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Adjudication and Justification: To What Extent Should the Excluded Be Included in the Judge's Decision?

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As follows from the Rule of Law, the judge has to justify her decision. In contemporary legal and social theory, it is argued that she should somehow give recognition to arguments and viewpoints that have been excluded from the final decision. In my paper, I will address the question why, to what extent and in what way the judge has to give recognition to the arguments and viewpoints that she has excluded from her decision.

KEYWORDS: Arendt, authority, decisionism, decision-making, jurisprudence, legal argumentation, Luhmann, rule of law, Schmitt, system theory

1. THE BURDEN OF RATIONALITY

Adjudication is about deciding. Two (or more) parties quarrel over the right interpretation of the law and by appealing to a judge, they give her the authority to determine the law's meaning, at least temporarily, for the *case* at hand. However, adjudication is not just about deciding. Not every decision will do: the judge's decision, including the way in which it is reached and how it is justified, has to meet some standard of rationality. As Lon L. Fuller, 1978, p. 380, argues, "adjudication is a form of social ordering institutionally committed to 'rational' decision." He even believes that, compared to other forms of social ordering, adjudication carries the heaviest burden of rationality:

Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision

which is the product of reasoned argument must be prepared itself to meet the test of reason.¹

The question is why adjudication has to meet this severe test of reason and when it can be said to have passed this test. Interestingly, Fuller puts “rational” between inverted commas when he claims that adjudication is “institutionally committed to ‘rational’ decision”. Could this perhaps indicate some reservation on his side towards the supposedly rational character of adjudication?

It may be questioned that a judge should justify her decision extensively. One could argue that by giving reasons, the judge does not necessarily strengthen her authority, but could also weaken or undermine it. According to Hannah Arendt, 2006, p. 93, authority excludes *potestas* or power (“where force is used, authority has failed”) as well as persuasion: “Authority (...) is incompatible with persuasion, which presupposes equality and works through a process of argumentation. Where arguments are used, authority is left in abeyance.” By giving reasons authority is deferred, because the acceptance of authority is made to depend on the always insecure outcome of persuasion: the parties involved may or may not accept the arguments offered by the judge.

In our Age of Reason, it is very difficult to accept that adjudication may not be fully “rational”. For good reasons, we as citizens expect the judge to give good reasons for her decision. One reason follows from the indeterminate quality of the law. The law, necessarily phrased in general terms, can never determine fully its application on concrete cases. Inevitably, the judge has to make a choice among competing interpretations – a choice which cannot be made solely on the basis of the settled law. Because multiple applications are possible, the judge has to justify why she favours one application over the other. Other reasons have to do with the need for accountability, controllability and predictability: the parties involved want to know whether she has considered their arguments seriously, higher judges must be able to assess whether she has applied the law correctly, scholars have to construe a doctrine on the basis of the various decisions, lawyers need to calculate their chances in similar future cases, and so on. So some amount of justification seems to be justified.

To a growing extent, in contemporary social and legal theory the burden of rationality that rests on the judge is raised. Some scholars have argued that she should somehow give more recognition to arguments and viewpoints that have been excluded from the final

¹ Fuller, 1978, pp. 366-367.

decision. According to Luhmann, 2000 and 2005, the judge provides information not only on the decision itself but inevitably also on the solution rejected, why this constitutes an alternative and no alternative at the same time. Following Luhmann, Fischer-Lescano & Christensen, 2005, claim that in the judge's decision the possibility of a different solution should be kept open. By giving recognition to all arguments put forward by the parties involved, the decision would lose some of its violent character. In my paper I will address the question why, to what extent and in what way the judge has to give recognition to the arguments and points of view that she has to exclude from her decision. Or does this inclusion of the excluded undermine the authority of the judge?

I will defend here a moderate decisionist position, which acknowledges that in the final analysis the judge has to take a decision that aims at reaching legal closure, that is, at ending – for the time being and for the case at hand – the on-going discussion on the meaning of the law. At the same time, it provides some room for reasoning and argumentation, albeit within institutionally defined and defensible limits. Below I will address the following three questions: in what sense can the judge's ruling be understood as a decision? (section 2); why does adjudication need any justification? (section 3); and what can be reasonably be expected from a justification by the judge? To what extent should the excluded be included in the final decision? (section 4).² My aim is to show that Fuller was right in putting inverted commas around “rational”: the judge's decision should meet some reasonable standard of rationality, but should not be overburdened by the insatiable demands of Reason.

2. DECISION AND DECISIONISM

The concept of decision has been brought into discredit due to its connection to decisionism (see Lübke, 1971, p. 7). Decisionism is usually seen as a political theory that favours an authoritarian and arbitrary style of governance, more suited to dictatorship than to the Rule of Law. It is associated with Carl Schmitt, the German philosopher and jurist who, for a short period of time, worked for the Nazi regime.³ Schmitt himself did not always defend a decisionist position. In one of his earliest works, *Gesetz und Urteil (Law and Decision)*, originally published in 1912, he argues that legal practise is directed at achieving “legal

² This paper is partly based on earlier publications on the same topic in Dutch (see, for instance, Van Klink, 2012).

³ A short biography can be found in Müller, 2003, pp. 15-48.

clarity" ("Rechtsbestimmtheit").^{4,5} The judge's decision has to be "foreseeable and calculable" (Schmitt, 1969, p. 73). That does not mean that the judge is required to simply apply the law by way of subsumption – that is, according to Schmitt, no longer possible –, but she has to establish whether another judge in the same case would have arrived at the same result: "A judge's decision is nowadays correct, if it can be expected that another judge would have decided in the same way" (Schmitt, 1969, p. 71). Moreover, the decision has to be justified: "There is no decision without justification; the justification belongs to the decision" (Schmitt, 1969, p. 69). In the justification it has to be explained why the decision in the given circumstances is right.

In his later work Schmitt gives up this intersubjective criterion for the correctness of a decision. Moreover, he breaks the connection which he previously had forged between decision and justification. Within the context of his theory of sovereignty, it is the sovereign who decides on the state of exception. By declaring the state of exception, the sovereign suspends the existing legal order in its entirety. The sovereign's decision is a subjective act of volition that, from the perspective of the law, seems to come from nowhere: "Looked at normatively, the decision emanates from nothingness" (Schmitt, 2005, pp. 31-32). From a legal point of view, no grounds can be given for the decision, since there are no legal norms anymore that can be applied; it is exactly the decision which has to prepare the ground for a return to the normal situation where it is possible again to apply legal norms. However, the exception appears to be not that exceptional. Also in daily legal practice a decisionist element can be found in the judge's ruling:

Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment.⁶

The general norms of the law have to be concretized or "transformed" in order to be applicable to a concrete case. This "transformation" presupposes an "*auctoritatis interpositio*", a determination of who has the authority to decide, which cannot be derived from the legal norms

⁴ Some of the texts I refer to in this article are written in German and have not been translated into English. Whenever I quote from these texts (like in this case), I have made my own translation (as indicated).

⁵ Literally, "Bestimmtheit" means determinateness.

⁶ Schmitt, 2005, p. 30, see also Schmitt, 1996, p. 46.

themselves (Schmitt, 2005, p. 31); nor does the law determine how the authority has to apply the norms at hand. According to Schmitt, the decision is in a literal sense a “de-cision” (“Ent-Scheidung”) in which norm and fact which are separated as much as possible in the “ordinary” legal order are re-united.⁷ In his view, the point of a legal decision is not so much to offer an “overwhelming argumentation” but to take away the doubt in an authoritarian way.⁸ In other words, to acquire force of law the decision does not have to rely upon its justification or “substantiation” (Schmitt, 2005, p. 32).

Hermann Lübbe, a critical student of Schmitt, has tried to rescue the concept of decision, despite its politically charged origin, for political theory. He develops a decisionist position that does not result in a defense of authoritarian or down-right dictatorial ruling. He accuses Schmitt and his followers – whom he, not without irony, calls the “Romanticists of the state of exception”⁹ – that they have created a false opposition between “real life” and the daily legal practice based on routine. According to Lübbe, ordinary life also consists of extraordinary circumstances and decisive moments in which decisions have to be taken. In the course of history, due to the erosion of common traditions, human existence has increasingly become decisionist in character. That is, to a growing extent, modern man lives under the pressure to take decisions. A decision is a choice one feels oneself compelled to make between two incompatible options. Only one of the possible options can be realized, so the other option has to be excluded. There are no “decisive” grounds available to make a well-founded choice between both alternatives. That does not mean, however, that the decision is irrational:

⁷ According to Schmitt, 1934, p. 18, in the normativist variant of legal positivism, facts and norms are separated in the most rigorous way.

⁸ Schmitt, 1996, p. 46 (my translation).

⁹ Schmitt never gets tired of blaming his liberal opponents to hold on to the romantic ideal of the “eternal conversation”: instead of taking decisions, they rather prefer to start a debate (see, for instance, his polemic against political romanticism in Schmitt, 1925). Lübbe, 1971, p. 29, counters this criticism by pointing out matter-of-factly that politicians in liberal democracies do take decisions, albeit in another way than a dictator would do.

The decision transcends a lack of rational determining grounds for action. It is not, for that reason, irrational. The rationality¹⁰ of the situation of deciding resides exactly in the fact that one determines a course of action, although there are no sufficient reasons to act in one way and only in this way.¹¹

The situation in which one has to decide always is a state of exception, because shared standards drawn from law, morality, tradition, public opinion and so on do no longer offer enough guidance and, therefore, one is left to one's own judgment (Lübbe, 1971, p. 21). The authority who has to take a decision, has to carry herself the "weight of the exception."¹²

Likewise, the judge's judgment can be understood as a decision in this sense. Building on Oakeshott's conception of the Rule of Law (Oakeshott, 1975 and 1999), I consider it to be her task to assess whether the actions in a specific case are in accordance with the general conditions set by the law. The judge does not evaluate these conditions – that is up to the legislature –, but primarily deals with their correct application on the case at hand. The general norms of the law are never directly applicable on the case; there are no easy cases in which the law is simply given. The relation between the judge's ruling and the law is contingent, that is, multiple applications are always possible. Every application of a higher legal norm necessarily gives the judge to a greater or lesser extents freedom. Inevitably, adjudication involves choosing. The settled law does limit the freedom to choose, but can never take it away entirely. The judge has to make a choice among the various options that the law offers and this choice cannot be made on the basis of the settled law itself. There is no established method that can produce "one right answer" for the case at hand.¹³ From the perspective of the settled law, as Hans Kelsen, 1994, p. 96, argues, the various possible decisions are of equal value, because the choice among them is based on a subjective evaluation from another normative, for instance moral or political, point of view. In the moment of decision, the judge finds herself in the state of exception as described by Lübbe: with

¹⁰ In German "Vernunft," which, among other things, also refers to reason, intellectual power or capacity.

¹¹ Lübbe, 1971, p. 21 (my translation).

¹² This expression is taken from Heidbrink, 2007, p. 178 (my translation).

¹³ Also Dworkin, who defends the famous "one right answer thesis" (see, e.g., Dworkin, 1978, pp. 279-290) does not offer a method of that kind. His appeal to general legal principles makes it even harder, if not impossible, to arrive at a univocal determination of the law's content in a specific case.

no generally shared, unequivocal standards at her disposal, she is the one who has to take the decision and carry its weight on her own.

3. DECISION AND JUSTIFICATION

Inevitably, the judge has to take a decision. However, that does not imply by necessity that she does not have to offer reasons for her decision. On the contrary, one could argue, if the law allows for multiple applications, she has to justify why she prioritizes one possible application over the other. There is not much to explain when the law would dictate univocally one right answer. In our modern age, adjudication is no longer seen as a matter of sheer subsumption (as if it ever was) but it is commonly acknowledged that the judge has nowadays to a greater or lesser extent discretion when interpreting the law. In the decision, the subjectivity of the subject who decides comes to the fore more and more explicitly. According to the German sociologist Ludger Heidbrink, 2007, this is due to the erosion of our normative orders. Normative orders, such as law or morality, do not have a self-evident validity anymore and their norm content is increasingly uncertain and indeterminate. As a result, the subject who has to decide, is forced to find a justification on her own and within herself. As Heidbrink argues:

The loss of traditional orientations, the decay of moral certainties and the erosion of social norms and rules have contributed to the situation in which the individual human being is forced to justify his actions and decisions from within himself (“aus sich heraus”) and to implement them into practice.¹⁴

In the absence of shared norms prescribing clear duties, one needs a justification: “Justification does matter in particular in situations where the validity, the determinateness and the information content have changed, where perfect duties are transformed into imperfect obligations” (Heidbrink, 2007, pp. 77-78; my translation). The growing need for justification is, therefore, caused by the increased complexity and insecurity in modern society, both on a normative level (which norms are valid?) and a cognitive level (how do the valid norms have to be applied?).

Decision and justification are thus no contrary concepts, as decisionism in its most radical form seems to suggest, but are

¹⁴ Heidbrink, 2007, p. 182.

inextricably linked: exactly *because* one has to decide, one has to justify oneself. At the same, an uneasy paradox occurs: due to the lack of generally valid standards, the subject increasingly has to justify herself and yet, again due to the lack of generally valid standards, she has less and less means at her disposal to do so in a persuasive way. According to Heidbrink, 2007, p. 114 (my translation) justification becomes to a growing extent an “Atopia” or a “non-place” which “can no longer be located, localized or captured.”¹⁵

Niklas Luhmann, 1995, also assumes that the application of law is not or not only a cognitive operation. In most cases, the law applicable in a specific case cannot easily be deduced from the legal text. Since the legal text fails to provide unequivocal answers, often additional sources of information such as principles are invoked (like in Dworkin’s theory of interpretation, see e.g. Dworkin, 1978). However, principles of law and morality neither produce one right answers. In a pluralist society, as Luhmann argues, conceptions of justice differ fundamentally so justice cannot decide upon a conflict between competing principles. Therefore, the settled law cannot be conceived of without the concept of decision: “The concept of positivity suggests that it can be understood through the concept of decision. Positive law is supposed to be validated through decisions” (Luhmann, 2004, p. 76). Although law’s validity is based on decisions, Luhmann dismisses any suggestion of decisionism in law:

This leads to the charge of “decisionism” in the sense of a possibility to decide in an arbitrary fashion, dependent only on the coercive force behind such decisions. Thus, this leads in fact to a dead-end; after all, everybody knows that in law decisions are never simply made arbitrarily.¹⁶

According to Luhmann, 2000, p. 134, the decision has to be accompanied by a justification in which it is explained that whoever takes the decision either has the right or the authority or good reason for deciding in the way she has decided. In the justification information has to be provided not only about the decision itself, but also about the non-chosen option – why it constitutes simultaneously an alternative and no alternative.¹⁷ By doing so, the authority gives herself or another

¹⁵ Original text: “sie lässt sich nicht mehr verorten, eingrenzen, dingfest machen.”

¹⁶ Luhmann, 2004, p. 76.

¹⁷ The original text runs as follows: “Die Entscheidung muss über sich selbst, aber dann auch noch über die Alternative informieren, also über das Paradox,

authority the opportunity to reconsider the decision and to include the excluded alternative. So in Luhmann's view decision and justification are necessarily connected: because one could have decided *otherwise*¹⁸ (and will do so in the future), one has to justify oneself.

Building on Luhmann's systems theory as well as Derrida's deconstructivism, Fischer-Lescano & Christensen, 2005, reject the decisionist approach as advocated by Schmitt. They accuse Schmitt of having misrepresented the decision as a purely subjective act which takes place in splendid isolation, as a creation from nowhere. In their view, the decision by the judge is part of a social communication process that does not end with the decision; on the contrary, it continues the communication process. The judge's decision is a suspension ("Aufschub") rather than a determination of law: "The law does not terminate the conflict between citizens by offering a stable decision, but [these disputes] delay the law continuously and force it into metamorphoses" (Fischer-Lescano & Christensen, 2005, p. 230; my translation). The decision taken has to be acceptable for society. For that purpose, the judge has to be open towards law's environment consisting of other social subsystems such as economy, morality, religion and science. However, she has to prevent that one or more of these systems will dominate the law.¹⁹ The deconstructivist systems-theoretical concept of decision is both pluralist and "extremely formalistic" (Fischer-Lescano & Christensen, 2005, p. 236; my translation). It aims at involving the law as an "empty signifier" in a process of eternal semiosis which includes as much as possible the excluded alternative meanings. Because the judge has a duty to justify her decision, she has to offer reasons which make the decision transparent and controllable and which explicitly leave room for a different decision. By taking into account all arguments presented by the parties, she is able to diminish or "relativize" the violent character of the decision (Fischer-Lescano & Christensen, 2005, p. 232; my translation).

dass die Alternative eine ist (denn sonst wäre die Entscheidung keine Entscheidung) und zugleich keine ist (denn sonst wäre die Entscheidung keine Entscheidung)" (Luhmann, 2000, p. 134). This can be related to what Agamben, 1998, p. 18, calls the "relation of exception," that is, "the extreme form of relation by which something is included solely through its exclusion" which, in his view, characterizes the state of exception.

¹⁸ This phrase is taken from Fischer-Lescano & Christensen, 2005, p. 241.

¹⁹ Or, as Fischer-Lescano & Christensen, 2005, p. 237 (my translation), put it, "to instrumentalize one-sidedly" the law.

So it seems that in contemporary legal and social theory, the concept of decision has not disappeared but is stripped from its decisionist connotations. Increasingly, decisionism is transformed into a deliberative approach that requires from the judge to give good reasons for her decision and to include somehow the viewpoints that she has excluded in her decision.

4. THE FINALITY OF DECISION

However, at some point the discussion has to stop. Although decisions in law often come about after and through lengthy debate, they aim at establishing legal closure. The law offers an institutionalized method for putting an end to legal discussions in society and in academia that, in the absence of an ultimate authority that is entitled to speak the “last word”, may continue endlessly. From an abstract academic perspective, *sub specie aeternitates* so to speak, this “end” may appear, a temporary halt in the process of eternal semiosis; for the parties involved in a case it is the final stop, if there are no legal possibilities left to re-open the debate. And this may be welcomed, since otherwise legal procedures would go on forever. In order to achieve legal closure, the law presupposes authority – authority that does not owe its validity to good reasons. According to Arendt (as quoted in section 1), “authority is incompatible with persuasion”²⁰ because, in her view, persuasion involves argumentation which equals a deferral or suspension of authority. Authority would become very volatile, when on every occasion it would depend on the willingness of the parties to accept the arguments given by the judge.²¹

The judge is not a participant in an ongoing discussion, as followers of the deliberative approach would have it, but an instance of authority that determines, by means of the law and in a legally binding way, what the law means here and now, for the case at hand. The judge’s decision aims, as the early Schmitt indicated, at providing “legal clarity”. Violence cannot be avoided, because alternative decisions are excluded, at least in this case. However, this does not mean that the judge as an instance of authority has to take away doubt in an *authoritarian* way, as the later Schmitt argued.²² On the contrary, it is reasonable to expect that she gives reasons for her decision. The justification given by the

²⁰ On Arendt’s view of authority, see Honig, 1993, chapter 4.

²¹ As Oakeshott, 1999, p. 149, argues, the Rule of Law is based on “the recognition of the authenticity of the law,” independent of its content.

²² The two prior references can be found in section 2.

judge cannot deprive the decision of its violent character though (or reduce the violence, as Fischer-Lescano & Christensen suggest): notwithstanding all considerations and caveats, ultimately legal consequences will be attached to the decision. Robert Cover, 1995, p. 203, expresses the relation between legal interpretation and violence very clearly: "Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."

As indicated earlier, every application of a legal norm involves to a greater or lesser extent freedom. Therefore, it can be expected that the judge, when applying general norms to a specific case, demonstrates that the interpretative choices made follow from a *possible and defensible*, not necessarily the 'one right' application of the legal norms at hand. She needs to justify her decision, because she could have taken a different decision (that is exactly why it is a decision). Strictly speaking, the validity of law in a concrete case does not depend on the size and quality of the justification; also short and poorly reasoned rulings are legally binding for the parties involved (as long as the decision is not overruled by a higher court). However, for the social acceptance of the general legal order it is important that the law, both when it comes to its creation and its application, manifests itself as a "product of reflexive intelligence."²³ In the justification, the different opinions of the parties involved must be reflected, so they are and that their case is taken seriously. Moreover, other judges who have to take a decision in the same or a similar case must have access to the relevant considerations of the judge. In my view, the judge does not have to address every argument that has been put forward in the social or academic debate on the issue at hand or to balance extensively the pros and cons of every solution thinkable. Moreover, I would be very cautious with including the excluded, as some authors have suggested (see section 3). The judge should, of course, justify why a certain view point, argument or solution is excluded, though not in order to keep the possibility of a different decision open (in the line of Luhmann and Fischer-Lescano & Christensen), but to achieve legal closure, however temporarily or provisionally. The justification should demonstrate convincingly and forcefully why the judge has favoured this decision over other possible decisions.

I would therefore like to argue for a justification that is concise, consistent and modest in that it presents itself, not as *the* right answer (that may not exist), but as *a possible* right answer. The faculty of reason

²³ Oakeshott, 1999, p. 256, borrows this notion from Hegel.

will always find reasons to question the judge's decision. Undoubtedly, from some normative point of view, other decisions will appear to be better or better justified. For lack of generally shared values,²⁴ we continue to argue about the meaning of the norms involved, the values at stake and their internal relation. But at a certain point the case has to be closed. What can be required in any case, is that the judge shows that her ruling is based on a possible application of the relevant legal norms, that it connects to earlier applications of these norms by other judges and is supported by the legal system as whole, its underlying aims and values and its historical development (that is, in Gadamer's terms, its effective history²⁵). As Odo Marquard, 2003, p. 78 (my translation) states, "the burden of proof is on the one who changes something." When deciding a case, the judge can appeal to the variety of *topoi* or common places, accepted by many people or the wise, that can be found in the various subsystems of society.²⁶ *Topoi*, such as equality or equity, can give some normative orientation when difficult choices have to be made, but they can never dictate a specific outcome. *Which* *topoi* are applicable in a concrete case and *how* they have to be applied, cannot be derived from the *topoi* themselves. When the cognitive operations have been carried out, the moment of choice has come. Ultimately, it is the judge who has to cut the knot.

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²⁴ Caused by the "disenchantment of the world", as analysed by Weber, 1996.

²⁵ See Gadamer, 2013, pp. 312 ff (in German: *Wirkungsgeschichte*).

²⁶ On the role of *topoi* in political decision-making, see Lübke, 1971, p. 61.

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