The Common Error in Theories of Adjudication

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I. The Common Assumption

1. Adjudication as the Heart of Law

Law is about adjudication. Adjudication is not only the centre of the law as a social system,\(^1\) but also what legal practice, legal counselling, trials, procedures and legal scholarship are all about.

Adjudication in turn is all about hard cases. Despite their quantitative epiphenomenology, hard cases are central not only to adjudication, but also to the practice of law as both a profession and a scholarly discipline. Lower courts may have the function of executing the law in easy cases - the debtor who fails to pay etc. -, but from the appellate level and upwards, easy cases become scarce. Higher courts predominantly deal with hard cases. It is precisely these cases which are reported in the law reports and reviews and which are of interest to lawyers and legal scholars. It is Roe v. Wade\(^2\), Riggs v. Palmer\(^3\), Chevron v. EPA\(^4\), not every day, run-of-the-mill easy cases, which lie at the centre of the practice of adjudication and scholarly work in different fields of the law. Carl Schmitt was right when he noted in his 1912 dissertation on adjudication "that the cases of doubt are those which attract academic and practical interest."\(^5\)

Dealing with difficult cases is also what lawyers are trained to do. As H.L.A. Hart observed: penumbral cases are the "daily diet of the law schools"\(^6\).

With adjudication being the centre of law and hard cases the centre of adjudication, it is even more disturbing that there is widespread disquiet about adjudication in hard cases in legal theory. To varying degrees, adjudication in hard cases is seen not as a legal, but rather as a non-legal, political, economic, moral or otherwise discretionary practice. Increasingly, the task of adjudication in hard cases has become a matter of political, economic, moral or otherwise discretionary practice. Increasingly, the task of adjudication in hard

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\(^1\) NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 293, 296 (2004).
\(^3\) Riggs v. Palmer, 115 N.Y. 506 (1889) – Can a murderer be the heir of the murdered person? Used as an example by RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14 et seq. (1977).
\(^5\) CARL SCHMITT, GESETZ UND URTEIL 6 (1912) – translation by the author.
cases is claimed to be the province of rival disciplines such as economics – as in law and economics –\(^7\) or the political sciences – as in the growing industry of law and political studies\(^8\). It is awkward to see how the western legal culture on the one hand promotes the rule of law, but is on the other hand unable to theoretically explain what the rule of law means in the most important cases, which its system of courts and legal education are set up to decide.

The essay will be focused the theoretical challenges and tries to present a strategy to address them. It is subdivided into two major parts. The first part exposes the common assumption that leads theories of adjudication to abandon adjudication as a specifically legal enterprise in hard cases. The first part demonstrates that this common assumption is entrenched in a variety of different theories of adjudication and portrays them as different reactions to the shared assumption. In the second part a theory of adjudication is presented that refutes the common assumption, demonstrates why it is flawed, and returns the focus to the doctrinal work of courts and lawyers. This doctrinal theory of adjudication will be developed as a comprehensive theory of adjudication encompassing a theoretical foundation, a normative defence, and a test of empirical adequacy.

2. The Common Assumption

How did we get there? All major theories of adjudication share a common assumption. According to the common assumption, the indeterminacy of the law entails that a decision made under conditions of legal indeterminacy cannot be a legal decision. The argument for this assumption is simple and straightforward. If legal materials and legal methods do not determine the decision made in a given case, how can this decision still be a legal decision? If legal criteria are exhausted, a decision must be made with the help of other, non-legal, criteria. Adjudication in cases where the law is indeterminate is no longer considered a legal decision, but as the exercise of some kind of political, moral, economic or otherwise non-legal discretion.

It comes as no surprise that, given such an account of adjudication, other disciplines try to fill the gap. Accordingly proposals by economists, public choice

\(^7\) Early standard volumes include RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972); WILLIAM LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); AVERY W. KATZ, FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW (1998).

theorists, political scientists and philosophers are abound to offer criteria to guide adjudication in hard cases. This would all be well and good if hard cases were epiphenomenal to adjudication. However, theories that give up on hard cases and consign them to other disciplines give up on the heart of the law and give it into hands in which it does not belong. Strange as it may seem, the common assumption, which gives up the ‘proprium’ of the law, is pervasive in theories of adjudication. Historically and currently there are three basic strategies for coping with the common assumption: the tactics of denial, radicalisation strategies and the mainstream approaches.

a) The Tactics of Denial

One strategy is the “tactics of denial”. This branch of theories simply denies the existence of the problem by asserting an idea of the law as a seamless web of concepts, precedents, statutes and principles that holds a single right answer for each case.

Continental conceptual jurisprudence in the 19th century⁹ and Anglo-American formalism¹⁰ - at least in the stylized accounts given by their critics –¹¹ are the historic variants. Its modernized forms can be found in Ronald Dworkin’s “one right answer thesis”¹² or Michael Moore’s naturalist realist conception of the law¹³ and in theories of adjudication inspired by Jürgen Habermas’ discourse theory – like Klaus Günther’s appropriateness approach¹⁴ - , which deliver idealized and proceduralized versions of the idea¹⁵. These theories do not give up on the law. On the contrary, they claim that even in hard cases there is a single right answer. However, it can be shown that they share the common assumption that

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⁹ See e.g. Rudolf v. Jhering, Unsere Aufgabe, 1 JAHRBUCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 (1857); GEORG F. PUCHTA, CURSUS DER INSTITUTIONEN (1841–47).
¹⁰ For example, CHRISTOPHER C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS (1871), esp. preface, pp. iii-v.
¹² DWORKIN, supra note 3, at 81 et seq.
¹⁵ ARMIN ENGLÄNDER, DISKURS ALS RECHTSQUELLE? 147 et seq. (2002).
adjudication would not be a legal enterprise were the law truly indeterminate, were there truly hard cases for which the legal materials or at least the morally enriched legal materials did not hold one pre-existing right answer to be discovered. The tactics of denial invest heavily in the ‘one right answer’ thesis to sidestep the problem that the law might really be indeterminate, in which case its proponents, too, would assume that a decision could no longer be a legal one.

The obvious problem for one right answer theories is their high implausibility to anyone familiar with legal practice and hard cases. Is there a single right answer for the tradeoffs between civil liberties and national security in times of terrorist threats? Sure we can rule out some answers and some false alternatives, for which the encroachment on liberty can even be detrimental to our security. But that there is only one single right answer in each detail of civil liberty cases brought to the fore seems – pace Hercules – highly implausible. If there is a single right answer to the admissibility of abortion, torture, stem cell research, death penalty and the like, why is disagreement so tenacious even though we share all the factual information that there is to be had and even though every thinkable legal and moral argument has already been made? Disagreements between lawyers and courts are abound and standing on most controversial issues of the law and – different form disagreements in the natural sciences – with no scientific method in sight that could give hope for their resolution.16

Theoretically these obvious difficulties of one right answer theories can be explained by the underdetermination17 of their mostly coherentist epistemologies18 like Dworkin’s interpretativism. They provide a basis to refute radical skepticism and to show – to use one of Dworkin’s examples – that “torturing a baby for fun”19 is - in some sense of objectivity – objectively and really wrong, that the assertions expressing such uncontroversial moral insights have a justified claim to truth. The coherentist strategy, however, does only go as far as it goes. At least in some hard cases different and diverging interpretations of the legal materials compete without coherentist epistemological resources to privilege one over the other. The limitations of interpretative theories of adjudication can explain the tenacity of our legal disagreements. The insight to be retained of these

18 Cp. Stanford, supra note 17.
approaches, however, is their insistence on the specifically legal nature of legal controversies and decisions even in hard cases. By insisting on the legal quality of our disagreements in hard cases, they capture a feature of our legal practice that every viable theory of adjudication has to account for.

b) Radicalisations

The second strategy for addressing the problem of indeterminacy and hard cases is the strategy of radicalization. Theorists of this approach radicalize the idea that there can be no law in cases of legal indeterminacy by arguing that the law is not only indeterminate in exceptional cases, but is so all or at least most of the time. On the basis of the common assumption, this leads them to advance the thesis that law is not law, but politics, that law is not about justice, but about power, that adjudication is merely politics in disguise.

Historical variants of the radicalization strategy can be found in the Free Law Movement of the early 20th century in German legal thought,20 the French so-called “Juristes Inquites” of the same period, and American Legal Realism,21 which relied heavily on its German and French predecessors.22 More recently the Critical Legal Studies Movement aligned itself with this tradition and gave it – at least partly – an even more radical spin,23 which drew on different analytical or post-modern sceptical views of language and meaning to give claims philosophical support.

20 EUGEN EHRLICH, FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT; SOZIOLOGIE UND JURISPRUDENZ (1903); excerpts translated in Eugen Ehrlich, Judicial freedom of decision: its principles and objects, in The Science of legal method – select essays by various authors 47 (Association of the American Law Schools ed., 1917); for his foundational work on the sociology of law see Eugen Ehrlich, Fundamental principles of the sociology of law (transl. by Walter A. Moll, with introd. by Roscoe Pound, 1962); HERMANN KANTOROWICZ, DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906); for an English account of his version of the Free Law Movement as contrasted against Legal Realism see Hermann Kantorowicz, Some rationalism about realism, 43 Yale L. J. 1240 (1934); ERNST FUCHS, WAS WILL DIE FREIRECHTSSCHULE? (1929). See also KARLHEINZ MUSCHELER, RELATIVISMUS UND FREIRECHT: EIN VERSUCH ÜBER HERMANN KANTOROWICZ (1984); DIETMAR MOENCH, DIE METHODOLOGISCHEN BESTREBUNGEN DER FREIRECHTSBEWEGUNG AUF DEM WEGE ZUR METHODENLEHRE DER GEGENWART (1971); JOACHIM SCHMIDT, DAS "PRINZIPELLE" IN DER FREIRECHTSBEWEGUNG: STUDIE ZUM FREI-RECHT, SEINER METHODE UND SEINER QUELLE (1968); David Nelken, Pound and Ehrlich on the Living Law, 17 RECHTSTHEORIE 175 (1986).

Unlike the other two strategies, the radicals make no attempt to avoid the calamity caused by legal indeterminacy; they embrace it. They embrace it to expose the ideology of adjudication as a legal, a political enterprise. The radical accounts – criticized even from within the Critical Legal Studies movement – massively distort legal practice. Their obvious problem is that they cannot capture the specificity of our legal practices. The radical indeterminacy thesis is descriptively inadequate, since it is not able to give a meaningful account of the obvious not only institutional but also argumentative differences of our legal practices and politics. Worth preserving, however, is the insight that the application of the law is accompanied by a decision in the true sense of the word – as Carl Schmitt has taken it to be pervasive in and characteristic of adjudication. There is something to decide. Adjudication – at least in hard cases – is not about finding a predetermined solution, but about deciding on one by applying the law.

c) The Mainstream

The third strategy is the mainstream strategy which does not fall for either of the two extremes: it accepts legal indeterminacy on the one hand, but does not throw out the baby with the bath water on the other. For the mainstream, law is indeterminate in some cases, but this does not render the entire practice of adjudication indeterminate. The most common variant of this strategy is the marginalization strategy.

Hard cases are seen as rare cases against the background of myriads of legal transactions in which the law provides a determinate answer. The number of hard cases can be further reduced by canons of interpretation and legal forms of argument. The few genuinely hard cases that remain can be decided on non-legal grounds; they do not threaten the overall determinate practice. The mainstream tries to accommodate the insights of both competing theories by subdividing the law into the overwhelming number of cases for which a right answer can be argued for and the infinitesimally small number of truly hard cases, in

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25 See e.g. Duncan Kennedy, A Semiotics of Critique, 22 CARDOZO L. REV. 1147 (2001) (turning himself against exaggerations within the Critical Legal Studies Movement, often taken by counter-critique as an easy target).

26 CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 33 (transl. by George Schwab, 1985).

27 For a recent explicit account of this often implicit mainstream strategy Brian Leiter, Explaining Theoretical Disagreement, U. CHI. L. REV. 1215 (2009).
which the law is not predetermined and a genuine, non legal decision must be made.

Other variants of the mainstream approach are essentially similar, but are less timid about hard cases. They see hard cases as an especially suitable aspect of the law through which to introduce interdisciplinary standards into the law. The gap left by the indeterminacy of the law is filled by economics, public choice theory, morality, neuroscience or whatever the fashionable discipline of the day happens to be.

A third variant of the mainstream takes hard cases out of adjudication altogether – at least for some fields of the law such as constitutional or administrative law. These authors attempt to split the law up into easy cases dealt with by the courts and hard cases dealt with by politics on its own terms or by administrative agencies according to their political vocation – sometimes even with institutional consequences. For the US-American context of constitutional law Keith Whittington pleads for keeping hard cases out of the Supreme Court and leaving their resolution to the other political branches. In the German discussion in administrative law there is a strong tendency in the literature to delegate the decision in cases of legal indeterminacy to the administrative bodies and take them away from the courts.

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28 For the German discussion on administrative law e.g. Ivo Appel, Das Verwaltungsrecht zwischen traditionellem dogmatischen Verständnis und dem Anspruch einer Steuerungswissenschaft, 67 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 226-285 (2008).


It can easily be shown that all three mainstream variants rely on the common assumption that the law is inadequate in hard cases. They differ mainly in the effort expended on developing extra-legal standards or institutional solutions for the cases which they no longer consider legal.

The problem with this mainstream approach, however, is that it mistakes quantity for quality. As already stressed in the introduction, adjudication as both professional practice and academic discipline is all about the hard cases the mainstream tries to marginalize. These are the cases that require explanation. The only explanation the marginalization strategy has to offer draws on self-deception or even outright deceit. Either lawyers who engage in a legal disagreement in hard cases act under self-deception or in outright deceit of the public about the true political nature of their argument. In hard cases, in which the law runs out, there is no legal issue to disagree about. Where there is no law, there can be no disagreement about the law and no specifically legal decision. Judges have to exercise their political discretion to decide hard case. They, however, dress up their political decisions in legal clothes to distract from the political power they exercise. Dworkin already criticized this explanation as highly implausible. “It is mysterious why the pretense should be necessary or how it could be successful ... why should the profession fear to correct their error in the interests of a more honest judicial practice? ... And if the pretense is so easily exposed, why bother with the charade?” The marginalisation strategy dismisses the heart of professional legal practice as a large scale charade. The monstrosity of this claim is not an analytical argument against it – as little as atheism is defeated because people have built cathedrals and fought wars in god’s name. But the monstrosity of the marginalisation strategy has to be made explicit and should let us think twice. If there were an alternative to explain our legal practice in hard cases, the avoidance of monstrous claims should count in its explanatory favour.

d) The Hidden Legacy of Formalism

All the accounts of adjudication discussed above share a certain perception of the relations between indeterminacy and adjudication. All these approaches assume that indeterminacy represents a threat to adjudication. In a way, all theories of adjudication rest on a formalist foundation. According to formalism – as a

32 Leiter, supra note 27, at 1247.
33 RONALD DWORKIN, LAW’S EMPIRE 37 et seq. (1986).
construction of its critics, not necessarily as a historical phenomenon –, adjudication is the discovery of a pre-determined answer to a legal question by means of legal materials, methods, canons and forms of argument, logic, and the like. Understood in this way, indeterminacy is detrimental to law. The three branches of theories of adjudication differ only in their presumptions regarding the extent to which the law can fulfil the formalist concept of adjudication, the extent to which the law can live up to what Hart called the “noble dream”. They differ only in their degree of disappointment with the central formalist tenet and in the therapy they choose to handle their disenchantment:

The one right answer theories stick to the flag. They are still true believers and keep their formalist faith against all the odds of pervasive and standing legal disagreements. Radical legal critique reacts with frustration and abandons adjudication in the face of radical indeterminacy claims. The mainstream is more moderate and applies different strategies to rein in indeterminacy and place it outside the law and, in some variants of the mainstream approach, even outside judicial institutions. Through all the critique, however, the central claim of formalism remains untouched: if there is to be adjudication it consists in the discovery of predetermined answers; legal indeterminacy and adjudication as specifically legal enterprise are mutually exclusive.

II. A Doctrinal Theory of Adjudication

The theory of adjudication proposed in this essay rejects the common assumption as a widespread error. The common assumption is the common error that plagues the portrayed theories of adjudication. Contrary to the common assumption the doctrinal theory of adjudication to be proposed holds that adjudication remains a specifically legal enterprise even in cases of legal indeterminacy, even in hard cases for which the law holds no predetermined answer. It can be shown how the creation of law in the process of adjudication is specifically legal in a doctrinal sense and how the creation of law in the process of adjudication does not become mere politics, economics or moral reasoning or legislation. The proposed doctrinal theory of adjudication insists on the autonomy of the law even in cases of legal indeterminacy. As a comprehensive theory of adjudication, the doctrinal approach must be convincing on three different levels:

34  For nuanced historical accounts see the references given in supra note 11.
first, its conception must be theoretically feasible;

second, it must be normatively defensible;

third, it must be descriptively adequate, if it does not want to formulate a
mere ideal without any relation to and – as a consequence – effect on the actual
practice of adjudication.

1. The Theoretical Claim

On a theoretical level the doctrinal theory of adjudication must challenge the
common assumption. How can adjudication in cases of indeterminacy of the law
still be a specifically legal enterprise? Were it true – as the common assumption
would have it – that there can be no specifically legal decision in cases of legal
indeterminacy, the doctrinal theory of adjudication would never get off the
ground. However normatively attractive it might be to have a specifically legal
way of deciding hard cases, if the common assumption were correct this would
simply not be possible.

The doctrinal theory does not challenge the common assumption by endors-
ing another one-right-answer-thesis. This approach would not only be unconvinc-
ing, but would also demonstrably share the common assumption which the doc-
trinal theory wishes to reject. The whole point of the doctrinal approach is its in-
sistence on the specifically legal character of adjudication in cases for which
there is no one right answer. Rather, the central argument rests on the assump-
tion that, even though adjudication has to create law in hard cases, the condi-
tions under which law is created in adjudication distances it from politics, eco-
nomics and morality in a way that can give it a specifically legal, that is doctrinal,
character. The doctrinal specificity of adjudication even in cases of legal indeter-
minacy follows from the interplay of the exigency to justify legal decisions also in
hard cases and the specificities of legal argumentation in a specific sphere of le-
gal meaning.

a) Legal decisions and their justification

In the legal context, decisions must be justified. This also holds true for hard
cases, for which different lines of legal reasoning are available, justifying differ-
ent legal outcomes. Given the necessity of justifying a decision, even in a hard
case, with legal arguments, the decision in a hard case is not only a decision in
support of a certain outcome, but also in support of a certain line of legal reason-
ing, a certain doctrinal position. Decisions in hard cases come alongside the bag-
gage of the legal argumentation that supports the outcome. One cannot have one without the other. We cannot endorse an outcome but fail to endorse the legal argument that supports it. The connection of decision and justification requires a commitment not only to the decision but also to the argumentation that supports it. This double commitment has weight not only because it links the decision to a specific line of argument, but because the arguments the decision is linked to are again linked to other arguments in the sphere of legal argumentation, in which they are interconnected. Chaining a decision to a line of argument immerses it into a context of argumentation which entails far more commitments than the immediate between the specific decision and its supporting argument. Via the argument that supports it the decision becomes inscribed into a sphere of argumentation, bringing with it a potentially unforeseeable number of argumentative commitments.

b) The Legal Sphere of Argumentation

That decisions require justification and that decisions come with the baggage of their supporting arguments is not unique to legal decisions. This is true also of political and economic decisions as well as of moral choices. But each of these different areas of discourse has its own sphere of argumentation, its own system of meaning – as Max Weber called it -\textsuperscript{36} with a specific content and a specific structure. A legal decision cannot be supported with an argument of party politics and a political decision cannot be supported with an argument from doctrinal history or elegance. Given the legal argumentative baggage that comes along with the decision, the choice to be made in a hard case is a specifically legal one. It is the connection between the outcome and a specific line of argument belonging to a specific sphere of argumentation that makes a decision specific to this sphere even though it is a real decision and not predetermined by – in case of the law – the legal materials. What counts as a specific legal argument or reason and how exactly the sphere of legal argumentation is structured is not only complex, but also in its details specific to a particular legal culture and a particular legal system and most likely even specific to different areas of the law within a particular legal system – the structure and content of the sphere of legal argumentation can vary between tax, tort and constitutional law. But even if the details of the legal sphere of argumentation are specific to each legal culture, there are some general structural elements that can be pointed at to make the claim about the

\textsuperscript{36} Cf. MAX WEBER, CRITIQUE OF STAMMLER 136 (transl. by Guy Oakes, 1977).
specific structure and character of legal argumentation theoretically more plausi-
ble.

(I)  Time

First, on a very general level there is a specific orientation in time in legal argumentation. Legal arguments have a specific historical, backwards looking orientation. A legal decision has to be justified at least with some reference to the past.

In a case law system the reference has to go to prior cases. The stare decisis rule is a direct emanation of the historical character of legal argumentation. But also in continental legal systems, in which there is no formal rule of precedent, past judicial decisions play an important argumentative role. An argument which can rely on a precedent or at least give a conclusive interpretation of precedents makes a strong case; whereas an argument that does not consider precedents of higher courts or is out of step with them has a difficult stand no matter what are its other merits.

Another obvious aspect of the historical orientation of legal argumentation shows in the importance of legislative acts. That judicial decisions have to take legislative acts into account and are – at least in civil law systems – most often based on legislative acts goes without saying. Legislative acts though designed to determine the future are from the perspective of the judicial decision acts of the past. The judicial decision has to be argued as one that is either determined or at least consistent with prior legislative decision.

As for the legal methods, historical arguments, and arguments involving the legislative process play an important role. According to the different kinds of originalism they are even supposed to have a dominant role. This does not mean that arguments with the future effects of a decision cannot be found in legal argumentation. They are, however, either linked to a historical perspective or have a kind of last resort, exceptional status averting obviously impractical re-

37  For the importance of precedent in constitutional adjudication cp. DANIEL A. FARBER & SUZANNA SHERRY, JUDGEMENT CALLS 63-84 (2008).
39  An aspect elaborated by JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDBUNG 141 (1972), who stresses the "correctness control" (Richtigkeitskontrolle) excluding generally not acceptable practical results as an integral part of the legal argumentative practice.
mentation, not as such, however. To make a legal argument the effects have to be linked to the historic purpose of the precedent or statute or to the historic intention of the legislator. Even though arguments from the effects are directed at the future they have to be connected to the past.

This historical perspective is very different from the political argumentation in executive or legislative institutions. At least in democracies almost the opposite holds true. The new government and the new parliamentary majority will rather pride themselves with discontinuity. They do not have to justify their politics by appeals to prior decisions of past governments and majorities, but are often elected because they promised to reverse prior decisions and break with them. This is completely different for the courts. New judges can deviate from prior decisions, too. If they do so, they, however, try to show, how this shift is consistent with a so far overlooked interpretation of the prior decisions or how the change in the judicature is just unfolding what has been inherent in the precedents all the time. Open reversals or overruling of prior decisions are exceptional and rare in judicial opinions. In contrast, political decisions are in the same way directed towards the future as judicial decisions are directed towards the past. It can help in a political context to show that a decision stands in the tradition of prior political decisions, but the standard it is going to be held accountable to is its future effects.

(II) Consistency

The fairly strong historical orientation in the sphere of legal argumentation has consequences that strengthen the connection between a judicial decision and the argumentation that supports it. Under historical and systematic aspects the consistency of decisions plays a major role in the legal sphere of argumentation. The consistency is not so much a consistency of outcomes but a consistency of argumentation. Judicial decisions on labor law issues do not have to come out consistently, either in favor of workers or employers. On the contrary, a consistency in outcome would be suspicious. What has to be consistent is the doctrinal argumentation with which decisions that are not consistent in outcome are supported. The historical perspective of the law leads to a consistency requirement for legal argumentation that is pervasive. If an argumentation is not consistent with prior line of argument it creates at least a problem. This relation of the outcome of decisions and the argumentation that supports it is again different in politics than in law. For politics it is rather the consistency of outcome, which is important. If labor representatives consistently vote for outcomes that favor working class interests, they will not get in electoral trouble because their
argumentation on the different issues is not always consistent, and they will not be able to talk themselves out of trouble if they vote for an unfavorable outcome just by pointing out that they have a well crafted, consistent argument for it.

(III) Path dependency

The consistency requirements of the legal sphere of argumentation are mirrored by path dependency effects. The path dependency of legal decisions and their supporting lines of arguments can anticipate the effects of a decision for future cases, in which the decision taken today will create consistency requirements for the future. In hard constitutional cases a judge might favour politically a decision with advantage for the executive against the legislative branch, because his party is in government and he favours their policy on the issue at stake. But the judge has to anticipate what kind of path dependency his decision and the legal argumentation with which he could support it would create. The consistency requirement of the legal sphere of argumentation forces to generalize the argumentation. In the example they force to think about the meaning of the doctrinal argument in favour of the executive in case his own party is in the opposition and other issues are at stake. The consistency requirements in the legal sphere of argumentation stand in the way of decisions based on day to day political opinions. There are consistency requirements and path dependencies in other areas of discourse, too. The consistency requirements and path dependencies of the legal sphere, however, have their own orientation and structure and are stricter than at least the ones in the political sphere.

(IV) Specific Arguments

The sphere of legal argumentation is further determined by a set of arguments which is specific to the law. On the one side there are arguments specific to the doctrinal context of the law, which cannot be used in other areas of discourse. Only in the legal sphere of argumentation arguments from the doctrinal tradition, precedents, doctrinal consistency can play a role. In a political or moral discussion doctrinal arguments are inappropriate. In a political discussion on the extension of consumer or environmental protection, or on tax benefits an argu-

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ment from the doctrinal history of the subject would only bewilder friends and foes.

On the other side the legal sphere of argumentation excludes certain arguments from entering a legal debate. This is most obvious for substantial or strategic arguments from party or day to day politics. But it also holds for advancing a special professional, regional, political, etc. interest group, which can be a legitimate argument in the political discourse. If a special interest argument cannot be connected to the legislative intent or the purpose of a statute and be transformed into a specifically legal argument, it cannot be introduced into the legal sphere of argumentation.

This does not mean that there is no overlap between legal arguments and arguments of other spheres of discourse. But arguments of other spheres of discourse have to be translated and integrated into the law in specific ways and not all arguments can be integrated, some are excluded. Whether arguments out of other spheres of discourse can be integrated into the law depends solely on the legal materials and the methodic standards of a specific legal culture. The general debate about the merits and defensibility of the death penalty might be informative to the legal debate. But inside the law the question has to be answered under very different conditions. In Germany death penalty is an easy case. The German constitution provides an explicit ban.\textsuperscript{42} Neither is a moral or empirical argument needed to defend the ban nor can it be overcome by moral arguments or empirical data in favour of the death penalty.

The specificity of the legal debate, however, holds for hard cases, too. Under the United States Constitution the constitutionality of the death penalty is a hard case. It has to be decided by an interpretation of the 8th Amendment's "Cruel and unusual punishment"-clause. Whether recent empirical data can matter,\textsuperscript{43} depends on whether one sides with some kind of originalism or rather with a living constitution type of interpretation - questions and positions irrelevant for any moral or political discourse.

The different canons of interpretation, the precedents, the legal texts, the different legal forms of argumentation of a particular legal tradition demand for a transformation of arguments of other discourses into legal ones. In this respect,

\textsuperscript{42} Art. 102 of the German Constitution.
\textsuperscript{43} Cass Sunstein & Adrian Vermeule, \textit{Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs}, 58 STAN. L. REV. 703 (2005) (with further references at 706, 710 et seq.).
law has a King Midas kind of quality: every issue that can be discussed in many other discourses becomes a specifically legal issue if it becomes a matter of law.\textsuperscript{44} To integrate arguments from other areas of discourse into the legal sphere of argumentation is a specific task for lawyers which cannot be taken over by philosophers, economists or political scientists. This explains why even in hard cases, which deal with morally, economically or politically contested issues, judges and lawyers and not moral philosophers, economists or political scientists are called upon to argue and decide.

Historically the legal sphere of argumentation is not necessarily connected to the law. The legal sphere of argumentation is not a conceptual feature of the law, but a cultural accomplishment which took centuries to develop. The development of the law as a distinct social practice has been a gradual process. This process included the development of a specific set of institutions, but also the development of a specific system of doctrinal legal meaning.\textsuperscript{45} Taking them as ideal types, the discreteness of legal institutions and a specific sphere of legal argumentation show in the differences between the ancient Greek and Roman law. The Greek legal system knew courts as legal institutions and certain legal procedures, but legal argumentation was still undifferentiated from general rhetoric also used at other occasions of deliberation.\textsuperscript{46} It was only at the dawn of the classical period of the Roman law that specifically legal arguments and a specifically legal sphere of argumentation started to develop.\textsuperscript{47} This process of social differentiation led not only to an autonomy of the legal institutions, but also an autonomy of the legal system of meaning that determines the validity and quality of the argumentative moves in and around the institutions of the law.\textsuperscript{48} At least in developed legal systems, as the ones western civilisations have brought about, the complexity of the institutions and the legal material these institutions

\begin{itemize}
  \item \textsuperscript{44} Cp. for legal concepts Ralf Poscher, \textit{The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate}, in \textit{CONCEPTS IN LAW} 99-116 (Jaap C. Hage & Dietmar v. d. Pfordten eds., 2009).
  \item \textsuperscript{45} For the distinction between law as a doctrinal system of meaning and a system of social action, which receives its identity from its orientation at the doctrinal system of meaning, see WEBER, \textit{supra} note 36, at 112.
  \item \textsuperscript{46} JOHN W. JONES, THE LAW AND LEGAL THEORY OF THE GREEKS 300-304 (1956) (with only sparse evidence of specific training in legal rhetoric).
  \item \textsuperscript{47} For the Roman Law see BRUCE W. FRIER, THE RISE OF THE ROMAN JURISTS 184-196 (1985), describing how a specific legal thinking slowly started to establish itself during the first century B.C. within the Roman legal institutions; see also MARIE T. FÖGEN, RÖMISCHE RECHTSGESCHICHTEN. ÜBER URSPRUNG UND EVOLUTION EINES SOZIALEN SYSTEMS esp. at 82-88 (2003), linking the autonomous character of the Roman Law especially to its written and secular form.
  \item \textsuperscript{48} For a detailed sociological description of the modern law as an autopoietic system see LUHMANN, \textit{supra} note 1.
\end{itemize}
have produced, have reached a level at which arguments of other discourses cannot be introduced as such into the law. Even though this autonomy of legal meaning is contingent in the long historical perspective of social differentiation, it is a defining feature of developed legal systems in functionally differentiated societies.

c) Legal decisions of hard cases

The interplay of decision and justification within a specific sphere of legal argumentation explains why decisions remain specifically legal decisions even in cases in which the law is indeterminate.

First, even if the law is indeterminate the legal sphere of argumentation does not allow for every possible decision because not every — politically or morally — defensible decision can be supported by a doctrinally valid line of argument. At the beginning of its jurisdiction the German Federal Constitutional Court was faced with the question if, and if so how fundamental rights effect relations between citizens.49 The legal materials on the question were inconclusive, some historical and textual evidence pointing in this, some in that direction with a diverging line of precedent between in different courts in the background. But even though the law was indeterminate on the question, the court could not have decided on any kind of state action doctrine. It could e.g. not have decided on a binding force of fundamental rights only for employers and landlords, even though such a selective approach could have very well been supported by any left leaning political party. Even though the law was indeterminate this answer would have been excluded because the legal materials would not have allowed a valid line of legal argumentation to support such a selective position.

Second, even the choice between multiple valid lines of legal argumentation in a hard case does not have to be guided by extra legal considerations or criteria. Multiple lines of argument that lead to diverging results might be open in general, but not for the court that has to decide on the case because of prior decisions and the consistency requirements of the legal sphere of argumentation. In German constitutional law there are serious arguments not to consider the guarantee of human dignity as a fundamental claim right on its own, but as an objective principle of constitutional law guiding the interpretation of the more

49 German Constitutional Court, Lüth, BVerfGE 7, 198.
specific fundamental rights. But after the Federal Constitutional Court had considered it in its early standing rulings as a fundamental right, it could not retreat from this position when it had to consider a law allowing to shoot down high jacked airplanes even if it would have liked to reject the case.

Third, even without such limiting precedents the decision must not be guided by extra legal criteria. The specific sphere of argumentation gives room for professional standards, commitments and preferences that weigh against an immediate outcome orientation in a specific case. As people have political, economic or moral preferences they also develop professional or in the case of law methodical and doctrinal preferences. These preferences can be found on various levels of abstraction: they can comprise a more formal or substantial understanding of the law; they can be methodical like in the case of originalists of the various brands or they can be more substantial like in the case of a more federalist or more centrist understanding of the US or German constitution. All of these dispositions are specific to the legal sphere of argumentation. None of these dispositions is contrary to the law. All of them are compatible with the legal norms whose application they influence. All of them come to bear if a decision has to be made between competing lines of argument in a hard case that involves the principles, methods and values that are addressed by the doctrinal preferences.

Fourth, even in cases of indeterminacy in which neither the limitations of the doctrinal sphere of argumentation nor prior decisions nor doctrinal preferences distinguish one of the possible options will the decision remain a specifically legal decision, because it will be a decision within the legal sphere of argumentation with its genuine argumentative and decisional path dependencies and commitments. As seen in the above example of the judge with party politics inclinations in a constitutional case on executive rights, the political inclinations and the doctrinal consequences do not have to map. A decision that conforms to the immediate political inclinations can bear doctrinal consequences which counter these inclinations because of its future effects.

What holds true in a diachronic perspective holds true in a synchronic perspective as well: The legal argument might commit to an argument in different cases in other areas of the law which do not map in the political sphere. Under

50 CHRISTOPH ENDERS, DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG. ZUR DOGMATIK DES ART. 1 GG 377 et seq., 501 et seq. (1997).
51 German Constitutional Court, Aviation Security Act, BVerfGE 115, 118.
the German constitution such law diverse areas of the law as national security regulations and reproductive medicine are linked via the constitutional protection of human dignity. After the Federal Constitutional Court construed the guarantee of human dignity as an absolute right in abortion cases, it was forced to stick to its absoluteness in national security issues as well. The doctrinal position on the guarantee of human dignity cuts both ways. Recently a candidate for the Federal Constitutional Court proposed by the Social Democrats was effectively opposed by the Christian Democrats, because he suggested that the protection of human dignity might be open for balancing considerations in national security cases. The Christian Democrats did not oppose him because of these national security considerations, which would even be closer to the agenda of at least some of their politicians, but because of the effects it would have in the area of reproductive medicine and stem cell research. While national security and stem cell research are distinct areas of the political discourse, which allow for non interdependent political positions, they are linked by the constitutional provision on human dignity and its doctrinal development in the legal sphere.

The special doctrinal structure of the legal sphere of argumentation does not correspond to the political or economic sphere of argumentation. It establishes a certain distance between legal arguments and the choice between those arguments and political or economic convictions. This prevents even in hard cases that political preferences can always be translated one to one into legal ones, in spite of the fact that the decision in hard cases is not legally predetermined. On the other hand it does not exclude that sometimes the choice for a certain legal argument corresponds with a certain political, economic, religious or moral preference, but that this is not necessarily so, shows that even in hard cases specifically legal decisions are possible. Modern legal systems have developed a specific legal sphere of argumentation that allows for specifically legal decisions not only in applying the law in easy cases, but also in developing the law in hard cases.

2. The Normative Claim – Justice as Impartiality

Why would we do this? Why would we install an institutional system with a system of meaning of its own, besides politics, economics etc. with the risk of

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53 German Constitutional Court, Abortion I, BVerfGE 39, 1; Abortion II, BVerfGE 88, 203.
54 German Constitutional Court, Aviation Security Act, BVerfGE 115, 118.
55 Horst Dreier, Art. 1 Abs. 1, in GRUNDEGESETZKOMMENTAR marginal nº 133 (Horst Dreier ed., 2004).
producing decisions that are politically controversial, economically deficient etc.? The normative case for this doctrinal approach to adjudication rests on two interconnected arguments: one from justice and one from social differentiation.

The argument from justice relies on the importance of justice as impartiality. Impartiality is constitutive for adjudication not only symbolically, but also in substance. Partial adjudication is an oxymoron. In easy cases, impartiality is established flawlessly by the priority of the norms that govern the case at hand. In easy cases, the answer to a legal question evoked by a social conflict is predetermined by the legal materials. Since the law and the right answer to the question raised by the issue were established at a time prior to the case, they cannot be partial with respect to the one or the other of the parties involved in the conflict at hand. In easy cases, the impartiality of adjudication is self-executing if the norms are applied. In easy cases impartiality comes for free. In cases for which the law is indeterminate, the self-executing mechanism that guarantees impartiality in easy cases fails. Impartiality must be guaranteed in a different way.

Impartiality is based on distance. Impartial decisions are decisions in which the decision-maker maintains a distance from the immediate economic, political or moral interest of the concrete parties. By establishing a specifically legal sphere of argumentation with its own doctrinal structures, the law is able to establish such a distance even in cases in which the law is indeterminate. The distance created by the specifically doctrinal approach to open legal questions is the specific form of impartiality that the law has to offer in hard cases. It is not perfect impartiality as in easy cases. But it is the impartiality achievable for hard cases.

Beyond its importance for the procedural justification of a legal decision in the concrete case at hand, the distance created by the legal sphere of argumentation bears on a more general feature of modern societies. The distance the specifically legal sphere of argumentation creates is also a distance to the substantial, non-legal conflicts brought to the fore. People do not have legal disputes. People have disputes about political, economic, moral, personal relation issues and the like. They fight over, who gets the children, who has to pay for a damage, if abortion is to be morally or religiously contested etc. The substantive conflicts people have are not about the law; they are only transformed by the legal system into legal conflicts. This leaves the underlying substantial issues still open for further discussion. Even if a supreme court rules on the constitutional admissibility of abortion, stem cell research, assisted suicide, an environmental or economic regulatory issue etc. the political, moral, environmental or economic
question is still open, since the courts only decide on the legal issue within a legal sphere of argumentation that keeps its distance to the substantial, real world, non-legal issue that lie at the bottom of the legal conflict.

The specificity of the legal sphere of argumentation thus allows the legal system to decide cases authoritatively without deciding on the underlying substantial issues. The legal sphere of argumentation thus combines authoritative decision making with persisting substantive discursive openness. Even if the courts have decided on abortion, they have not decided the moral question; even if the courts have decided on some environmental regulatory policy, they have not decided the issue of global warming and not on some economic theory in the case of economic regulations. The non legal, substantial discussions are kept open, the public, scientific or academic discussions can continue even though the courts have rendered an authoritative legal decision.

Before the background of theories of social differentiation\(^{57}\) it is a fair guess that modern societies developed a legal system with a specifically sphere of legal argumentation to stay more flexible and retain a greater amount of plasticity\(^{58}\) despite the need for authoritative decisions of concrete conflicts. The legal sphere of argumentation allows societies to keep the substantive discussions going at multiple levels and thus to stay open to revisions, for new challenges and knowledge. The specific sphere of legal argumentation thus contributes to the flexibility, plasticity, intellectual vitality and viability of modern societies despite their permanent and even increasing need for authoritative decisions.

3. **The Empirical Claim – Crunching Numbers**

Besides its analytical and normative aims, the doctrinal theory of adjudication also attempts to explain something about the reality of adjudication. It claims that we are better able to understand what actually happens in adjudication when we see it through the lens of the doctrinal theory. This does not mean that adjudication always follows the model of the doctrinal theory. The doctrinal theory is not undermined by cases in which judges do not take the requirements of doctrinal argumentation seriously – even if there were many such cases. It is in part a normative theory and as such always in potential conflict with reality. But it would be a less interesting theory were it defeated all the time, did it not


\(^{58}\) Cp. the idea of social plasticity in ROBERTO M. UNGER, PLASTICITY INTO POWER (1987).
provide a plausible general account of the practice of adjudication on the ground. A doctrinal theory of adjudication has to confront the empirical data on adjudication, which has been amassed especially on the US-American federal court system. But all these empirical findings fall within the range of what should be expected on the basis of a doctrinal theory of adjudication.

Political attitudes do influence judicial decision-making. Conservative judges lean towards doctrinal positions that in general tend to promote conservative outcomes and liberal judges lean towards doctrinal positions that tend to promote liberal outcomes.\textsuperscript{59} This explains the overall 7\% variance\textsuperscript{60} and the higher 44\% variance in ideologically contested areas of the law\textsuperscript{61}. Yet, even in the politically most contested areas of the law the outcomes do not simply map the political preferences of judges in each individual case. There are numerous cases in which political preferences and doctrinal outcome do not match. The doctrinal theory of adjudication can explain why, in the overwhelming number of all hard cases in ideologically contested areas of the law, courts deliver unanimous decisions. This fact would be difficult to explain if the common assumption were true, that deciding hard cases is a matter of personal politics or morality.\textsuperscript{62}

A doctrinal theory of adjudication can provide a theoretically feasible, normatively attractive and empirically adequate account of legal decisions and discussions of hard cases which are central to the legal practice in modern legal systems. It builds on a specifically legal sphere of argumentation which is not conceptually linked to the law and does not necessarily accompany the establishment of legal institutions. The development of a specific legal sphere of argumentation is a cultural development on its own. It is only established through the doctrinal work of courts, lawyers and legal academics, which presupposes and depends on the independence of the legal institutions, but does not follow from their establishment alone. The sphere of legal argumentation is an accomplishment of a legal culture that comes in degrees; it can be gained, but also lost.

\textsuperscript{59} TAMANAH\textsc{a}, supra note 11, at 139 et seq.
\textsuperscript{60} ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS Ch. 7 (1983).
\textsuperscript{61} See e.g. Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 COLUM. L. REV. 1, 24 (2008).
\textsuperscript{62} For an illuminating critique of the field see TAMANAH\textsc{a}, supra note 11, Ch. 7 and 8.