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Coherence and Revision – Critical Remarks on the Günther-Alexy -Debate

The aim of this paper is to propose a critical solution to the debate between Klaus Günther and Robert Alexy about the distinction between the justification and the application of norms. One of the main issues in this debate is whether a modified norm serving for the production of an ideal coherent system among the colliding norms has to be justified. This question, in my view, cannot be satisfactorily answered without a clarification of the concept of coherence and its significance for justification of norms. In this paper I will argue the resolution of norm collision in a certain application situation can be reconstructed as a process of revising an incoherent set of norms to a coherent one. By way of this reconstruction, it can be shown that the modified norm, as Günther claims, is already contained in the resultant coherent set; however, achieving a coherent set of norms is still a procedure of justification. Therefore, the resolution of norm collisions in a certain application situation cannot avoid the problem of justification.

1. The Günther-Alexy-Debate on Justification and Application of Norms

The foundation of Klaus Günther's theory of practical discourse is the distinction between the justification and the application of a norm. According to Günther, the justification of a norm is concerned with its validity, and only its validity. The validity of a norm is justified if all participants could agree with it in a discourse determined by freedom and equality¹. The application of a norm, by contrast, is concerned only with its appropriateness in a concrete situation. The appropriateness of a norm is determined with regard to all features of a certain situation and all norms which might be applied to this situation². The validity of a norm, however, can be justified only on the basis of limited knowledge and time; it is impossible in a justification discourse to consider all relevant features of every possible situation in advance. The consideration of relevant differences between possible application situations is artificially excluded in the justification discourse and shifted to the application discourse. The justification discourse is therefore situation-independent and limited to justifying prima facie norms only³. Prima facie norms are defined by Günther as norms which are only applicable in circumstances being equal in each situation. The prima facie character of a valid norm consists in the fact that its application to a certain situation could be inappropriate. In every situation there might be several valid norms which are prima facie applicable, but only one norm which is appropriate⁴. From this situation-independent character Günther draws the consequence that norm collisions cannot be the subject of a justification discourse, because valid norms collide with each other only in a concrete

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1 Klaus Günther, *Der Sinn für Angemessenheit*, Frankfurt a. M. 1988, 53 ff.

2 Günther (n. 1), 271, 298

3 Klaus Günther, A Normative Conception of Coherence for a Discursive Theory of Justification, *Ratio Juris* 2 (1989), 156 ff.

4 Günther, (n. 3), 159 f.

situation, and a justification discourse by definition must abstract this situation-dependent problem from its scope⁵. According to Günther, the problem of norm collisions is not concerned with the validity, but rather with the appropriateness of the colliding norms. Although the validity of *prima facie* applicable norms is presupposed in an application discourse, it does not determine which one of the colliding norms should be regarded as appropriate in a certain situation of application⁶. This question is to be answered by employing the criterion of coherence, which Günther formulated as follows:

“A Norm N_x is appropriate in the situation S_x if it is compatible with all the other semantic variants NBn and all the norms applicable in S_x ; and if the validity of each semantic variant and each norm could be justified in a justification discourse.”⁷

The criterion of coherence concerns not the justification, but only the appropriateness of an applicable norm. It says the application of a norm in a certain situation is appropriate if it is compatible with all the other norms applicable to this situation as well as their interpretations. The discourse of application turns into a discourse of coherence. To illustrate the construction of a coherent relation among colliding norms in a certain application situation, Günther used a school case⁸, in which a has promised Smith to attend his party, but hears that his friend Jones has fallen ill and needs his help, before he can fulfill his promise. Help can only be given at the time when the party takes place. In this situation, which shall be called “ S ”, there are two *prima facie* applicable norms, which can be roughly formulated as:

N_1 : A promise must be kept.

N_2 : Friends in an emergency must be helped.

Assume the validity of N_1 and N_2 has been justified in a justification discourse. It can be easily seen that the application of both norms to the situation S leads to a collision. Since neither norm can be regarded as invalid, this norm collision has to be resolved, according to Günther, through a *coherent interpretation*. To construct a coherent set of valid norms, it must be shown under which conditions the colliding norms N_1 and N_2 will be compatible with each other. These conditions will be given by establishing priority-relations between colliding norms⁹. If the application of N_2 is regarded as appropriate, then the result of the coherent interpretation can be formulated in the following norm:

N_3 : One ought to break a negligible promise in order to help friends in an emergency.

N_3 provides the only appropriate justification of the singular norm “ a ought to help his friend Jones”. Furthermore, Günther stresses that producing coherence through new interpretations of situations leads to “change, modification, revision” of the “semantic content” of valid norms¹⁰:

“If every valid norm requires a coherent completion with all the other norms which can be applied *prima facie* to the situation, then the meaning of the norm is changing in every situation.”¹¹

The coherent interpretation N_1 can be modified on account of the coherence interpretation as follows:

- 5 Günther (n. 1), 300
- 6 Günther (n. 1), 306; (n. 3), 163
- 7 Günther (n. 1), 304.
- 8 Günther (n. 1), 306; (n. 3), 162
- 9 Günther (n. 1), 162 f.
- 10 Günther (n. 1), 95
- 11 Günther (n. 3), 163

\mathcal{N}_k : Someone who has promised to do something has an obligation to do it except if he hears that a friend is in an emergency and needs help.

Now it is in question whether the resulting norms of a coherent interpretation such as \mathcal{N}_k or \mathcal{N}_3 need to be justified. Günther is aware that a coherent interpretation without construction of new norms or revision of the existing norms is not possible. Nevertheless, he denied that the norms which serve for the production of an ideal coherent system among colliding norms have to be justified in a discourse of justification, because such norms, according to Günther, are already contained in the set of valid norms:

“The interpretation moves along the lines and within the boundaries of the meaning of the norms and principles commonly accepted as valid. Within those boundaries we strive for an ideal coherent system among the colliding norms. All newly constructed norms which serve the purpose of producing support relations within this ideal system still belong to the set of norms commonly accepted as valid.”¹²

Exactly at this point Robert Alexy raises his objection. Alexy’s criticism begins with a reconstruction of the application of norms in the above school case. According to Alexy, the application of \mathcal{N}_1 and \mathcal{N}_2 to \mathcal{S} has the following structure ¹³

- (I) (1) Someone who has promised to do something has an obligation to do it. (\mathcal{N}_1)
 - (2) a has promised to attend Smith’s party
 - (3) a has an obligation to go to Smith’s party.
- (II) (1) Someone who hears that a friend is in an emergency and needs help, has an obligation to help this friend. (\mathcal{N}_2)
 - (2) a has heard that his friend Jones is in an emergency and needs help.
 - (3) a has an obligation to help Jones.

Alexy formulated the logical structure of (I) in the following manner:

- (I) (1) $(x) (T_1x \rightarrow OR_1x) (\mathcal{N}_1)$
- (2) T_1a
- (3) OR_1a

(1) represents the structure of \mathcal{N}_1 as a universal norm. “ T_1 ” represents “has promised to do h”, “ R_1 ” represents “does h”, “ O ” is the deontic operator “it is obligatory that...”. The logical structure of (II) is formulated by Alexy in a similar way:

- (II) (1) $(x) (T_2x \rightarrow OR_2x) (\mathcal{N}_2)$
- (2) T_2a
- (3) OR_2a

In Alexy’s view the application of norms only differs from the justification of norms insofar as its subject of justification is not a universal but an individual norm such as OR_1a or OR_2a ¹⁴. The more serious problem arises from the fact the application of \mathcal{N}_1 and \mathcal{N}_2 to the situation \mathcal{S} with the features T_1 and T_2 results in two individual norms which cannot both be fulfilled. This collision, as mentioned above, can be resolved by modifying \mathcal{N}_1 . Alexy formulates the logical structure of the modified norm \mathcal{N}_k as follows:

- $\mathcal{N}_k: (x) (T_1x \wedge \neg T_2x \rightarrow OR_1x).$

\mathcal{N}_k is compatible with \mathcal{N}_2 . Now both norms can be applied to the situation \mathcal{S} without coming into conflict.

After this logical reconstruction Alexy asks whether the resolution of norm collision in such a way can really avoid the problem of justification – in other words – whether the modified norm \mathcal{N}_k really does not need to be justified in a justification discourse. For Günther the justification of the modified norm is not necessary, because, as men-

¹² Klaus Günther, Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation, *Rechtstheorie* 20 (1989), 181

¹³ Robert Alexy, Justification and Application of Norms, *Ratio Juris* 6 (1993), 161

¹⁴ Alexy (n. 13), 162

tioned above, a norm such as N_k which serves for the production of an ideal coherent system among N_1 and N_2 still belongs to the set of norms commonly accepted as valid and thereby does not need to be justified again. However, Alexy thinks this thesis is wrong. According to Alexy, N_k shows “an additional normative content” in relation to N_1 and N_2 . N_k is not contained in N_1 and N_2 because it does not follow from N_1 and N_2 . Only with a further premise could N_k belong to the norms already accepted as valid¹⁵. Günther offers such a further premise with the idea of an ideal coherent system, but the idea of coherence, as Alexy supposes, refers to “the procedure of justification in a system”.¹⁶ If producing coherence is a procedure of justification, then the task of justifying the modified norm N_k in a discourse of justification will be unavoidable.

Whether and to what extent Alexy’s criticism is justifiable cannot be satisfactorily answered without a detailed analysis of the notion of coherence and its significance for the justification of norms. In the following I will begin with explicating Günther’s idea of coherence, then explain the connection between coherence and justification.

2. The Criteria of Coherence

In a recent work about coherence and legal interpretation Susanne Bracker summarizes the concept of coherence into three criteria: (1) consistency, (2) comprehensiveness, and (3) positive connection¹⁷. A set of sentences is accordingly coherent if it is consistent, comprehensive, and its elements connect with each other in a positive way. With help of Bracker’s analysis, Günther’s conception of coherence also consists of these three elements¹⁸:

(1) The criterion of consistency requires that a coherent set of sentences must not include any contradictions. This demand can be easily found in Günther’s claim that the appropriateness of a norm in a certain situation depends on its compatibility with other applicable norms and their interpretations.

(2) The criterion of comprehensiveness requires that a coherent set of sentences should comprise as many relevant elements as possible. This requirement can also be found in Günther’s demand that an appropriate norm must be compatible with *all* the other norms that are also applicable to a certain situation. To find out which norms are applicable, one has to take *all* relevant features of the situation into account. Hence the criterion of comprehensiveness in Günther’s theory requires that in a situation of application one has to take all possibly applicable norms and all relevant aspects of this situation into consideration¹⁹. An additional element which Bracker classified into the requirement of comprehensiveness is the deductive or inferential closure²⁰. A set of sentences is deductively closed if it includes its own logical consequences. In Günther’s theory it is unclear whether the logical consequences of all applicable norms should be also accepted as valid or not. This question has a great significance for clarifying the debate between Günther and Alexy and I will come back to this point soon.

15 Alexy (n. 13), 165

16 *ibid.* For Alexy’s conception of coherence see Robert Alexy and Aleksander Peczenik, *The Concept of Coherence and its Significance for Discursive Rationality*, *Ratio Juris* 3 (1990), 130 ff.

17 Susanne Bracker, *Kohärenz und juristische Interpretation*, Baden-Baden 2000, 171 ff. Bracker’s idea is based mainly on Rescher’s coherence theory of truth, see Nicholas Rescher, *The Coherence Theory of Truth*, Oxford 1973.

18 Bracker (n. 17), 102

19 Günther (n. 1), 29 f.

20 Bracker (n. 17), 171 f.

(3) The third criterion of coherence, the positive connection, can be clearly seen in Günther's search for an "implicit theory which establishes an internal context of justification for the otherwise disordered valid norms of a form of life"²¹. Günther tries to get hold of this by employing "paradigms" which put an unordered set of valid norms into a transitively ordered one. The paradigms consist of prima facie priorities offering appropriate solutions to the typical and expectable cases of collisions. Nevertheless, in an unexpected case with a different constellation of features, the existing paradigms could be challenged and new concrete priority-relations between colliding norms would be established²². Finally, the positive connection in Günther's model of coherence can be formulated as follows: The elements of a coherent set of norms are connected with each other if definitive priority relations or prima facie priority orders are established between them.²³

From Günther's statements we may infer that the criteria of coherence are applied to "the set of norms commonly accepted as valid". In order to be comprehensive, this set must contain all those norms relevant for the case to be decided, as far as their validity is not questioned by the participants in the justification discourse. This comprehensive set, for the sake of simplicity, can be regarded as a set of norm-sentences expressing valid norms. With regard to the deductive closure we can further distinguish between *explicitly* and *implicitly* accepted norm-sentences. A norm-sentence is explicitly accepted if and only if it belongs to the set of the relevant norm-sentences. On the contrary, a norm-sentence is implicitly accepted if and only if it does not belong to the explicitly accepted norm-sentences, but follows logically from them. Let us consider the set $H = \{N_1, N_2\}$. Though H contains all relevant norm-sentences in the situation \mathcal{S} , it includes only explicit norm-sentences because it is not deductively closed. We use the symbol $Cn(H)$ to denote the set of all sentences following logically from H , i.e. the set of all logical consequences of H ²⁴. A norm-sentence is implicitly accepted in respect of H if and only if it is included not in H , but in $Cn(H)$.

The first key to resolving the Günther-Alexy controversy is to clarify the question: in which manner shall "the set of norms commonly accepted as valid" be understood? If this set were viewed as H , i.e. the set of explicitly accepted norms, then Alexy's objection to Günther's thesis would be correct in the following way: Günther claims that a modified norm such as N_k already belongs to the set of norms commonly accepted as valid, but N_k is obviously not included in H . Nevertheless, it must be noticed that, contrary to Alexy's claim, N_k does follow logically from N_1 . For this is the following justification: " $(x) (T_1 x \rightarrow OR_1 x)$ " (N_1) is logically equivalent with the conjunction " $(x) (T_1 x \wedge T_2 x \rightarrow OR_1 x) \wedge (x) (T_1 x \wedge \neg T_2 x \rightarrow OR_1 x)$ ". Hence " $(x) (T_1 x \wedge T_2 x \rightarrow OR_1 x)$ " as well as " $(x) (T_1 x \wedge \neg T_2 x \rightarrow OR_1 x)$ " (N_k) is deducible from N_1 . If the set of norms commonly accepted as valid, on the contrary, were understood as the deductively closed set $Cn(H)$, then Alexy's objection would be untenable in this respect, that N_k as a logical consequence of N_1 is included in $Cn(H)$. Günther's thesis would be correct if he had assumed that N_k was already implicitly accepted in H . However, it is doubtful whether this way of regarding N_k as a member of the set of valid norms implies that the norm revised for the solution of a norm-collision does not need to be justified. This question, again, cannot be answered without an explication of the notion of justification. The second key to resolving the debate between Günther and Alexy is hence to clarify the connection between justification and revision.

21 Günther (n. 1), 307

22 Günther (n. 3), 163 f.; (n. 12), 182 f.

23 For this interpretation of positive connections in Günther's conception of coherence see Bracker (n. 17), 102

24 Since every sentence follows from itself, H is a subset of $Cn(H)$. Hence $Cn(H)$ includes not only implicitly, but also explicitly accepted sentences.

3. Justification and Revision

The concept of justification of norms is understood by Günther in a very special way. According to Günther, the impartial justification of valid norms is identified by means of a “universal-reciprocal consideration of everyone’s interest”. A norm would be justified in this sense if everybody could accept it because of the stated reason. A norm justified in the justification discourse is therefore universalizable²⁵. For Günther’s conception of justification the question “which universal norm is correct?” is constitutive. For the application discourse, on the other hand, the question “what is the correct solution in a certain situation?” is decisive. The impartiality of a norm-application consists in not suppressing any feature or any norm which might be alternatively applied. In Günther’s opinion the justification of norms necessarily lacks the dimension of application, so that producing coherence in the application discourse is ignored in the universal-reciprocal justification of norms²⁶.

The concept of justification proposed by Alexy is more comprehensive than Günther’s. Alexy employs a semantic-syntactic conception of justification, according to which “a statement p justifies the statement q if and only if q follows logically from p alone or from p together with additional premises”. Besides this semantic-syntactic dimension, Alexy characterizes the pragmatic dimension of justification as an “activity which aims at convincing the auditorium of the justifiability and thus the rightness of a claim.”²⁷ Alexy distinguishes further two aspects of legal justification: the internal justification, which concerns the deduction of an individual norm from a universal norm together with the fact-description and other premises (e.g. the semantic interpretations of the concepts contained in the universal norm), and the external justification, which concerns the justification of the premises used in an internal justification²⁸. Through this distinction between the internal and external justification, it becomes apparent that the justification of norms in Günther’s sense is restricted to justifying the rightness of the universal norms which are used as premises in a deductive justification. Beyond the logical deduction there is another important requirement for the internal justification: the set of premises in a deductive justification must be consistent. The elements of an inconsistent set of sentences cannot be all true or correct; among them there must be at least one which is false. But a necessary condition for a successful internal justification is that all premise uses in the deduction must be true or correct. Otherwise, we could not know whether the conclusion deduced from them is true (correct) or not. Moreover, because of *ex falso quodlibet* one can infer any sentence at all from an inconsistent set so that the justified sentences cannot be distinguished from those unjustified. An inconsistent set of sentences, therefore, cannot be used as an adequate set of premises in an internal justification because it cannot ensure the truth or correctness of its own consequences. To maintain consistency, an inconsistent set of premises must be revised to a consistent one from which only correct or true conclusions follow. Revision is thus a process of selecting the true or correct elements from an inconsistent set of premises and takes place within the context of external justification. In the previous example, two individual norms “ OR_1a ” and “ OR_2a ” are deducible from the whole premises, but they are incompatible with each other and cannot be both regarded as the correct solution to the situation S. So the set of premises $HU\{T_1a \wedge$

25 Günther (n. 1), 56; (n. 3), 156

26 Günther (n. 1), 207, 305 f.

27 Robert Alexy, *Argumentation, Argumentationstheorie, Ergänzbares Lexikon des Rechts* 1987, 1

28 Robert Alexy, *Theorie der juristischen Argumentation*, 4. Aufl., Frankfurt a. M. 2001, 273 ff. The above schemata (I) and (II) represent the logical structure of the internal justification respectively.

T_2a needs to be revised. If there is no doubt about the truth of the fact-description, i.e. $T_1a \wedge T_2a$, then only the set of universal norms H is to be considered as the object of revision. In the following I will show that the revision, if its object is a deductively closed set of sentences such as $Cn(H)$, can be understood as a process of applying the criteria of coherence. This construction also offers a solution to the problem of whether the modified norm N_k , which follows logically from N_1 and is thereby implicitly accepted in the set of relevant valid norms, needs to be justified.

4. Achieving Coherence as a Procedure of Justification

The deductively closed set $Cn(H)$, to which the criteria of coherence are applied, is consistent in itself because its base $H = \{N_1, N_2\}$ is consistent. The need for revision arises only from the fact that the expansion of $Cn(H)$ by adding the fact-description, which is noted as $S (= T_1a \wedge T_2a)$ for the sake of simplicity, results in inconsistency. The collision or incoherence of valid norms, as Günther correctly points out, is mostly situation-dependent.

The revision of $Cn(H)$ has the aim of being consistent with S . In order to avoid inconsistency with S , we have to delete enough elements from $Cn(H)$. In our example it is not sufficient to give up N_1 only. As a logical consequence of N the norm-sentence " $(x) (T_1x \wedge T_2x \rightarrow OR_1x)$ " must be removed from $Cn(H)$ as well, because it and other retained sentences together are still inconsistent with S ²⁹. Nevertheless, not every consistence-preserving revision can be regarded as coherent. The consistency with S can be also achieved by giving up the whole set $Cn(H)$, and thereby also the appropriate norms N_k and N_2 . An extreme result as such, however, is incoherent because the criterion of comprehensiveness requires that a coherent set shall contain as many as possible of the relevant valid norms, as long as they are compatible with each other. According to this, the criterion of comprehensiveness is transformed into the criterion of maximality, which requires that the revision shall remove as few elements from $Cn(H)$ as possible. If the demands for consistency and maximality are strictly satisfied, then the result of revision will be a maximal subset of $Cn(H)$ consistent with S . A subset M of $Cn(H)$ is maximally consistent with S if and only if M includes as many elements of $Cn(H)$ as possible, such that no further element in $Cn(H)$ can be added to M without generating inconsistency with S . Usually there are not only one, but several such subsets. In the previous example there are at least two alternative subsets maximally consistent with S : one contains N_1 , but not N_2 ; the other one contains N_2 , but not N_1 . At this point the criterion of positive connection comes into effect. In Günther's model of coherence, the positive connection will be established through the priority-relations between colliding norms. Unlike Günther, the priority-relations are now established not between the elements in $Cn(H)$, but between the maximal consistent subsets of $Cn(H)$. By means of such preference-relations, some of the maximal subsets consistent with S are regarded as "better" than the others. The result of revision will be identified as the intersection of the best maximal subsets, and can be called the "coherent" set of valid norms³⁰.

29 N_1 follows from " $(x) (T_1x \wedge T_2x \rightarrow OR_1x)$ " together with N_k , which is implicitly accepted in $Cn(H)$. Hence N_1 is not really removed if " $(x) (T_1x \wedge T_2x \rightarrow OR_1x)$ " is still retained.

30 Such construction is called "partial meet contraction" in the literature of belief revision (cf. Peter Gärdenfors, *Knowledge in Flux*, Cambridge (Mass.) 1988, 80 ff.). For a similar construction see Rescher (n. 17), 80 ff.

Now the connection between coherence and justification of norms is disclosed. We can say in the case S a norm-sentence of $Cn(H)$ is externally justified if and only if it belongs to the result of revision. Because some elements accepted in $Cn(H)$ could be deleted in the process of revision, the acceptance of a sentence in $Cn(H)$ does not ensure that it is already included in the result of revision. Following Günther's usage we may call a norm accepted in $Cn(H)$ "prima facie valid" or "prima facie justified". A prima facie norm becomes definitively valid or justified only if it has withstood the revision. Therefore, the process of revision brings not only the coherent set of valid norms, but also the set of definitively justified norms to light. Although the revision can be seen as a process of achieving coherence and, as Günther thinks, always takes place on the occasion of a concrete situation, it is still a procedure of justification that aims to pick out the true or correct sentences from the initial set $Cn(H)$. Contrary to Günther's thesis, the production of coherence concerns not only the appropriate solution in a certain situation, but also the correctness of universal norms.

After this construction we can answer the question of whether the norm modified for the solution of a collision needs to be justified. Even if the set of norms commonly accepted as valid can be understood as the set $Cn(H)$, the fact that N_k is contained in $Cn(H)$ does not mean it is therefore justified. Because $Cn(H)$, which represents the set of prima facie-valid norms is not identical with the set of definitively justified norms. The latter is rather a proper subset of the former one. N_k will be regarded as definitively justified only if it is included in the result of revision, i.e. in all the best subsets maximally consistent with S . It is not difficult to find out that a maximal subset including N_2 must also contain N_k , but not N_1 or its logical consequences, because N_k and N_2 are compatible in the circumstances S , i.e. N_k and N_2 together with S do not lead to contradiction. If those maximal subsets containing N_2 should be preferred, then N_k will be qualified as definitively justified because it belongs to every preferred subset containing N_2 . Certainly one could claim that the set of norms commonly accepted as valid could be understood in a third way now: it could be understood as the set of definitively valid or justified norms, i.e. the coherent subset of $Cn(H)$ obtained by revision. This, however, cannot avoid the problem of justification of N_k . Which maximal subsets are preferred is determined by a preference relation. The determination of this preference relation, for its part, needs to be justified. Hence it needs to be justified why those subsets containing N_2 should be regarded as better or preferable than those containing N_1 . As an element alone, N_k is not the direct subject of this justification, but the selection of the preferred subsets, which is based on a certain preference-relation, needs a justification. This is the reason why the modified norms such as N_k can and must be justified. As Alexy correctly points out, the determination of the preference relation cannot be adequately justified without the aid of additional premises. This justification is often grounded in preference criteria, which go beyond the criteria of coherence and generate reasons for or against a certain selection or preference³¹. If they collide with each other, it must be again determined and justified (on the meta-level) which of them are decisive in the situation in question. Thus the justification of norms is inevitable for the resolution of norm collisions.

31 For these preference-criteria in the coherence model of legal interpretation see Bracker (n. 17), 231 ff.