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Are There Still Indispensable Norms in Our Society?[1]

Abstract: In his Heidelberg University lecture of 1992, the author uses an all-too prescient torture scenario to exam the function and putative indispensability of norms in modern society. In the exceptional case, recourse to the »normativity of norms« or to »values« proves to be untenable because all norms and values reveal themselves to be undecidable. Viewed from within the legal systems, the validity of norms remain unquestioned, but viewed from »society« (by, say, the sociologist), norms are seen as social facts and thus open to discussion. The author works his way through many permutations of the torture question (»Would you do it?«) not to give us a normative answer to the problem, but to exemplify the seeming impossibility of reasonably expecting that any given legal norm is normatively indispensable.

I

Following good legal custom, presenting a case might help attune us to the topic of this talk. Imagine: You are a high-level law-enforcement officer. In your country – it could be Germany in the not-too-distant future – there are many left- and right-wing terrorists – every day there are murders, fire-bombings, the killing and injury of countless innocent people. You have captured the leader of such a group. Presumably, if you tortured him, you could save many lives – 10, 100, 1000 – we can vary the situation. Would you do it?

In Germany the matter seems simple. One consults constitutional law. Article 1 (Human Dignity) provides for no exception.[2] Indeed, the layman is at first astounded that the norm is formulated as fact. Is it therefore possible for torture not to violate human dignity? The jurist will let him know better. So far, so good. If not in terms of justice, then at least in terms of the legality.

For common law, which doesn't operate in such legal-positivist terms, there is an extensive discussion that is relevant here. The question is whether or not every legal question can be decided on the basis of weighing the consequences. If so, one could influence the decision by manipulating the evaluation of consequences. Or whether or not there are indispensable rights that are to be observed regardless of any of the decision's consequences.[3] It is striking that

1 Translated by Todd Cesaratto. The translation follows the German original: Niklas Luhmann, Gibt es in unserer Gesellschaft noch unverzichtbare Normen? Heidelberg: C.F. Müller, 1993.
2 Also see Hassemer 1988.
3 Foremost on this see Dworkin 1978.

the discussion is about *rights*, and not, for instance, as Pufendorf, Kant and above all Jewish law would suggest, about *duties*.[4] The emphasis on rights may be a liberal inheritance, but it has the advantage that one can use it in a legal-technical sense to allot authority in a case. Not to mention that globally the discussion is about human rights and not about human duties. Still this question does not help us to decide, because we still always have a prior decision to make: Are there rights fully independent of consequences?

To complicate the decision and make it ultimately undecidable, one can vary the hypothetical case. The terrorists have a nuclear bomb, and it must be found and disarmed. Would you use torture?

It does not lie in the sociologist's competence either to make a decision or even simply to recommend a certain decision (»after weighing all factors« as jurists say). As a sociologist, one is interested in the *problem*; or, as one could say, owing to particular theoretical guidelines, in the *form of the problem*. One can only get it wrong. It is a matter of »tragic choice«.[5] While in the normal case, jurists have no doubt that they are just when they distinguish between just and unjust and decide accordingly (however that may be justified), one could pose this case conversely: one is unjust when one distinguishes between just and unjust. The usual solution to the paradox of the self-reference of the just/unjust code – which consists in doubling its positive value and explaining the distinction itself as lawful – does not work. Or it works only if one applies the same operation of solving the paradox to the negative value. As in early Greek tragedies, the assertion of justice is for its part unjust. The code itself must first be generated, first institutionalized, free of paradox. Athene intervenes, establishes the Areopagite Council and retains for herself the right to decide »hard cases« (as Americans would say in their inimitable fashion).

Since our law lacks a religious legitimation, this expedient does not enter into consideration for us. We also no longer preside over the institution of »Divine Judgments«, by means of which such »hard cases« were once decided.[6] Thanks to *Gödel* we now know that we must »gödelize« such problems of system-inherent paradoxicality and require external references to do so. At the same time, however, the development of semiology since *Saussure* has taught us that such external references do not exist; rather a system remains dependent upon self-implemented distinctions.

To be sure, with these considerations we have not gained a decision, but rather the insight that the problem is a matter of high theoretical caliber. Here it is above all advisable to avoid every moral judgment (and that also means every ethical construction of the problem) because that could only lead to morally

4 Compare Horowitz 1973, 7f.
5 Such is the formulation of economists. See Calabresi/Bobbitt 1978.
6 See Bottéro 1981. Compare also Alafenish 1982.

discrediting one or the other option[7] and expelling the law's devil with morality's *Beelzebub*. Instead of this, I suggest resorting to a sociological analysis, thus exploiting the distance between sociologists and the legal system. It should be clear in advance that the jurist may expect no recommendation for a decision. However, a certain semantic reorganization of knowledge might be helpful, at least regarding the effort to reach a proper formulation of the problem for modern society.

For it could well be that a long tradition burdens us with an error in controlling the way problems are posed. Perhaps we are still expecting, but probably without much hope for success, a correspondence between decision and principle, a redemptive, conclusive formula, a system in the sense of *Kant's* or a general law, valid a priori.[8] However, the final ground of all deciding lies not in a principle but in a paradox.

II

The sociologist's distance does not begin with the question of deciding whether or not there are indispensable norms in modern society. Rather, and in a quite general manner, the notion of the normative itself undergoes estrangement. With the concept of the norm, jurists (and the same could be said, mutatis mutandis, for ethicists) presuppose a particular manner of existence that since the 19th century has been termed »validity« and distinguished from factual existence. They work with this presupposition because, for the legal system, it is a matter of ordering facts according to norms and deciding whether behavior corresponds to the norm or violates it. Therefore the legal system seeks the foundation for its own method of observing the world in the *distinction* between norms and facts. In contrast, sociology is free to deal with norms as facts as well – obviously as facts of a particular kind. A possible construction is to understand norms as formulas for *contra-factual expectations*, for expectations of behavior, that is, that do not allow themselves to be irritated by factual behavior, but which are adhered to even when they are frustrated.[9] The guiding distinction here is not fact/norm but learning/not-learning. The usual manner of speaking, which is calibrated to »ought« and talks of »validity«, is then conceived if as an expression for the right to refuse learning and the right to maintain expectations, even when they are frustrated. But this manner of speaking always deals with factually occurring, determinable expectations; therefore

7 On this some caveats worthy of consideration in Jewish law – but then again, on the basis of religious legitimation. Compare Cover 1983.

8 In reference to tradion, see for instance Girolamo Cardano (1663, 277): »Unum bonum est, plura verò malum« [there is only one good, but truly there are many bad things]. Compare also the guarantee from above directed against Aristotelians: »non ergo tendunt in unum se ab uno procedunt« (279) [therefore they do not tend toward one but proceed from one].

9 See Luhmann 1983, 40f. Also Luhmann 1993.

with expectations in the social system of society, with facts of a case that one can grasp through empirically recognizable communications. Thus determining whether or not the communication of »indispensable norms« finds success in a society – and what tests (Scenario: Terrorists have an atom bomb!) the acceptance of such a norm can handle – also becomes a matter of facts.

In a somewhat different terminology, one can describe the cultural invention of normativity as a *doubling of reality* – just as one can distinguish between a game and life or, according to the evolution of language, between a language's signs and what they signify. Something similar applies to the assumption of a religious meaning behind the phenomenal world or for the art system's distinction between fictional reality and real reality – no matter how one then imagines the coupling and the possibilities of transgressing borders in such cases. There is no doubt that linguistic communication really happens, even when it »is« not what it »signifies«. There is also no doubt that behavior in accordance with norms really is expected, even if – especially if – it must be distinguished from anticipated behavior and may not be confused with it. Only with the help of such doubling of reality can one gain the possibility of cultivating a more precise conception of real reality, of hard factual reality – precisely because one can distinguish it and observe it from the other side of the distinction. Culturalhistorically it will not be wrong here to think immediately of the semantics of religious transcendence; and one also sees that both law and art develop in a gradual process of differentiation, and then generate their own forms of comparison and also their own descriptions of real reality.[10] The hardening of reality is first possible through fictionality. The nominalist individualism of facts (*Ockham* and successors) creates its own fundament in a language theory that suits it. Induction problematizes itself and legitimates its reality deficit through mere »habits« (*Hume*) and today through statistical analyses that describes no single concrete situation.[11] And this applies to contemporary positive law as well.

As opposed to societies that start with a religious positing of the world, modern societies cannot integrate these descriptions of reality, which rely on a doubling, into a transcendental principle. In this respect (as in others), the transcendental subject has failed. Our society describes itself »poly-contextually«,[12] that is, with the help of a plurality of distinctions, whereby the distinctions with which an observer designates his objects serve simultaneously to distinguish him from his objects, thus setting him in an »unmarked space«,[13] from which he can observe something – but not his observing.

In reflecting on the theme of the indispensability of certain norms, these considerations offer the freedom of describing how the legal system describes this

10 For early European poetics, compare for instance Schlaffer 1990.
11 On this see Spencer Brown 1957.
12 This is Gotthard Günther's Terminology. See for example Günther 1979.
13 According to Spencer Brown 1979.

problem, and thereby, from a sociological prospective, of discovering non-arbitrary facts. Thereby we depart from the mode – which is also more typical of sociology – of investigating the »institutionalizability« of norms. Ultimately it becomes a matter of asking whether and in which regard normative expectations are normatively expected, and above all whether and how far these normative expectations of normative expectations may be assumed without further information.[14] In this way, one would indeed arrive at an empirical analysis of normalization's social chances of success, but not at the problem that is here interesting, namely whether and with which semantic means the legal system can establish the *indispensability* of norms.

III

If one inquires into the legal-theoretical or legal-philosophical attempts at identifying and establishing indispensable norms, one's attention will likely be drawn, even today, to natural law. That »the eternal return« of natural law has already been the topic of discussion should indeed give us pause,[15] and *Noberto Bobbio* has therefore inferred from this an insufficient maturity.[16] But since the concept belongs to the few who have remained in the discussion, and since safeguards against political atrocities are always expected from natural law, testing it springs immediately to mind. In so doing one indeed stumbles across some of the tradition's peculiarities that are hardly present in today's discussion. This holds for both the Aristotelian concept of nature as well as for the few references from the tradition of Roman civil law.

For *Aristotle*, nature was distinct from technique, from fabricated products, and was determined by this distinction. Among other things, entities that could observe themselves – that is, people –were counted among nature, as well as cities and other social bodies. Accordingly if one asks how one's own or foreign nature is to be observed, one meets with the following instruction: The observer should attend to the perfect state and not the corrupt one.[17] According to this, nature can evidently assume a natural and an unnatural state. Thus nature presents itself to the observer, who must differentiate accordingly, as an inherently paradoxical state of existence. The paradox is resolved through the assumption of a self-normalization of nature in the direction of its own perfection. Nature is conceived to be teleologically ordered, and *Aristotle* assumes that in most cases nature achieves that toward which it exerts itself. One has

14 On this see the always worth reading Allport 1933.
15 Thus according to the much cited publication of Rommen 1947.
16 See Bobbio 1972, 159ff. (190).
17 Thus Politeia 1254a 36-37 (formulated with skopeîn, thus observe!). Compare also Thomas of Aquinas, *Summa Theologiae* IIae, IIae, q. 57 a.2 ad primum: »Natura autem hominis est mutabilis. Et ideo id quod naturale est homini potest aliquando deficere.« [The nature of man is mutable, and therefore that which is natural to man can at some time fail.]

to deal only with the deficient remains. The home's economic order and the city's political order, among other things, see to this. This concept of nature is no longer common today, nor would the assumed congruent relation between normality and normativity be very convincing anymore either.

It is difficult to discern exactly how large a roll the concept of nature played in the texts handed down from Roman civil law. However one finds a very similar state of affairs. In an Ulpian passage, which was often used in the Middle Ages, natural law is differentiated from *ius gentium* (law of the people) and civil law, but is in no way viewed as superior law. Rather, natural law is distinguished through the fact that it governs all living entities, thus humans and animals.[18] As a result one must conceive of the civilizing process as a *deviation from natural law*. Marriage constricts the natural reproductive drive.[19] Property constricts equal access to all goods (supposed as originally common property). And institutions such as slavery, serfdom or contractual wage labor constrict what must be presupposed as natural freedom. Consequently, medieval civil and canon law construe the legal condition as a deviation from natural law, although, at the same time, they use – and again we stumble upon a hidden, canceled paradoxicality – concepts like *communitas*, *universitas*, *civitas* as designations for natural bodies.[20]

The problem does not change fundamentally in the 17th century when social contract (*pactum unionis*) doctrine becomes operative. The contract only sets the constitutive paradox more sharply in relief. The origin lies now in the presumption of individually manageable freedom; but that also means (and this is uncontested until late into the 18th century) that the ability to renounce freedom on the basis of well-considered grounds belongs to freedom. Later paradoxicality will be built into and resolved in the concept of freedom through a distinction precisely targeted at freedom, that is, through the distinction between *libertas* and *licentia*.[21]

In this version natural law's historical semantics could accompany the feudal order and its disintegration, the newly developing territorial state, and the transition to an absolutist understanding of statehood; and even enlightened absolutism, even the transition to the constitutional state in the liberal mold availed

18 See D 1.1.1.3: »Ius naturale est, quod natura omnia animalia docuit.« [the law is natural in that nature teaches all creatures.] Incidentally it is considerable that nature teaches itself. Natural law must thus be neither taught, nor learned, nor studied. Study relates to texts, not nature!

19 Highly engaged with this is Weigand 1967.

20 And on this there is another fitting, also much-cited Gaius-text from D.4.5.8. that states that a change in currently valid law does not extinguish natural law, »quia civilis ratio naturalia iura corrumpere non potest.« [Because civil reason cannot corrupt natural laws.] As always the legal decisions indeed fit each other, but not the mnemonics and founding formulas that the Middle Ages then draw from the texts.

21 In addition, this distinction – since it makes the concept of freedom usable through the unfolding of paradoxes – can serve both more conservative as well as revolutionary ends; it is simply a matter of excluding arbitrariness from the concept. See for example Wolff 1740, Pars I, §§ 150f. (reprint Hildesheim 1972, 90f.). See also Price 1776, 12ff.

itself of the idea of natural law.[22] In contrast to all that was conjectured and postulated after 1945, the semantics of natural law remain captivating precisely because of its capacity for political assimilation. The idea of human rights and their inalienability first enters the discussion toward the end of the 18th century. This holds for states that still know slavery, persecution of religious opponents, massive expropriation of property from »royalists«, as well as immense profit speculation (but as a sign of modernity), namely the North American States. All of this speaks for the fact that natural law remains only as an empty shell of a word, applicable in flowery phrases – which now requires being made into positive law constitutionally.[23] In any event nothing results from the historically deducible meaning of natural law that could answer our question as to the validity of indispensable norms in today's society.

IV

How could it have been assumed at all that from within its own nature *any* norm contain *in itself* the assurance for unassailable, indispensable validity? In the old world this had been guaranteed through the myths of origin – for their part, resolutions of the paradoxicality of a beginning without a »before«. Since the early modern age the metaphor of the »source of law« (hardly used in antiquity) assumes this function.[24] The paradox of decision hides behind the notion of an origin without precedent, which constructs an alternative in which the decision does not occur.[25] How is such an assumption plausible? Evidently not by inquiring further back into the origin of the origin or the foundation of foundation. The metaphor is used as a halt to reflection; it has the function of making the decider of the decision invisible. If it is plausible, then its plausibility stems from other reasons.

As a sociologist, one may suppose that unfolding of paradoxes of this type or another – that is, the substitution of distinctions with fixed identities – owe their plausibility to their social-structural adequacy. This demands analyses by way of the sociology of knowledge. For this we no longer use the Marx-Mannheim diction that resorts to class or position and thus ultimately to (conscious or unconscious) actor-specific interests. We replace this by presuming a connection between a society's semantics and the currently prevailing form of system-differentiation.[26]

22 For more recent times and for the transition into the 19th century, compare Klippel 1976.
23 Or, as Klippel (1976) shows – natural law is only pursued when a political constitution is unattainable.
24 In lieu of still-lacking thorough research following the model of intellectual history, compare Sève 1982. There is also ample material by Vallet de Goytisolo 1982.
25 On this see Shackle 1979.
26 By way of introduction, see Luhmann 1980.

It is not hard to show that the semantics of natural law (insofar as one accepts the preceding depiction) correlate with the immanent imperative of a noble society, thus with the imperative of stratified differentiation, and through this obtain its power to convince. That a society with higher organizational demands must be founded upon a deviation from natural law represents precisely the noble stratum's requirements for differentiation. Family genealogy must be secured through lineage, thus through marriage, whatever else the natural reproductive drive achieves in terms of pathologies. The nobility must be able to name property its own and defend it, whatever other requirements accrue.[27] Stratified social systems compel inequality of rank and resource distribution and they see in this an essential (indispensable!) condition of social organization. That work must be done and thus freedom limited also belongs to this. It is only much later that this arrangement can be supported by an adequate appeal to earning and spending money, that is, by wage labor.

It may be remarkable that this order must be declared a *deviation* from natural law. However, that evidently suffices for depicting its relationship to nature – as eternally given in a cosmos of essences or as created by God – and for providing specific justifications for respective deviations. The de-paradoxicalization of paradoxicality is plausible in the extant order, for which no alternatives are in sight.

The same applies to the Aristotelian concept of nature. It can be directly copied into the nobility's self-depiction. Nobility demands that one is well-born and sound (*arete*, *virtus*), thus a nature that is not already in and of itself what it is, rather something that requires attention and care. An immense literature, which blossoms again in noble circles of the 16th and 17th century, discusses the weighing of these criteria.[28] Doctrines of education emphasize that adolescence in particular is endangered by passion and temptation. But this refers to children of noble birth, circumstance and advantage. In any event, it is clear to jurists that a farmer cannot become noble through twice as much virtue.[29] Ennoblement or the certification of old nobility is required for that. The ambivalence of the concept of nature proves itself, one could say, in a discussion that does not lack clearness and criteria for managing problems – as long as society is differentiated through the form of stratification.

27 This must not necessarily be, and normally is not, secured via individual property in a juridical sense. It does not at any point presuppose a clear distinction between criminal law and civil law for the ordering of ruling and protective authority. It is the money economy that first compels, above all for the safeguard of credit, individual rights of provision; thus it is a disintegration of the feudal order. On this and the consequences of the first English inflation circa 1200, see Palmer 1985b and 1985b.

28 From the extensive secondary literature, compare Donati 1988; Jouanna 1981; Schalk 1986.

29 One reads, »Rusticus, licet probus, dives & valens, tamen non dicitur nobilis« [a farmer can be virtuous, wealthy, and stout, but he is never called noble] in Bartolus, *de Dignitatibus fol 45 v and ad 52*, quoted according to the Omnia edition, quae extant, Opera Venetiis 1602, vol. VIII. In reality the relations were by no means so unambiguous, especially when it was a matter tax exemption.

Today, society is construed differently, and that has far-reaching consequences extending into all details of social semantics. The primary form of societal differentiation has been shifted from stratification to functional differentiation. That pertains above all to the societal position of the individual. For until late in the 19th century, the emphasis on the individuality of individuals was that semantic mechanism with which the old order of societal division was undermined. The societal position of individuals no longer results from their lineage but from their careers, which of course are helped or hindered by lineage to varying degrees. But lineage (and eventually race and gender) acts on a complicated integration mechanism, which has a primarily temporal structure, so that attained positions are prerequisites for the attainment of further positions. Every step depends on a contingent (for example, economically sensitive) collaboration of self-selection and hetero selection.

This corresponds to a time orientation in which past and future are no longer always already bound to assigned necessities / impossibilities through essential forms, but rather must be coupled through decisions. That also implies that one attributes things, which are no longer alterable, to decisions and plans decisions in terms of series of decisions that are dependent but not yet determinable. Hence, time is no longer experienced in the difference between *aeternitus* / *tempus* (eternity / time), so that there can also no longer be time-invariant norms. Rather, the dominating time distinction is that between past and future, and only the border, separating both sides of this time form, counts as the present, which, however, can no longer be situated in the form. Therefore, the social orientation must also be adjusted to insecurity and risk, to »in the next moment things are different.«[30] It depends on developing social forms of accommodation that tolerate such instability and thereby maturate. This also applies to the projection of norms with which one attempts to bind future expectations to the schema conformist / deviant and therewith distribute positions as favorable / unfavorable – with the proviso that the decision will eventually change.

The reason for such a degree of individualization and temporalization lies in functional system differentiation. This differentiation does not allow concrete individuals to assign themselves to a given functional system and only to that one system, so that one individual »exists« only legally, another just educationally, the next one only economically and still another just politically. Rather, societal inclusion must be kept open and all individuals must be granted access to all functional systems. For precisely this reason, freedom and equality are made abstract norms, so that the degree of inequality and freedom's limitation results from the regulation of inclusion in functional systems. The reason for choosing this form of normativity rests in the fact that the future is unpredictable and hence one must reckon with the as-yet-unknown outcomes of actions.

30 On this, see Luhmann 1991.

Therefore there can be no societal hierarchy of subsystems and their relation to each other, thus no representation of society in society. Rather the influence of the subsystems on each other, which is much more intense than in the older order, changes from situation to situation and cannot be steered through society. This is the case for sequential as well as simultaneous events, so that the inner-societal environment becomes uncontrollable for systems.

If this analysis applies even crudely, it must have consequences for the theme of the indispensability of one or several fundamental norms. It would certainly be premature to conclude that these consequences lead to »decisionism,« relativism, or the basic arbitrariness of »anything goes.« Those are mere devaluations that impose themselves when one doesn't wish to forgo the old world's certainties of orientation. On the contrary, one will have to assume that such a structure of contingent operations – a structure that is organized recursively, non-hierarchically, but rather hetero-archically – generates »Eigenvalues« and projects »inviolate levels« that correspond to their organizational archetype.[31] The only question is: in which forms?

V

If one pays attention to what modern society itself recommends, the motto is: values. The concept of values has a long, multi-track history, which, however, produces nothing for our question. That applies to the nobility's concept of valor as well as to the economic distinction between value and price. Already in the 18th century one finds a casually applied, unspecified value concept. However, this concept first wins a top-ranking semantic position in the course of the 19th century. And that is a first indication of the adoption of a specifically modern semantics.

The concept certainly owes this appreciation in value to philosophy – partly to the philosophical distinction between being and validity, partly to neo-Kantianism, partly to phenomenology, in any case to an unquenchable thirst for aprioris. Meanwhile, value as a concept concept has fallen out of philosophical fashion. In contrast, it seems to be essential for the formulation of party programs and the juridical desicions of the Federal Constitutional Court. When it comes to formulations, value replaces the orientation according to a real analysis of societal circumstances that confront politics and the orientation according to classical forms of juridical dogmatism (approximately: subjective rights). The concept marks exactly what we are seeking: maximum relevance with normative content. Thus one would like to know more specifically to what

31 On »Eigenvalues« in connection with this logical-mathematical concept, see von Foerster 1981, as well as other contributions in the cited volume. On »inviolate levels« as forms of the development of self-referential paradoxicality, see Hofstadter 1979, specifically 686f.

– besides itself – the concept refers. For sociology this has to mean: to what type of reality.

The use of value judgments in the course of communicative conduct makes conspicuous that these judgments are not asserted as theses, but run in tandem as implications. Values »are valid« in an imputational manner of communication. One assumes that consensus exists regarding value assessments, that advance understandings can be used. When talk is of smoking, one assumes that it is harmful to the health, and that all participants value the positive value, health, and not the negative value, disease. Or: Life is preferred and not death, peace and not war, freedom and not bondage, democracy and not tyranny, and so forth. The question, »Why?« is omitted, because in communication, making something explicitly thematic is always understood in such a way that acceptance or rejection of the imposed meaning comes into consideration. The mere insinuation of this would miss value's validity and be misunderstood, or at any rate understood as a provocation.

Values, then, are valid without justification – as the observation of communication, as it actually occurs, shows. But then it is not possible to request justification for values. In practice, values serve to halt reflection. When that does not work, smaller systems differentiate themselves in which it does work. From the perspective of normal communication, as inspired by television, such deviations then appear radical, fundamental, esoteric. They are dealt with through a distancing semantics; although, in terms of genesis and validity, the same mode is in effect as in the realm of universally accepted values. Even differentiations and alienations, even controversies and conflicts do not call into question the semantics of values as *form.* This might also serve as an indicator for an »inviolate level« – a deep location that replaces nature and reason for the anchoring of norms.

Like stars in the heavens there are countless values. Therefore basic values are needed for emphasis. Here traditional concepts like freedom, equality, justice, peace, security, dignity, welfare and solidarity are used to designate special status.[32] With that the order of value references reinforces itself once more. But even when it is a matter of easily quotable values, nothing changes in terms of the implicated mode of validity. Nor can one pose the question during ongoing communication – especially not then – whether these values are accepted or rejected.

In this form, having values is easy. If certain values become questionable, new »inviolate levels« will form. But there's a catch to the matter: Nothing follows

32 Traditional concepts – in the process taking into account that all these concepts change their meaning and in part their linguistic form during the transition from stratified to functionally differentiated society. Already *Pufendorf*, in terms of dignity, shifted from *dignitas* to *dignatio*. In the 17th century, *securitas* sheds the old religious connotations for a measured self-security. Freedom is made singular in the 18th century. Solidarity appears for the first time in the 19th century, and along with it, a reference to the consequences of functional differentiation (at first: industrialization) is already signaled.

from values to aid in the adjudication of value conflicts. There is, as is often said, no firm hierarchical (transitive) order of such a type that certain values are always preferable to certain other ones, for instance, that freedom is more important than security in every case, peace always more important than freedom, justice always more important than peace, etc. The question of preference is only decided in advance when a value refers to its opposite (peace is better than war), but not when it refers to the contradictory demands of various distinctions between value and non-value. Different values do not exclude each other reciprocally, hence they always allow for the addition of new values. They remain available to all of us, therefore, as orientating points of view within the system. Value theorists base their hope for stability on this. Collisions of value are reduced to individual cases. But it is precisely in these individual cases that values must demonstrate their practical relevance. They lose their prescription value right at the moment it is needed. And the opposite is also true. Because decisions are always and only due when values pose conflicting demands (because if not, the decision would already be decided)[33], the decisions themselves remain unregulated.

For purposes of comparison, it might be of use to see how this problem of collision is solved at the level of the law's typical conditional programs. Either this occurs through rules of cancellation – new law breaks old law or (when it is a matter of constitutional law) vice versa – or the collision is brought into the schema of rule and exception. One proves the rule, as the saying goes, by conceding the exception. In this way law generates growth, differentiation, commensurability to cases in forms that can be handed down as such. All this however cannot be transposed to the level of values. In the case of a collision, one value does not delete another. Nor is a gain in complexity produced in the form of stable (and expandable) rule-exception regulations. Value collisions can only be decided ad hoc, because one requires evidence derived from the situation in order to justify the consideration of values, which applies a fortiori if more than two values are in play. The more values, the more chaos at the level of the decision.

Here again we have a possible paradox. One can also put it into a modal-theoritical version. Values are *necessary* in order to give decisions recourse to indisputability. Decisions however bring this *necessity* into the form of *contingency.* The necessity of adhering to values becomes for its part a contingent evaluation – when it comes to deciding – which can turn out differently depending on value constellations, the site of decision, and influences on the course of decision. Jurisprudence and legal dogmatics speak of »consideration of values«,[34] but that is a formula that has unity only insofar as it does not reveal to which results it leads. Thus (as is typical for the unfolding of paradoxes) the formula

33 One can add: »Only those questions that are in principle undecidable, *we* can decide,« with von Foerster 1992, 14.

34 For many examples, compare Pawlowski 1991, 378ff. and elsewhere.

does not say that it does not say what it does not say. Obviously this is not a mistake to be rebuked, but a transitory semantics that enables the cultivation of precedent decisions, which can be subsequently attended to with the proven technique of juridically analyzing the grounds of decision, or further developed in a process of distinguishing and overruling.

As far as it depends on values and decisions, society operates under the condition of *self-generated uncertainty*.[35] It first creates the »frame«[36] that establishes that what is to emerge as a decision is not yet established. One will have to grow accustomed to the consequences this has for social interaction, for the constant updating of modified understandings, and for a corresponding culture of self-representation.

One may doubt whether or not something like a concept of jurisprudence in the classical style will ever arise from this. Perhaps the development is going more in the direction of precedents, typical of common law, coupled with a correspondingly complex demand for proficiency in decision-making and a less conceptual style of argumentation. This is already a widespread practice in continental law with regard to rationales for authorizing appeals. Neither the arbitrariness of decision nor external influences on legal practice can be inferred in any way from the law's paradoxical founding. If anything, one needs to take the poorly synchronized self-formation of the legal system into account. But then that would be a typically predictable trait of a functionally differentiated social system. Slower and faster changes occur simultaneously in functional systems and synchronization becomes ever more difficult.

In this way, more than is officially acknowledged, the problem of the indispensability of specifiable norms or an inventory of such norms has dissolved. The substitute solution, that is already practiced, provides only for a paradox capable of developing as a formula for unity. Looking backward one can construct the history of the problem as if this would have always been the case. But that is a history written for our time. In today's society, it may depend on the insight that the problem does not lie in the difference between loyalty to principles and arbitrariness. Principles must be generalized in such a way that they signify nothing anymore. But on the other hand, arbitrariness – viewed factually – does not occur in social reality. Therefore the question can only be, whether or not maintaining the legal system's autonomy, self-determination and operative closure will also work in the future.[37] There is, then, no question that this system can structure its own autonomy, develop the paradox of its own distinctions' unity (even that between just and unjust) and come to terms with the necessity of contingency. The indispensability of norms – that is the autopoiesis of the system.

35 As in a somewhat differently specified context, Ladeur 1992.
36 »Frame« in the sense of Erving Goffmann 1974.
37 On this conceptuality, see Luhmann 1992, as well as the subsequent discussion. More comprehensively, see Luhmann 1993.

VI

But even then the problem of the tragic choices still remains, the problem, that is, of the right to violate the law.* From *Kant* to *Habermas* one can observe a quest for solutions that approximate the concept of system autonomy. For *Kant* »eternal peace« can only be guaranteed through states that grant citizens legal protection.[38] *Habermas* adds this desideratum the affected persons' democratic participation in constitutional procedures to.[39] Both suggestions are modern insofar as they avoid a dogmatic (metaphysical, religious, indisputable) anticipation of correct decisions that would sort the rams from the sheep in advance. But both suggestions are also characterized by other-worldliness and ignorance of the law. Neither *Kant* nor *Habermas* poses himself the problem of the right to break the law. For both the problem's solution lies in arrangements that enable access to the insights of reason. For its part reason is handled like a tribunal or like a source of insight that, under conditions of uncoerced communication, enables precisely that which it presupposes, namely, understanding without coercion. However, if negation actually exists, then there is not only positive self-reference, but negative self-reference as well. The state of today's world guides the gaze more to the problem of a decision between justice and injustice that is made not in accordance with the law – for example, as mentioned at the beginning, the case of torture, or cases of international intervention, or cases of the retroactive condemnation of »crimes« that were covered by positive law (but ostensibly not through »supra-positive« law) at the time of their commission.

It follows that in spite of a global society that communicates worldwide and has extensive interdependences in all functional sectors, the postulates of functional autonomy – the constitutional state [*Rechtsstaat*] and democracy – can only count as implemented in a few regions.[40] Implemented, that is, in the sense that violations can be handled as isolated cases, which can be processed using procedures belonging to the system they have violated. Globally this is more the exception than the rule – and this is so despite the fact that an alternative concept is nowhere in sight. A general diagnosis would therefore have to state that world society has adapted itself to the functional differentiation of systems, but in many functional domains (including economics, politics and law) such an evolutionarily improbable form of differentiation cannot assert itself – but neither can any other!

* Editor's note: Luhmann refers here to conflicts between the law and other social values. For example, conflicts between law and religious conviction or personal ethics, between existing law and political actions (e.g., civil disobedience) designed to modify the law or specific political structures, and, in its most extreme case, so-called emergency powers used by the executive branch to preserve the state (it's constitution) from extinction.

38 On Kant's Traktat »Zum ewigen Frieden«, see Tesón 1991, who elaborates Kant's viewpoints.

39 For example, Habermas 1992.

40 On this see Neves 1992.

This situation seems to correspond to the widespread appearance of »tragic choices«: economic development only through exclusion of large segments of the population; democracy only through presidial despotism and the like; guarantee of rights only through the right to break the law. If one confines the investigation to the legal system provided one brackets, among other issues, the much more complicated problem of an all-appropriate ethics), then one finds examples for our problem of the just-unjust system code's paradoxicality that have been made juridical with thorough success – one famous case and one less famous, yet highly pertinent.

The classical case is the case of derogation, the illegal breaching of the law by the holder of the highest political power.[41] In the Middle Ages this right to violate the law was seen as a component of an all-encompassing *iurisdictio*, and thus was moved into proximity with the regulation of exceptions – for the preservation of privileges, for instance. The early modern era saw in this a problem of »reason of state«. The Venetian state murders, for example, were thus justified (public interest of the commonwealth comes before private rights!).[42] Admittedly, only with a sigh and only in the case of emergency did one demand that this occur. On this basis, then, the notion of an eminent law (ius eminens) in states of emergency had become accepted parallel to the development of a right to expropriation of property against compensation based on eminent domain (dominium eminens). In the 18th century, this falls under the repertoire of the sovereign's normal legal authority[43] and finally under the matters that a constitution should regulate.

A second, less well-known legal development follows from the premise that the exercise of rights cannot be against the law. »Qui suo iure utitur neminem laedit.« (He who acts according to his own rights hurts no one.) But then one would have to forbid everything that could possibly injure others. The hard alternative »either legal or illegal,« which is and remains sensible as system code, would then take effect at the program level. In order to prevent this, legal figures were invented that stipulate that one can be held liable (strict liability) for, say, damages resulting from a perfectly unobjectionable (legal, guiltless) use of the law.[44] Presupposed as a concomitant institution is insurability and

41 For older literature, see Bonucci 1906. Also compare de Mattei 1953; 1969.

42 For example, compare Giovanni Maria Memmo 1563, 12: »Et Meglio e, che un Cittadino privato patisca a torto, che permettendogli, si tanta licenza, & autorità, egli ci faccia lecito a una Repubblica fare ogni opera, quantunque ingiusta, derivando da quella una tanta utilità, quanta e la libertà publica.« [And it is better that private citizen suffers a wrong, than to allow onself so much license and authority, and to legally oppress one's public liberty for the conservation of that which is legal in a republic even though injustice comes from this one such use, as well as public liberty.]

43 Compare for instance Weitzel 1749.

44 The trend-setting German monograph is Esser 1941. For the just-unjust code problematic, also see Merkel 1895. Common law's method of argumentation – which, departing from the concept of hazardous items, led to the concept of comparable results – is well traced by Levi 1948. More than anything, the enormous claim amounts and limits of insurability, which in turn allow total innocents to suffer as a result of economic effects, have provoked the more recent discussion in the United States. Just see Priest 1990.

the possibility for the offsetting of costs through pricing-raising, and then once more: equal treatment of market competitors.
One needs only to use one's power of imagination a little to see that our case of torture has a similar structure. One could therefore also think here of a similar juridical solution – regardless of all legalistic considerations based on Article 1 of the German Federal Constitution. For example: Allowance of torture through internationally supervised courts, closed-circuit surveillance of the scene in Geneva or Luxemburg, long-distance supervision via telecommunications, transferring the just/unjust distinction on to the victim's option of being either hero or traitor. Taken altogether, not very satisfying solutions. But it is equally unsatisfying to do nothing at all and thereby sacrifice innocent-bystanders to the fanaticism of terrorists.

VII

Viewed globally one can currently observe a growing attentiveness to the problem of human rights. Indeed the old- and new-European style of justification was hardly able to convince by way of nature or reason. Neither are rights such as »freedom« and »equality« well suited to function as human rights. In and of themselves, they are constructed paradoxically. They include their opposite and therefore must always be modifiable via law or contract. A disposition regarding this cannot be centralized. What one can observe is however a very primal way of generating norms on the basis of scandalous incidents to which the mass media gives global coverage. Whether there are texts that forbid such acts – or whether there are people who determine and ratify these texts and people who do not – hardly plays a role in the matter. One is not instructed to compare legal texts and conduct in order to read from this whether or not something violates the law or not. On a much more immediate level, scandal itself can generate a norm (that was not previously formulated at all) in cases like forced deportation and resettlement, the traceless disappearance of persons accompanied by state obstruction, illegal incarceration and torture, as well as political murder of every type. One who reacts indignantly and expresses counterfactual expectations in such cases does not have to reckon with dissent – almost as though the meaning of the norm was vouched for by sacred powers. The generation of norms follows the Durkheim model, it avails itself of public outrage (colère publique).[45] A juridical bestowal of form, a regulation in accordance with international law, can only attach itself to this but not act as source of law.
The dominant tendency, particularly since the end of World War Two and the decolonization of the globe, is to expand human rights – as well as broaden

45 See on this Emile Durkheim 1973. In particular see chapter II, 35ff.

their content and demand global observance. Corresponding to the development of the welfare state, the concept of protection within the realm of human rights has been completed – if not replaced – through a concept of public support. One places together needs and interests of »the« human, which are putatively foundational, and demands redress.[46] This corresponds exactly with the value concept, as dealt with above, and presents to all those engaged with it, either professionally or casually, a good starting point for communication. The question, »How are value conflicts resolved?« can thus be put on hold for the time being. Politically the notion of human rights is a foundation for poorer countries' demands on richer countries. At the same time, there comes a frightening magnitude of injuries to the minimum requirements for human dignity. From here, the inflation of the idea and terminology might lead to the widespread impression that human rights are disregarded anyway (one also speaks of ideals), and that in this question, everyone is sitting in a glass house. Therefore it is advisable to limit the discussion of human rights to the problems of injury to human dignity.[47] When this no longer occurs, one can inquire further with typical juridical caution.

Correspondingly one must distinguish among causes: »exemplary experience of injustice«[48] is one thing, horror and (helpless) outrage is another. In any event, it cannot be a matter of some type of global-style social work when a norm that evades all conflicts of interest is sought. That this is not an objection to social work or developmental aid should be self-explanatory. But with regard to political opportunity and limited economic possibilities, the problem is a matter of a different caliber. Of injuries to human rights, experienced globally in a unified manner, one can speak only of unambiguously unacceptable occurrences, when the weighing of pros and cons is no longer an option, and at best an understanding for tragic choices may still be expected. Injustice, in any case.

In this situation one could replace the semantics of human *rights* with one of human *duties.* That would mean holding state governments responsible, at least in the sense of keeping order within their territory. And it would correspond to a mounting tendency that also structures the global societal system more strongly for politics, and that understands the state organization not only as an expression of the will of the »people« but also, and perhaps first and foremost, as the international address for questions about the provision of order.

46 Just see Brugger 1989; 1992 – indeed with reference to the dangers of »inflating« (1992, 31) and ideologizing (1992, 30), which however are hardly to be avoided in this concept. In relation to the *juridical* applicability of *anthropological* justifications, Riedel (1986, 205ff., 346ff.) expresses skepticism.

47 Thus also see Bielefeldt 1988.

48 Thus see Brugger 1989, 562, and 1992, 21f. on the distinction between »exemplary experience of injustice« and »elementary experience of suffering«, and with a different catalogue of criteria. As to the latter sense, I understand the formulation of Heiner Bielefeldt (1988, 430): concrete, historical experiences of injustice. But the formulation should be sharpened in order to distinguish the scandalous from justified discontent over a given situation.

But then one would also have to consider what would be surrendered by this change of terminology. Talk of subjective rights had been a program for the unfolding of paradoxes. It was a matter of lending *objective* validity to *subjective* rights – of socially recognizing individuality and, through this, making the individual's unsociability the basis for regulating the legal system of society. Notwithstanding all the legal-theoretical controversies that might indicate the illogicality of this thought, it has proved its value in legal practice. Precisely this figure has proven to be the basic principle covering all possible claims up to the claim that law and politics are to be formed in accordance with the individual's own opinion. This may or may not be tolerated according to political requirements of scale, but when it leads to conflict between individuals, the state (as far as there still is one) will not be able to look on inactively just because it finds that both sides are right. It may also come to a loss of plausibility for the program of unfolding the paradoxes of subjective rights – but not necessarily to an abandonment of the legal-technical figure. The program, however, certainly leads to questions about the relevance of the figure when the problem of the indispensability of certain systems-vital norms is posed.

In effect this analysis changes the way in which the indispensability of norms becomes a problem. Realistically viewed, it is not a matter of conclusive formulas for an edifice of norms, nor of principles, nor of a basic norm, nor even of a highest value that encompasses and trumps all others. But it is also not a matter of postponing decision until uncoerced discourses have led to a reasonable result that will produce consensus among all sagacious individuals who only require certain procedural guarantees for this. Viewed cognitively, it concerns paradoxes – the self-blockage of knowledge that is not resolvable logically, but only creatively. And normatively viewed, it is about scandals with norm-generating potential. A high degree of contemporary relevance inheres in this problem given global-societal realities and the creeping intellectual defeatism that reacts to the problem. Ultimately, the question this situation confronts us with is: What can we do? But before we can ask this, there is a vital preliminary question: How can one observe and describe adequately?

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