that all results of real discourses must not only be placed under reservations of knowledge and time, but also under a reservation of participation. This can only be denied

4 The unlimited knowledge mentioned here is just an empirical knowledge about outer and inner facts. If it was normative knowledge, too, it would directly include the correct solution to any case, and a practical discourse would become superfluous.

5 Habermas demands that the principle of universalizability as a rule for argumentation must not demand "anything impossible." It has to "retain an operational meaning" (Habermas 1991, 139). As long as one continues to demand that the participants in a discourse are real persons (and one has to keep demanding this), the principle of universalizability as a rule of argumentation asks for something factually impossible, if it is not equipped with a reservation of participation.
by someone who considers the participants of a discourse irrelevant to its result. Proposing this thesis however would mean leaving the realm of discourse theory.

Günther’s separation of discourses of justification and discourses of application is not falsified by a reservation of participation. It gives reason to suppose, though, that not the distinction between justification and application could be the decisive problem for discourse theory, but rather the distinction between ideal and real discourses.

It is noteworthy that Günther names a totally different argument besides the discourse-theoretical one outlined above for the separation of justification and application: “I want to defend the thesis that by the impartial justification of a norm’s validity we mean something different from its impartial application in an individual case” (Günther 1989, 168). An opponent of discourse theory could also agree with this argument, for example someone who considers the application of norms a mere act of prudence, hermeneutic insight or skilled intuition. The decisive moral-theoretical problem is not yet formulated by stating that the impartial justification of a norm is something different from its impartial application. This concerns the question whether the discourse-theoretical interpretation of the impartiality of an application of norms is the best interpretation of this concept. Thus, the decisive question is defined: Does the splitting into discourses of justification and of application proposed by Günther lead to the best defence of a discourse-theoretical and therefore universalistic interpretation of impartiality in the application of norms? This can only be the case if Günther’s theses concerning the distinction between discourses of justification and of application are correct.

III.

The question whether Günther’s distinction is correct shall be discussed by considering the school case also used by Günther (1988, 261, 288ff.), in which a has promised Smith to attend his party, but hears that his friend Jones has been seriously taken ill and needs his help, before he can fulfill his promise. Help can only be given at the time when the party takes place. In this situation, which shall be called “S,” two norms are applicable. They can be roughly formulated as:

\[ N_1: \text{Promises must be kept.} \]
\[ N_2: \text{Friends in need must be helped.} \]

In discussing the problem of justification and application it is useful to bring these norms into the following conditional form:

\[ N_1: \text{Someone who has promised to do something has an obligation to do it.} \]
\[ N_2: \text{Someone who hears that a friend is in need and needs help, has an obligation to help this friend.} \]
If one applies these norms to \( S \), one gets two singular or individual norms,\(^6\) which do not as such contradict each other, but of which only one can be fulfilled in the situation \( S \). The application of \( N_1 \) and \( N_2 \) to \( S \) has the following structure:

(I)  (1) Someone who has promised to do something has an obligation to do it. (\( N_1 \))
(2) \( a \) has promised to attend Smith’s party.
(3) \( a \) has an obligation to go to Smith’s party.

(II) (1) Someone who hears that a friend is in need and needs help, has an obligation to help this friend. (\( N_2 \))
(2) \( a \) has heard that his friend Jones has been seriously taken ill and is, for that reason, in need and needs help.
(3) \( a \) has an obligation to help Jones.

One has to stress that (II) has a more complicated structure than (I). Premise (2) includes the premise that someone who is seriously taken ill is in need. In a comprehensive presentation of norm application this thesis would have to be named as an independent premise (cf. Alexy 1989, 225ff.). As we are only concerned with the problem of collision and not with the problem of subsumption at this point, we shall omit this here.

For further considerations it is useful to bring into view the logical structure of the application of \( N_1 \) and \( N_2 \) to \( S \) at least in its most fundamental aspects. That of (I) can be presented in the following way (cf. Alexy 1989, 68, 222):

(I)  (1) \((x)(T_1 x \rightarrow OR_1 x) \ (N_1)\)
(2) \( T_1 a \)
(3) \( OR_1 a \).

(1) represents the structure of \( N_1 \) as a universal norm. “\( T_1 \)” represents “has promised to do \( h \),” “\( R_1 \)” represents “does \( h \),” “\( O \)” is the deontic operator “it is obligatory that.”\(^7\) (2) is an empirical sentence which expresses that with reference to \( a \) in the situation \( S \) the feature \( T_1 \) is given. (3) is the individual norm logically following from (1) and (2), which says it is obligatory that \( a \) keeps his promise, which is to imply that he has an obligation to do this.

The logical structure of the application of \( N_2 \) can be presented, much simplified, in a similar way:

(II) (1) \((x)(T_2 x \rightarrow OR_2 x) \ (N_2)\)
(2) \( T_2 a \)
(3) \( OR_2 a \).

\(^6\) For the concept of the individual norm see Alexy 1985, 73.
\(^7\) Of course the logical structure of (I) and therefore of (I) could be presented in a far more differentiated way. For a complete analysis one would also have to include variables for the receiver of the promise and for its subject, which is only possible if one uses relational predicates. For the considerations made here, however, the representation suffices.
(II) is an even more radical simplification than (I). Not only does (2) include a word usage or semantic rule (cf. Alexy 1989, 226, 234) which would have to be mentioned as an independent premise (see above), (1) also sums up various features in one. Still in this case a simplified representation suffices for the argument to be presented here.

The considerations so far lead to two simple insights. The first is that the application of norms, too, can be considered a justification of norms. In its logical form it only differs from what is generally called "justification of norms" insofar, as its object of justification is not a universal but an individual norm. This, however, has far-reaching consequences. Far more important is the second insight. It consists in the fact that with the school case considered here, problems do not arise within the application of $N_1$ and $N_2$ to $S$, but just because of the relationship between both applications, which, as seen for themselves, are unproblematical. Only because firstly $N_1$ and $N_2$ are valid and because secondly the situation $S$ shows the features $T_1$ and $T_2$, do two individual norms come into existence which cannot both be fulfilled. This causes what Günther calls the "problem of collision" (Günther 1988, 267). The question is what follows from the problem of collision⁸ for the distinction between discourses of justification and of application.

If one takes a look at the matter from the point of view of the result, three model solutions are possible. In the first one the collision remains unsolved. In spite of the fact that $a$ cannot fulfil both obligations, he is subjected to both. He can do what he may, still he always violates a norm and therefore does wrong. This model can (at least with respect to cases in which someone gets into a situation like $a$ due to no fault of his own) be called the "tragic model." I do not want to decide here whether there are cases in which the tragic model recommends itself. Anyway the present case is not of this kind. The second model is the extreme opposite of the tragic one. It is chosen if one supposes that in cases of collision there is no obligation whatever. Günther does not even consider this model and is right in not doing so. It would lead to $a$ going free of his obligation to help his friend because he had by mere chance promised Smith to attend his party. Only the third model of solution can therefore be correct here, in which one or the other obligation remains valid. I hope to be able to say without further explanation that in the present case it is the obligation to help the friend in his difficulties.

Someone who chooses the third and the only right model of solution, can construct the relationship between the relevant norms (in this case between $N_1$ and $N_2$) and the result (in this case the obligation to help the friend ($OR_a$)) in two ways. The first construction leaves the level of norms untouched by the decision in favour of $OR_a$. Before and after the decision

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⁸ I do not intend to make the distinction of rules and principles a topic here. If I did so, one would have to distinguish conflicts of rules and collisions of principles (cf. Alexy 1985, 77 ff.). The term "collision" is therefore used in a wider sense here, and refers to conflicts of rules as well as to collisions of principles.
it consists of \( N_1 \) and \( N_2 \) as *prima facie* norms. The decision just adds the individual norm \( OR_2a \).

He who chooses this construction can easily separate discourses of justification and of application. The object of discourses of justification are norms of simple character like \( N_1 \) and \( N_2 \), which do not refer to each other and are in this sense isolated *prima facie* norms. Discourses of application take such norms as a starting point, but they exclusively have individual norms like \( OR_2a \) (which express definite decisions in concrete cases) as their object. Universal norms cannot be the object of a discourse of application simply because in this construction, there are no universal norms apart from \( N_1 \) and \( N_2 \) which have to be applied. This construction is advantageous to someone who wants to defend a strict separation of discourses of justification and of application, but it has great disadvantages with respect to practical rationality. A universalistic practice of decision-making is not possible with this construction. The relations between the level of the *prima facie* norms and the level of definite decisions have an *ad hoc* character. The fundamental moral demand of equal treatment runs empty because in the sparsely furnished normative universe of this construction there is nothing that could grant equal treatment. There are only definite individual norms which are completely cut out for individual situations, and simple *prima facie* norms like \( N_1 \) and \( N_2 \) which have to be evaluated anew in any new situation. Normative coherence cannot be reached in such a system.

There are some statements by Günther which suggest that he wants to choose this construction, if one looks at them isolatedly. For example he says that in discourses of application the statement "that Jones was in a helpless situation and therefore the obligation to help had to be fulfilled, gained the status of an argument." This argument aimed "no longer at the validity of the colliding norms but only at their appropriateness under consideration of all the situation's circumstances" (Günther 1989, 172). The fact that \( N_2 \) is appropriate under this condition does not mean anything other than what \( N_2 \) demands is definitely valid. Therefore one could read Günther as if he thought that there was nothing but *prima facie* norms like \( N_1 \) and \( N_2 \), definite individual norms like \( OR_2a \) and \( OR_2a \), and a judgement of appropriateness, which prefers one of the two *prima facie* norms and consequently one of the two definite norms, in this case \( N_2 \) and \( OR_2a \). That would equal the first construction.

If one takes a comprehensive look at all of Günther's statements, one arrives at a different impression. For example, he talks about "new interpretations of situations" leading to "change, modification, revision" of the "semantic content," "with the consequence that a norm which has been modified in such a way again has to be examined as to whether it can be accepted with reasons by all with respect to the contexts now known" (Günther 1988, 95). That does not mean anything but that the norm is changed for the solution of a case and that the changed norm can and must
be justified. Günther becomes most explicit when talking about word usage or semantic rules. In the case of \( N_2 \) there are many situations in which it is not clear whether \( N_2 \) can be applied to them. The word usage rule (presupposed above) which says that someone who is seriously taken ill is in need causes relatively few problems. But how about a minor illness, say an inflammation of the tonsils? \( N_2 \)'s second precondition causes far more problems of interpretation. Does a friend, who is taken seriously ill, need help, if a nurse takes the necessary care of him, who is, however, extremely unfriendly, and makes him want a friend's consolation? The features of such situations can be linked in positive and negative ways to the concepts contained in \( N_2 \). After this has been done, the case can be solved by a subsumption (Alexy 1989, 224ff.).

The most simple positive case of application corresponds with the following scheme (Alexy 1989, 234):

\[
\begin{align*}
(II') & \quad (x)(T_2x \rightarrow OR_2x) \quad (N_2) \\
(1) & \quad (x)(Mx \rightarrow T_2x) \\
(2) & \quad Ma \\
(3) & \quad OR_2a.
\end{align*}
\]

Günther stresses correctly that word usage rules like (2) "need justification like a norm" (Günther 1988, 291) because a new norm (1'): \( (x)(Mx \rightarrow OR_2x) \) follows from (1) and (2). Correct is also his statement that "the task of justifying the appropriateness of a determination of meaning in relation to other variants of meaning does not differ from the task of justifying the appropriateness of a norm in relation to other applicable norms" (Günther 1988, 293). In the case of indeterminacy as well as in the case of collision the decision about appropriateness in a given situation on the level of norms includes modifications that both can be and must be justified.

To this corresponds the second construction. It is characterized by the fact that it represents the decisions made in concrete situations on the level of norms. In our case, that is, \( S \), this can happen by adding an exception clause to \( N_1 \) (the norm which demands the keeping of promises), which refers to the norm \( N_2 \) colliding with it in \( S \). \( N_1 \) gets the following form:

\( N_1^k: \) Someone who has promised to do something has an obligation to do it except if he hears that a friend is in need and needs help.\(^9\)

\( N_1^k \) has the following structure:

\[ (x)(T_1x \land \lnot T_2x \rightarrow OR_1x). \]\(^10\)

\( N_2 \) may remain as it is. Now \( N_1^k \) and \( N_2 \) can be applied to \( S \) without colliding.

\(^9\) For a similar formulation see Günther 1989, 178.

\(^10\) For this structure as the basic structure of a norm's limited applicability see Alexy 1989, 236.
If one accepts the second construction, the question arises whether the problem of application is not at heart a problem of justification. Although the situation \( S \) with the features \( T_1 \) and \( T_2 \) is the motivation to modify \( N_1 \), the important thing seems to be whether the modified norm is justified, that is, whether \( N_1^k \) can be accepted in a discourse of justification and is therefore valid. Günther answers this question in the negative. In his answer one can distinguish two reasons.

A first argument is that one must not isolatedly refer to a newly constructed norm. A discourse of justification would not be necessary as long as “the interpretation moves along the lines and within the boundaries of the meaning of the norms and principles commonly accepted as valid.” What Günther means becomes clear when he adds: “Within those boundaries we strive for an ideal coherent system among the colliding norms. All newly constructed norms which serve the purpose of producing support relations within this ideal system still belong to the set of norms commonly accepted as valid” (Günther 1989, 181). With a view to the small universe of the case \( S \), one can sum this up into the following thesis: \( N_1^k \) does not have to be substantiated in a discourse of justification if \( N_1^k \) serves for the production of an ideal coherent system among \( N_1 \) and \( N_2 \). I think this thesis is wrong. \( N_1^k \) is first of all a norm, and what is more, a norm that shows an additional normative content in relation to \( N_1 \) and \( N_2 \) (cf. Dwars 1992, 75f.). \( N_1^k \) contains consequences for the fulfillment of interests of the people concerned by it, which are not yet included in \( N_1 \) and \( N_2 \). Discourse theory’s principle of universalizability therefore demands that \( N_1^k \) is substantiated in a discourse of justification.

Günther’s thesis would only be right if one could say that \( N_1^k \) was already contained in \( N_1 \) and \( N_2 \) and therefore already belonged to “the set of norms commonly accepted as valid” (Günther 1989, 181). If one looks at \( N_1 \) and \( N_2 \) isolatedly as prima facie norms, \( N_1^k \) is certainly not contained in \( N_1 \) and \( N_2 \). This is simply because \( N_1^k \) does not follow from \( N_1 \) and \( N_2 \). Only with addition of a further premise could \( N_1^k \) therefore belong to the norms already accepted as valid. Günther offers such a further premise with the idea of an ideal coherent system. The idea of coherence is either a magician’s hat one can draw anything out of—one likes to talk about “Gesamtschau” —or it refers to the procedure of justification in a system. Günther’s attempts at operationalizing the concept of coherence (Günther 1988, 299ff.) hint at his aiming at the second conception. But if producing coherence is a procedure of justification, it is not limited to discourses of application but can also be used in discourses of justification. Someone who wants to deny this has to claim that coherence is irrelevant for the justification of norms. That is why the idea of coherence does not allow for \( N_1^k \) to be taken out of the realm.

\(^{11}\) For the latter see Alexy and Peczenik 1990, 130ff.
of the discourse of justification as not needing to be substantiated. Günther seems to see this when he says that in all cases where a norm’s like $N_i^k$’s claim to validity is being debated one can find out “in a discourse of justification . . . whether the norm represents a general interest and should belong to the set of norms accepted as valid” (Günther 1989, 181). Thus he concedes that any norm like $N_i^k$ can be substantiated in a discourse of justification, because it is impossible to exclude right from the beginning that a norm might be questioned. He seems to think, however, that not every norm like $N_i^k$ needs to be substantiated. According to him this should not be the case if a norm like $N_i^k$ can be shown to be an element of a coherent system, a thing that had to be done in discourses of application (Günther 1989, 188). It is not possible to agree with this.

Günther’s argument, as described and criticised so far, leads to a strange shift of the concepts of discourses of application and of justification. In a discourse of application, the individual case recedes into the background. The coherence of all elements in the system of norms becomes decisive with respect to the cases already decided or still to be decided. The discourse of application in this manner turns into a discourse of coherence. This goes hand in hand with a thinning of the discourse of justification, if one takes some of Günther’s statements seriously. At one point, for example, he says that “we do not accept valid norms . . . with respect to external collisions” (Günther 1989, 180). By external collisions Günther means the collision of two valid prima facie norms (Günther 1989, 170) like, e.g., that of $N_1$ and $N_2$.

The subject matter of a discourse of justification is accepting norms as valid. If collisions of norms are no longer to be topics in discourses of justification, apart from the exclusion of norms never to be applied (like norms allowing the unlimited maximisation of individual utility (cf. Günther 1989, 169) or norms which, for example the principle of race in National Socialism, damage the interests of participants in the discourse in any situation) only the production of general arguments for discourses of application and of rules of thumb for standard cases would remain. With the rise of the discourse of application to a discourse of coherence, the discourse of justification would deteriorate to a mere discourse of topoi.

V.

One therefore has to question the acceptability of Günther’s second argument for the independent character of the discourse of application. It says that discourses of application are concerned with the correct decision in a certain situation, discourses of justification, on the other hand, with a norm’s validity. This perception is right. The question is only whether it really causes the far-reaching consequences Günther proposes.

First doubts are caused by the fact that situations of application are by no means only employed in an “illustrative” way in discourses of justification,
as Günther occasionally seems to think (Günther 1989, 167). On the
contrary, the reference to situations of application is also necessary in
discourses of justification. Without reference to situations of application
it is impossible for the participants in the discourse to find out which
consequences a norm is likely to have for the interests of those who will be
concerned by it. Günther notices the problem (Günther 1988, 25). He thinks,
however, it can be solved with reference to the fact, that in discourses of
justification referring to situations happens in a different way from in
discourses of application.

In one point his thesis is doubtlessly correct. Moral\textsuperscript{12} discourses of
application have a topic directly referring to a situation which discourses of
justification lack. For discourses of application the question what is the
correct solution \textit{in a certain situation} (Günther 1988, 34) is constitutive, for
discourses of justification, the question which \textit{universal norm} is right. But
from the fact that those two questions have to be distinguished it does not
follow that there exist two essentially different kinds of discourse. It is also
possible that those two questions only set off two different operations within
one form of discourse and therefore only lead to two variations of the same
form of discourse.

The latter would be the case, if discourses of application and of justification
started with different questions, but when answering them, found the same
questions and had to answer them in the same form of argument and
according to the same rules. With Günther this is exactly not the case. In
discourses of justification, situations of application are supposed to have
only the character of “hypothetical” or “exemplary situations” (Günther
1988, 51). Such exemplary situations should differ fundamentally from
“genuine situations of application” (ibid.): “The microcosm of each indi-
vidual situation is as infinite as the macrocosm of all situations to which a
norm can be applied” (Günther 1988, 58). Therefore, only in discourses of
application could one try to “consider all features of a situation” (Günther
1988, 95), but this claim would not be valid in discourses of justification.

Günther is right if he points out that any concrete situation shows a
potentially infinite number of features. This is at least true if “feature” also
means the gradation and the combination of features. His concept of a
hypothetical or exemplary situation, however, demands an interpreta-
tion. In some places he seems to say that the situations of application referred
to in discourses of justification have to be artificially simplified standard
cases.

\textsuperscript{12} In legal discourses of application this is different to a certain degree because of the
institutional character of the norms to be applied. Even there, however, we are regularly faced
with problems of collision (cf. Alexy 1985, 78ff.) and the question of modification arises as a
problem of the development of law (cf. BVerfGE 35, 263 (278ff.); 37, 67 (81); 38, 386 (396ff.); 49,
304 (318ff.); 65, 182 (190ff.); 71, 354 (362ff.); 82, 6 (11ff.)). Apart from that, the justification of word
usage rules created in situations of application is one of the main tasks of legal argumentation.
This can be called "standard case interpretation." We have already mentioned Günther's thesis that in discourses of justification the ceteris paribus clauses serve the purpose of "artificially excluding the consideration of different situations of application" (Günther 1988, 266). Elsewhere, he talks about "selective descriptions of situations" as well as that it would be sufficient to "reduce" (Günther 1989, 171) the descriptions of situations to unchanging circumstances. This interpretation of the concept of the hypothetical situation leads to what I called "discourse of topoi" above. If the relevant case material in discourses of justification is reduced to simple standard cases, these discourses can only produce points for weighing and rules of thumb. This would have the fatal consequence that the norms modified or newly created for the decision of a case in a discourse of application could no longer be subject matter of a discourse of justification and therefore could not be substantiated. The standard case interpretation must therefore be excluded.

The second interpretation can be called "approximation interpretation" according to which hypothetical situations of application in discourses of justification may not only but should be as manifold as possible. There is no discourse rule which forbids making up complex situations and asking whether in reference to them, too, the proposed norm is acceptable to all. The admissibility of fantasy is but one aspect of the matter. The other is the admissibility of experience. The participants in the discourse own a biography and can lean on historical experience. In this way, there is a rich "situation material" at hand. A limitation is only caused by the factual possibilities, that is, the limits of empirical knowledge, of historical experience, and of time. In Günther we find this approximation interpretation when he answers the question "according to which criterion we are supposed to distinguish an exemplary situation used in justification from a genuine situation of application" by saying that:

There must not be such a criterion as it would be irreconcilable with the meaning of the principle of universalizability... any limitation would have the consequence of putting certain possibilities of application under taboo and withholding them from an examination of their relevance to the interests of every individual... The limitation... lies on the subjective side. It depends on the historical status of our experience and our knowledge. (Günther 1988, 51)

If one follows this interpretation, the difference between discourses of application and of justification is reduced to two points. The first is that in both discourses, a different question is asked at the beginning and a different answer is given at the end. Discourses of justification are concerned with universal norms, discourses of application with individual ones. The second and decisive difference is that in discourses of justification one refers to many constructed or experienced situations, while in the discourse of application one is concerned with one concrete situation.
For two reasons the concrete situation of application has a genuine discourse-theoretical significance. The first is that because of its richness in features it is a touchstone of a special kind. The demand to consider all its features is an elemental postulate of rationality. For a long time it has found its expression in the formula "under consideration of all circumstances in the individual case." Each developed legal system shows how the consideration of all circumstances leads to a permanent process of making more precise, changing, rejecting and newly creating. Insofar the concrete situation of application is an irreplaceable instance of examination. But that is all. The norm which in a concrete case has been made more precise, changed or newly created must be justifiable in a discourse of justification and the rejected norm must be allowed to be proved non-justifiable.

The second reason for a genuine discourse-theoretical significance of the concrete situation of application is that by means of application the discourse comes into contact with the social world and thus with history. History keeps producing unpredictable and surprising situations and with them a rich material of fallibilistic instances, and in history the interests, preferences, and normative convictions of the participants in the discourse change. Insofar one has to agree with Habermas if he talks about "intrinsic historicity" (Habermas 1991, 142) with a view to the problem of application. All this, however, does not change the fact that one cannot exclusively react with situative, individual norms to historical experiences and changes. Rather, the existing system of norms has to be made more precise or modified because of a new historical experience, if one cannot simply react to new situations by applying norms already accepted. Those norms made more precise, changed or newly created because of a new situation can be and have to be substantiated in a discourse of justification, no matter if it is a new, but everyday case or a situation totally unknown so far. The same is valid for rejected norms. The "intrinsic historicity" is doubtlessly of great importance from the aspect of the relationship between discourse and reality. To upgrade the discourse of application so that it becomes an equal counterpart to the discourse of justification would however be a wrong conceptualization of this relationship. The fact that any discourse of application necessarily includes a discourse of justification on which its result depends, forbids contrasting discourses of application and of justification as two independent forms of discourse.

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References