# Interpretation of Law in the Global World: From Particularism to a Universal Approach

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# Chapter 2
# Discourse Ethics as a Basis of the Application of Law

**Bartosz Wojciechowski**

**Abstract** This chapter forms a theoretical, philosophical, and legal study concerning the issue of legal argumentation and judicial discretion. The issue is discussed in relation to all of the traditionally identified stages of the application of law. I discuss the foundational relation between discourse ethics, the application of law, and democracy. There are two main theses that form the starting point for the analyses presented in this chapter. First, that legal reasoning is inherently discursive and, second, that legal reasoning should be communicatively rational. The statement that legal thinking has a discursive character seems irrefutable. The aim of this chapter is to present the application of law as a process of balancing arguments, meaning a movement from a syllogistic model to an argumentative one, in which – according to the author – abiding by discourse ethics plays a vital role. It is a model which corresponds with liberal and deliberative judicial practice. Morally, it represents the best interpretation of pluralistic and multicultural society. This model is then based on the assumption that finding the meaning of a juridical text is a result of complex discourse, in which it is significant to take into consideration all cultural dimensions and which cannot be conducted without the active role of judges.

## 1 Introduction

Globalization processes have caused a cosmopolitan, or perhaps still multicultural, society to create a material basis of the new ethics, within which exists a need to justify our behavior not only within a national state but also in front of the whole world. Such new ethics have not only universalistic aspirations, but most of all extra-national and trans- and intercultural ones; however, its main function is to

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serve the interests of all the inhabitants of the world (Kessler, 2000; Apel, 2007, p. 55 et seq.). In my view the communication change made all over the world does indeed attract people's attention to the ethical globality problem; therefore, I would like to emphasize the growing role of the ethical and social concepts that derive from the Frankfurt school, which possess both generality and globality at the same time. In this context, Jürgen Habermas' words are symptomatic: "Universalistic position does not intend to deny pluralism as well as the total non-compatibility of characteristic, historical forms (*historische Ausprägungen*) of «civilized humanity», but the variety of life *limits it to cultural substances* and it proclaims that each culture – if it is capable of achieving a certain degree of «awakening» and «sublimation», must share definite *formal properties of the modern understanding of the world*" (Habermas, 1981, p. 316; Habermas, 2008).

## 2 General Assumption of Discourse Ethics

Discourse ethics are such ethics that are aimed at duties regulating human coexistence. They refer to the mutual limitation of freedom as well as indicate interests and goals which ought to be assigned a scope and manner of their mutually accepted realizations. Hence, discourse ethics lead to such a way of justifying norms and obligations which – in case of a conflict among the intra-particular moral, religious, or view-of-the-world notions – can constitute an elementary, common ground for an acceptable agreement. One of the most crucial elements contained within discourse ethics is the thesis that the conditions that enable the argumentative process possess themselves an ethical-normative character, thus providing a foundation for the procedure of ethics justification. It allows the combination of serious universal claims with it as well as perceiving it as a project of universal ethics.

The idea of the ultimate norm justification is a fundamental element in the philosophy of transcendental pragmatics. It is impossible here to present its assumptions and the criticism aimed toward it; hence, I will confine myself to indicating its basic messages. The justification of "universal-pragmatic" discourse rules depends on showing that the contract of definite rules is the condition that enables the interpersonal communication, which – according to Apel – obtains a status of the ultimate justification (Apel, 1973, p. 222). Human nature indicates that denying this idea, and at the same time denying the process of argumentation, would lead to schizophrenia and self-destruction (Apel, 1973, p. 414). Habermas, for whom the contract of certain rules is the basis for enabling making definite speech acts, has a similar opinion. Resigning from these speech acts, in turn, is not possible without desisting behavioral forms seen as typically human (Habermas, 1984b, p. 353). According to Apel, the concept of transcendental argument is defined as follows: "This who argues, *implicite* recognizes all possible claims of all participants of the communication community that can be justified by rational arguments ... and also commits oneself to justify all own claims towards others through presenting arguments" (Apel, 1973, p. 424). Discourse rules therefore have a two-level character, between the

formal-procedural final and the consensual-communicative justification of substantial norms. The first-level norms are discourse rules relating to those recognized in the freedom of formal-procedural norms, which are included *implicite* in ethics; the second-level norms, however, would be those that are still distinguished from material (thus relating to a concrete situation) norms given only by practical discourses (Apel, 1997, p. 122).

The assumption that each participant of the discourse has the possibility of each argument means that the interpretation of individual preferences cannot be arbitrally disconnected. The heart of the problem lies in the fact whether there exist reasons supporting ruling out certain preferences or concepts of good from being affected for the choice of justification rules and which reasons could not be rejected by any participant of the discourse (Baynes, 1990). Such a depiction of the civil justification of political rules corresponds with the rudimentary idea of the discourse ethics, which assumes that a norm is justified only when all the participants of the actual discourse are unanimous and where the power of argument is above the argument of power (Habermas, 1986). Furthermore, dealing with the discourse obliges one to observe definite validity claims (understanding, veracity, sincerity, and correctness of what one says). Naturally, the discourse that concerns the laws will be subject to certain limitations stemming exactly from the legal order (Alexy, 1978, p. 62 et seq.). The limitations resulting from democracy, which paradoxically are also subjected to discourse justification, appear to be the most important.

It is therefore important to distinguish various types of discourses according to assumed limitations, which allows us to state that legal discourse differs from a moral discourse, just as both of them differ in their limitations from political discourse (Habermas, 1989, p. 147 et seq.; Alexy, 1978, p. 62 et seq; Neumann, 2008). As a consequence, the model of discourse ethics does not assume and it does not require that the result of each actual discourse be a unanimous agreement. Only within the actual discourse itself can the conditions required for an individual autonomy be explained and justified. Kenneth Baynes ascertains quite accurately that on the basis of discourse ethics it is rather required that either the compromises that are being achieved or those that have been achieved be conscientiously thought over in the sense that the principles, rules, and arguments that order such discourses are open to public discussion and can be substantially agreed upon on the deeper level of justifications (Baynes, 1990). A deeper level of justification of laws and political ideas requires recognizing as well as considering the conditions and the presupposition of the action of the very justification. However, the debates taking place on that deeper level, but concerning the questions of basic constitutional laws or a preferred model of legal and political institutions, are a less relevant subject for an honest compromise or the majority rule, because it is only in the context of these laws and institutions that the rules of making decisions are regarded as honest. Baynes also notices that the changes concerning constitutional matter and basic legal institutions require a broader agreement bordering with unanimity, which, as we know, is practically impossible. In order to solve this problem the so-called stimulation discourses (Rawls, 1971) are not sufficient since they themselves do not guarantee the participation of all citizens in a public debate in the same way; hence, they cannot lead to

the unanimous agreement of all persons involved. Therefore it is postulated to apply the complementary theory of social institutions within which creating such institutions that are indispensable to expanding the possibilities and variety of the actual discourses in the political sphere on all levels will be considered, that is to say, on the level of civil society and on the political-national (constitutional) one as well as on the grounds of the contractual ideal of unconstrained moral-practical discourse understood as the ultimate justification for various forms of institutionalized debate (Baynes, 1990).

The author of *The Theory of Communicative Action* starts off with the conviction that the source of communication rationality is the unifying power of the discourse, without which any constraint establishes the consensus among the participants. By communication rationality then he understands speech based on arguments, thanks to which various discourse participants overcome their originally subjective convictions and thanks to the communally shared rationally justified assumptions they come to the unity of the objective world as well as the inter-subjectivity of their lifetime relationship (Habermas, 1981, p. 33). In such a way, the discourse participants (citizens) determine not only the veracity of the statements and the effectiveness of theological actions (theoretical discourse – instrumental-cognitive rationality), correctness of action norms (practical discourse – moral-practical rationality), or the clarity of statements (explication discourse) (Habermas, 1981, p. 410 et seq.) but also the correctness of legal norms (legal discourse). The law is understood as the expression of "the rational formation of inter-subjectively shared form of life" (Habermas, 1992, p. 192). In other words, the communication reason is confirmed within the binding force of the inter-subjective agreement and mutual recognition, but moreover it constitutes the universe of the common form of life. At the same time the communication action has an emancipated character, though confirming the aspiration toward overcoming the disagreement through argumentation and it expresses the systematic interest of the reason in the assurance material conditions which enable its fullest development. In this context, Habermas states that communication action "is renewed with each act of unconstrained understanding, with each moment of living together in solidarity, successful individualization and saving emancipation. (...) The communication reason acts in history as the soothing power" (Habermas, 1984b).

Everyone who accedes to the discourse assumes the ability of all its participants to take part in rational argumentation, renounce violence as a means of imposing certain acceptable arguments, and moreover agree to accept the conclusion that constitutes the effect of a well-argumented, unconstrained dialogue. In other words, rational argumentation determines the validity and effectiveness of a definite communication action; it's an element allowing the assessment of judgments and actions. As a consequence, rationality manifests itself when a participant of an argumentative process puts forward validity claims, he assumes the existence of rules and processes that are obligatory to acknowledging the court or the effectiveness of actions. Taking on discourse obliges one to obey some definite validity claims (intelligibility, truth, truthfulness, and correctness of what one says). In other words, this means intelligibility claim, the claim to truth (that the propositional

content of his speech act is true), the claim to truthfulness (a speaker communicates authentic statements in such a way that the listener could recognize his statement as reliable, in his speech act he expresses truthfully or authentically his opinions, emotions, wishes, etc.), the claim to normative rightness (the claim to correctness) – the statement is correct in such a meaning that the participants of communicative actions accept his statements in the accepted axiological system (Habermas, 1981, p. 410). The Frankfurt philosopher correctly points out that the mutual understanding and achieving the consensus in the situation (reality), in which lies, mystification and manipulation occur, is not possible. According to Habermas, rationality then has a procedural character and the measure of the rationality of the discourse participants is the ability to justify through, rational argumentation, their views in all circumstances. That means that the concept of communicative rationality belongs to the cognitive stream of ethics as the principles that have the universal, normative, and non-limited character constitute the assumption of each argumentative discourse and enable the consensual achievement of understanding. Habermas also assumes that the knowledge concerning the formal-pragmatic acts of speech is implicitly included in communicative actions and possesses the intercultural importance. The consequence of such a conviction is the fact that "the one that acts communicatively must assume certain pragmatic assumptions that have contractual character" (Habermas, 1992, p. 18). In other words, he must perform the idealization that depends on the necessity of realizing the above-mentioned validity claims.

In other words, the rules, principles, and norms, regarded in discourse as non-limited, serve the rational indication and agreements of social expectations, consequently reducing social tensions. It is important to emphasize that one considers looking for the universal rules of discourse in the basic criterion of the acceptance of the argumentation process with reference to law (especially the process of the application of law). Hence, the principle that "Each legally valid (in force) norm must meet this condition that the results and side effects, supposedly emerging from its common perception in order to satisfy each and every one's interest could be accepted without any compulsion by all who are interested" (Habermas, 1984a, p. 219). This principle has a universal character, but it is at odds with the transcendental-pragmatic ultimate justification of K.-0. Apel, which, according to Habermas, is not either possible or necessary. At the same time it constitutes the assumption of each practical discourse, thus being the non-limited rule (Alexy, 1978, p. 74). Habermas transfers the assumptions concerning discourse ethics into the considerations concerning the law, transmitting the principle of the discourse onto the surface of law, which in spite of the moral contents is neutral in relation to law and morality. "Only those action norms are valid to which all possibly affected persons could agree as participants in rational discourse" (Habermas, 1992, p. 138). In the consequence of such an application Habermas attempts to find the system of law that would meet the rule of the discourse, that is to say, in which it will be clear why private and public autonomies, human rights, and people's sovereignty overlap.

My goal is to present the judicial application of law from the viewpoint of the theory of discourse, which decisively binds the judge with the norms of valid law even in the circumstances of a discretionary decision that is left to him. I will

try to justify the thesis that the unconstrained recognition of a judge within the argumentative-interpretative (discursive) model will be substantially (or perhaps completely) limited to a relevant balance combining the rules and goals of law by a judge.

## 3 The Concept of the Discursive Model of the Judicial Application of Law

With reference to J. Habermas' views it was earlier stressed that the behavior of discourse participants in communicative actions ought to be coordinated through acts of reaching understanding and not by egocentric calculations of success. Decisions made in such a manner are rational and correct as they come into existence during an unconstrained discussion and ultimately they mirror the convictions of the participants. The conditions assumed within such a procedure allow balancing definite rights, grant the right to the confrontation of ones own (the judge's) validity claims with others. The paradigm of the application of law is the judicial application of law and within this the legal discourse is close to an ideal situation of the speech as it takes place among separate subjects of the dialogue and toward impartial, independent dispute (not engaged in the court) and the rationality and claims to the correctness constitute its basic features. It might then be stated that reality (the elements of the concrete state of things) depicted in such a way becomes subject to negotiation during a trial as the law is a form of social discourse in which all its participants are equal and limited solely by the procedural rules that are significant in a given case.

It is emphasized in philosophical-legal literature that the ideal discursive situation on the grounds of the law is characterized by certain separate properties. In legal action the discursive situation is not always identified with the communicative one, whose goal is to reach a common consensus. The consensus is often replaced by an authoritative legal settlement, i.e., the arbiter's decision who is acting as an impartial person in a dispute. The authoritative character of the settlement is primarily noticed in criminal proceedings. In a legal discursive situation, the consensus in the formal sense depends on the subjects' agreement concerning the idea of the law as well as on the submission to the arbiter's decision in accordance with this idea. In a democratic society a rational action within legal bounds, serving the common good (social consensus) through the legal safety assurance, the sense of justice and correctness is the limitation of freedom of decision. The non-rational decision can be otherwise referred to as arbitral, excessive, unneeded, or such that violates the basic laws of the individual. Irrational actions, like the decisions based on the freedom, contradict the principle of a law-abiding country. As it is rightfully stressed in the jurisdiction, the freedom to make decisions does not go hand in hand with the principle of the equality of the parties in the discourse, which is treated as a warranty of the respect of an individual and the principle of a democratic legal country, especially in civil proceedings and with certain limitations also in criminal proceedings. In the legal

discourse, the intra-sphere assumption of the gradation of discourse rates appearance is indispensable. This gradation is determined by the autonomy of procedures, i.e., the civil proceedings (liberal proceedings) as well as the criminal proceedings (non-liberal proceedings). (Król, 1992, p. 84)

A judge does not have full autonomy with his independence; rather, he is subordinate to the act as well as the culturally shaped standards of the evaluation of the rationality of the issued decision. On the basis of the highlighted features of an ideal judicial discourse situation we can say that they created "a discursive model of the judicial application of law" within which dispute resolution will be conducted on the basis of a dialogue and the acceptance of the arbitral judicial decision by the parties to the dispute. In the discursive judicial model of the application of law, the validity of the resolution will play a special role. It results from the fact that each contemporary continental system of law assumes a construction of the closure of argumentation, exactly in the shape of the institutions of the validity of the resolution. The force of law as the rule of this discourse has a conventional confirmation of the arbiter's decision that is based on the preceding dialogue that fulfills four communicative requirements. It makes a legally sanctioned method of the closing of pending discourse. The force of law as a form of the obligation that comes from the state is not only an order (the obligatory power of the individual's decision) and a ban (*res iudicata*) but also a procedural framework of the legal (judicial) situation of the discursive situation within the communication of the parties that is widely understood (Król, 1992, p. 84).

Also Ronald Dworkin notices that the theory of the judicial ruling is a discursive theory (Dworkin, 1977, p. 127 et seq.). Such a thesis is based on the assumption that a judge, while settling a given case, ought to first of all depend on the correctness of his own judgment in order to make any judgment, but he also may decide that it is his institutional responsibility to fall back on the judgment of others. Thanks to such a position the judge is certain that his resolution is not ultimately determined by his own views or political preferences. The morality of the oracular judge causes a situation in which the process of his hearing certain testimony by others can become convincing for him; however, his judgment technique does not rule out the issuing of a resolution contradicting popular morality. Also in such a situation the judge is not guided by his own convictions, but he makes a judgment, whose substance is the statement that the social morality is incoherent in a given scope.

In the theory of the legal argumentation it is emphasized that if one wishes to require the connections of the constitutional-legal argumentation processes and statutory requirements one ought to assume that jurisprudence has such criteria and regulations which allow distinguishing correct and incorrect resolutions of the applicant of law (Alexy, 1985, p. 498). Binding by law is understood here as binding by legal rules and legislative will. I want to point out that the legislative will (the rational employer) is treated as an element that identifies the correct judicial decision and which refers to the authority generally accepted in a certain culture. Such a stand introduces a significant anthropological dimension in the theory of discourse. The consequence of this binding is in fact the necessity of the application of definite principles and rules of argumentation (Alexy, 1978, p. 176).

The claim to correctness (*Richtigkeitsanspruch*) assumed in the legal discourse ought to limit judicial discretion through appealing to a wider perspective than principles or rules resulting only from the same applied norm, i.e., to the principles and rules formulated in a communication common to all mankind, that is, to the ethics of speech. Owing to this, the statements of the application of law are a special class of speech acts, which assume a philosophical claim to correctness realized precisely in the universal practical discourse through a relevant procedure (the procedural theory of discourse) (Alexy, 1978, p. 77, 1985, p. 50, 1995, p. 96). Naturally, as the legal discourse is the only example of this practical discourse, it is not possible to formulate the application of the universal law of the claim to correctness for a judicial trial in each case (Alexy, 1978, p. 263 et seq.). Alexy does not explain his concept of the legal discourse whether and why such a claim to correctness should be assumed in the legal practice. He only proves that the principles and forms of arguments of the legal discourse cannot always fulfill the same universal claim to correctness. The claim to correctness is not considered from the interior perspective of the practical analysis of justice, but it is deductively assumed.

The conflict of directives (principles) and goals that limit judicial discretion illustrates the need to understand the application of law as a model that depends on balancing relevant principles and goals. In balancing such principles and goals we may consider preferences, interests, good and values or rules. The balancing of the principles here consists of justified determination of the priority relation between the colliding principles, and in so doing I will refer to principles as such norms which are characterized by gradation. Such a collision of principles and goals results from the fact that various principles (goals) that can be applied in a given case cannot be simultaneously fulfilled in a complete way (Sieckmann, 1995, p. 46, Alexy, 1995, p. 46 et seq.). It is not then about the obvious collision of the norms (rules) of law, which means a situation in which a given case is regulated by more than one legal rule, and these rules designate to the recipients' mutually excluding ways of behavior. It is then not possible for the recipients to act according to the ruling of each of these rules. In order to eliminate such a collision we apply the "colliding principles." The understanding of the goal here refers to the policies distinguished by Dworkin. They set a goal which is to be achieved and which usually refers to the economic, political, or social aspect of life of a certain community. It is then about the understanding of the goal or principles as relatively significant. In my opinion, Dworkin's idea that the principle shows a certain direction of argumentation without extorting a certain decision is accurate. "There may be other principles or policies arguing in the other direction – a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle ('No man may profit from his own wrong') may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive" (Dworkin, 1977, p. 26).

The judicial settlement does not then require in each case a consensual fulfillment of the universal resolution of the understanding assumed in the theory of the practical discourse, but it does require the conformity of the resolution with the

text, values, and goals of the norms that belong to the valid legal order. In other words, the rationality of the one who determines cases ought to be adequate to the valid legal rules, the accepted culture, and legal tradition as well as to the rationality understood in a transcendental way, and by the legislator's will. Such a conclusion is the consequence of accepting Alexy's thesis (*Sonderfallthese*) that says that the legal discourse is only the case of the practical case. Consequently it is the application of the rule that is to be the criterion for the discovery of the rational and correct resolution.

We can find such an assumption in the principle of the legal democratic country, from whose substance we learn that each resolution ought to find its own justification in the valid law. The theory of discourse assumes binding a judge with the constitution or an act, but at the same time it indicates that the normative text itself may not determine a complete decision. It is then necessary to appeal to "a code of practical reason" (Alexy, 1978, p. 234 et seq.) in order to properly justify the decision. Thanks to this, the decision will be limited not only by the principles or rules resulting straight from the applied law, but it also realizes the set of rules, which also cover the substance of the same law.

The principle of the legal democratic country with its requirement of the justification and the possibility of review of each decision that is based on relevant legal principles may be treated as a special codified case of the discourse ethics. As we can also see in the theory of the legal discourse, which preserves a positivist understanding of a legal norm, *binding law* is understood as a binding of values and goals that result from it. A judge is not allowed to make decisions which contradict the unanimous tone and goal of a given norm. If he was free to give such a judgment, especially within the range of balancing certain principles and goals that influence a choice of a given legal consequence in a deciding case, he ought to act, next to legal indications, according to the discursively realized rationality claim and other principle of the practical discourse. The process of the application of law and balancing between the given forms and principles of argument, the principles of the practical discourse, and the principles of law ought to take place on the basis of the boundaries which result from the binding of the argumentation with the formal principle of the legal country. A decision made in such a way ought to always be closest to the goals and values resulting from the applied legal text as well as the valid legal order, which undoubtedly guarantees its larger role in the argumentation.

## 4 Seeking the Priority Principle as a Subject of the Application of Law

The above-mentioned overall depiction of the problems of the limitation of the judge's discretional power will be especially useful in tackling the situation in which the unconstrained recognition of the judge in the process of the application of law within the boundaries designed by the valid law becomes limited to the balance between the colliding principles or legal goals (rights). For example, the collision

of legal rules is the collision of two principles (directives) of judicial sentencing, i.e., the principle of humanity as well as the directive of general prevention. The proof of the approval of the principle of humanity is the hierarchy and the sequence of penalties, adopted in ancient codes, according to which one gives the penalties according to the degree of their significance (non-insulating), that means the ones that do not cause direct sufferings – a financial penalty or the restriction of freedom. However, imprisonment ought to be applied through a decisive court as a last resort when other penalties would be insufficient.

On the other hand, the legislator pointed out the needs within shaping the legal awareness of the society, formulating the directive of the overall prevention as one of the most important directives of the judicial sentencing. This directive is applied so that the fact of the infliction of the punishment has an influence not only on the offender but also on other potential offenders, who, in the first place, ought to be deterred by this punishment and also shape socially accepted attitudes. Such an application of the criminal law and the imposition of appropriate punishments serves to convince the society that criminal law is not artificial but that everyone will bear deserved responsibility in case of inflicting it, which in turn ought to serve the observance of law.

The principles are understood here as a norm, which assume the approximative realization of a certain ideal. The principles are connected with the order of optimization and require the single matter to be settled on the basis of legal and real aspects (possibilities) in a most precise way (Alexy, 1985, p. 75). According to R. Alexy, the connection between the notion of principles and the notion of the optimization is a definitional, analytical connection emerging from the structure of principles. The requirement of the optimization comes from the fact that the principle ascertains an ideal obligation (Alexy, 1995, p. 214). In his interpretation of the principles as non-conclusion directives, also R. Dworkin points out the fact that if a given system of law is sufficiently developed and consists of a group of principles, rules, and constitutional practices as well as numerous precedents and acts, one can always assume the possibility of finding only one correct decision (the right answer) (Dworkin, 1977, p. 285). Moreover, Dworkin also states that a legal principle will be a reason which must be taken into account by a judge while he is making a decision (Dworkin, 1977, p. 26). Taking into consideration the above-mentioned examples, we notice that while determining the legal consequences, the principles (goals) can be fulfilled only to a certain degree. The degree of fulfillment is dependent on the degree of the measure of fulfillment of a given principle or goal in a concrete case to a complete fulfillment (Sieckmann, 1995, p. 47).

According to J.-R. Sieckmann, the acceptable results of balancing and consequently the rules of propriety can be presented as the combinations of "the degrees of fulfillment of the colliding principles (goals)." Consequently, the decision, which is optimally made from the combination, requires every explanation and every justification. The result of balancing is optimal when any other state of things cannot be indicated, which in any case (of the fulfillment of one principle) is better, or at least equal in any other case (of fulfillment of one principle). Another requirement of the optimization is the decision that the result of balancing with the view to the

significance of the colliding principles must be as good as any other possible case. In other words, no other result can be better than the chosen result of balancing.

Sieckmann is correct in admitting that the statement *if the result is better than any other one* must be conducted with the help of a relevant valuation (the use of the valuing function). Such a valuation is supposed to order the results of balancing as equal, good, or at least as good, or better than others (Sieckmann, 1995, p. 48). First, he indicates a purely intuitive way of valuing that depends on the establishment of any result without giving further criteria that justify such a relation. The other possibility depends on valuing the balancing results according to certain balancing of relevant properties. For the balancing of the principles, the establishment "to what degree the colliding principles fulfill each and every possible result of balancing" may be the relevant possibility. The results of the balancing can then be characterized as the combinations of the degrees of fulfillment. The degrees of fulfillment are not the sufficient basis for the justification of the balancing decision as it also depends on the significance of the colliding principles as well as on the validity of their fulfillment. Naturally, such a valuation is connected with the settlement of a given principle on the preference scale values. Such a relation of preferences should be anti-reversible, asymmetrical, and transitive. Naturally, that requires the decision of the assumption of the rationality of the preference process, which in turn is connected with the assumption of the thesis of legislator rationality, especially his axiological rationality.

We learn from these considerations that in the process of the application of law, even within the judicial discretion, there are legal limitations in the shape of the necessity of balancing colliding principles on the basis of a correct principle of priority. The relation (principle) of priority between the colliding principles (goals) allows us to determine what conditions need to be met in order for one definite principle (goal) to take place before another principle (goal) in a discussed case. It is vital to emphasize that balancing (the determination of the priority relation) takes place with regard to the choice of a relevant meaning of the interpreted legal norm, defined legal consequence, or making the right decision that shapes the course of legal proceedings. It must be pointed out that every principle (goal) may give rise to different legal effects.

We may also conclude from it what solution, in a single case, will have to be determined as exactly connected with the valid law as it was discovered by the relevant balancing of the definite principles (Alexy, 1985, p. 78; 145 et seq.; Sieckmann, 1990, p. 65). It must be pointed out that the conditional character of the priority relation allows finding it on the way of the appropriate balancing even when the legal system is not characterized by the ideal noncontradiction and the axiological cohesion. Naturally, these principles that justify binding by an act will play the biggest role. The balancing of legal rules expresses a comparative and normative attitude between the degree of fulfillment of one rule and the importance of another one. This relationship exists only when we assume the fulfillment of the following conditions: such a relationship must be relative to a definite situation and it is only valid in such cases which are characterized by the relative balance of colliding principles.

Referring to various principles (types of arguments) in the process of the application of law may lead to the contradiction in justifications of the issued decision. One must therefore decide which principles come first while justifying a given decision. Making use of the terminology introduced by R. Dworkin, we may talk about the relative significance of rules He states: "Principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each" (Dworkin, 1977, p. 26).

The conclusion is that the essence of binding DS with the statutory goals or values resulting with a given legal order is the answer to the question of whether it is possible to define a solid, always correct relationship of the priority between all statements (values, goals) of the applied laws or the principles that result from them. The most general rule, which can be applied when balancing the principles, is "The higher the degree of nonfulfillment or impairment of the one principle, the greater must be the importance of the fulfillment of the other principle," defined by R. Alexy as balancing law (*Abwägungsgesetz*) (Alexy, 1985, p. 146). The significance of the principles is most often understood here as their relative importance which directs us to say to which degree a given principle should be fulfilled, and on the other hand it justifies the given degree of nonfulfillment or impairment of another colliding principle.

## 5 The Judge as a Real Participant of the Communication Community

A judge, while deciding a case based on the nature of the discretion that is given to him, must always take into consideration firstly the goal and values of the law and secondly the general goals and values of the whole legal order. Consequently, we can observe the departure from the syllogistic model into the argumentative-interpretative legal application of law. It leads to the necessity of each balancing between a range of goals and principles (directives) that limit the judge's freedom in making a decision and shaping the legal proceedings. It is not possible to indicate a universal principle of priority which could be applied in each adjudicated case unless its form will be as general as to be able to realize such a formal rule: the application of formally established norms; applying norms, which should be valid according to an empirically claimed legislator's will, the application of a norm, which constitutes a rational consequence of articulated or assumed by the legislator, which requires at the same time a relevant interpretation and balancing having a complex character in relation to each case.

Allowing a judge to have the freedom in balancing principles and goals leads to the conclusion that the balancing process is only his individual and subjective concern. However, he is assumed to have the ability of such balancing, recognizing what leads to the formulation of a correct principle or goal in any given case. Moreover,

he is aware of conducting such balancing and he also aims to issue the only correct decision (Vila, 2000, p. 192 et seq.). There should be then objective criteria for the correct application of principle and balancing the colliding principles or goals. The lack of them will trigger the danger of the impossibility of distinguishing between the real application of a principle or realizing a goal and only a belief that the relevant principle was indeed applied. The criteria of controllability, justification, and the rationalization of a decision, i.e., such decisions that will enable us to arrive at a discursively correct decision. Then the problematic and significant issue is the question of whether and how the priority relation (or the decision that such a principle (goal) has the priority, and moreover according to what criteria the priority between the colliding principles (goals)) should be determined.

The justification of the decisions in which balancing was used poses a question about the possibility of binding by the one who decides with the "balancing judgment" of the rationality, correctness and objectivity claims (meaning the inter-subjective normativity. The answer could be produced on the basis of the diversification between the "positive balancing judgments" and the criticism of the "balancing judgments" (in other words "a negative balancing judgment" – *Kritik von Abwägungsurteilen*) (Sieckmann, 1995, p. 52 et seq., p. 63 et seq.). By the term "the positive balancing judgment" we understand the determining of the priority relation between the principles. Such a priority relation may be ascertained intuitively or with the help of definite, further criteria. The intuitive ascertainty of such a priority must be connected with the claim to correctness. J.-R. Sieckmann notices the necessity of binding the judgment, which determines the priority between the colliding principles, with the claim to correctness as it results from the order of its presence in each discourse and with it, its priority before other principles (Sieckmann, 1995, p. 53). Then the one who encounters the balancing judgment must assume that the priority relation (determined by that person) is obligatory and at the same time it is obligatory to settle it.

It is not possible to present the whole concept of "positive balancing judgments." In order to do so it would be vital to discuss the absolute and relative theories of balancing, which are naturally extremely interesting, but the discussion about them would exceed the subject matter and the range of this chapter. I will then limit myself to the introduction of the concept that is generally called "the criticism of balancing judgments," which – in my view – merits a wider, practical application and is more useful from the point of view of the justification of discretional judicial decisions.

The concept of "positive balancing judgments" is based on the assumption that they include the claim to correctness, which implies that the ascertained priority relation should exist and be recognized. The criticism of such judgments can bear a positively different balancing judgment, meaning such a judgment that is connected with the claim to correctness, which imposes the justification problem that is considered here. In other words, the discussed criticism may restrict itself to indicating some mistakes in the justification of "the positive balancing judgment," meaning the violation of the requirements of the impeccable balance. The concept presented by J.-R. Sieckmann includes the complex model of the justification procedure in the case of balancing the colliding principles (goals), in which the one who decides must

always respect the normativity claims and the objective correctness (Sieckmann, 1995, p. 69). The priority principles for the collision of the principles do not allow in themselves, according to such a concept, formulate regardless of the deciding case, but they emerge from each deciding settlement. Such a justification allows giving objective, or even inter-subjective connected criteria for the rationality of decisions, in which balancing rights – that is, the principles, goals, and values influencing the final judgment – must take place despite the fact that the judge was left with a certain degree of freedom. The judge can never present his balancing decision as the only subjective decision. Consequently, the judge from his view point must, in his own decision, take into consideration the thesis about "the only one correct" decision. Such a rationalization of balancing depends on the acknowledgment and the impeccable compliance with the optimization orders, the requirements of consistency and coherence as well as other balancing rights mentioned above. In other words, such balancing may serve as a paradigm of rational normative justifications. A violation of the discussed rights connected with the claim to correctness makes the balancing process a defective one; however, their observance facilitates the avoidance of subjective accusation and the arbitrary balancing of arguments and also avoids the accusation of the contingency of criteria, the acceptance of which influenced the result of the decision.

In summary, it is worth pointing out that the openness of legal argumentation should always lead the judge to the correct decision. Within such an argumentation the court may also come to the conclusion that in a given case important relations (interactions) are against the application of one principle (e.g., the principle of humanity) rather than for it. In such cases the court should abandon the application of such a principle in favor of another principle (e.g., the general prevention directive). The court applies the principle that is more relevant in a given situation and on this basis makes the relevant choice of legal proceedings (or the shape of legal proceedings) within the freedom that it is given. It occurs that the defined principles of goals can be applied only in a part of its range of application and the degree of this "applied part" will be determined by how "useful" the competitive principles or goals will be according to the judge.

The general principles and rules of legal importance formulated in the constitution and other legal acts can achieve the intended goal only when they are taken into account in a concrete decision. Only when they are recognized by the judge when dealing with each case. Thus, justice is always bound by such general principles, values, and goals, which greatly limit the judge's scope even in cases that gave him a great deal of discretion freedom. This limitation of freedom can be presented in two ways: with regard to the choice of alternatives and with regard to the choice of alternatives (or forms of arguments), whose chosen deciding alternative should be justified. The necessity of taking into account different goals and values leads to two consequences: firstly, it allows the definition of the expected result of the decision in a more certain way, and secondly, it also increases the possibility of the realization of the socially expected activities of legal norms, as the closer the results of a judge's activities are assumed, the more permanently they allow us to define the choice of a defined alternative in the case of applying a certain principle

or rule. However, binding the judge in his actions by the contract of the assumption of testing his decisions is a completely different matter.

A judge should realize the great power vested in him over the respective participant of social interactions that take place in front of him in the courtroom. He must then be a rightful participant of the argumentation process, aiming to obtain the nature of law on the basis of his own judgment which would be ethically accepted in a certain society as important, and objective rights would speak for him. He should never act on the basis of opportunistic reasons, he should be far from indolent in the application of law, and can under no circumstances refuse to participate in the legal discourse. We witness here an intriguing problem, especially in the context of the European integration of the participation of lawyers, especially judges, in our culture. The real participation of judges in our culture can guarantee the social approval for decisions that are issued by them. In the decision-making process, a judge should always be guided by the principles and forms of the arguments of the legal discourse. The importance of their fulfillment is closely connected with the reflective realization by the judges themselves of how important a role they play in social life. Through his competent conduct he should aim throughout the whole trial to issue such a judgment which will realize the principles that govern the discourse understood as "the speech regulated by the moral requirements."

The depiction of the application of law as a process of balancing arguments, which are for or against a defined alternative decision, is the expression of distinguishing the mechanical deduction of legal consequences exclusively from legal principles. We witness the journey from the syllogistic model to the argumentative one, which is characteristic for the law of the post-modernism epoch. In the system of institutional law, especially in the argumentative-interpretative judicial model of the application of law, the judicial decision, in the scope of both the material law and the adjective law, is always a decision of the application of law. It finds its reflection in the fact that it is a decision that can be justified by the applied legal norms, relevantly balanced goals, values, and principles that result from them, and moreover by culturally shaped patterns of the level of the rationality of the decision.

In such an understood system of law, the judge's role is to find an optimally legal decision, which is both rational and justifiable. Such a model of the application of law allows the judge to treat the act as only one of many sources of law, which is to be the point of reference for a judge. A legal text only specifies the law, which does not diminish the importance of one regulation, and the judge should be the guarantor of the widely understood law against the legislator's arbitrary action. The application of law moves from the mechanical into the reflective. Both the judges who apply the law and the recipients of their ill-fated verdicts become the equal participant of the communication community that is expressed in the symbolic-linguistic dimension of law. What is more, they can more fully participate in the public sphere as citizens who are able to comprehend or simply accept the legal reality that surrounds them, and they can create a community, of which the identifiable signs in democratic society can be a hermeneutic (argumentative-discursive) model of the application of law. Just as Jürgen Habermas, I perceive democracy as the basic way of solving a conflict and negotiating a collective action (Habermas, 1995, p. 169).

We can agree with the thesis that democracy constitutes "a means that allows different societies to make common decisions and the transition of authority without violence" (Gray, 2000).

The observance of the law and the acceptance of the verdicts are possible, thanks to the fact that the unifying element of society is language (Taylor, 1985, p. 263) expressed here in the shape of legal norms. At the bottom of such a model of the application of law and the vision of democratic society must lie common convictions when it comes to the values that at least take into account only the need for the protection of certain laws and freedom, while at the same time accepting the coexistence of different ways of life. Political morality (Dworkin, 2006, p. 2 et seq.) will be expressed, among other things, in the consideration of the dissimilarity of respective individuals or groups, the acceptance of equality, and the freedom of citizens, allowing them deliberative democracy and moreover – which I hope I was able to justify in this text – in guarantying the right and just procedure of the application of law. I am convinced that the real participation of the individual in the political community without providing legible and correct principle of the linguistic game before the court, and especially equal chances and the objectivity of the jurors, is impossible.

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